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Belgian Competition Day

21 October 2010
Rue Ravensteinstraat 23
1000 Brussels

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09.00 **Welcome**

Jacques Steenbergen | Director General Competition Authority
Vincent Van Quickerborne | Minister for the Economy

09.45 **Competition policy: State of play and future outlook**

Joaquin Almunia | Commissioner responsible for competition policy

10.15 **Speech on DG Comp's policies**

Alexander Italianer | Director general of DG Comp

10.45 **Competition policy in 2010, from a Belgian perspective**

Jacques Steenbergen | Director general of the Belgian Comp

11.30 **Presentation on the most recent developments in respect of the Commission's Initiative: Fostering private enforcement of the EU antitrust rules**

Eddy De Smijter | Deputy Head of Unit A1 Private Enforcement
DG Competition, European Commission

11.50 **Private enforcement: the US experience**

W. Kovacic | Member and former chairman of the US Federal
Trade Commission

14.00 **Private enforcement: towards a European approach?**

Stefaan Raes | Chairman, President of the Competition Council
Konrad Ost | Director of the General policy Division -
German Bundeskartellamt
Donald Slater | Counsel – Ashurst LLP
Philippe Lambrecht | Secretary General – Federation of
Enterprises in Belgium (FEB)
Augusta Maciuleviciute | Legal officer - BEUC
Philipp Collins | Chairman, Office of Fair Trading (OFT)

16.00 **Private enforcement: Damage assessment**

Bert Stulens | Prosecutor general for competition
Gunnar Niels | Director Oxera
Hans Friederiszick | Faculty Professional of ESMT
Frank Verboven | Professor of economics K.U. Leuven
Ivan Verougstraete | President Belgian Court of cassation

17.30 **Closing Remarks**

Alexander Italianer | Director general of DG Comp

* An initiative of the Belgian
Presidency of the European Union

Vincent VAN QUICKENBORNE
Belgian Minister for the Economy

Abstract

This article reproduces the opening statement delivered at the Belgian Competition Day held in Brussels on October 21, 2010 by Vincent Van Quickenborne, the Minister for the Economy. He welcomes the efforts to improve the enforcement of competition rules and acknowledges that attention to the victims of anti-competitive behavior is a key part of continued improvement of the regulatory framework. He welcomes the EU Commission's efforts in respect of private enforcement and refers to the joint statement by Commissioners Almunia, Reding and Dalli calling for a coherent European framework to strengthen collective redress.

Cet article reproduit le discours d'ouverture prononcé lors de la Journée belge de la concurrence, tenue à Bruxelles le 21 Octobre 2010 par Vincent van Quickenborne, ministre belge de l'Economie. Celui-ci souligne les efforts déployés pour améliorer les règles de concurrence et rappelle que la prise en compte des victimes des comportements anti-concurrentiels est l'élément clé pour une amélioration du cadre réglementaire. Le ministre salue par ailleurs les efforts de la Commission européenne en matière de mise en œuvre privée du droit de la concurrence, faisant notamment référence à la déclaration commune des commissaires Almunia, Reding et Dalli appelant à un cadre européen cohérent pour renforcer les recours collectifs.

1. It has become a tradition for the State that holds the European presidency to organise a seminar on competition policy in the EU and the Member States. In this second half of 2010 it is the Belgian government that invites you to Competition Day.

2. “*Competition is not only the basis of protection to the consumer, but is the incentive to progress.*” (Herbert Hoover, US President)

3. These are exactly the two reasons why competition policy occupies a central position in the European construction. It's the watchdog of the common market, one of two pillars that support the economy of the European Union, the other being the monetary union.

4. But whereas the monetary union still needs broadening (eleven Member States have not yet introduced the euro) – and deepening (“economic governance” in terms of budgetary discipline), the common market has much more maturity. The main principles of the EU competition policy were already set in 1957, in the Treaty of Rome, and have served as a blueprint for Member States that in most cases have only started to develop their own competition policy framework somewhere in the last two decades.

5. Nevertheless many challenges remain to be tackled. The continuous improvement of the regulatory framework is one of the frontline battles in this area. To think of better ways to enforce the competition rules. With continuous attention for private enforcement but also for the victims of non-competitive behavior.

6. Which brings us to the theme of today's seminar, the private enforcement of competition law and the issue of damages. This debate has won itself a place on the European competition agenda in only a few years time. The first half of the past decade was dominated by discussions on the modernisation package, the adaptation of the regulation on concentrations, and a new approach to cases of abuse. After this elaboration of the public enforcement aspect, Europe started focusing on the private enforcement.

7. The first step in this direction was the Green paper on damage actions for breach of the EC antitrust rules of December 2005. Followed by the White paper of April 2008. Then there was the unofficial draft proposal for a directive on damages actions for infringements of anti-competitive practices in 2009, a resolution from the European Parliament in March 2009. The new commission also decided to include collective redress in the new Commission's work program for 2010. And, most recently, there was the joint information note by commissioners Almunia, Reding and Dalli. This note calls for a coherent European framework to strengthen collective redress drawing as much as possible on the different national traditions, thereby widening the scope beyond competition law to enclose also consumer and health policies.

8. On a different track the Commission has worked on how to quantify the harm suffered by victims of competition law infringements. It ordered a thorough external analysis in December 2009 and organised an economist workshop on this topic in early 2010. Both collective redress and damage assessment are at the heart of today's seminar.

9. The first subject offers the right stuff for heated discussions opposing consumer and business interests. The way for class action seems to be cleared since the 2001 *Courage and Crehan* judgment of the European Court of Justice. Everyone who suffers losses from a violation of articles 81 (now 101) or 82 (now 102) is entitled to compensation, it said. Fans of class actions want to involve customers and consumers, the small businesses and individual citizens who are often the victims of illegal behavior upstream. It's expected that an increased level of private actions will have the effect of increasing deterrence, in that way complementing public enforcement.

10. Opponents are afraid that class actions will lead to US style, sometimes abusive mass litigation, and point at the unclear legal basis for the Commission to introduce directives in this field. Personally, I prefer a system that allows the plaintiff to put in a claim in the name of a group of victims without a preliminary authorisation. Victims should also be allowed the possibility to opt out of a class action.

11. The topic of damage assessment is at least as important and technically as difficult as the collective redress problem. Sadly, when it comes to media attention, it seems to be of much less importance. The calculation of damages should respond to two main criteria. Firstly it should be done with the desire to determine the real damage value as closely as possible, according to the full-compensation principle that guides the White Paper. Secondly it should remove the obstacles to private damages actions as a matter of better and more effective access to justice, using approaches that are clear and easy to apply, and that fit within the existing EU and national legal frameworks.

12. These seem to be very straightforward and easy-to-understand criteria, but it will prove quite a challenge to translate them into an operational system.

13. One of the crucial decisions in this respect has to do with allowing the passing-on defence. Such a defence puts forward the argument that the purchaser plaintiff could have passed on the cartel's price overcharge (or part of it) to its own customers and correspondingly suffered lower losses than the overcharge. The two key policy questions are whether a passing-on defence against direct purchasers should be allowed, and whether final consumers (or other indirect purchasers) should have legal standing to obtain compensation. This discussion is in full swing now and not yet settled. I hope that today's seminar will shed some useful light on this question.

14. Ladies and gentlemen, these points make up a very full agenda and I suspect that you cannot wait to start discussing these items. I wish you all a very interesting and fruitful seminar day and I hope that by this evening the minds of officials, people on the field and academics will be sufficiently nurtured and enlightened to bring the discussion to a higher level. ■

Joaquin ALMUNIA
Vice President of the European
Commission responsible for
Competition policy

Abstract

Vice-President Almunia addresses the issue of private enforcement and gives a brief survey of the first nine months in office. With regard to private enforcement, he announces a new round of public consultation in respect of collective redress. He confirms that his goal is to work to common standards for private enforcement. These standards are based on five principles: an effective compensation for victims, the avoidance of abuse of procedures, the possibility to settle cases, the possibility of collective redress, and financial arrangements that give citizens effective access to justice. With regard to the Commission's antitrust policy, the Vice-President underlines the importance of deterrence. This deterrence is not incompatible with an increased attention for the ability to pay fines. He refers also to the use of settlement procedures and the need of a detailed analysis in merger control cases. Finally, he indicates that the crisis regime will last over 2011 with stricter conditions and will be replaced by new rules in 2012 for State aid policies in the financial sector.

Dans cette contribution, le vice-président Almunia aborde la question de la mise en oeuvre privée du droit de la concurrence et livre un bref aperçu des neuf premiers mois de son mandat. S'agissant de la mise en oeuvre privée du droit de la concurrence, le vice-président annonce une série de consultations publiques sur les recours collectifs. Il confirme que son objectif est de travailler sur des normes communes de mise en oeuvre du droit de la concurrence. Ces normes sont basées sur cinq principes: l'indemnisation effective des victimes, la prévention contre les procédures abusives, la possibilité d'un règlement des conflits, celle d'un recours collectif, et enfin, sur les arrangements financiers donnant un accès effectif à la justice. En ce qui concerne la politique antitrust de la Commission, le vice-président souligne l'importance de la dissuasion. Cette dissuasion n'est pas incompatible avec une prise en compte accrue de la capacité de payer les amendes. M. Almunia se réfère également aux procédures de règlement et à la nécessité d'une analyse détaillée en matière de contrôle des concentrations. Le régime de crise sera prolongé et renforcé en 2011; il sera ensuite remplacé par de nouvelles règles en 2012 pour les politiques d'aides d'État dans le secteur financier.

Competition Policy: State of Play and Future Outlook

I. Introduction

1. It is an honour for me to address you in this year's edition of the European Competition Day. First of all I would like to thank the Belgian Competition Authority, and in particular its President Mr. Van Steenberghe, for their hospitality and the work they have done in preparing this gathering. I first attended the Competition Day, in Madrid, when I was still starting to carry out my work as Competition Commissioner in the Barroso 2 Commission. Now, almost nine months after we started, I would like to take this opportunity to look back at what we have delivered over this period, as well to give you an indication of what lies ahead.

2. But before I dwell on those issues let me say a few words on private enforcement, the theme you have chosen for this conference, and about which I talked about more extensively last Friday at a Conference organised by the School of Law of the Valladolid University.

II. Private enforcement

3. All EU citizens and businesses should enjoy the right to obtain compensation for damages caused by a breach of EU law. But in reality, their rights depend on where they live in Europe. About half of the Member States don't have any form of collective action, and even where this right is recognised, its use is very diverse both in scope and effectiveness.

4. Last week, the College of Commissioners debated these and other issues related to collective redress. The discussion was prepared by an information note I put forward together with my colleagues Reding and Dalli, developing the ideas the three of us had anticipated to the EP during our confirmation hearings last January.

5. The College agreed on the need for a coherent EU framework to strengthen collective redress across Europe that would draw on the different European national traditions. At the same time, we are committed to avoid the excesses and drawbacks of the US system.

6. Five principles for group actions across the Union were agreed:

- we should ensure effective compensation for everyone who has suffered damages, recalling that group claims are often cheaper and more practical than individual claims;
- we should put strong safeguards against abusive litigation;
- we should consider settlements or systems in addition to court proceedings to resolve disputes;
- collective judgements should be enforceable throughout the EU; and
- finally, we should ensure that adequate financing can be allowed so as to give citizens and businesses – especially SME's – fair access to justice.

We decided to launch a public consultation from this coming November until the end of February 2011. In light of the replies that we will receive, we will propose a framework for collective redress.

7. This framework would become the basis for possible legislative initiatives in several policy areas including competition, environment, consumer protection, and others. As to private enforcement of competition law, I've already announced that once the College approves this framework I intend to present a draft Directive on antitrust damages actions, hopefully in the second half of 2011, that would need to be approved by the Council and the European Parliament.

8. The initiative would set common standards and minimum requirements for national systems of antitrust damages actions to ensure that rights are a reality for all. Member States would then translate these common standards into practice according to their respective legal traditions.

9. I believe that EU-wide action on group claims is particularly critical in the field of antitrust. Today, only large companies can afford to go to court to seek compensation for damages caused to them by illegal practices. But when the victims are citizens or small businesses, they generally do not bring claims because when taken individually the losses are too small. This can only be addressed with effective collective redress rules across Europe.

10. When the common standards will be in place, businesses and citizens will get the compensation they are entitled to on an equal footing across Europe. I don't need to stress the implications for the single market. And, again, I am convinced that we can uphold this right without importing into Europe the abuses we know exist on the other side of the Atlantic.

11. At any rate, these are just preliminary ideas and the public consultation will doubtless bring many more. I invite you all to participate in the consultation and help us trace a European way to group actions that is fair, consistent, and safe.

Now I would like to give you a state-of-play account of competition policy. I will start with the antitrust field as this ties in well with the issue of collective redress.

III. Antitrust

1. Cartel decisions

12. As I have said many times, cartels are the most serious infringement of competition rules and therefore the fight against cartels is one of my most important priorities. Cartels hinder the normal functioning of competition in markets; they hurt consumers and reduce the competitiveness of the industrial users of the products for which the price is illegally fixed.

13. Illegal agreements also hinder the necessary restructuring in certain sectors, increase production costs and ultimately thwart growth. This is certainly the wrong strategy to get out of the current crisis.

14. I would like to stress two aspects of our fight against cartels: our fining policy and the implementation of a tool we have recently introduced in our legislative framework: settlements.

1.1. Fining policy and inability to pay

15. Deterrence is the primary objective of our enforcement and we must make sure that fines are set at an appropriate level to make companies think twice before entering in this kind of agreements. Even during a crisis such as this one, deterrence is key. But we are public authorities and cannot ignore the fact that some companies are in financial difficulties and may be driven into bankruptcy as a consequence of our fines – with the corresponding social costs. This is why we assess very carefully companies' requests to take into account their possible inability to pay the fines that we plan to impose.

16. The goal is to strike the right balance between maintaining a deterrent level of fines and avoiding unwanted side-effects, such as pushing companies out of business.

17. Our analyses have led us to grant reductions to some companies, mostly small- and medium-sized enterprises. These reductions have been granted on an exceptional basis to respond to an unprecedented economic and financial situation in the history of EU antitrust enforcement.

1.2. Bathroom fittings

18. The *Bathroom fittings* cartel decision of last June is an illustration of this approach. In total, seventeen companies were fined for operating a price cartel for 12 years. We concluded that five of these companies were in dire straits due to the crisis and that they would not be able to pay the planned fines. We reduced the fines accordingly.

19. This case shows the central principle of our fining policy: we impose fines to punish past illegal practices and deter future ones, but we have no interest in driving companies out of the market.

1.3. Settlements: *DRAMs* and *Animal Feed Phosphates*

20. As to settlements, of the five cartel decisions adopted in the past months, we've already used this new instrument twice; in the *DRAMs* and *Animal Feed* cases.

21. The *DRAMs* case – in which ten companies were fined €330 million, including a 10% reduction for settling – was a milestone. The benefits of settling were immediately apparent: there have been no appeals – which in standard procedures can last for years – and our investigations gave rise to a ripple effect of leniency applications in related sectors.

22. The other settlement case to date – *Animal Feed Phosphates* – was also a success. We discovered and fined a cartel – a classical market-sharing and price-fixing arrangement – which had run for over thirty years. Although

not all the parties settled – we call this a “hybrid settlement case” –, the procedure proved to be highly efficient, including the fact that we expect only one appeal.

2. Other antitrust cases

23. Besides cartels, we have maintained an intense activity in the field of antitrust, focusing in sectors and cases which may have the biggest impact in terms of efficiency and welfare. You will not be surprised to hear that energy, telecoms, information technology, pharmaceuticals, financial services, and transport are still high on our enforcement agenda. As are commodities and industrial products.

24. We have been very active in the energy market; a key area for Europe’s industry and with a direct impact on citizens. Since the beginning of 2010 we have adopted four decisions in this sector: the *Svenska Kraftnet*, *EDF*, *EONGas* and *ENI* cases.

25. The latter is a good example of our enforcement approach in this market, since we accepted far-reaching structural remedies, consisting in the divestiture of ENI’s share in international pipelines that transport gas to Italy. These remedies will remove the ability of the Italian gas incumbent to adopt anti-competitive practices to keep prices high on the national market.

26. We are also following very closely developments in the airline industry and especially the strategic alliances involving key European players. Last July, we adopted a decision on the Oneworld alliance – including British Airways, American Airlines and Iberia – in which we accepted major commitments put forward by the parties, including the leasing of slots at Heathrow airport. We are currently monitoring the implementation of those remedies, continuing our investigation into the other alliances, and other possible infringements in the transport sector.

27. Moving to a different area, we have done a thorough assessment of the planned proposal by the Anglo-Australian mining groups BHP Billiton and Rio Tinto to combine nearly all of their iron ore activities into a production joint venture. This case has attracted a lot of attention because of the strategic role of iron ore for steel production and the potential for the joint venture to eliminate competition between these two giants in an extremely concentrated market.

28. Last January – and in light of our experience of the merger the companies had planned and abandoned years ago – we opened an ex-officio investigation into the proposed joint venture. We informally communicated our concerns to the parties last Friday, which as you all know decided to abandon their plans over the weekend.

29. Apple’s warranty for its iPhone is another case where we’ve had an impact on the market. Last Spring, we launched a preliminary investigation on Apple’s country-of-purchase rule, which limited repair services to the country where the iPhone was bought. Our concern was that this restriction would dissuade consumers from buying iPhones outside

their country of residence, leading to a market partitioning. However, after our conversations, in September Apple repealed the rule for the EU/EEA, where it now offers cross-border warranty services.

2.1. Digital Agenda

30. The Apple case I’ve just mentioned is not the only one in the ITC sector. As you remember, at the end of last year we closed a case concerning Microsoft after the company made a commitment to allow users to use their browser of choice. Our monitoring of the market shows that the commitment is yielding results.

31. Another case that has created headlines concerns a number of complaints against Google, which were made public by the company itself. We are presently analysing the comments we have received from the company but no decision has been taken as to whether we will open formal proceedings.

32. In relation to these cases, I would like to say a word on competition policy and the digital economy. In this fast-moving sector, we are monitoring market and technological developments closely. Our goals include:

- keeping digital platforms as open as possible;
- having operators respect the net-neutrality principle, and
- strengthening the digital single market in Europe; including for content.

33. In general, I believe that competition rules apply to the digital economy just as they do to any other industry. If anything, they are even more crucial, because the digital sector holds out the promise to bring a new impetus to our economy – and for this reason the Digital Agenda is a priority of our Europe 2020 strategy.

IV. Mergers

34. Moving on to merger control, this is a mature area of enforcement in which the legislative and analytical framework has been reviewed in the last years. We now have a solid and consistent practice, and I think that it is important that it continues like this.

35. The business community needs to know that our decisions are based on solid analysis and that remedies are effective in addressing the competition issues at stake.

36. The crisis has produced a drop in mergers and acquisitions in the last years, and the number of cases has remained stable in 2010. However, we’ve had, and continue to have, quite a few interesting cases to decide upon.

37. In the pharmaceuticals sector, for example, we cleared both *Novartis/Alcon* (branded eye care products) and *Teval/Ratiopharm* (generic pharmaceuticals) with clear-cut remedies in each case.

38. In telecoms, we cleared T-Mobile/Orange, having co-operated closely with the UK's OFT and OFCOM.

39. In transport, we cleared the Deutsche Bahn/Arriva merger, but only after securing the full divestiture of Arriva's German operations.

40. At present, we have a number of in-depth investigations of which I will mention two: the acquisition by Unilever of Sara Lee Body Care and the proposed merger between Aegean and Olympic Air.

41. The Unilever/Sara Lee transaction will have an impact on a large number of end-consumers in the EU. This is a complex case which involves consumer products such as deodorants, aftershave, and detergents – including many popular brands – which makes the search for suitable remedies particularly challenging because not all the brands, products, and markets present the same problems. This is why we are taking extra care with this case.

42. As to the proposed merger between Aegean and Olympic Air – the two largest Greek airlines –, the second-phase investigation is under way and the final decision is planned for January 2011. The big difficulty here is that the two companies hold almost all the domestic market in Greece.

43. It is worth noting that one of the only two mergers that the Commission blocked under Neelie Kroes's mandate was the *Air Lingus-Ryanair* case, which had some similarities with this one. As with previous airline cases, we will need to ensure that consolidation in the airline sector does not happen to the detriment of consumers and businesses in Europe.

44. Taken together these cases illustrate two important features of merger control: the need for detailed investigations in complex cases, and the search for effective remedies with sustainable effects on the market.

45. Prohibitions are rare. When we are satisfied that mergers pose no competition problems, we will not stand in the way of the emergence of companies with a global reach.

46. I believe that mergers and acquisitions are an important part of a healthy economy. I can think of many examples of global and European champions cleared by the Commission; for instance, only last July we cleared SAP's acquisition of Sybase, which created a global player in software, database and mobile technology. There is plenty of room for pro-competitive mergers, but when a merger threatens the European economy and the interests of consumers, we have the duty to intervene.

47. My goal is finding a balance between protecting consumer welfare and creating the right conditions for business in Europe to grow to the scale needed to take on global competitors.

V. State Aid

48. Finally, I would like to close my review with a brief look at the special State aid regime we have introduced to tackle the financial and economic crisis. Two years after the crisis erupted, we are at a crucial juncture in the exit strategy, which should be neither too abrupt – because we are not out of the woods yet – nor too slow, because that would be dangerous in the medium term.

49. Given the still shaky state of the markets and the uncertain recovery, the crisis regime for financial institutions will be extended to 2011. However, its measures will be adapted to prepare the shift to the post-crisis regime. In the course of next year we will tighten the conditions of access to the extraordinary support. For instance, every beneficiary of a recapitalisation or impaired asset measure will be required to submit a restructuring plan, irrespective of whether the institution is considered to be sound or distressed.

50. In parallel, work has started on the new rules for banks' rescue and restructuring in normal times. Market conditions permitting, they will be in place as of 1st January 2012.

51. Another extraordinary instrument introduced in December 2008 was the Temporary Framework, designed to encourage banks to resume lending to companies – especially SMEs – that were suffering from a sudden shortage of credit.

52. In 2009, measures totalling about €81 billion were approved under this measure. The Temporary Framework too will be extended in revised and limited form until the end of 2011.

VI. Beyond enforcement

53. Enforcement is not our only task. We need to keep our rules in tune with today's changing economy and ensure that we have a consistent framework, rooted in solid economic principles, that can give guidance to companies. We have done so recently with the adoption of new “vertical” guidelines and the new rules on car distribution and the after-sales market. We are now in the process of updating our “horizontal” guidelines on co-operation agreements between competitors.

54. A final text will be adopted by year's end, taking account of the results of a public consultation that closed last June.

55. Due process is another priority – and a very important one. Our decision-making process – and the decisions that result from it – must be open and respectful of the rights of defence of the parties.

56. I am convinced that our administrative system complies with due process requirements at least at the same level than those based in the judicial principle. Our checks and balances, from transparency to the role of the Hearing Officers, are adequate.

57. But as I said several times in previous speeches, every time I will consider that our procedures, and the rights of the parties, can be improved without putting at risk the fulfilment of our own responsibilities, I am ready to introduce such changes.

58. Before I close, I would like to tell you that I am very happy with the excellent cooperation we have established with the National Competition Authorities; which I regard as especially important in the current economic climate. My services cooperate closely with competition authorities across the EU to examine cross-cutting issues that are crucial for well functioning competitive markets. Interchange fees in payment card systems, or the functioning of milk markets, are among those topics.

59. Among the network of the European Competition Authorities, we have also seen an intense two-way referral activity, which shows that the mechanisms we have in place ensure that cases are dealt with by the best placed authority. They also show that parties should consider this principle already at the stage of pre-notification referrals; there is no room for forum shopping.

VII. Conclusion

60. I am very pleased with the work we have done in these first few months, but let me tell you that this is just the beginning. I can assure you that there is a great deal of work waiting for us in the future. We will have to be more vigilant than usual in the next period, because the uncertain recovery makes anti-competition temptations all the more difficult to resist. We will continue to be the best friends of an efficient and dynamic economy and the worst enemies of protectionism. I am convinced that this is the best service we can render to Europe's economy and to our fellow European citizens.

61. Keeping a level playing field in the internal market will create the best environment for Europe's competitiveness and will boost its prospects for long-term growth and job creation. ■

Jacques STEENBERGEN

Director general of the Belgian
Competition Authority

Abstract

In this contribution, Prof. Steenbergem emphasises that the Belgian competition authority aims at contributing to a competition culture, and that it tries to do so not only by establishing infringements and imposing sanctions, but also by giving motivated decisions. He regrets the tendency of competition authorities that judge mainly on the basis of the amount of the fines they impose. Prof. Steenbergem discusses the need to restore the confidence in market mechanisms by a realistic expectation management and by a range of initiatives that can (i) increase the footprint of competition policy, and (ii) [that bring the useful effect of enforcement policies forward in time notwithstanding the fact that formal investigations with an adequate protection of the rights of defendants will always take more time than public and political opinion tend to accept.

Dans cette contribution, le professeur Steenbergem rappelle que l'autorité belge de la concurrence cherche à contribuer à la culture de la concurrence non seulement en établissant des infractions et des sanctions, mais également en motivant ces décisions. Il déplore la tendance des autorités de concurrence à ne statuer, en grande partie, que sur le montant des amendes qu'elles imposent. Le Prof Steenbergem explique également la nécessité de rétablir la confiance dans les mécanismes de marché par une gestion des attentes réalistes et par une série d'initiatives. Ces initiatives sont de deux ordres, (i) celles ayant pour objet de renforcer l'empreinte de la politique de la concurrence, et (ii) et celles donnant un effet utile aux politiques de concurrence.

Competition policy in 2010, from a Belgian perspective

1. The competition world does not look all that different when you look at it from Belgium. Compared to the Commissioners' priorities there is just one we do not seem to share thanks to our dual structure (and the temptation to say so is just too big): due process.

2. This structure also meant that for some 15 years we had a system we could not afford at the expense of efficiency. Now, thanks to a reduced demand of merger control on our (still modest) resources, and the combined efforts of the Council (tribunal), the Auditorat (College of Prosecutors) and the directorate general, we take on average some four infringement decisions a year + some motivated non-infringement decisions. If the Commission does not expect to have an average of more than eight to ten, in admittedly larger cases but with significantly more resources, this seems quite a honest result for an approx. 65 people dual authority. Some admittedly seem to do better, many do not.

3. Two comments:

– do not judge us on the amount of fines! Our goal in life is to contribute to a competition culture by whatever means appropriate, not just by imposing fines. Moreover, in smaller economies, associations of undertakings tend to figure more prominent in competition cases than in larger economies and for facts prior to end of 2006 the Council could not fine them;

– infringement decisions of most competition authorities tend to focus on hardcore restrictions. The markets often learn more about what is acceptable and what not in motivated non-infringement decisions. We therefore should continue to take them – although admittedly the proportions may indicate that we decided in the past to easily to open cases. By the way, and with my thanks and appreciation, I wish to testify that I never experienced any pressure with regard to the outcome of cases (partly thanks to the structure, partly thanks to the unwavering respect of the succeeding ministers for the structure). There was however a constant pressure from all sides to take on cases.

4. But most priorities are shared. This holds especially true at a time that, largely due to the greed of some who still manage to make many of us believe that we would be worse off without them, market mechanisms have suffered a dangerous loss of credibility. In Dutch we say: “*gooi het kind niet weg met het badwater*” (“make sure you do not throw away the baby with the badwater”). Put, like this, it goes without saying. But I am afraid that, notwithstanding the warnings of the OECD, the experiences in the US in the thirties, the more recent experiences of Japan and Korea, it will take more carefully designed confidence building measures in the area of competition policy!

5. Some measures we should prepare ourselves:

– we must have a more credible response to exploitative abuse, and especially excessive pricing complaints when inflation reaccelerates, or it will be very difficult to avoid a reactivation of price controls even though experts agree that price controls can only offer temporary relief and are likely to lead in the longer run to higher and not to lower prices. We have worked on it, together with our Dutch and British colleagues, but I am not confident that we will have access to the data necessary to make our analytical tools work;

– we must maximise our efforts to contain the duration of procedures, and come to grasps, preferably in the ECN context with the mushrooming discussions on business secrets and access to documents;

– and because the nature of cases and the need to safeguard the rights of defendants will always make that infringement procedures take time, we need to speed up interim measures procedures.

6. And of course one of the ways to strengthen the credibility of competition law and policy is the facilitation of the recovery of damage caused by infringements, provided we manage to avoid excesses that could make the remedy worse than the disease! And that is the theme of the following contributions and round tables! ■

Eddy DE SMIJTER
Deputy Head of Unit A1 Private
Enforcement DG Competition,
European Commission

Abstract

In this contribution, Mr Eddy De Smijter discusses three issues. The first is the need to better enable the victims of competition law infringements to get the damages they are entitled to by improving the conditions under which compensation can be obtained, with special attention to methods for alternative dispute resolution. The second is the need to stimulate private enforcement by giving adequate support to national judges. The last is the need for a continued reflection on the 'cohabitation' between private and public enforcement (with amongst others attention for what public enforcement can do to foster private enforcement and the impact of private enforcement on leniency).

Dans cette contribution, M. Eddy De Smijter traite de trois sujets. Le premier est la nécessité de mieux permettre aux victimes d'infractions au droit de la concurrence d'obtenir les dommages-intérêts auxquels ils ont droit en améliorant les conditions dans lesquelles une réparation peut être obtenue, avec une attention particulière portée aux voies de résolution alternative des conflits. La seconde est la nécessité de stimuler la mise en oeuvre privée du droit de la concurrence en donnant un soutien adéquat aux juges nationaux. Le dernier sujet traité est la nécessité d'une réflexion sur la «cohabitation» entre la mise en oeuvre publique et privée du droit de la concurrence (et notamment ce que la mise en oeuvre publique peut faire pour favoriser les actions privées et l'impact de l'application privée sur la clémence). Fostering private enforcement of the EU antitrust rules

Presentation on the most recent developments in respect of the Commission's Initiative: Fostering private enforcement of the EU antitrust rules

I. The need to improve the conditions for victims to get the damages they are entitled to

1. Some may doubt there is still a need today to improve the conditions for victims of competition law infringements to bring damages claims. To support that argument, reference is usually made to the increase in reported damages actions being brought. To fully appreciate that argument, one needs to check where these damages actions are being brought, who is bringing those actions and when. Conclusion: if there would indeed be any real increase in damages actions, then it basically concerns follow-on actions being brought by businesses in a handful of Member States. It would be completely wrong to deduce from these few cases that most victims of competition law infringements get their damages. We are miles away from reaching the point that the victims that want to be compensated can actually obtain this compensation.

2. Don't understand me wrong, though: I am not one of those who consider the number of actions being brought to be the determining factor to judge the success of antitrust damages actions. I know that in a commercial setting, lots of these conflicts are being solved outside the courtroom. And that's fine, as long as those out-of-court settlements lead to a fair deal for all parties involved. We don't want to import in the EU 'nuisance settlements', as they exist elsewhere, but we neither want to end up with 'beggar settlements' as they exist today in Europe. We need to have fair settlements.

3. That brings me to the issue of Alternative Dispute Resolution (ADR), which, as you have heard from Vice-President Almunia earlier today, has been identified by the Commission as one of the key concepts in any future EU collective redress scheme.

4. First on mediation. Frankly, mediation offers the best of all worlds: parties with conflicting interests are brought together by a neutral third to reach consensus. That is what we need to stimulate: that people, in the shadow of the law, can find consensus, fair consensus for all. However, mediation also has its limits. One may wonder, for example, whether mediation is an appropriate instrument for collective claims. Whether it is possible to have mediation between an infringer and a group or a representative of that group and whether, in the context of collective claims, one is not necessarily forced to go into some form of adjudication, like arbitration or, as in the case of the Dutch collective settlement act, through a judge. A judge could marginally check the fairness of the settlement and then declare it generally binding, thereby creating the finality, which in the context of ADR, is exactly what everyone is looking for. Finality of the conflict. Not to drag on for years in procedural battles.

5. So, let's use the occasion of the public consultation on collective redress not only to repeat the usual talk on safeguards against abusive litigation (although these safeguards are surely very important), but let's also use it to exchange experience on ADR and what needs to be done to ensure the fairness of the outcome of these processes.

6. The need for an efficient collective redress is of course only one of the conditions that need to be improved for victims of competition law infringements to get the damages they are entitled to under EU law. I think that the analysis that was made in the Green and the White Paper on the problems that victims are facing to get compensation, is to a very large extent still relevant today.

7. To give you some examples: in June this year a German court found that the EU general principle of effectiveness (effet utile) implies the prohibition of the passing-on defence and the exclusion of standing for indirect purchasers (except when the direct purchaser is a subsidiary of the infringer). In that same week, the French Supreme Court concluded that an indirect purchaser could not get damages because the Court of Appeal had not checked whether that indirect purchaser himself had passed on – totally or partially – the overcharge further downstream. Should we continue with that kind of difference in applicable rules in Europe? In some Member States you can wait until a competition authority has decided on an infringement before going to a court and claim damages for the harm caused by that infringement, whereas in another Member State, you are forced to hurry up with your damages claim, even before the competition authority has finalised its investigations, because otherwise you may be time barred. Is that the kind of difference in treatment of our citizens we ultimately want? Do we want to stimulate this competition between national legal systems? Who benefits from the forum shopping that is the result of it? Is it the consumer? Is it the SME? When the Commission is pleading for a level playing field for all citizens and businesses in Europe, that is what it is referring to: that you can seek redress in your own Member State and that you should not be obliged to go to another jurisdiction, simply because there are better disclosure rules or more favourable passing-on rules.

II. The need to stimulate private enforcement by giving adequate support to national judges

8. When one wants to foster the private enforcement of EU competition rules, one has to think of the judges who have to deal with those cases: they should have the means and the competences to swiftly deal with those cases.

9. In some Member States the issue of competence is dealt with through a specialisation of courts. In addition, the Commission is financing now already for 10 years the training of national judges in EU competition law. I think we have to continue that training. We may have to review the system as it exists today to ensure its efficiency, but the very fact of training judges is a good one. It's not only the training itself that is worth investing in, but also the networking between judges: stimulating judges to get together and exchange experiences. We cannot ask the European judges to create a full-fledged judicial ECN, since that is not tailor-made for the judiciary. But still, to create a forum where judges can meet and exchange experience would definitely be worthwhile.

10. Moreover, as a competition authority we have to continue giving guidance. Guidance in general terms like the one we are achieving through guidelines and block exemption regulations, and also as the one we plan to do with regard to the quantification of damages, which is a tricky issue both for the parties and for the judges. We need to get into the era of *judex calculat*. And that is not an obvious step. We have to find the appropriate means to bring economic reasoning into legal proceedings without overly burdening the latter. It may sound difficult, but it is an exercise that is both feasible and necessary. And it is an exercise we want to do together with the stakeholders. You will in due time be invited to contribute to this discussion.

11. Apart from this more general guidance, we have to continue giving specific guidance: when a court asks for our help under Article 15(1) of Regulation 1/2003 or when we believe that it is appropriate to preserve the coherence of the application of the competition rules via an intervention based on Article 15(3). The Commission is receiving very few requests under 15(1) and we need to analyse why this is the case. If the reason is that judges don't feel acquainted with asking a European administration for an opinion, I am happy to rest my case. But if the reason for this lack of 15(1) requests would be that the guidance that we are giving through our opinions is not sufficiently helpful, then we have to sit together with those judges and see what we can do to improve the quality of our opinions. And maybe we should consider making more publicity for our opinions so that the advice that is given to a judge in a specific case can, without any binding force, also be available to other courts.

12. I would also want to plead for the NCAs to take up their role in supporting national courts in the application of EU competition law. They already have the power of intervention under 15(3), but they also need the power to give information and opinions to national courts. We have wonderful examples in Europe where NCAs regularly go to court upon request of the court and give a non-binding expert advice. Those examples should serve as inspiration for others.

13. I know there is often some reluctance on the side of the competition authorities to intervene in national proceedings. They fear undue interference with the independence of the judiciary. Remarkably, that argument is usually heard when discussing the issue with competition authorities, not when talking to the judges themselves, who are all too happy to receive expert advice that is neutral and objective.

III. The need to continue reflecting on the “cohabitation” between private and public enforcement

14. As for most cohabitations, also this one is not a very obvious one. Still, it is worthwhile reflecting what we could do as a public enforcer to further foster private enforcement. When we are setting priorities as a competition authority, when we are conducting investigations or when we are deciding on the course of action subsequent to these

investigation (to close a case, to accept commitments, to settle, to go for an infringement decision), it is obvious that we should only be led by the public interest, not by the desire to prevent or to stimulate private enforcement.

15. However, apart from these moments, there is still plenty of room for a public authority to foster private enforcement without jeopardising our primary task of a public enforcer and without jeopardising the legitimate interest of parties on confidential treatment of their business secrets and other confidential information. I refer amongst others to the timing and the content of the public version of our infringement decisions, to the difficult issue of a possible rebate in fines in case of voluntary compensation, to the interaction between leniency and private enforcement, on which we have launched some ideas in the White Paper. There are indeed lots of ways to optimise the relationship between public and private enforcement.

16. In this post-modernisation era of convergence of national procedural rules, I would think that these topics deserve a thorough reflection in the framework of the ECN, to avoid that the allocation of cases has detrimental or favourable consequence in terms of private enforcement. ■

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Abstract

This set of articles reproduces the discussions delivered at the first round-table at the Belgian Competition Day held in Brussels on October 21, 2010. Mr. Ost stresses the complementarity of public and private enforcement. He however fears the possible impact of a "private enforcement industry" and the danger that it may present to the leniency programmes. Based on the German experience, he wonders whether there is in the light of the available remedies a real need for a European coordination, and asks whether a "one size fits all" approach is feasible. Mr. Slater stresses that the debate on private enforcement should focus on the compensation of damage, and not on enforcement or deterrence. He asks whether a system of settlements in which the fines would take into account a voluntary indemnification of victims might not offer an alternative that would give enterprises an incentive to indemnify victims. Such approach would also avoid a negative impact on leniency programmes. Mr. Lambrecht emphasises the need for a strict enforcement of the rules of competition, but also argues that excessive harmonisation can create unforeseen problems. He fears "American situations" and asks whether there is really a common interest justifying such harmonisation. As a representative of an employers association, he considers that individuals should defend their own interests. Mrs. Maciuleviciute argues that consumer associations also aim at the compensation of damage and are equally concerned that damages should correspond with the damage the actual victims have suffered. She considers that ADR is not yet able to achieve that goal and that courts are better placed to do so. She argues that opt-in systems do not achieve a sufficient degree of participation and therefore opt-out systems are preferable, and that the available data do not show a tendency to abuse opt-out systems. Mr. Collins confirms that NCAs are, just as the EU Commission, interested in improved possibilities for victims of competition infringements to obtain damages. A "one size fits all" EU solution will not work; on the contrary, there is a need for a variety of types of national action within an EU framework. Private and public enforcement are complementary; optimal balance between the two is needed. Private actions must not undermine leniency and inconsistent decisions must be avoided. He concludes that UK has already a sufficient legal framework to deal with B2B standalone cases, but that there remains a lot to be done in respect to B2C collective redress disputes in order to improve the remedies that are effectively available for consumers without creating the problems seen in the US. These presentations are followed by a debate on the following issues: the option between opt-in and opt-out in collective redress procedures, the relationship between public and private enforcement, and the question which court should have jurisdiction for private enforcement cases.

Le présent dossier regroupe les communications présentées lors de la première table ronde de la Journée de la concurrence belge à Bruxelles le 21 octobre 2010. M. Ost souligne la complémentarité entre la mise en oeuvre publique et privée du droit de la concurrence. Il souligne que le « private enforcement » contribue à une culture de la concurrence mais également le danger que pourrait présenter une "industrie du private enforcement" notamment pour les programmes de clémence. Sur la base de l'expérience allemande, il se demande si il y a réellement besoin d'une coordination européenne, et si un « one size fits all » est applicable. M. Slater souligne que le débat sur le « private enforcement » devrait se concentrer sur la réparation des dommages, et non sur la dissuasion. Il se demande si un système de sanctions qui prendrait en compte une indemnisation volontaire des victimes ne suffirait pas à inciter les entreprises à indemniser leurs victimes. Une telle approche permettrait également d'éviter un impact négatif sur les programmes de clémence. M. Lambrecht souligne la nécessité d'une application stricte des règles de concurrence, mais fait également valoir qu'une harmonisation excessive peut créer des problèmes d'imprévisibilité. Il redoute les aspects négatifs de l'expérience américaine et se demande si un intérêt commun susceptible de justifier une telle harmonisation existe bien. Défendant le point de vue des entreprises, il conclut qu'il appartient en premier lieu aux personnes ou entreprises concernées de défendre leurs propres intérêts. Mme Maciuleviciute fait valoir quant à elle que les associations de consommateurs visent également à l'indemnisation des dommages et que ces dommages-intérêts doivent correspondre au préjudice effectivement subi par les victimes. Elle considère que les moyens existant de résolution alternative des litiges ne sont pas encore en mesure d'atteindre cet objectif et que les tribunaux sont mieux placés pour le faire. Selon elle, les systèmes d'opt-in n'atteignent pas un degré de participation suffisant et les systèmes d'opt-out sont préférables; les données actuellement disponibles ne montrent pas une tendance à l'abus des systèmes d'opt-out. M. Collins confirme que les ANC sont, tout comme la Commission, intéressés par les possibilités d'améliorer la réparation des victimes d'infractions des règles de concurrence. Une solution « one size fits all » européenne ne fonctionnera pas; il convient au contraire de favoriser la diversité des procédures d'actions nationales dans un cadre communautaire. Mises en oeuvre publique et privée sont complémentaires. Il souligne que les actions privées ne doivent pas porter atteinte aux programmes de clémence et rappelle qu'il convient autant que possible d'éviter les décisions incohérentes. Il conclut que la Grande-Bretagne dispose déjà d'un cadre juridique suffisant pour traiter les affaires opposant des entreprises; il reste en revanche à faire en ce qui concerne les demandes de réparations collectives. Il faudrait améliorer les voies de recours des consommateurs sans reproduire les problèmes existants aux États-Unis. Ces présentations sont suivies d'un débat sur les questions suivantes: le choix entre opt-in et opt-out dans les procédures de recours collectif; les interactions entre mises en oeuvre publique et privée, et; la question de la compétence juridictionnelle pour les cas de private enforcement.

* The text of each presentation is the transposition of the sound recording by staff of the Directorate General for competition of the Belgian Competition Authority, validated afterwards by each author.

Private enforcement: towards a European approach?

1. Mr Ost stressed the complementarity of public and private enforcement, and the contribution private enforcement can make to a competition culture. Private enforcement therefore in his opinion serves the goals of public enforcement. But he also pointed to a certain fear of the possible impact of a “private enforcement industry” and the danger that this may present to the leniency programmes. Considering the pros and cons of private and public enforcement he concluded that in the (limited) areas of conflict, public enforcement should have priority.

2. He considered that companies can already bring claims. They can bundle their claims in what can be equivalent to an opt-in system. The private enforcement debate is therefore in his opinion mostly relevant in respect of small claims of private customers. But German law also accepts the possibility for consumer organisations to bring claims in the name of citizens who granted them that right (by what can be assimilated with an opt-in procedure) provided the action only aims at compensation of the damage they suffered.

3. He therefore wondered whether there is in the light of the available remedies a real need for a European coordination, and asked whether a “one size fits all” approach is feasible. He further referred to the issue of forum shopping in the light of the Rome II regulation and expressed the view that a minimum-standard approach will not exclude it. He argued that the argument that community action is needed to ensure a level playing field is therefore flawed. He attributed the intensified debate to the European initiative and welcomed further discussions. However, he advocated for a less ambitious approach on the community level as private enforcement seems to be developing more and more in many member states.

4. Mr Slater stressed that the debate on private enforcement should focus on the compensation of damage, and not on enforcement or deterrence. He wondered whether the debate on collective actions and on issues such as passing-on defences are veering towards a debate on enforcement.

5. He referred to the cost of a proliferation of litigation. He expressed the fear that consumers will not only suffer damage because of a cartel but that they will moreover ultimately pay for both the damages that are granted and the fines cartel members are likely to pass on to consumers.

6. He asked (referring to the *Nintendo* case) whether a system of settlements in which the fines would take into account a voluntary indemnification of victims might offer an alternative. It would give enterprises an incentive to indemnify victims and make real compensation available without endless and costly procedures, and without a negative impact on leniency programmes.

7. Mr Lambrecht emphasised the need for a strict enforcement of the rules of competition, but also argued that excessive harmonisation can create unforeseen problems. He feared “American situations” and asked whether there is really a common interest justifying such harmonisation. The employers association considers that individuals should defend their own interests.

8. The VBO/FEB also fears that the already overburdened courts will not be able to cope and that an excessive facilitation of private enforcement will in the absence of a total (and impossible) harmonisation lead towards an unhealthy competition between member states.

9. In the opinion of the VBO/FEB, the competition authorities should defend the public, collective interests, and private parties who suffered damage should file their own cases.

10. Mrs Maciuleviciute argued that consumer associations also aim at the compensation of damage and are equally concerned that damages should correspond with the damage the actual victims have suffered. She considered that ADR is not able to achieve that goal and that the courts are better placed to do so.

11. She also argued that opt-in systems do not achieve a sufficient degree of participation and therefore opt-out systems are preferable, stating that the available data do not show a tendency to abuse opt-out systems.

12. She furthermore considered that the burden of proof should be reduced. Decisions of NCAs should e.g. have value of evidence. She advocated also financial support for consumer associations.

13. Mr Collins confirmed that NCAs are, just as the Commission, keenly interested in improved possibilities for victims of competition infringements to obtain damages. Whilst there are now more private actions, significant barriers to bringing cases remain and the procedure for collective redress does not work well. But he also argued that a “one size fits all” EU legislative solution will not work and saw on the contrary the need for a variety of types of private action following national procedures but fitting within an overall EU framework. It is also important to ensure an optimal balance between public and private enforcement. They must be complementary but do not serve the same purpose.

14. He emphasised that private actions must not undermine the attractions and benefits of leniency, particularly by enabling claimants to secure access to leniency documents and noted the risk of inconsistent parallel decisions by NCAs and courts. He advocated an enhanced cooperation between NCAs and judges and stressed the importance of vigorous judicial case management in private actions.

15. Mr Collins concluded that in the UK there is probably a sufficient legal framework to deal with B2B standalone cases, but that there remains a lot to be done in respect to B2C collective redress disputes in order to improve the remedies that are effectively available for consumers without creating the problems we see in the US.

Opening the debate, the Chairman suggested to discuss first the option between opt-in and opt-out in collective redress procedures.

16. The panel members discussed *i.a.* how we can ensure in small claims cases that the victims receive the damages that might be granted. Opinions remained much divided.

The Chairman proposed as a second issue for discussion the relationship between public and private enforcement.

17. Several panel members expressed the view that private enforcement cases should, e.g. in respect of access to files, not cause an additional burden for the public authorities.

The Chairman then asked which court should have jurisdiction for private enforcement cases – e.g. the court that hears appeals against decisions of the competition authority.

18. The panel members described the existing rules in their respective member states. It was pointed out that it would be unconstitutional in Belgium to grant jurisdiction in respect of private enforcement to an administrative court. The panel felt that the training and support of the judges who hear private enforcement cases is more important the choice of the court that has jurisdiction. The panel also advocated ADR provided the access to courts remains possible. ■

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Abstract

This article reproduces the papers delivered at the second round-table at the Belgian Competition Day in Brussels on October 21, 2010. Dr. Gunnar Niels, author of the first contribution, presents the report Oxera prepared for the European Commission. He also emphasises the importance of training programs for judges and, giving US and UK practice as an example, of guidance for experts and judges on the use of economic evidence. In the second paper, Dr. Hans W. Friederiszick presents the empirical method applied for damages quantification in the German Cement Cartel case in 2009 and draws general lessons for the use of econometric work in the court room. He highlights the importance of a clear communication by the judge on the applicable standard of proof to the economic expert and its relevance for the choice of an appropriate empirical method. The "tragedy of information asymmetry" in cartel cases, i.e. that the defendants hold 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. In the third paper, Prof. Frank Verboven presents the economic findings in respect of passing on defences. He is convinced that there is a good framework to appreciate these defences but accepts that it is not easy to apply. He argues however that the assessment of passing-on defences is in itself not harder than applying the overcharge analysis. In the last paper, Mr. Verougstraete, after noting that judges usually do not faint when they see a graph, pleads for the development at the European Union level of an interface that would help judges to limit the amount of information they have to cope with. He considers that the various economic methods provide the judge with a useful intellectual framework but that it remains the task of the judge and not of the expert to select the methodology on which he holds his judgment. He also points to the degree of uncertainty that is caused by legal issues such as the discussions on causation, the compensation for loss of opportunities (lucrum cessans), etc. He concludes that the outcome of damages cases is likely to remain rather unpredictable as long as there is no sufficient body of case law. The outcome will depend not only on the choice of an economic method, but even more on the available facts and on the way the method is adapted to the available data..

Cet article regroupe les communications présentées lors de la seconde table ronde de la Journée de la concurrence belge à Bruxelles le 21 octobre 2010. Dr Gunnar Niels, auteur de la première contribution, présente le rapport Oxera préparé pour la Commission européenne. Il souligne l'importance des programmes de formation des juges existant aux États-Unis et au Royaume-Uni concernant l'utilisation pour les experts et les juges des données économiques. Dans la deuxième contribution, Dr. Hans W. Friederiszick présente la méthode empirique utilisée pour le calcul des dommages-intérêts dans le cas allemand du cartel du ciment de 2009 et en tire des leçons générales pour l'utilisation des travaux économétriques devant les juridictions. Il souligne l'importance d'une communication claire par le juge des modes de preuve utilisés par l'expert économique et de leur importance dans le choix d'une méthode empirique. Dr Friederiszick souligne, entre autres, que la difficulté tenant à l'asymétrie d'informations que l'on trouve dans les affaires de cartel (tel est le cas lorsque les défendeurs disposent d'informations que le demandeur doit prouver empiriquement et, inversement, que le demandeur dispose d'informations que le défendeur a besoin afin d'établir que le coût du cartel a été supporté par les clients) nécessite des règles de procédure solides pour permettre une estimation correcte. Dans la troisième contribution, le professeur Frank Verboven présente les résultats économiques concernant le passing on defense. L'auteur souligne qu'un cadre juridique suffisant existe pour apprécier cet effet mais reconnaît qu'il est difficile à mettre en oeuvre. Il fait valoir que le passing off defense n'est pas en soi plus difficile à appliquer que l'analyse des surcoûts. M. Verougstraete, auteur de la dernière contribution, après avoir souligné que les juges ne sont pas totalement démunis face à l'analyse économique, plaide pour la mise en oeuvre d'un dispositif au niveau de l'Union européenne afin d'aider les juges à limiter la quantité d'informations auxquelles ils ont à faire. Il estime que les différentes méthodes économiques fournissent au juge un cadre utile, mais qu'il reste du devoir de celui-ci, et non de celui de l'expert, de choisir la méthodologie motivant son jugement. Il souligne également le degré d'incertitude résultant des difficultés juridiques telles que la causalité et de la réparation de la perte d'une chance. Il conclut que le sort des affaires de dommages en matière de concurrence risque de rester imprévisible tant qu'il n'y aura pas une jurisprudence suffisante. Le résultat dépendra non seulement du choix de la méthode économique, des données disponibles mais surtout de la façon dont la méthode sera adaptée à ces données.

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PRIVATE ENFORCEMENT: DAMAGE ASSESSMENT

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I. Introduction

1. As already mentioned today, a major policy concern is the fact that today victims of EC-antitrust infringements only rarely obtain reparation of the harm suffered.

2. One of the major obstacles to damages actions is the quantification of the damages. In this difficult task of quantification, guidance is needed, both for the benefit of the national courts, as well as for the parties concerned.

3. The Oxera report on quantifying antitrust damages is such a step towards guidance. Several topics of this report will be discussed today. As mentioned in the Oxera report, such guidance needs to consider at least two objectives: (1) finding the most accurate answer possible in determining the real damage value as closely as possible and (2) removing obstacles to private damages actions as a matter of better and more access. And this will be our main objective today. And I sincerely hope that this round table can also contribute to this guidance.

4. In response to what Eddy De Smijter this morning said: “*we do not want lawyers and judges to faint when they see graphs and equations*”, well, certainly not the judges. As already mentioned, Dr. Gunnar Niels was closely involved in the study and is therefore well placed to give us an insight in the types and methods that are acceptable and feasible and what is best practice for estimating damages.

5. We were also delighted to work with Eddy De Smijter and his team to develop and produce this report. I will talk about the main issues in the report and also a bit of discussion on how it can be used (and currently is used) in court cases.

6. As was mentioned by the Minister and Bert Stulens this morning: any guidance will have to fit within the legal reality.

7. And that immediately throws up a potential trade-off between the search for the accurate answer *versus* practical approaches that can be readily applied in court cases. We have to bear in mind also that commercial realities are complex and especially damages cases are complex, because what has to be done is to assess the situation of what would have happened in the absence of infringements. So don't blame the economists for the (inherent) complexity. What economists can do and should do is explain economic concepts clearly to judges and lawyers. That is what we try to do in our report

8. Another aspect of fitting within the legal reality is the differences across the jurisdictions, in particularly differences

in terms of data availability, and also disclosure rules can differ between member States, for example, the U.K. being on one extreme and several member States on the other.

9. Data availability can also differ at different stages of any damages case. If you are a carteliser who has just been fined or who has been investigated and you want to do some risk assessment of what kind of damages claim may follow against you, you have very limited data and limited budget at that stage. But perhaps you want to do some simple back of the envelop damages quantifications.

10. Likewise, if you are a claimant, at the very early stage, what you want to see is a very rough estimate of the damages, to know if this claim is actually worthwhile pursuing. Again you want to do some simple analysis.

11. Then if you go further in the proceedings, you may have more data available from your own side, or from the other side if there are good disclosure rules. And our report is clearly meant to give some guidance and ideas about what kind of methods you can use in all these different situations.

12. A further aspect of guidance that fits into the legal reality is that there are a number of legal principles (and we learned a lot about them in doing the study for the Commission) that actually limit in practice what sort of damages actions you actually can get: these are the principles of causation, remoteness, and foreseeability.

13. This means that, for example, in cartel damages cases, what you typically see is damages claims by actual purchasers of the cartel (companies who continue to purchase during the duration of the cartel period). What you don't see very often is claims for lost volumes or claims from purchasers of the cartel who say that they actually purchased less because the price was higher during the cartel period, and maybe they sold less in their downstream market.

14. Equally you don't see claims from would-be purchasers, those who say they would have bought from the cartel in the absence of the cartel, if the price had been lower. Again, you rarely see such claims, even though from an economic perspective, these purchasers may also have been harmed by the cartel.

15. Likewise, in exclusionary conduct there is a significant legal difference between actual loss and lost profit. Again, from an economic perspective, the two are not so different but legally there is an important difference. What you do see time and time again, if you look at exclusionary conduct cases across Europe, is that damages awards tend to be

limited to actual damages and that cases with lost profit are often dismissed as too uncertain and too speculative.

16. Two examples of this, for different reasons are the *Conduit* case in Spain and the *Enron v. EWS* case in the U.K., but there are more examples.¹

17. Just briefly as regards the conceptual framework: in any damages estimation exercise there are two main stages :

- determining the counterfactual (“but-for”) scenario: what would have happened in the absence of the infringement. This is usually the stage where you get most of the economic analysis and most debates between the lawyers and the economists;

- but there is also a very important second stage, which is moving from this comparison between factual and counterfactual to actually determining a final value of the claim. This means in particular applying interest. So the compensation principle in EU case law means you are entitled to interest as well (if you are a victim) and interest calculations can make a significant difference to the ultimate damages claim. In particular when you are talking about cartel damages or cartels that took place in the nineties or even in the eighties. Twenty or thirty years of interest can make a huge difference to the total damages value claim.

18. Like Bill Kovacic said, in the USA you have treble damages but no prejudgment interest. In practice, in Europe, when you do apply interest, the interest can easily double or triple the nominal damage. So that can make a huge difference. And there is still an important gap between the economics and the law on how to determine the interest (which I explain later).

19. One of the central parts in our report is the classification of methods and models. There are basically three classes of methods and models that you can use for damages estimations.

¹ Competition Appeal Tribunal (2009), *Enron Coal Services Limited (in liquidation) v. English Welsh & Scottish Railway Limited* [2009] CAT 36, December 21st ; Madrid Commercial Court, *Conduit Europe, S.A. v. Telefónica de España S.A.U.*, judgment of November 11th 2005.

20. Table: Classification of methods and models

| Approach | Comparator-based | | | Financial-analysis-based | | Market-structure-based |
|--------------------------|------------------------------|--------------------------|---|---------------------------------|-----------------|--|
| | Cross-sectional | Time series | Difference-in-differences | Financial performance | Financial tools | Industrial organisation models |
| Basis for counterfactual | Markets | Before and during | A firm, market or country before, during and after | Comparator firms and industries | | Cournot oligopoly |
| | Firms | During and after | | | | Bertrand oligopoly |
| | Countries | Before, during and after | | Cost of capital | | Monopolistic |
| Techniques | Comparison of averages | Comparison of averages | Comparison of averages (arithmetic difference-in-differences) | Cost plus | | Perfect competition |
| | | Interpolation | | Profitability | Multiples | Auctions |
| | | | | Event studies | | |
| | Cross-sectional econometrics | Time-series econometrics | Panel data regression | Valuation | Discounting | Estimation of structural models of competition |
| | | | | Bottom-up costing | | Two-model estimation |

21. The three columns to the left are comparator-based methods and models. They are probably the most intuitive and also most frequently used ones in damages cases. One of these approaches is to compare between different markets, cross sectional. For example if there was a cartel in one region in Germany, then you can compare the prices, in the same period, in another region in Germany where there wasn't a cartel.

22. You can also do comparisons over time and that is probably the most frequently used method. You look at the same market and you look at it before, during and after the cartel and you look at whether the prices were different.

23. Economists have developed a third variant of this, called difference-in-differences, which is a combination of the two previous models.

24. A second class of models is financial-analysis-based: these are commonly used in other areas in law, for example, in IP or commercial damages litigation, where often the question is: what is the value of the brand that has been harmed or what is the value of the company that could not enter or operate into the market. These techniques can be used equally for antitrust damages cases, for example, in exclusionary conduct cases. Another form of financial-analysis-based approach is to analysis the management accounts of companies to determine the costs, for the claimant or for the defendant. So you do bottom-up costing and try to derive the counterfactual price that way, rather than looking at a comparator market or period.

25. The final class of methods and models is market-structure-based. Perhaps the easiest way to explain to this audience is: it is a bit like merger simulation. So the models that economists have in merger cases and where you do merger simulations, you can also use them in damages cases. You have a model of a market and then you simulate what happens to the prices when two companies join (in merger cases), equally you can simulate what happens when companies compete in the market, rather than collude.

26. Of all these models and methods, what is the right approach? Within each of these approaches, there is a range of techniques from the more simple to the more sophisticated. And that may be of some comfort to lawyers and judges, that there is this range. So, for example, when it comes to comparison between markets, you can do a very simple technique of comparing averages. You can take the average price in one region in Germany (say North) and you compare it with the average prices in the South region, where there was a cartel. The same comparison you can make the econometric way: you take into account all the factors that are explaining prices in the North and in the South, including the cartel as one of the explaining factors. It may well be that after taking into account all these factors the cartel is one driver of the difference in price.

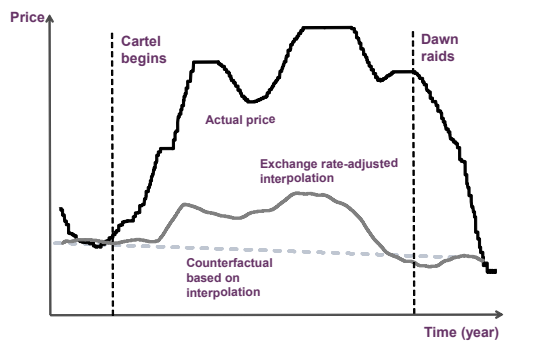
27. The appropriate method is not something that you can really prescribe a priori. It depends on the availability of data (also on standard of proof., but the economic models depend basically on data availability). These models are complements, not substitutes. You don't have to use necessary one model. If the data is available, there is no reason why you should not

the most sophisticated technique. You can also use two or three models and see if they all point in the same direction.

28. Just to give an example (see the first chart) to illustrate the range from simple to complex approaches.

Oxera

Example of before-during-after analysis



29. This is an example from an actual case, but highly stylised. The top line shows the actual prices paid to the cartel. The left dotted line is the date the cartel begins. The right dotted line is the date the dawn raids took place. The story this drawing tells is that the prices are much higher during the cartel than before and after. It is a very simple approach. You can do linear interpolation of the average price before and the average price after. That tells you already a story, quite a powerful story in this case. From this start you can go further. You have to dig into other possible explanations of this “pattern”. In this case there was the possible effect of exchange rate movements because, in this stylised example, the cartel fixed its prices in one currency unit and the claim referred to transactions that took place into another currency. You can see that the adjusted interpolation does explain some of the price movements but far from all of it. So having controlled for the exchange rates, there is still an effect of the cartel. Beyond that, you can look at other factors, such as the underlying cost, you can test if they follow a similar pattern. If not, you still have a good story that there was an effect of the cartel. And if there is more information or a time series of data, you can use econometrics to explain how prices would have evaluated in the absence of a cartel.

30. In addition to setting out the methods and models that exist, our report also provides some further insights from economics that can be relevant in damages cases. And one of them is in relation to the passing-on of overcharges (see also the presentation of Frank Verboven). What the report highlights is that there are some useful theoretical insights on passing-on that can be quite powerful in these damages cases, especially if you don’t have a lot of data available. One of these insights is rather counterintuitive to many business people and indeed to many lawyers as well. Under perfect competition you have 100% passing-on. If you are in a downstream market and you have purchased from the cartel, but your market is perfectly competitive, economic theory and also a lot of general economic studies show that over time, you will have passed everything on. The intuitive

economic explanation is that in perfect competition prices equal costs. If costs go up across the board, everybody in your downstream market faces the same cost increase, prices also go up. At the margin, some firms may go out of business, which might then result in a lost-volume claim, but that’s a different type of claim and as I said earlier, a much more difficult one to prove.

31. Another relevant insight from theory is if not all competitors in the downstream market face the same cartel overcharge, then the passing on rate maybe well zero. For example, if you are an industry that has purchased from a cartel but you compete with imports, say from South America, or China, and those imports are not using a cartelised input, then you have a good argument *prima facie* to say “I haven’t been able to pass this on”. And a good example of this was the *Spanish sugar cartel* judgment by the Audiencia of Valladolid, one year ago, where actually the same economic logic was applied by the judge.² This was that the Spanish biscuit manufacturers who sued the Spanish sugar cartel (or rather one of the members of the cartel), were competing in the downstream market with biscuit manufacturers from other European countries France, Italy etc. and the court in Spain accepted that as a valid reason to say that it is a competitive disadvantage there because they were not able to pass it on, they suffered a harm. This is one example of a court applying this simple but quite insightful economic logic.

32. But beyond that, I think in every case, once you are at a stage of greater data availability, you do have to look at the specific facts of the case as well, in particular what is called the microstructure of price setting. So how do companies in this market actually set prices? And you find that the theoretical relationships may sometimes break down, like there may be pricing friction, companies do not always change their prices every time their input price changes. A restaurant isn’t going to print a new menu every time the price of fish or the price of meat, changes. (Only very expensive restaurants do that.)

33. On the question of interest, there is a big gap between the law and the economics. That debate has three aspects. One aspect is: should you apply a simple interest rate or compound interest rate? Compound interest rate is much more natural to economists and business people. But also if you have a bank account, you expect compound interest rate. You don’t get simple interest. There is some movement, in the U.K. courts in particular – as you can see from this quote: “*The obvious reason for awarding compound interest is that it reflects economic reality*” (Sempra Metals, 2007, UKHL 34) – perhaps towards recognising that compound interest rates may be relevant. But my impression is, across Europe, including the U.K., the predominant rule is still to apply simple interest only. Obviously the two can make a big difference in the ultimate damages estimation.

34. The second aspect of the debate is whether you use a statutory interest rate or a commercial interest rate. Again, to an economist, the commercial rate is the more natural one to take, but the law, so I am told, usually prescribes statutory interest rate.

² Audiencia Provincial de Valladolid, Sentencia num. 261/2009, judgment of October 9th 2009.

35. The third aspect is, if you accept that the commercial cost of debt is relevant, then it is a small step to look at a firm's cost of capital as a relevant interest or discount rate. Because firms not only finance themselves through debt but also through equity.

36. Just to conclude: where did we end up in the question of simple versus complex approaches? Some people found our report too simple (some economists did), but other people were perhaps a little bit disappointed because it is not a clear handbook that says: take number A and you divide by B and you have your damage. That is in our view not really feasible. One message from our report is that claimants, but also defendants, and courts, will have to do some homework when it comes to estimating damages. But on the other hand, it is not all too difficult.

37. Mr De Smijter mentioned the importance of training the judges. We had the pleasure to train judges from across the E.U. earlier this year and the feedback we got on the report is that they actually found it interesting to read such a concise overview of the various methods and models, and of what is going on and accepted in economics and also in member States, what sort of cases have been heard in member States. They found that useful as background. So it is not a handbook, but a useful read. And what I generally hear, but that's my opinion, is that courts can handle a degree of complexity of course. Issues like counterfactuals and valuation come up in IP litigation or commercial damages litigation as well, which judges are perhaps more accustomed to than antitrust cases.

38. This quote from a U.S.A. court goes a step further, and goes as far as saying that it expects an expert to produce some econometric evidence: *Ôthe prudent economist must account for differences and would perform minimum regression analysis when comparing price before relevant period to prices during damage periodÔ* (in re *Aluminium Phosphide Antitrust Litig.*, 893 F Supp. 1497, 1507, D. Kan 1995). Maybe in European courts one does not go as far yet, but it shows that courts can handle a degree of complexity.

39. That brings me to the last theme, which is also one that has come up this morning, which is this role of the expert and how to use economic evidence before the courts. One recent development is that various competition authorities, including the Bundeskartellamt, the European Commission and the Competition Commission in the U.K., have published guidance on best practice for how to use and how to present economic evidence. Very simple but quite good principles of sharing your data with the other side and sharing your assumptions, being open about it and transparent. Those best practices are also relevant for court cases.

40. The U.S.-Court has developed some tests for the admissibility of expert evidence, which is also quite helpful here, the principles of it, the Daubert test.³ Daubert says that the economic evidence has to be based on established principles and methods. Again, that's quite a comforting thought. So the economics that you see in antitrust cases in

general and also in damages cases, is not the state of the art high-tech economics that is been developed in academia. It is often down-to-earth applied economics. Any expert evidence has to be based on hard data, verifiable data. It has also to be rooted in the facts of the case. Experts can't give their evidence just on a theoretical basis. As indeed one famous Nobel Prize winner of economics discovered when his evidence was actually rejected under the Daubert test in the U.S.A.

41. The theme that evidence has to be rooted in the facts of the case, regularly comes back in the CAT, the Competition Appeal Tribunal. They call this theme the "triumph of theory over commercial reality". We also saw this in the *Enron v. EWS* case last year, which was a loss-of-chance claim, by the customer of a rail company that had abused its dominant position. That customer company, Enron, or the liquidators for Enron, claimed that they would have won a significant contract to supply a big power plant for a number of years. But the claim faced the inherent difficulty that the actual business person who was at the power plant and who was in charge of awarding the contract at the time, gave his evidence and said "*well even in the counterfactual I probably wouldn't have granted this contract to Enron for this and that reason*". He gave plausible business reasons for it and the CAT found him a coherent and plausible witness of fact. So that left the claimant's economist with this difficulty of arguing that a rational business person would have granted that contract to Enron, and the Tribunal had to decide between a real business person and a theoretical rational business person.

42. Finally a comment on the U.K. system: experts have to be helpful to the court, they have a duty to the court. They are also required to talk to each other and narrow the issues between them. You may be skeptical about economics in general, but I think in my experience, this is a good system. It works and it brings out the best of the economic experts. I am not the only one who says that. You can see it in this quote of a high court judge: *ÔThe quantum experts have managed to make very good progress in agreeing figures. This meant that the issues between them were more limitedÔ* (*BSkyB v. EDS*, 2010, EWHC 86, TCC). This was a very big case, it was not a damages litigation case, but a commercial one, but the principles were the same. There was a lot of economic evidence, it was a big claim of several hundreds of millions of pounds, it was a long case and at the end the judge said some good things about the experts (see quote). I think that's a sign that this system can work.

43. Combine that in the U.K. with the prospect that you will be peer-reviewed by the economist on the other side and cross-examined by a hostile barrister. That actually provides the right incentives on an economist to come up with robust and credible analysis.

44. Final thoughts: there is a growing body of court precedence across Europe. Most cases settle, but you see more and more judgments and therefore more and more clarity about the issue how to assess damages. The economics and finance toolkit is a useful one. It has this mix of simple and complex approaches and probably one of the main challenges that are to be resolved is this issue of how to make lost-profit claims more credible, and also the issue of the interest rate.

³ *Daubert v Merrell Dow Pharma, Inc*, 509 U.S. 579 (1993). For a more detailed discussion of the test, see Berger (2000) and Cwik and North (2003).

45. Bert Stulens: can also be provided for by legal precedents, although case precedence on the quantification of cartel damage are still scarce.

46. Hans Friederiszick will tell us some insights in the way damages assessment has been done in Germany in the German cement case, with special attention to the procedural approach.

47. He will also tell us why the trade-off between accuracy and practicability is central in the debate of damage assessment. ■

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Faculty Professional of ESMT Managing Director of ESMT Competition Analysis

1. 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. 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 reduced by a 25% discount 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.



Source: German Statistical Office; own research.

3. I would like to make two points in relation to this graph:

– A central debate of the case in court was whether it is appropriate to take the price war period into account when you apply a “during and after”-methodology: the “during and after”-approach compares the prices during the cartel period with prices after cartel breakdown. Given the availability of time series data on prices, costs and demand factors in this case this methodology was a plausible one, in general. But can the price war period be taken into account when assessing the counterfactual, competitive price level? Our answer was: “no, this is not correct”. In our view the long term competitive equilibrium price is the right counterfactual, not a short term partial equilibrium. This view was further supported by the view that the price war was a consequence of the collusive conduct and, hence, affected by the collusive behaviour. Overall, I think, there was a common understanding that the price war period cannot be used as a counterfactual; conflicting views remained, though, about the length of this period.

– A second point I would like to make is that a simplistic comparison of price levels during the cartel period and after 2008 misguides you about the effects of the collusive agreement: under such an approach the data indicate that prices were *higher* after 2008 compared to prices during the cartel period. A more careful empirical approach reveals that significant changes of demand and cost parameters over time occurred. For instance electricity prices exploded over the but-for-period. If one controls for those changes, one finds flat price at a low level in the post cartel period.

Let me move on to my conclusions as an empirical economist about the procedural setting.

4. The judge in charge of the *Cement* case, Manfred Winterscheidt, followed a three-step process: design, application and robustness checks.

5. The design stage 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 end, a “during and after approach” was ultimately chosen, comparing the prices during the cartel period with prices after cartel breakdown. Important details such as how to take into account the price war period post-cartel breakdown, whether to take into account quantity effects and whether to collect regional price data from the parties in order to refine the methodology were discussed both in written format and during oral hearings.

6. In the following weeks, the application step was carried out. Smaller changes were communicated in memos and the underlying data sources (raw data and statistical codes) were submitted to the court and the parties.

7. 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. During two subsequent oral hearings those questions were discussed

and – where appropriate – adjustments and checks to our assessment were made.

8. What can one learn for other cases where econometrics is used in the court room?

II. The trade-off between accuracy and practicality: Five comments

9. Accuracy requires us to ask whether the selected methodology has the potential to produce the right result. The issue of practicality is concerned with the verifiability and transparency and the issue of the time frame required in applying this kind of methodology. The latter is on what the lawyers often focus; the former is the playground for economists. In my next comments I will discuss how to balance these two objectives in an appropriate way.

10. The first important lesson for me, out of this court experience, is that there are different legal standards depending on what you are required to do. There is a very high standard for proving collusion. Indeed, most economists (and lawyers) agree that circumstantial economic evidence is not sufficient to prove collusion. Furthermore, there are differences – in some legal systems – between the legal standard to prove that there has been any harm at all and the issue of quantification of harm, the latter typically being slightly lower than the former. This difference matters a lot for the empirical method chosen and, hence, it is very important that these standards of proof are communicated to the economists clearly and transparently. In an adversarial environment the economist has to be protected by the judge against changing legal standards over the course of the assignment through well-defined tasks.

11. A second important insight is that methods that may work very well in some instances may not meet the legal standards of proof in another environment. Indeed, there is no simple ranking of methods. Ranking of methods is rather case and data dependent. However, some guidance can be given – and indeed was given – by the recent judgment of the highest German court in the paper wholesale cartel case: the court argued that price-based methods are in general more robust than cost-based methods. This is also in my view a sensible approach given the practical difficulties when assessing costs. There is for instance a lot of leeway in assigned costs in a multi-product, fix cost intensive industry.

12. A third comment I would like to make is that economists should be open to take into account the practicality of what they recommend as an empirical strategy. Economists tend to propose all feasible methods in parallel. Lawyers tend to opt for a single method. In a legal environment it seems to me plausible to carefully reflect (also as economists) whether the full set of methods needs to be applied or whether a single technique is sufficient to meet legal standards. To the opposite, situations do exist, like low-data-quality situations, which require multiplicity of methods.

13. Forth, it has to be highlighted that if you use econometrics in the court room the analysis is exposed to strategic

behaviour by the parties involved: parties will reflect on which particular method they will support and one has to expect strategic delay in delivering information if feasible. This kind of behaviour needs to be taken into account and makes clear and enforceable rules necessary. 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 between 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 in this case resulted 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.

14. Finally, I think one has - to some extent – to accept the role of simple short cuts and overcharge presumptions. In the cement case it was helpful, despite all the criticisms one might have against simple presumptions on the overcharge, to cross-check our econometric results with average overcharges in other cartel cases. It turned out to be also helpful if a judge provides indications - based on the questioning of witnesses during the hearings - about the effectiveness of the cartel. In the cement case, this allowed us to cross-check our quantitative results with additional, independent information. Finally, discounting the estimates of the damages by the court are helpful instruments to balance the trade-off between accuracy and practicability. However, this should be applied carefully so that the estimate does not become superfluous. ■

1. Prof. Frank Verboven started from the full compensation principle, and the fact that this principle does not require to estimate the price overcharge but also the extent to which it has been passed-on.

2. He was convinced that we have a quite good framework to appreciate passing-on defences but did not pretend that it is easy to apply. He argued however that the assessment of passing-on defences is in itself not harder than applying the overcharge analysis.

3. He then presented some of the economic findings as follows.

4. In a passing-on defence the defendant argues that the overcharge caused by the cartel is not equal to the damage, but that it should be discounted by the amount that has been passed on to downstream customers. If we are going to implement that, we should also realise that passing-on will lead to reduced sales (by the victim of the cartel). So the defendant can't have everything. You should take into account both aspects if you want to have a full passing-on analysis. Economists developed some formulas and there is also some literature that shows that it is not so difficult to implement this.

5. With regard to the effects of a cartel we should distinguish direct and final or indirect customers:

6. There is first the overcharge, which is A, damage to the direct purchasers, and then there is passing-on, which is a negative damage, which is minus B. And then there are the lost sales, which is C. That is the first row on the table. In an example, you could think of a damage of 1000, then you have passing-on minus 800, so that reduces the damage. Then the indirect customer raises prices because of the pass-on, so that means that he loses sales. And you could think of that as an additional damage of 400. So, if you want to implement a passing-on defence, there is not just a need for a deduction of 800, but you have to adjust for the 400 increasing damage again. So, in this example the net effect would be a passing-on defence of only minus 400.

7. The second row of the table shows the end consumers and of course their passing-on is just their damage. So we have to account basically for the fact that someone else has this damage and we shouldn't ignore that. That is why for instance in the USA the passing-on defence is not implemented because there was a fear that end consumers might not be compensated (at least they should be paid the full amount).

8. So, on a graph, basically this graph shows the industry of the plaintiff and it is a down sloping demand curve. And we see three effects again: A, B and C.

I. Affected parties and sources of harm

Affected parties and sources of harm (1)

Basic cartel damages accounting

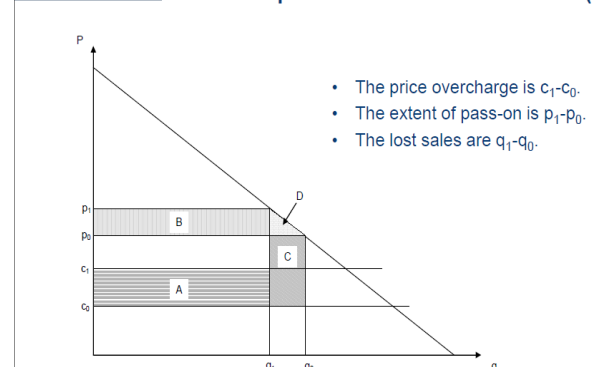
| | Overcharge | Pass-on | Lost sales |
|-------------------|------------|---------|------------|
| Direct purchasers | A | -B | C |
| End-consumers | 0 | B | 0 |
| Total harm | A | 0 | C |

Example

| | Overcharge | Pass-on | Lost sales |
|-------------------|------------|---------|------------|
| Direct purchasers | 1000 | -800 | 400 |
| End-consumers | 0 | 800 | 0 |
| Total harm | 1000 | 0 | 400 |

II. Affected parties and sources of harm

Affected parties and sources of harm (2)



A = The price overcharge is $c_1 - c_0$.

B = The extent of pass-on is $p_1 - p_0$.

C = The lost sales are $q_1 - q_0$.

P q p1 p0 c1 c0 B A C D q0 q1

9. A is the overcharge. It is the demand of the cost increase.

10. Then area B is the passing-on part which is a bit smaller than A so that is what you can deduct.

11. The third area is basically the lost sales (C), because the direct purchaser has to raise price

12. Finally I have to show these effects also in a formula, because I think this illustrates very concretely how you can implement it in practice.

13. Assume that there is a passing-on of 60%. If the direct purchaser would be a perfectly competitive firm, what economic theory then says, is that the discount of the overcharge is just 60 %. That is what people usually think. The passing-on defence is then 60%. If the overcharge is 100, you can discounted by 60%. However, this is not the end of the story, because in practice these direct purchasers they are working in an imperfect competitive market and that's not illegal, that's just life, markets are imperfect. So what you should do is to adjust that 60% discount for the fact that in an imperfect competitive market, the direct purchasers they loose sales and these lost sales are valuable at the margin (because these firms earn some margin).

14. In the formula, lambda is the adjustment factor that you have to account and it measures the extend of competition in the market. With a very simple example: if the passing-on is 60%, and for example the degree of competition is 20%, then you should apply the formula and you will have a final discount that is 48% (not 60%).

15. So still the defendant (the different cartel members) they can still claim a discount to the overcharge, but only 48%.

16. There is discussion on how to implement this in practice. You could do simulation analysis.

17. One small remark: it is true that under perfect competition if supply is flat and no capacity constraints, then there is full pass through, it is 100%. But if there are capacity constraints, it is not 100%. So you have to account for supply and demand elasticity .

18. Econometric analysis is a second approach to implement the passing-on defence. Here basically, as already discussed in the other presentations, you should gather evidence on the prices and the costs of the direct purchasers and you should try to see whether there is a relationship between the costs and the prices to see if there is passing-on. One practical problem is that often the cartelised input is just a very small part of the costs of the direct purchaser. Then it is very hard to see a relationship between that cartelised input and the consumer prices that the firm is charging. So it is very hard to detect economically any passing-on but our point is that we don't have to look only at the relationship between the cost and the price. We can look at all costs and just see whether generally speaking whether the costs of the direct purchaser are passed on to consumer prices. So, we can look at *indirect* evidence and also detect the degree of passing-on.

19. Final remark on implementing the passing-on defence: in some cases the direct purchaser may suffer from the cartel but some of them are integrated upstream with the cartel. In this case the framework that I have outlined still applies. The only thing is you have to be more cautious and the amount of the passing-on is going to be more limited. Because you are the only one firm who suffers from the cartel, you won't be able to pass on much. And the amount that you did pass on, will lead to a bigger amount of lost sales.

20. For those two reasons the scope of the passing-on defence is more limited when the direct purchaser is the only one affected by the cartel.

21. With regard to calculation of the compensation of indirect customers, there are two ways to do it. We could either do something similar as an overcharge analysis. We could see how much the indirect purchasers paid more because of the cartel. Or we could do it another way and start with the overcharge that was estimated at the upstream level and then multiplied by the amount of the pass-on, to get to the overcharge as faced by the downstream firms, by the final consumers.

22. In a final slide Prof. Verboven concluded that there is a coherent framework to assess the passing-on defence. He emphasised that, whenever a firm is passing-on overcharges downstream, we must take account of the fact that the downstream level is also loosing sales. He gave as his main message that, even though it is not an easy task, the assessment of passing on defences is in his opinion not more difficult than an overcharge analysis. ■

I. Who are the judges? How are they organised? What are the inherent weaknesses of the judicial approach?

1. There is only a small number of published cases on private enforcement of competition law. Most judges in the European Union are not specialised and have only a limited economic knowledge. That does not mean that they don't understand a graph. It means that they do not have the intuitive feeling of how to handle these cases. Most of the district courts all over Europe do not have a tendency to specialise, apart from some exceptions. Even in countries with commercial courts, it is not sure that they have enough specialisation on competition law.

2. Judges still find it difficult to be informed about European law and European case law (of the Court of Justice). This doesn't mean that they do not use the opportunities. In fact, they are too well informed about everything that happens but they tend to disregard this multiple information they get from all kind of sources. He considered it necessary to work on the European Union level in order to provide judges with a useful interface that helps them to limit the amount of information they have to cope with. The European judicial network should select the information and not just refer judges to various websites.

II. About the proceedings

3. We don't have in many countries a system of collective redress, which makes the work of the judges much more complicated. As the total number of cases is very limited, due to the cost of individual litigation and the resulting lack of interest of possible plaintiffs, the judges have only few opportunities to learn through their practice how such cases should be handled.

III. About the experts

4. They are a problem, more than a solution. They are a problem in the sense that in the weaker courts you have the situation of expert A and expert B from the other party who both come with conflicting evidence. The judge does not understand A nor B and appoints expert C. The result will be that the judge will transcribe the words of expert C. This is completely unsatisfactory. In most countries the experts are supposed to help the judges. They are not supposed to adjudicate the case themselves. The judge cannot discharge his duty on the experts and if he does his decision will be overturned by a higher court. He has to decide himself.

5. In Mr. Verougstraete's opinion, the judge has to decide before the expert, which method he is going to follow. He has to decide for a but-for or the benchmark method or else and *he* has to say within which lines the expert has to work. He cannot let the expert to decide what is the best method. The judge can do it in steps, or can provide a range of methods. Because in his final decision he has to say according to which methods he works and why the method he selected is the best method. That is his duty as a judge.

6. Mr. Verougstraete added that in his opinion the judges' decision to use a given methodology to calculate damages, for whatever reason, is unlikely to be squashed by the Supreme Court because the Supreme Court does not decide on the facts and mostly gives a large discretion to the appeal judges. It is only when the methodology is clearly unreasonable that the Supreme Court will step in.

IV. About the law that the judge is going to apply

7. In respect of private enforcement cases, we must obviously refer to the law on torts. You know how subtle the courts are on these matters. When you read article 1382 in the French Civil Code, it is simple and straightforward. But after 200 years of court law, things are less clear than in the time of Napoleon.

8. One of the main problem areas is concerned with causation. Theories concerning the *causa* in tort abound but none is really convincing and can fully explain the case law in the various countries. The courts in many countries are divided on the issue to what extent they can compensate for the loss of a chance. With this issue we are right in the middle of competition law cases because much of the compensation of the damage will be concerned with lost opportunities. Therefore the judges try to avoid – when they can – the issue of causation and concentrate their thinking on damages.

9. The various methods of calculating the damages can at first glance seem easy to apply but they can be confusing. In the footnotes of the papers of today I found that the results can be quite different in the real world, and indeed they are.

V. What is expected from the judge?

10. He has to decide the amount of loss. He is not allowed, when he is able to assess the damages on a rational way, to give the amount *ex aequo et bono*, although he has a great discretion in determining the amount of the damages. In other fields than competition law, as in personal injury

cases, the judges use sophisticated formulas that have only an appearance of objectivity and allow for much discretion. Most judges, feeling bound by precedents, are not anymore aware that the formula's are not necessarily close to the truth. A high margin of discretion that is only marginally controlled by the Supreme Court, leaves the judge a large choice between the methods that he will use to assess the damages.

VI. Assessing the damages

11. Mr. Verougstraete thinks that most of the judges are, in respect of litigation on damages, whether in commercial or competition conflicts, well informed on the law and of the case law of the European Court of justice and of their own national Supreme Court.

12. They are much less informed on the case law of the colleagues of the other countries. Which is a pity because they could learn a lot from the case law of other countries. This information should be available in a horizontal way, i.e. not subdivided in information given on specific aspects: making a decision concerning competition law requires a good knowledge in the law of contract and in administrative law, besides competition law.

13. It is very hard for a judge to assess evidence from courts from another country. A judge will spontaneously be inclined to handle evidence as in a normal commercial case. Therefore, there is nothing that points to any method, except the preference for a very simple method. The simpler, the better they understand.

14. For exclusionary practices, the bench mark method would be something quite easy to understand. The but-for and after method is also rather popular with the judges. Or any analytical method based on reasonable projections by the plaintiff is already more difficult because he has to project in the future and that makes it very tricky. In debt law the judges are used to do it but in fact in this kind of cases, it will be more complicated.

15. For price fixing cases: the difference between the counterfactual world and the actual world maybe quite relevant and perhaps more easier to ascertain than the experience has shown.

16. Future damages can be discounted and paid directly. There are national rules on how to do that.

17. There are also national rules on the calculation of interest which might considerably put a burden on the defendant.

VII. Conclusions

18. The outcome of damages cases will depend not only on the choice of a method, but even more on the available facts and on the way the method is adapted to the available data. These methods are very relevant to the judge because they give him an intellectual frame work, a checklist for the judge. But it is hard to predict which kind of method he will choose:

19. Mr Verougstraete concluded that there is indeed a high level of unpredictability although the framework is promising. This leaves ample room for the *ars judicandi* and the related uncertainty.

The Chairman Bert Stulens concluded and said he could give the floor to the audience for one question.

Mr. Huveneers: Might there not be a more simple reasoning on the basis of the facts in the German cartel case. If you assume that after the dawn raid the behavior became competitive, then you also have to assume that any across the board increasing marginal cost will be fully passed through. And so you have to explain the high level of the price after the dawnraid by the costs (prices of some inputs). And it might be that the but-for price can be as high as the collusive price. And in case the but-for price could be rather high, the evaluation of the damage will be very small.

Prof. Friederiszick: There is a point here. In this period 2008-2009 several of the relevant input costs of the cement industry, particularly the electricity cost, exploded. So this explains the increase of the prices, even in a competitive environment. And if you determine the but-for price, what would be then the price after the cartel period if the electricity cost would not have increased during the period 2008-2009? You would come to a much lower price in the but-for price after the cartel period which would then, compared to the cartel period, identify significant price effects. So that is what comes out if you do the econometrics correctly. The issue of pass-on was not really an issue in the administrative proceeding. ■

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Abstract

Director General Italianer concluded that the discussions of the day illustrated that the right to compensation is confronted in practice with a patchwork of national procedural rules. The key question is therefore to find a workable common approach.

In defining this approach account should be taken of the fact that public and private enforcement are complementary, and that private enforcement must aim at the compensation of damage (no punitive damages). Drawing upon the discussions of the day, Mr. Italianer made reference to a series of questions to be reflected upon such as the interaction between private enforcement and leniency programmes, the relation between compensation and deterrence (between damages and fines), and the need to grant effective rights of action to consumers and small or medium sized enterprises whilst avoiding unmeritorious claims.

Dans cet article, l'auteur, Directeur général de la DG COMP, présente son point de vue en conclusion de la Journée belge de la concurrence. Il souligne que les discussions ont illustré combien le droit à la réparation des dommages des pratiques anticoncurrentielles est confronté à une grande variété de règles procédurales nationales. La question essentielle consiste donc à définir une approche commune acceptable par tous. Il conviendrait d'abord de tenir compte de la complémentarité de la mise en oeuvre publique et privée des règles de concurrence. Les actions privées devraient ainsi viser la réparation des dommages et non les dommages punitifs. Reprenant les points évoqués lors de la journée, M. Italianer souligne l'importance des questions telles que l'interaction entre la mise en oeuvre privée des règles de concurrence et les programmes de clémence, la relation entre la réparation et la dissuasion et la nécessité d'accorder des droits effectifs aux consommateurs et aux entreprises de petites et moyennes entreprises tout en évitant les actions non fondées.

The text is the transposition of the sound recording of the presentation by staff of the Directorate General for competition of the Belgian Competition Authority, revised by the speaker.

* Avec la collaboration de Julie Feger-Katz.

Closing remarks

1. Vice President Almunia explained this morning that we are faced with, on the one hand, judgments of European Courts that establish the right for compensation, and on the other hand a very patchy system of national systems when it comes to actual enforcement of those rights. He also clarified the general approach of the Commission to collective redress.

2. Today only half of the Member States have some form of collective redress procedures in place and when they have them, the rules and procedures can be extremely diverse. The general consultation which the Commission should hopefully launch over the next months, will lead to laying down general principles that will help build a framework for collective redress at EU level. As far as I am concerned, today was already a first step in that consultation process.

3. I would like to emphasise what Mr. Kovacic has already said this morning: in this debate, the key question is finding the right dosage. I think this is very true. We need to address the patchy systems, in particular in the cross-border sphere.

4. By using the word “cross-border”, I would like to make one thing perfectly clear. When listening to the debates today, I think there was hardly any distinction made between on the one hand a system of private enforcement at the level of the Member States, and on the other hand European competition law, where private enforcement concerns of course cross-border situations. The legislation at EU-level only deals with cross-border situations. Regulation 1/2003 assigns responsibility to the Commission and to the Member States to enforce the Treaty rules in that respect. It is logical that any European legislation that has to deal with private enforcement would be therefore limited to these cross-border situations. I like to take away the impression, or perhaps the fear, that there will be European legislation dealing also with private enforcement for purely national situations. I think that is a very important aspect that has not been mentioned today.

5. During the debates today a number of questions were raised. The Commission will take them very seriously into account. For the sake of presentation, I would like to divide the core issues raised into three bundles, that are not necessary mutually exclusive.

I. The complementarity between private and public enforcement.

6. There was a consensus today that any private enforcement initiatives at European level should be limited to compensation and should not contain punitive elements.

7. A second issue that came up frequently is the interaction with leniency programs. Whatever we do in respect of private enforcement should not be done to the detriment of public enforcement and to the role that leniency programs play in public enforcement. Linked to that is the issue of the discovery of data, one of the issues that is very prominent in the USA and where I think appropriate safeguards need to be included.

8. Then there is the issue (mentioned by Eddy De Smijter) of the potential interaction with fining policy. For example, when there is a settlement in the USA, there is a commitment of one party to engage in a compensation process. So, although deterrence and compensation are not the same, I could remark that in practice there is some kind of interaction between what is happening in respect of compensation and the setting of a fine.

9. Another aspect discussed was the difference between follow-on actions and stand-alone actions. When one talks about this distinction and places it in a cross-border context it is logical to expect that most of the cases in the European context would be follow-on cases and that therefore, the issue of unmeritorious claims would be mitigated to a very important extent.

II. How to achieve an effective compensation system?

10. Another important issue raised today relates to who would have standing to put forward these claims. Should representative organisations have standing or should this only be allowed for parties that suffered the harm themselves?

11. The issue of the funding of actions is also crucial. Apart from individuals, I would like to add that there are also small and medium sized enterprises that suffer from antitrust infringements. It may be that, like individual consumers, SMEs do not have the means to seek compensation. Representative organisations should also have the ability to obtain funding for their claims because they are generally not endowed with many resources.

12. Speakers today mentioned the issue of the “passing-on defence”. We have heard today some practical approaches to this issue. We have also referred today to the issue of “opt-in” and “opt-out.” Vice President Almunia this morning already indicated that the world between opt-in and opt-out is not black and white and that there are intermediate solutions possible.

III. The actual implementation at national level

13. In terms of the process and format, the Commissioner said in the hearing before the European Parliament earlier this year that he would propose a legal instrument that would give the European Parliament the possibility to co-decide.

14. If for example the measure takes the form of a directive, would it be limited to minimum standards? The issue of the calculation of the compensation will also have to be dealt with. Should guidance be given and under which form? We had an interesting panel on this issue today. Part of the panel focused on the guidance that the Commission should give to the national judges, to help them with the methodology for calculation. There are already interesting examples at national level, for example in Hungary there is a provision in the competition law that says that the harm in the case of a cartel is assumed to be a 10% overcharge. It might be more but the starting point is 10 %. Of course, such highlight the patchy nature of the systems we have today across the EU.

15. We will have to further reflect on the role of the judges in this context, and on the relationship with alternative dispute resolution (ADR). Should that be a compulsory step before

one can go before a judge? Can it be a substitute or is it rather a complement? Should the ultimate stick of judiciary ruling be there, either as a last resort or a certainty?

16. And then when we consider future initiatives on private enforcement, we need to carefully consider the link with other areas. One of the reasons why the Commission will organise a consultation is because there are other issues about private damages that can arise for consumers, e.g. in an environmental context. In terms of cross-border enforcement, we will also have to address forum shopping. I would like to remind you that in German and UK law for instance, the fact that the Commission has ruled on an antitrust infringement is already taken into account when parties seek compensation. So, we also have to deal with that.

17. I hope that the consultation process that is set in motion will in a certain sense “de-dramatise” the discussion. We need not look too much to the US. As the discussion today demonstrates, and Bill Kovacic’ speech was very powerful in that regard, the US system is actually the result of the conjunction of various elements that have led to a particular situation. We can unravel all these elements and put them in place in a European context, so as to build a workable system that achieves what we want to achieve. That means that the victims are being compensated for the harm that has been done to them, nothing more and nothing less. So that is our objective and that is the way we will attack this issue in the coming months. ■

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