

E.CA Economics

Comments on the EU draft Guidance Paper – Quantification of harm

Brussels, 27.9.2011

EU Workshop

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Two preliminary observations

- The only two economists which made it into this “law and economics” paper are:



French bias?

Mrrs Joseph Bertrand and Augustin Cournot

- The example given in the cartel section (which is a cartel on flour) is not “*entirely fictitious*”

Frankfurter Allgemeine
FAZ.NET
Aktuell Wirtschaft Hintergründe

Kurz-Link: <http://www.faz.net/-01152e>

Mehlkartell
Zur Preisabsprache mal kurz nach Sylt

Im Februar 2008 durchsuchen Kartellwächter die führenden Mühlenunternehmen Deutschlands. Der Vorwurf: Absprache des Mehlspreises über viele Jahre, zu Lasten von Verbrauchern und Großkunden. Jetzt drohen ihnen hohe Geldbußen. Ein Bericht aus den Tiefen des Kartells.

Von Johannes Ritter

23. September 2010 Der „Überfall“ ist minutiös geplant und bringt den erhofften Erfolg. Am Morgen des 21. Februar 2008 macht sich ein

DutchNews.nl

Flour cartel fined for keeping Dutch bread prices high

23-12-2010

The Dutch competition authority NMa has fined 15 Dutch, German and Belgian flour companies a total of €81m for price fixing.

The highest fine - €13m - goes to Dutch company Ranks. The competition authorities in Belgium and Germany were also involved in the investigation.

Perspective taken

- Practitioner supporting both defendants and claimants in European cases on overcharge estimations
 - Knowing a regulators perspective from my times at the Commission
 - Knowing the situation in front of a court through my experience as a court expert
 - Knowing the US practice through our partnership with a US consultancy

- Focusing on harm related to increases of prices

Central topic: Does the draft Guidance Paper (“dGP”) help me in my practical work as an economic expert in support of claimants AND defendants?

Big picture sum of the dGP

- dGP drafted for “*the practical needs of judges and parties in antitrust damages cases*”
- Legal context
 - “*everyone who has suffered harm ... has a right to be compensated for that harm*”
 - principles of effectiveness and equivalence
 - interests
- Economic context
 - Counterfactual
 - Impossibility to know with certainty/ best estimate
 - Multiple methods; no disqualification of a particular method; no revealed preferences for a particular method
 - Including complex econometric work; theory driven approaches (like simulations or structural estimations) and simple “non economic” evidence, like business plan excerpts
 - Industry knowhow required in any case
- With respect to harm related to price increases
 - Volume effect (in the directly affected market), pass-on and volume effect (in the downstream market) are covered
 - Effects on the supply side and on indirect customers are recognized
 - Lingering effects of cartels as well as periods of price wars as factors limiting after-cartel-breakdown prices as counterfactuals

Overview

Does the dGP say something economically wrong?

How will it be used (or misused) by judges and parties?

Some recommendations

Does the dGP say something economically wrong?

The answer is no!

- Methods are described accurately and balanced
- The paper goes to the limits of what can be communicated without losing a legal audience
- Some potential refinements:
 - **Market definition** only mentioned for the identification of comparator markets (FN 46); it can also play a role in assessing affected commerce and may be important in cases where the overcharge is simply assessed by reference to a presumption, e.g. firms allocate large scale projects. Does this also affect small scale products
 - Regarding the **relationship between price and volume effect**: one may want to mention **bilateral negotiation models** delinking the two; this is of importance for instance for industries like retail grocery
 - **pass-on** may be restricted by claimants with **captive production** (and one may want to add further examples justifying a low pass-on)

Conclusion: an overall balanced description of standard methods

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How will it be used by judges and parties? Use and Abuse

Use:

- As a reference point to support that the method applied is recognized as a standard methodology
- Giving some support to judges that simple methods are not *per se* wrong
- Footnote 100 and para 107 offer important guidance:
 - discrediting a (simple) model by indicating potential limitations only is not sufficient -> one has to show that simplicity most likely will result in wrong predictions under the specificities of the case at hand!
 - Apparently contradictory results of two models does not allow to
 - “*simply take the average of the two results*”
 - *nor would it be appropriate to consider that the contradictory results **cancel each other out** in the sense that **both methods should be disregarded**”*

Conclusion: dGP will help judges to recognize standard methods and to apply simple techniques; it will help economic experts not to be neutralized too easily

How will it be used by judges and parties?

..and potential misuse:

- Judges becoming their own economic expert is good to some extent only...
 - dGP would have benefited from a chapter summarizing key variables for an economic assessment judges can deliver to support an economic expert
 - Duration of the infringement; start/ end points (see para 131,132)
 - Likely effectiveness during different periods
 - Specific events to test for proven implementation or deviation
- Details may be misinterpreted if read naively:
 - Allowing potentially affected periods of comparator markets (in the sense of lower bounds; para 47) is risky
 - PLEASE add a graph where prices post cartel breakdown do not fall! (para 61; para 72; but para 116)
 - In FN 126 – please add that average overcharges are significantly higher if calculated based on but-for-prices (give an example, i.e. 20% translates into 25%; $\text{overcharge but for price} = \frac{\text{overcharge actual price}}{1 - \text{overcharge actual price}}$)

Conclusion: Highest risk is that we see judges running STATA...

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What is missing

- Topic of individualized damages
- Confidence intervals and burden of proof
- A to-do-list for judges to introduce an economic expert
- Some details: market definition, bilateral negotiations and captive production, etc.

Conclusion: Helpful paper – I will use it when communicating with lawyer and judges!

Thank you!

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