

Agenda

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The EU draft Damages Actions Directive: another rebuttable presumption to rebut?

In June 2013 the European Commission made another push towards promoting private actions for damages under competition law, through the publication of a 'Practical Guide' on quantifying damages and a draft Directive. The latter includes a new rebuttable presumption that a cartel has caused harm, citing economic evidence in support. Does this make sense from an economic and policy perspective?

Promoting the use of private competition law actions before national courts in EU Member States has long been a policy goal of the European Commission. It published a Green Paper in 2005 and a White Paper in 2008, followed in 2011 by a consultation on collective redress and a draft guidance paper on the quantification of damages.¹

A major push forward was made in June 2013, when the Commission issued the final version of its non-binding 'Practical Guide' on the quantification of harm from competition law infringements, and a draft Directive on damages actions.²

The Practical Guide is, to a large extent, based on a study by Oxera et al. (2009) for the Commission.³ The Guide shows that a range of methods and models can be used to estimate harm arising from competition law infringements. These vary from the simple to the relatively complex, and can be usefully divided into three main categories: comparator-based approaches, financial analysis-based approaches, and market structure-based approaches.⁴ Courts across Europe are increasingly being presented with such methods and are familiarising themselves with them.

The number of private actions has been on the rise in several Member States—in particular, follow-on damages actions (actions following an infringement decision by a competition authority). Yet the development of legal principles and procedural rules has been slow because, perhaps inevitably, the majority of cases are settled out of court. The body of relevant case law across Europe remains limited.

The proposed Directive is aimed at removing a number of obstacles to damages actions brought before national courts by victims of anti-competitive behaviour. It contains provisions on topics such as parties' access to evidence in legal proceedings, limitation periods

within which parties can bring an action, and the passing on of overcharges further down a supply chain. It also contains a provision establishing a rebuttable presumption that cartels cause harm.

The presumption that cartels cause harm

Article 16 of the proposed Directive states that:

Member States shall ensure that, in the case of a cartel infringement, it shall be presumed that the infringement caused harm. The infringing undertaking shall have the right to rebut this presumption.

According to the Commission, the aim of introducing this rebuttable presumption is to assist the victims of the cartel in overcoming the difficulties and costs related to proving that the cartel caused higher prices.

The Commission justifies the presumption based on 'the finding that more than 9 out of 10 cartels indeed cause an illegal overcharge' (see section 5 of the explanatory memorandum of the proposed Directive). The footnote reference given by the Commission for this 'finding' is the Oxera et al. study mentioned above.

Is there a policy case for presumption of harm?

Where complexities arise in legal procedures, the use of rebuttable presumptions is a commonly accepted technique to make these procedures more effective. These are presumptions that a court holds to be true, unless someone comes forward to contest them and prove otherwise ('presumed innocent until proven guilty' is a well-known rebuttable presumption). From a policy perspective, rebuttable presumptions can enhance justice and the efficiency of the legal system.

However, they may not be appropriate in all circumstances.

One difficulty with the proposed rebuttable presumption is that it refers to ‘cartels’. There is no clear-cut legal definition of a cartel. Article 101 TFEU prohibits various types of restrictive agreement, many of which cannot be presumed to be harmful (including vertical agreements and types of horizontal agreement that can yield efficiency benefits). There is a class of classic ‘hardcore’ cartels, where the competition authority has found factual evidence of secret meetings (in ‘smoke-filled rooms’ or similar venues) with competitors systematically agreeing to fix prices or allocate customers. The Commission has uncovered many such hardcore cartels in the past ten years, but Article 101 infringements are not all of this nature. There have, for example, been many cases of information exchange, which are also sometimes categorised as cartel cases, but where actual harm may not necessarily have arisen in the same way as in hardcore cartels.

Even in hardcore cartels, where it seems more likely than not that prices have been raised illegally, it is questionable whether a rebuttable presumption on overcharge is needed. If the factual evidence on secret price-fixing or market-sharing meetings is clear, a court is likely to be sympathetic to a claim that prices must have increased. Courts in Germany and other jurisdictions have followed this logic. For example, in a vitamins cartel case, the Dortmund Regional Court applied the *prima facie* rule that a market price was in general lower than a cartel price:

The damage of a price cartel consists of the difference between the cartel price and the hypothetical competitive price in the absence of the cartel. According to the experience of life (*Lebenserfahrung*), it can be assumed that a competitive price is lower than a cartel price. The defendant did not show that it would have been different in this case and why. The difference between the competitive price and the cartel price represents a financial damage in the sense of lost wealth.⁵

A rebuttable presumption of harm seems superfluous when courts already apply such ‘experience of life’ criteria.

In addition, based on Oxera’s experience, the point made about the informational disadvantage of claimants may be overstated. Claimants will often possess relevant information on the purchases they made from the cartel over time. Furthermore, as noted in the Oxera et al. report for the Commission, and in the Practical Guide, several simple techniques can be used to approximate the order of magnitude of the likely harm caused by the cartel, even where relatively limited information is available.

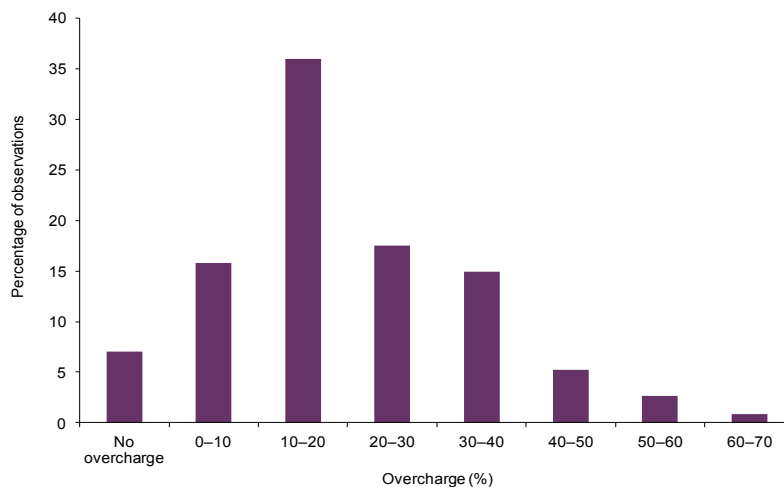
One jurisdiction with an explicit rebuttable presumption of this nature is Hungary. The Hungarian Competition Act 1996 provides that injured parties bringing claims against members of price-fixing cartels can rely on the rebuttable presumption that ‘it shall be deemed that the infringement affected the price by 10% unless the contrary is evidenced’.⁶ The UK government last year proposed a rebuttable 20% overcharge presumption, but this was discarded following a large amount of criticism from commentators.⁷ The European Commission presumption is less determinative than the Hungarian and the (withdrawn) UK presumptions, in that it does not refer to a specific overcharge percentage; it simply says that the overcharge is greater than zero.

Studies of past cartels

The Commission refers to studies of overcharges in past cartels, and concludes from this that more than nine out of ten cartels result in an overcharge. However, it has not made it sufficiently clear that these studies come with significant health warnings.

Economists have carried out many empirical studies on overcharges in past cartels, but some care is required when interpreting this empirical data. Not all studies on cartel overcharges would qualify as sufficiently robust. It may also be that empirical studies tend to focus on those cartels that are most likely to have had an impact on the market, in which case cartels with no effect will be underrepresented in these studies. A study by Connor and Lande (2008) uses the most comprehensive dataset on cartel overcharges currently available, and is also the most widely cited study on this topic.⁸ It contains 674 observations of average overcharges from 200 social science studies of cartels from the 18th century onwards—for example, it covers a British coal cartel that started in the 1770s and a Canadian petroleum lamp oil cartel in the 1870s—and finds that the median cartel overcharge for all types of cartel was 20% of the cartel price.

As part of the study for the European Commission referred to above, Oxera examined the dataset underlying the 2008 Connor and Lande study, as well as an additional 350 observations provided by Connor and Lande (thus totalling more than 1,000 observations), and tested the sensitivity of the overcharge median and other results by filtering the sample to cartels that started after 1960 and to overcharge estimates obtained from peer-reviewed academic articles and chapters in published books (this reduced the sample size from over 1,000 to 114). Figure 1 below illustrates the distribution of cartel overcharges across this new dataset of 114 observations. The range with the greatest number of observations is 10–20%. The Commission basis its position on the ‘No overcharge’ bar, which indicates that 7% of cases had a zero overcharge—hence the Commission’s logic that more than nine out of ten

Figure 1 Distribution of cartel overcharges in empirical studies of past cartels

Source: Oxera et al. (2009), based on underlying Connor and Lande data described above and selection criteria applied by Oxera.

cartels result in harm. Based on the limitations of these studies noted above, this figure should be interpreted with care.

Concluding comments

The economic literature on past cartels provides some interesting background information on the orders of magnitude of overcharges. However, the literature provides an insufficient basis for a rebuttable presumption, because there is a wide variation in overcharges and there are certain types of cartel that do not necessarily result in harm. In hardcore cartel cases where the competition authority has obtained factual evidence of secret meetings to agree to fix prices or allocate customers, courts are likely to be more sympathetic to overcharge claims even without a rebuttable presumption. The amount of the overcharge in any particular damages case ultimately needs to be determined according to the facts of the case.

The Commission's Practical Guide comes to the same cautious conclusion:

These insights into the effects of cartels do not replace the quantification of the specific harm suffered by claimants in a particular case. However, national courts have, on the basis of such empirical knowledge, asserted that it is likely that cartels normally do lead to an overcharge and that the longer and more sustainable a cartel was, the more difficult it would be for a defendant to argue that no adverse impact on price did take place in a concrete case.⁹

In many jurisdictions, not having rebuttable presumptions on overcharge or pass-on does not constitute a major obstacle to bringing follow-on damages actions. Claimants, defendants and the courts must each do some homework to come to plausible quantifications of damages.

¹ European Commission (2005), 'Green Paper: Damages Actions for the Breach of EC Antitrust Rules', COM(2005) 672 final, December; European Commission (2008), 'White Paper on Damages Actions for Breach of the EC Antitrust Rules', COM(2008) 165, April; European Commission (2011), 'Staff Working Document: Towards a Coherent European Approach to Collective Redress', February; and European Commission (2011), 'Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union', draft guidance paper, June.

² European Commission (2013), 'Practical Guide on Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty of the Functioning of the European Union', staff working document, June; and European Commission (2013), 'Proposal for a Directive on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union', June.

³ Oxera and a multi-jurisdictional team of lawyers led by Dr Assimakis Komninos (2009), 'Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts', study prepared for the European Commission, Directorate General for Competition, December.

⁴ This is Oxera's terminology. The Commission's is slightly different. It calls the second and third categories 'cost-based and finance-based analysis' and 'simulation models', respectively.

⁵ LG Dortmund O 55/ 02 Kart Vitaminkartell III, Decision, April 1st 2004. The quote is a translation by Oxera.

⁶ Competition Act (as amended, 2008), Hungary, Section 88/C; applicable to damages arising after September 2008.

⁷ Department for Business, Innovation & Skills (2013), 'Private Actions in Competition Law: A Consultation on Options for Reform - Government Response', January.

⁸ Connor, J.M. and Lande, R.H. (2008), 'Cartel Overcharges and Optimal Cartel Fines', chapter 88, pp. 2203-18, in S.W. Waller (ed), *Issues in Competition Law and Policy*, volume 3, ABA Section of Antitrust Law.

⁹ European Commission (2013), op. cit., para 145.

If you have any questions regarding the issues raised in this article, please contact the editor, Dr Leonardo Mautino: tel +44 (0) 1865 253 000 or email l_mautino@oxera.com

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