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Actions for damages – a Practical Guide to the quantification of harm

Jan Peter van der Veer (RBB Economics) · Monday, June 17th, 2013

Together with the publication of its proposed legislation to facilitate damage claims, the Commission has published a Practical Guide to the quantification of harm arising from infringements of the competition rules. The Practical Guide was published in draft form in 2011 (as draft Guidance Paper). Subject to a small number of additions, the changes relative to the draft are minimal – in essence, the Guide is very much the same document as the 2011 draft.

The Guide discusses a number of methods and techniques that can be used to assess damages, and also explains how these can be applied in practice. The Guide covers both damages arising from a rise in prices (typically caused by cartels) and damages arising from exclusionary practices.

The key question in any damage calculation is to establish the counterfactual (or "but-for") scenario: in what position would the (allegedly) injured party likely have been absent the infringement? Once the likely counterfactual scenario has been established, it is possible to assess the damage by comparing the actual and counterfactual scenarios.

The most commonly used methods to estimate the counterfactual scenario, and the ones that receive most attention in the Guide, are comparator-based methods. These methods use actual market outcomes in settings unaffected by the infringement in order to draw inferences on what likely would have happened in the affected market had the infringement not occurred. Comparisons can be undertaken either over time (using data from the same market before and/or after the infringement period) or across markets (using data from a different product or geographic market not influenced by the infringement).

When drawing inferences on likely counterfactual market outcomes from comparator data, it is important to ensure that like is being compared with like. The Guide discusses a number of techniques that can be applied in this context, focusing in particular on regression analysis (often referred to as econometric analysis). Using regression analysis, it is possible to estimate the effects of the infringement on prices, controlling for other factors impacting on prices (such as costs, or the level of demand). Another benefit of regression analyses is that these provide an indication of the degree of confidence in the results by stating whether the effect of a particular factor is statistically "significant".

It is also possible to use simpler methods to draw comparisons, and the Guide also discusses these. For example, a simple comparison of average prices across different time periods or different markets may also provide an indication of the overcharge. Such analyses may be valuable in certain cases, for example when data availability is limited, but do raise the question to what extent any observed differences in average prices may be related to factors other than the infringement.

Sometimes, it is possible to significantly increase the reliability of the analysis by using a so-called "difference-in-difference" analysis. Such an analysis combines comparisons over time and comparisons across markets. Suppose for example that a cartel affected the EU but not the US, and that prices in the EU have always been higher than in the US because of higher input costs in the EU. In that case, observed price differences between the EU and in the US during the cartel period cannot simply be ascribed to the cartel. However, if the difference between EU and US prices *widened* during the cartel period, the *additional* difference might be due to the cartel. Still, it would in that case be necessary to assess whether the widening of the difference was not due to other factors (e.g. input costs in the EU rising at a faster rate than in the US). Regression analyses may be of use also in this context.

The Guide discusses the pros and cons of simple and more complex approaches, but stops short of expressing a preference one way or another. Instead, the Guide indicates that the choice of technique will have to be made on a case-by-case basis, taking account of data availability as well as a number of other considerations (including applicable national law, and proportionality considerations). Generally, throughout the Guide, the Commission makes no secret of its desire to encourage private actions to happen, often suggesting that claimants should be allowed to take short cuts in establishing the damage that they have suffered.

The Guide identifies a number of possible alternative approaches to estimating counterfactual prices, but discusses these only briefly. One of these other approaches is simulation-based analysis, under which theoretical models of competition are used to develop a model of competition in a market. This model can then be used to predict market outcomes, and in particular the level of prices that might have been expected in the non-infringement scenario. These models however rely on a large number of assumptions and it is far from clear whether they will ever be of much use in a litigation context.

Further approaches that are briefly discussed in the Guide are cost-based and finance-based methods. The cost-based method seeks to estimate prices in the counterfactual scenario by adding a "reasonable" profit margin to costs. These methods raise their own challenges, both in the context of the determination of costs (notably when costs have to be allocated across different products) and in the context of the estimation of the reasonable profit margin (although it may sometimes be possible to use comparators for this purpose). Finance-based methods, which represent one of the very few additions in the final version of the Guide relative to the draft, are based on financial performance indicators, and may be useful in cases where loss of profit is claimed (e.g. in the context of exclusionary abuses).

Following the discussion of the main methods and techniques, the Guide addresses more specifically the quantification of harm arising from price increases and exclusionary abuses. These sections include a number of examples, and also discuss a number of additional issues that may need to be taken into account in the calculation. In particular, it may in the context of cartels be relevant to consider the extent to which customers of a cartel have passed on some or all of any price increase caused by the cartel to their own customers. As the Guide notes, however, any attempt by downstream firms to pass on cartel overcharges will lower their sales (the "volume effect"). This implies that downstream firms may suffer a damage even when the entire price overcharge has been passed on. In view of this, the analysis of pass-on should also consider the value of lost sales caused by any price increase.

The Guide states that to date, courts in the EU have mainly used straightforward comparator techniques to assess damages, and that little experience exists with econometric analysis in actions for antitrust damage before courts in the EU. It will be interesting to see whether the publication of the Guide will, over time, change that.

The Guide is available here.

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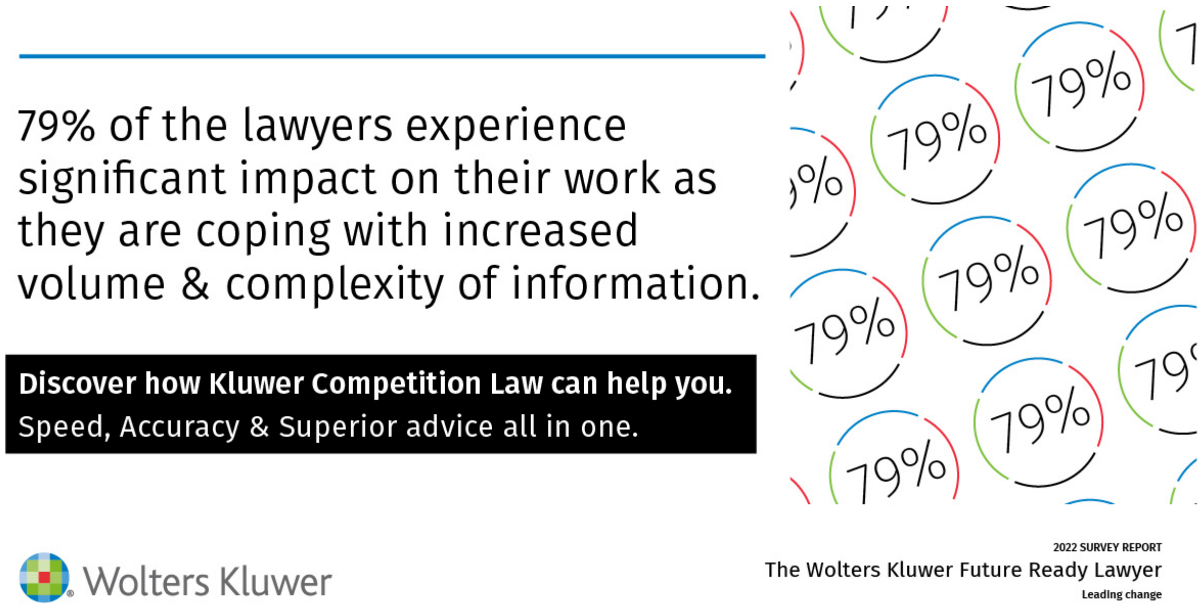

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UNCTAD“>Damages, European Commission
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