

# Agenda

## Advancing economics in business

### A judge's perspective on the role of economic analysis in damages actions

As competition cases, including damages claims, are increasingly brought before courts (rather than competition authorities) in EU Member States, a pertinent question that arises is what sort of economic evidence is suitable and acceptable in such proceedings? Frédéric Jenny, an experienced competition economist-turned-judge (at the Cour de Cassation—the French Supreme Court), gives a first-hand take on this complex issue

There is no question that, in some countries, there is a feeling that courts have not always done a good job of assessing economic harm from antitrust violations (or, for that matter, the economic harm from any violation). Economists understandably insist that correct methods, derived from sound economic analysis, be used to assess the counterfactual in antitrust damages cases. This can help judges and parties focus on the right variables in their measurements of harm. However, whereas economic methodologies to assess aggregate economic damage are relatively straightforward in cases of non-competitive pricing due to an anti-competitive agreement or abuse of dominance, the proper economic methodology to assess the harm from some practices, such as tying and bundling, is much more complex and open to debate (indeed, in the absence of the tying, the tying product would presumably have been sold at a higher price and the tied product would have been sold at a lower price). Similarly, the area of oligopolistic markets assessing the impact of tacit agreements or exchanges of information is particularly complex because of the interdependence between the market equilibrium, the number of players, and the individual strategies of each player. Thus, for a number of violations, the economic methodology for assessing damages is open to scientific controversies. But even in simpler cases where there is a consensus of economists on the counterfactual, estimating the effect of an antitrust violation can be challenging and still open to controversies between economists because it requires the assessment of a large number of variables.

Thus, while the role of economists in the assessment of antitrust damages is certainly useful, one should be under no illusion that court judgments in antitrust damage cases will not in many instances continue to be criticised by losing parties as reflecting poor economic reasoning or methodologies.

At a general level, one can ask whether the major impediment to robust, predictable and economically relevant judicial compensation of antitrust harm is due to:

- the difficulty for courts (or lawyers or economic experts) to find the appropriate economic tools to assess damages; or
- the difficulty experienced by courts when they must arbitrate between contradictory, but methodologically sophisticated and scientifically sound, economic empirical assessments of harm; or
- the legal provisions or procedural constraints restricting the ability of courts to play an active role in the assessment of economic harm or from reaching findings in accordance with sound economic reasoning.

I would like to focus this article on the legal constraints faced by judges in some countries when assessing the economic harm from antitrust violations, and on the legal limits to their ability to consider sound economic assessments of such harm by economic experts. Such constraints or features of the legal system are too often ignored by economists.

#### Is there a presumption that antitrust violations cause antitrust injury?

This question is quite important in delineating the burden of proof of plaintiffs seeking damages in court. For example, if there is a presumption that an antitrust violation causes antitrust injury, the violator will be prevented from arguing that the violation did not result in any harm.

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Symmetrically, once a violation is established, the plaintiff will have to discuss only the importance of the harm suffered due to the violation, without having first to establish that the antitrust violation caused injury. Thus, the burden of proof will be quite a bit lighter for victims of antitrust violations if there is a legal presumption that the antitrust violation caused antitrust injury.

In some countries (eg, France), there is a presumption that 'unfair competition' (such as counterfeiting, malicious falsehood, or slander of goods through false advertising) necessarily leads to an economic harm for the victim. Thus, when the court has found that there was unfair competition, the only question discussed with respect to damages is the quantification of the harm suffered by the victim—but not the existence of harm. Things are more complicated in the area of antitrust. The presumption that antitrust violations cause antitrust injury may, from an economic perspective, be unjustified when the law prohibits practices which never or infrequently restrict competition (eg, the prohibition of resale price maintenance). Indeed, in most countries (both civil law countries and common law countries), there is no presumption that an antitrust violation necessarily causes an antitrust injury.

In France, practices which 'have the object' or 'may have the effect' of restricting competition are prohibited by articles L.420-1 and L.420-2 of the Commercial Code. Thus, it is not necessary to establish that a practice of collusion or of abuse of dominance actually restricted competition to find it in violation of the law. It is sufficient that an anti-competitive object of the potential effect of the practice be established. For example, under French law, exchanges of information will be considered violations of French antitrust law because they can potentially be used by each participating oligopolist to learn what the competitive behaviours of its competitors are or are likely to be, even if it is not established that the information exchanged was in fact used for that purpose. An example of an illegal practice under French law which may have no effect on the market, and therefore no antitrust damage, would be a case where bidders on a public procurement have exchanged information, but another bidder, not party to the exchange of information, has won the contract with a bid that is inferior to the bids of the bidders who participated in the exchange of information.

Thus, one would expect that, under French competition law, there would not be a presumption that an antitrust violation creates a damage since some of the antitrust practices may have had no real effect. One of the consequences of the ways in which French competition law is written is that the competition authority, having the choice between several possibilities for qualifying a

violation, may be tempted to choose the qualification which lessens its burden of proof. This means that in many cases the competition authority will stop after having established that the practice examined had the 'potential' or the 'object' of lessening competition without investigating further whether it had an anti-competitive effect. If the competition authority chooses to minimise its burden of proof by limiting itself to establishing that a particular practice had the object, or could have had the effect, of restricting competition, victims seeking compensation for damages in follow-on cases may face more difficulties since, in court, they will have to establish that the practice created harm before going on to discuss the magnitude of their injury.

### Is the assessment of economic injury a question of fact or a question of law?

Under French law the injury incurred by the victim of a violation of the law must be fully compensated. However, French jurisprudence holds that the assessment of harm (and of compensation) from a violation is a question of fact (unlike the UK, where the assessment of compensation is a question of law). French civil courts therefore have considerable discretion to assess damages. Their assessment is subject only to a very narrow review by the Supreme Court (Cour de Cassation) under the abuse of discretion standard—trial courts cannot refuse to award damages when they have established that a violation caused injury, or assess the amount of damage without consideration of the specificities of the case. Beyond this, courts have full discretion. In their decisions, French civil courts do not have to specify the factual elements that they take into consideration or the reasoning they use to assess the amount of injury from an antitrust violation and the compensatory amount of damages. The amount of damages awarded by appellate courts cannot be challenged by referring the case to the Supreme Court. This means, in fact, that lower courts and appellate courts have great liberty in assessing injury; they do not have to consider the economic expertise provided by the parties, and they have an incentive to be as brief as possible in their decision on the question of injury, merely stating, without justifying, the amount of damages awarded.

### The importance of the general legal context and the case law on conditions under which courts will assess economic harm

Under French law a number of legal principles must be kept in mind. First, there should be no enrichment without cause; second, we apply the principle 'non bis in idem' (comparable to 'no double jeopardy' in other jurisdictions); third, French civil law includes the principle of 'integral compensation of harm', which means that victims should be compensated for the exact value of the damage they have suffered (no more, no less).

The first principle (in conjunction with the second) explains why it is held that defendants in antitrust civil cases should be given the opportunity of a passing-on defence. Otherwise, victims (such as distributors or retailers) who have passed on to the final consumers the price overcharge inflicted on them by a cartel or an abusive practice could claim damages for the full overcharge they have been subjected to and enrich themselves without cause, while the real victims (the final consumers) would be denied the possibility of compensatory damages because of the 'non bis in idem' rule, since the distributors or retailers would have already been compensated. The possibility of a passing-on defence, combined with the third principle (integral compensation), vastly complicates the economic analysis in damages claims resulting from antitrust violations affecting commercial partners. Indeed, the combination of these principles requires the percentage of passing-on to be precisely assessed (which in turn requires an investigation into the competitive conditions in the downstream market).

### What economic harm can be compensated?

In many countries not all injuries reflecting the anti-competitive effect of a violation can be compensated. For example, in French civil law, under Civil Code Article 1382 (as in some other European countries), only injuries that are caused by the violation can be compensated, and the harm must be (i) directly related to the violation, (ii) current, and (iii) certain.

As to the direct relationship, under French law, consumers would probably not be able to claim that they have been the victims of, say, a successful exclusionary practice by a firm holding a dominant position, even if the exclusion of competitors meant that the intensity of competition in the market was lower than it would have otherwise been. Indeed, in such cases the courts would be likely to find that the harm to consumers is only indirectly related to the violation. Similarly, the suppliers of an input to a product in a cartelised market would probably not be successful in claiming damages against the cartel members, despite the fact that they may have suffered harm from the cartel (since the restriction in output meant that the cartel members purchased less input than they would have had the market been competitive), because they may have difficulties establishing that they are the direct victims of the antitrust violation.

Thus, if economists want to establish best-practice methodologies, or if the European Commission wants to provide guidance on quantifying damages, they should first focus on the assessment of the direct harm suffered by victims of antitrust violations.

The fact that, in order for compensation to be granted, the harm suffered must be clearly established means that when dealing with civil claims, courts may have

difficulties basing their decisions on estimates about how the market equilibrium was modified by the anti-competitive practice. Indeed, the market equilibrium in the counterfactual is hypothetical rather than certain. Moreover, the requirement that, in order to be compensated, the harm to the plaintiff from the antitrust violation must be established with certainty means that it is, in most cases, going to be difficult for courts to use estimates about the aggregate harm to consumers from an anti-competitive practice to assess the harm suffered by a particular victim. For example, consumers who are priced out of a market because of the increased price resulting from an anti-competitive agreement or an exploitative abuse of dominance would, in many instances, have a difficult time in court establishing that the harm they have suffered should be compensated. Indeed, they would have to prove that were it not for the increase in price due to the violation they would have certainly purchased more of the product or service considered.

In addition, regarding cases of exclusionary conduct, neither the estimation of the aggregate loss of profits by all victims of the practice, nor the examination of losses of profits in one or a few individual 'representative' transactions, could be easily used by civil law judges to estimate the harm to the victims of the antitrust violation. However, as discussed below, estimating the aggregate increase in price from a violation can still be useful in making the burden of proof for victims lighter by establishing a presumption of harm (and restricting the discussion in court to estimating the actual harm suffered).

As to the requirement that the harm be 'current', this leads to the question of at what point in time the economic harm of an antitrust violation should be assessed. This is a legal question, and the situation is not the same in all countries. Unlike the case of common law countries, French courts assess the harm suffered by the victim at the time of the judgment (usually several years after the violation has ceased) rather than at the time of the violation. This means that the assessment of the damage is not based on the reasonable expectation that the victim could have had at the time of the violation, but on the damage observed ex post. Thus, the influence of random events which have affected the market after the violation but before the judgment (eg, a sudden increase in demand for the product) is not usually eliminated when assessing the harm due to the violation.

Furthermore, under French law, victims of violations of the law do not have the same duty to mitigate their harm as victims in common law countries. This lesser duty to mitigate is intended

to protect victims and to prevent the possibility arising that violators may avoid having to compensate their victims because of unrelated favourable events. However, this is at odds with what sound economic analysis would suggest.

### What is the role of the judge in civil cases?

At the procedural level, there are differences across countries concerning the role of the judge in civil cases. In France, the parties are fully in charge of determining the scope of the case, the facts that they want to bring to the attention of the court and their demands. The role of the judge is limited to the legal assessment of what the parties bring to the proceedings. This implies that the burden of proof rests fully on the parties. If they do not provide the court with the relevant information, there is nothing the judge can do. This contrasts with Germany where the judge has a duty to alert the parties on the weaknesses of their arguments or of the means of proof they bring to the proceedings.

In the UK, the judge does not conduct any investigation. However, the parties, their counsels and their experts have a 'duty to assist the court' which supersedes their obligations to their clients. Courts are likely to be more impressed by the arguments put forth by lawyers and the parties' experts in countries where they have such a duty to the court. In other countries there is a lingering feeling that estimates of injuries presented by the lawyers or the parties' experts may be biased because the experts are not independent of the parties. It is worth asking whether some other mechanism could increase the level of confidence of judges in the economic experts of parties, particularly in countries where lawyers and parties' experts do not have a duty to assist the court. It could be suggested, for example, that appointing a court's expert to review the submissions of the parties' experts could in many cases help courts better understand where the differences between the parties' experts lie, and feel more comfortable with the quality of the economic evidence presented by the parties.

### Should competition authorities be required to quantify the aggregate damage of the anti-competitive practices they sanction?

Competition authorities in many jurisdictions—including the European Commission—have resisted the idea of calculating the damages associated with the violations they sanction during the investigation stage. The reasons given for this tend to be vague. Some will argue that it would increase their burden of work; others argue that it is not what they were set up to do. Neither reason seems very convincing.

If, as the Commission believes, private enforcement is a useful complement to public enforcement and increases the deterrence effect of competition law, and if an estimate of the (aggregate) harm from a violation

is likely to be indirectly useful to courts—either as a reference or as a methodological guide—when they assess the harm suffered by individual victims, the quantitative assessment by the national competition authority of the aggregate harm from violations increases not only the quality of rulings in civil claims, but also the deterrence effect of the antitrust law enforcement system.

Furthermore, competition authorities are well placed to quantitatively assess the aggregate harm of individual antitrust violations. They are set up as technical bodies with a high level of interaction between lawyers and economists, wide powers of investigation and very experienced economist teams. Having access to all the data concerning the firms and the markets involved means that they are in a good position—certainly in a better position than courts—to assess quantitatively the damages of the violations they sanction. Even in a country like France, where the national competition authority, by law, has the duty when it sets fines to consider among other things the damage to the economy of the violation, the authority (supported by the courts) has established that this requirement does not necessitate a quantitative evaluation of the harm of the practices examined and that a qualitative assessment of this harm is sufficient. While this does not prevent the national competition authority from mentioning in its decision estimates of increases in prices due to a practice when this information is readily available, the authority will not systemically estimate the harm caused by violations.

Even if courts in most cases cannot directly use the overall assessment of harm computed by competition authorities to establish the injury of a particular plaintiff, the assessment of global harm to consumer surplus by competition authorities can provide information about the market and the counterfactual that can be useful to courts, and also suggest an appropriate methodology to assess the harm to individual plaintiffs from the violation.

### Procedural techniques to facilitate the dialogue between experts and courts

In France, as in a number of civil law countries, for the reasons mentioned above, courts will have to rely on experts—either the parties' experts or the court-appointed experts—to assess injury from a competition law violation. When parties' experts intervene in a damages case, there is a risk that courts will be overwhelmed by the technicalities and confused by the differences in the experts' assessments. This is even more likely in cases of antitrust violations because understanding parties' experts often requires that the courts understand economic theory, concepts and measurements. When courts retain their own expert in antitrust damages proceedings, there is also a need for the court to define the expert's mission in a relevant

way. Such a definition also requires the court to have a sufficient understanding of economics.

The question then is how to ensure that courts will have a sufficient level of understanding of economics to enable them to fully grasp the differences between the parties' experts or to instruct their own experts. This is a challenge in civil law countries where judges (or lawyers) had, until recently, very little exposure to economics during their legal training. There are a large number of institutional, procedural and methodological tools which can be used to increase the level of economic understanding of courts. At the institutional level, some countries have a specialised competition court (such as the Competition Appeal Tribunal in the UK), while other countries have chosen to concentrate all antitrust-related cases in a few jurisdictions where a small set of judges will hear all the cases, such as in France where the Paris Court of Appeals hears all appeals on competition-related cases. Other institutional innovations, such as the use of economists as ad hoc panel members in court proceedings, or the recruitment of economists by the judiciary, have been made in some countries.

At the procedural level, different techniques can be used to facilitate the dialogue between the experts of

the parties and the courts. For example, pre-trial conferences between the judges and the parties' experts, during which the court can become acquainted with the arguments of the parties and get a sense of where they agree and where their differences lie, can be useful in helping the court focus on the most relevant issues during the trial. So-called 'hot-tub' techniques, where the expert of one party testifies in the presence of the expert of the other party, and where each expert can comment on the expert testimony of the other party, can also contribute by encouraging experts to be more realistic and prudent in their claims, and by facilitating an understanding by the court of the points of disagreement.

Finally, at the methodological level, it is clear that on the one hand judges cannot (unless they sit on a specialised court) become fully knowledgeable about economic methodology but that, on the other hand, having some notions of basic scientific methodologies can help them understand what the experts are saying and help them assess the general 'quality' of the expertise with which they are presented. In this respect, the so-called *Daubert* criteria in the USA, which relate to 'relevance' and 'reliability' to assess the quality of the expertise, can be a great help for courts in Europe as well.

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