

How to estimate cartel damages

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Despite the best efforts of the European legislator, in some European Member States private enforcement of competition law, that is, private litigation for compensation of cartel overcharges is meagre at best. One of the numerous reasons why private enforcement of competition law mostly fails is the lack of meaningful provisions for determining the damage suffered, that is, the cartel overcharge. Only some EU Member States have solved the problem by implementing a presumption of cartel damage. For the remainder, the burden of proof and, thus, of determining the cartel overcharge lies with the claimant.

As the essential feature of anti-competitive conduct is secrecy on the part of the cartelists and, thus, a striking asymmetry of information between the defendant cartelist and the claimants, the latter rarely have any relevant information on the anti-competitive conduct let alone of the cartel overcharge. Even when competition authorities fine cartelists ('follow on-cases') this asymmetry persists. Although claimants thereby learn for which goods or services a cartel existed, the competition authorities do not provide any meaningful information on the cartel overcharge.

To be sure, claimants could present commission expert opinions as evidence in court. These expert opinions are, however, very time-consuming and expensive as the experts also suffer from asymmetry of information on the cartelists' anti-competitive conduct. Hence, experts perform data forensics and apply difficult economic methodologies with often weak results. Numerous econometric expert opinions in identical cases provide for drastically different outcomes.

Estimating damages

Where the burden of proof lies with the party having no relevant information and if expert opinions are not reliable, we argue that courts could quite simply fall back to the provided legal procedures for these situations, that is, estimate the cartel overcharge. In Germany, for instance, such estimation of damages is after all a rather common procedure. Notably, the esteemed chief judge of the First Senate of the Düsseldorf Higher Regional Court ('*Oberlandesgericht*'), Jürgen Kühnen, in 2019 provided ample arguments for such an estimation of damages (c.f. NZKart 2019, 515 et seq.).

The starting point has been laid out above: Where one party to a case has insufficient knowledge to meet the standard of proof and the verdict of experts is somewhat arbitrary, most Member States' codes of civil procedure provide for an estimation of damage, as does, sec 287 of the German Code of Civil Procedure ('*Zivilprozessordnung*', ZPO). To enable the court to estimate a loss, the party charged with proving the damage has to come forward with evidence of so-called 'estimation factors' ('*Anknüpfungsfaktoren*'). Quite obviously, a rather large number of such factors are available, and no factor can be singled out against the others.

Basics of a flexible system

In the middle of the last century, the Austrian tort law luminary, Walter Wilburg, confronted with quite a similar problem, started to build his 'flexible system' approach to law ('*Bewegliches System*'). According to Wilburg, a doctrine at the time offered 'a selection of points of view, some of which are interwoven with each other, some of which argue independently for precedence as the basis of liability for damages. From all of them some truth shines forth, and yet not all have succeeded in grasping the law of damages as a whole and at the same time within its proper limits.' (c.f., Die Elemente des Schadensrechts (1941) 26). Amongst others, the contemporary scholar Bernhard A Koch phrased Wilburg's notion as follows: '[T]here is hardly any area of law which can be perceived through the lens of a single guiding idea. Accordingly, the perspective must always be broader since legal rules are typically based on a plurality of valuations and underlying purposes. Inasmuch as these can be identified, they also have to be observed in the application of the law.' (c.f., B Wilburg's Flexible System in a Nutshell, in: H Koziol/B Steininger (eds), European Tort Law 2001 (2002), 545)

According to the flexible system approach, this dilemma can be solved by skillfully combining the respective significant ideas (or 'elements') by considering their specific interaction and by attributing more or less weight to them. Indeed, such a balancing of different elements is quite common in the legal tools of the trade. Any proportionality test is based on that exact notion.

The novelty at the time and the very reason to apply the flexible system approach to law to the problem at hand lies in the style Wilburg chose to present the balancing of elements as a gradation ('the more – the merrier'), that is, the more one element is present, the more this element will be taken into regard in the overall balance.

Basic valuation

The flexible system approach is not, as BA Koch phrased it, 'floating freely in a sea of indetermination'. Instead, it needs a basic value (*Basiswertung*) as a standard of comparison. Indeed, such a basic value is available for competition law and was concisely phrased by the CJEU as follows: '[E]ach economic operator must determine independently the policy he intends to adopt on the common market this requirement of independence strictly precludes any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.' (inter alia, CJEU, 16 December 1975 – joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, Coöperatieve Vereniging "Suiker Unie" UA and others v Commission of the European Communities, ECLI:EU:C:1975:174, no 173, 174).

Starting with this universally accepted legal basic value of 'independence' Kühnen has rephrased the paradigm for the problem at hand, that is, basic estimation, as it were. Accordingly, the 'non-independent', the anti-competitive conduct enables the cartelists to induce a wider range for setting the price. The damage sustained – in analogy to the basic value – is then the exploitation of this range, that is, the price increase or the cartel overcharge, which could not have been achieved without the anti-competitive conduct.

Elements

Starting from the basic valuation that harm in such cases typically ensues from the cartel-induced widening of the margin to increase the price, suitable elements must be found to reflect this appropriately.

Market coverage

The most obvious element in this regard is the market coverage of the respective cartel. If only a few participants act in violation of competition law, leaving a considerable amount of residual competition in the market, their margin for setting prices hardly changes because customers can switch to the offers of the cartel outsiders. The opposite, however, is true for a high degree of market coverage. A comprehensive cartel, in which all competitors participate, prevents customers from switching to alternative products or services of cartel outsiders, resulting in greater effectiveness and thus greater margin for setting the price and therefore the ensuing overcharge. The greater the market coverage of the cartel, the more likely it is to be effective and the more likely it is to cause a higher (cartel-induced) price on the market.

Substitutability of the cartelized good or service

The element of market coverage is interlinked with a further element of functional substitutability commonly used in merger control cases. The possibility to raise prices is only available where other functionally comparable products cannot easily substitute the cartelized product. Hence, if demand can be satisfied by alternative offers on the market, the cartel-induced margin for price increases is limited. If such alternatives do not exist, customers will have to purchase from the cartel participants to cover their needs, which enables the cartel participants to increase prices accordingly.

Duration of the anti-competitive conduct

In view of the basic valuation, the duration of the cartel must be included as a further element. Only if cartels are maintained for an extended period can they provide room for manoeuvre in pricing. As such, maintenance of a cartel is quite costly since the coordination must be done secretly. It would be commercially unviable to maintain a cartel if the cartelists fail to extend their margin of setting the price. A long-term cartel without any gains on the part of the cartelists is against all criminal common sense: why should cartelists expose themselves to the risk of a substantial fine or other sanctions if they did not see any advantage for themselves in doing so?

A cartel that has been in operation for a sufficiently long period restricts competition more effectively and thus widens the margin for setting increasing the price for all cartel participants. The longer the anti-competitive conduct in violation of cartel law lasted, the more likely it was to be effective and the more likely it was to cause a higher (cartel-induced) price on the market.

Customer sensitivity

As expanded earlier, cartelists have to rely on raising the prices by their anti-competitive conduct in secrecy. If cartelists increase their prices due to such conduct (by way of concerted action) and the customers notice such increase and see no explanation therefore in external circumstances, the possibility to increase the prices diminishes as customers would simply not accept it. Therefore, if the cartelists have to assume that the customers subject prices to strict scrutiny and question any alterations, the cartel-induced price increase is lower than if cartelists can expect less strict price control or even none at all. The more buyers monitor prices and the more they are price-sensitive, the less effective the cartel can be and the less it can cause a higher (cartel-induced) price on the market.

Level of cartelists' organization and cartel discipline

Finally, the element of the level of organization of the cartel and the associated cartel discipline must be considered against the effectiveness of a price-setting range. A highly organized cartel will find it much easier to demand and maintain cartel discipline and thus prevent cartel participants from making deviating, more favourable offers to customers, thereby lowering the overall range for setting the price. Thus, the sooner cartelists opt out of the cartel discipline, for example, because the cartel has only a low degree of organization, the less effective the cartel is and the less it can cause a higher (cartel-related) price on the market.

Of course, due to the asymmetry of information customers have no insight into the level of cartel discipline. However, the level of organization and the degree of cartel discipline is indicated, for instance, by a change in

market shares during the cartel period. Opting out of the cartel by an individual cartel member will almost necessarily lead to an increase in his market share, as customers will be drawn to the cheaper offer undermining the price set by the cartel. Thus, if cartel discipline is lacking, the balance of market shares of the cartelists will inevitably change. Thus, the sooner and the more the market shares of individual cartel participants change on the market concerned, the sooner the cartel becomes less effective, and the less it will therefore contribute to maintaining a higher (cartel-related) price on the market.

All the above-mentioned aspects can be summarized in an overall flexible system rule: The larger the market coverage of the cartel participants, the more the cartelized goods or services cannot be replaced by another good or service; the longer the anti-competitive conduct lasts, the less the market opponent is price-sensitive, the more cartel participants are organized and therefore cartel discipline exists, the more likely the cartel is to be effective and the more likely it, therefore, is to cause a higher (cartel-induced) price on the market.

The above-mentioned aspects can also be expressed – under the disclosure of *Kühnen's* basic valuation – as follows: The estimation of cartel damage is determined by whether the cartel participants were able to expand their price-setting range by their anti-competitive conduct and to exploit this in the form of a price increase. The extension of the price-setting scope and the respective price increase is determined based on the market coverage, the substitutability of the cartelized goods or services, the duration of the anti-competitive conduct, the price sensitivity of the customer, and the degree of organization and of the respective cartel discipline.

Determination of the specific amount

As sound as the above rule may seem it is not entirely helpful to determine a specific amount by judges. However, the elements described are in extensive use in the readily available economic studies on cartel damages. Here cartel overcharges are usually described in extensive tables, and further calculations are based on the market coverage of the cartel, the type of product, the duration of the anti-competitive product as well as the price sensitivity of the customer and the degree of organization of the cartel.

These tables, and, of course, the underlying economic calculations provide for average cartel overcharges and, thus, permit experts to see average overcharges, trends, tendencies, ranges and corridors for each and every element. As a result, the expert's opinion on the individual case could be confined to a presentation of these average values, trends, tendencies etc for each of the respective elements for the respective product, geographic and temporal market concerned.

For example, it would be conceivable that an expert for the relevant product, geographic and temporal market would estimate a range of 20-25% cartel overcharge for complete market coverage; a range of 5-10% cartel overcharge for a 10-year (i.e. long-lasting) anti-competitive behaviour; a range of 60-70% cartel overcharge for the lack of functional substitutability; a range of 15-30% cartel overcharge for a lack of price sensitivity on the part of the customers, a high degree of organization and a high level of cartel discipline or an unchanged market share of the cartelists, respectively. On the basis of these corridors, the court can then carry out the balancing process on a case-by-case basis by disclosing its precise balancing process in view of the facts of the case and linking each element to a percentage in the range elaborated by the expert for the respective element.

Burden of proof

The proposed flexible system approach has no effect on the general burden of proof on the part of the claimant. However, the claimant's burden is somewhat simplified as no specific amount must be established but, instead, facts for the above elements. Notably, if the claimants succeed, the defendant then bears the burden of bringing forward a substantiated counter-argument, which cannot be done without consideration and therefore disclosure of cartel-related special knowledge, for instance with regard to the cartel discipline.

Summary

The above model to estimate cartel damages is no substantial innovation of the law of cartel damages or civil procedure law, but merely methodologically combines the ideas of *Kühnen* and *Wilburg* by considering economic knowledge in a distinct but flexible manner.

A rather stereotypical counter-argument of endangering legal certainty may be ignored. Quite the opposite seems correct. Predictability of any rule can only be achieved when courts clearly consider and state the relevant factors and their respective weight in their judgments. Addressing and weighing the relevant elements – instead of manipulating the law and facts to avoid inequitable results, or even throwing out cases in general, because the question of estimation of damages is deemed too difficult – renders decisions predictable.