E.CA Economics

Quantification of passing-on of overcharges in damages actions

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Practical Feasibility

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Introduction/ disclaimer

- E.CA Economics has been carrying out pass on analyses in many cases over the last 3 to 5 years affecting more than 40 to 50 relevant product markets (without counting geographic markets individually…)
- Many ongoing engagements, both on defendant and claimant side
- Accordingly, my statements may be "biased" by the cases I have been working on and the positions I have taken there
  - Given the diverse positions, biases should cancel out, though…
  - In any case, my comments are formulated here as "open issues/ questions"; answers to be delivered by the courts, I guess

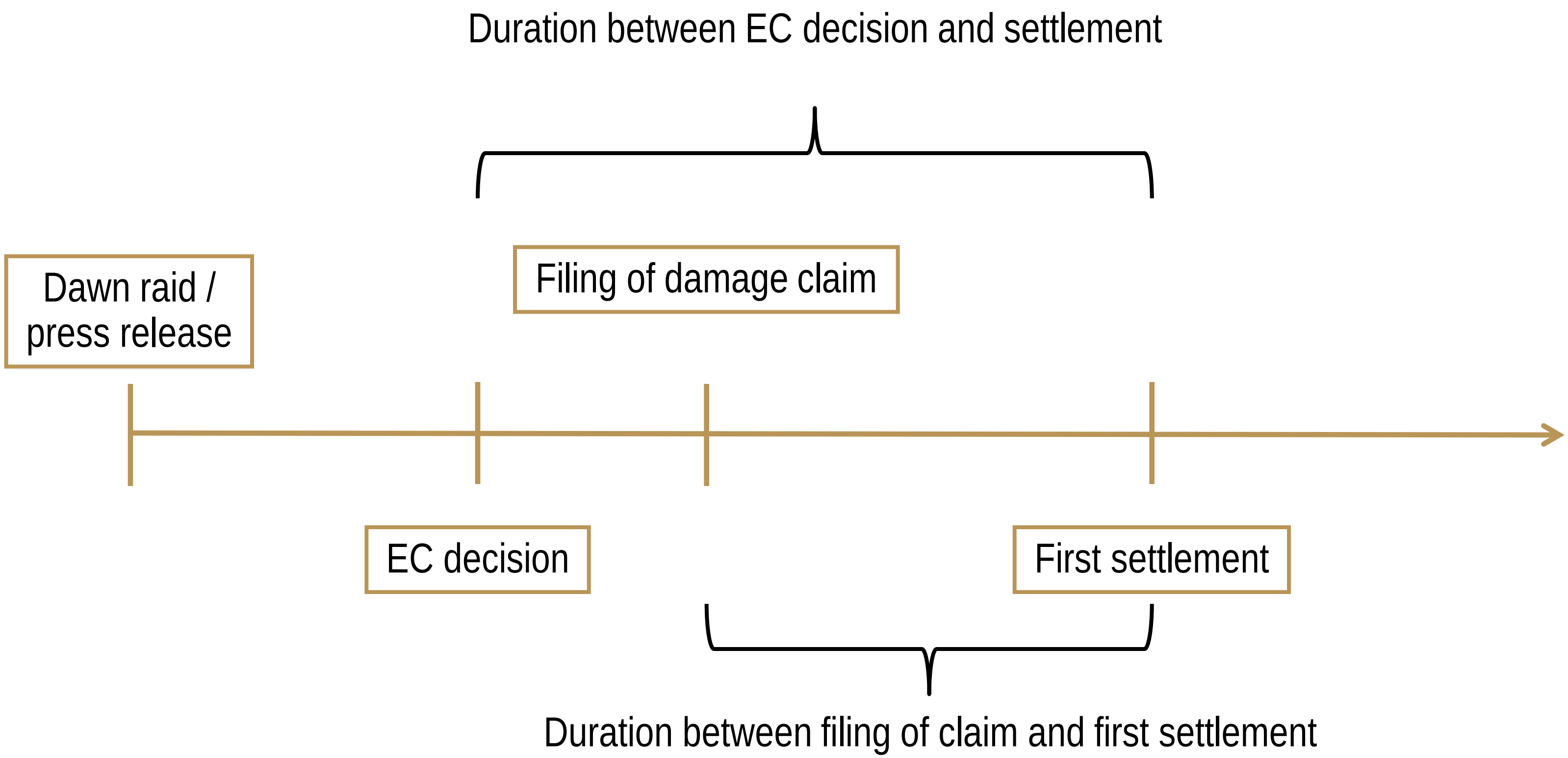
Agenda

Introduction/ disclaimer

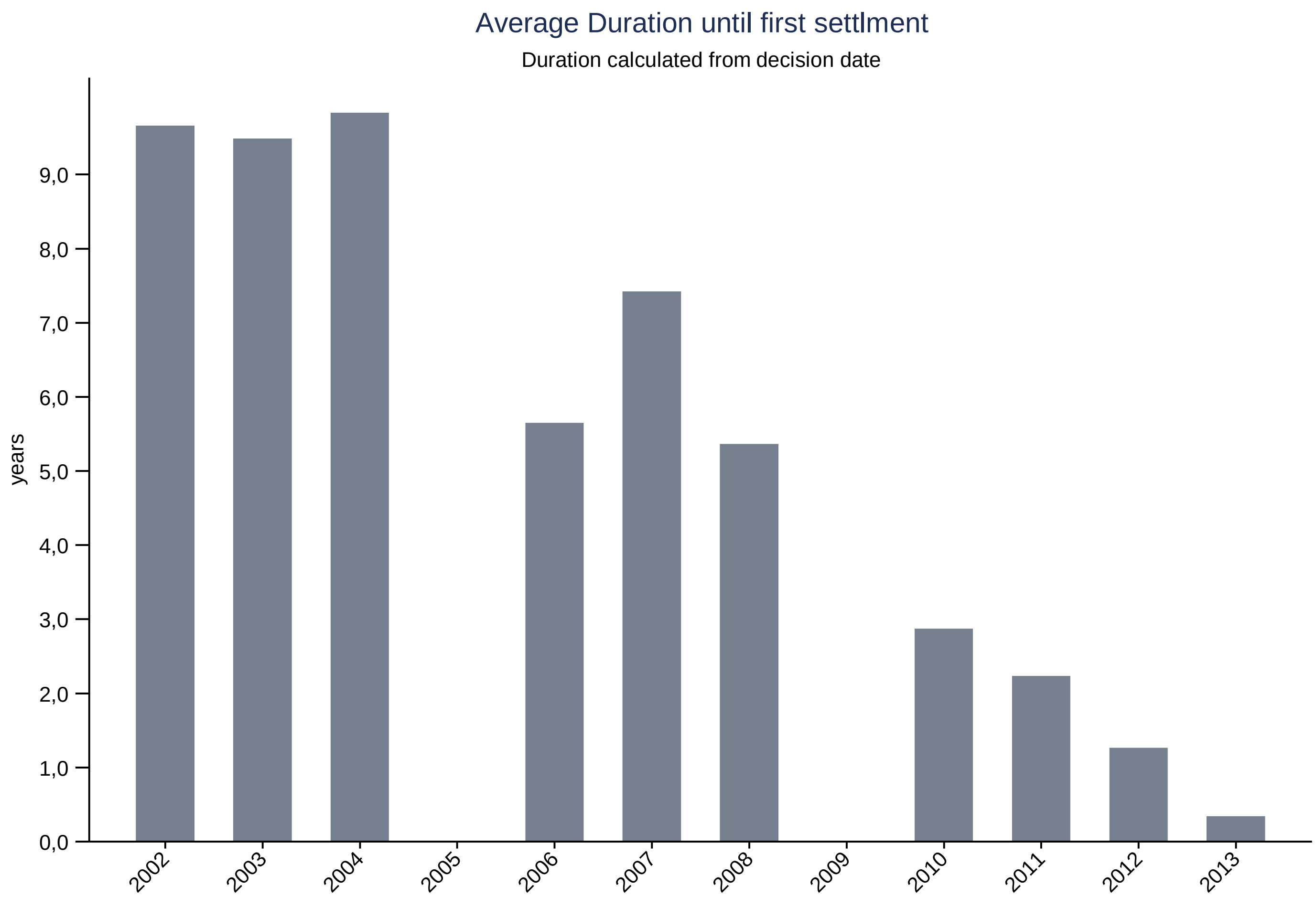
General remarks

Specific issues

Illustration of timeline of administrative and damage proceedings



Speed of settlements accelerated – sign of health!



Source: The authors. Based on 22 observations. Note likely truncation and bias towards later years due to smaller observation period.

General comments – practical issues

- From a claimant's perspective: Pass on defence represents a significant, weakening factor in its negotiation position
  - Disclosure of information on claimants' own business
    - Significant effort
    - Information revelation along the vertical chain
  - It reduces/ complicates the incentives for joint action
    - Horizontal vs. vertical

⇨ Significantly increases the costs of litigation

- From a defence perspective: Disentangling conditionality between overcharge and pass on a central theme
  - Burden of proof with the defendant
  - Not willing to "accept" overcharges in early stages of the proceedings

⇨ In particular, but not only, an issue in information exchange cases

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Specific issues – economic vs. legal causality, I

- Sainsbury’s vs. MasterCard decision (CAT, 2016, 484-4) highlights the differential between economic and legal concepts:

“We have already noted that whilst the notion of passing-on a cost is a very familiar one to an economist, an economist is concerned with how an enterprise recovers costs, whereas a lawyer is concerned with whether a specific claim is or is not well-founded.

We consider that the legal definition of a passed-on cost differs from that of the economist in two respects:

- *First, whereas an economist might well define pass-on more widely (i.e. include cost savings and reduced expenditure), the pass-on defence is only concerned with identifiable increases in prices by a firm to its customers.*
- *Secondly, the increase in price must be causally connected with the overcharge, and demonstrably so.”*

Specific issues – economic vs. legal causality, II

- **Example 1:** A retailer reacts to a cost increase (an overcharge?) by i) requesting from its suppliers an extra rebate, ii) its staff to reduce hourly salary rates, iii) laying off staff or closing shops
  - If you can show under normal empirical standards a causal link: Does it qualify within a pass on defence?

- **Example 2:** In a resource intensive, capacity driven industry, a firm decides either to reduce its overall production capacity by closing a plant due to eroding profitability or not to built a new one. As a consequence the ROCE stays stable despite elevated input costs
  - How to defend against the argument of “margin stability”?

- **Example 3:** A grocery retailer uses some products as a loss leader, other products not; or alternatively, the retailer allocates ex post rebates differently than the supplier to products/ product categories
  - Legal causality given?

- **Example 4:** A branded product manufacturer introduces price increases through “new” products, i.e. prices for existing products are always decreasing
  - You find a limited pass through on product level but significant pass through over the full assortment – legal conclusion?

Specific issues – economic vs. legal causality, III

There is a **infinite list of equally (or even more!) relevant issues**…

- Currency risks decouple input and output prices, does it break causality?
- One can observe end customer prices, but not the exact prices of the claimant, is this sufficient?
- Most often reoccurring issues:
  - Small cost: sufficient to show pass on for a larger cost category?
  - Industries/ firms in transition/ decline: Sufficient to show limited pass on capabilities?
- Specific topic: abc cartels, i.e. a mixture of vertical and horizontal issues: What is pass on? What is the overcharge?

⇨ Economists, I think, can easily agree on what are convincing methods (and outcomes). The translation of economic relevance into legal causality will evolve only over time…

Thank you!

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