

A French perspective on the quantification of antitrust harm

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There is no question that in some countries there is a feeling that, in the past, 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 damage cases. This can help judges and parties to 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 anticompetitive agreement or abuses 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, absent 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, in 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 to assess damages is open to scientific controversies.

Furthermore, 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 (and the publication by the EC Commission of best practices for assessing economic harm due to antitrust violations) are certainly useful, one should be under no illusion that court judgments in antitrust damage cases will in many instances continue to be criticized 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:

a) the difficulty for courts (or lawyers or economic experts) to find the appropriate economic tools to assess damages, or

b) the difficulty experienced by courts when they must arbitrate between contradictory, but methodologically sophisticated and scientifically sound economic empirical assessments of harm, or

c) the legal provisions or procedural constraints restricting the ability of courts to play an active role in the assessment of economic harm or from finding in accordance with sound economic reasoning.

I would like to focus this short note on the legal constraints faced by judges in some countries (France among them) 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. Those constraints or features of the legal system are too often ignored by economists.

a) What harm can be compensated ?

First, we must recognize that in most countries not all economic injuries related to an antitrust violation can be compensated. As was established by the US Supreme Court in *Brunswick Corp v. Pueblo Bowl o Mat* (1977), the harm which can be compensated must be an antitrust injury, that is an injury of the type antitrust laws were intended to prevent, and not merely an economic injury related to an antitrust violation¹. The Supreme Court held that : “Plaintiffs must prove antitrust injury, which is to say injury of the type antitrust laws were intended to prevent and that flows from that which makes defendant’s acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should in short be “the type of loss that the claimed violations ... would be likely to cause”.

¹ In the Brunswick case, the claim was that Brunswick’s acquisition of a large number of bowling centers violated section 7 of the Clayton Act and that without these acquisitions the acquired bowling centers would have failed and that Pueblo (a competing bowling center operator) would have had higher sales and profits.

b) Is there a presumption that antitrust violations cause antitrust injury ?

This question is quite important to delineate the burden of proof of plaintiffs seeking damages in courts. 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. Symetrically, once a violation is established, the plaintiff will only have to discuss 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.

However 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 (for example, the prohibition of resale price maintenance).

In some countries (for example France), there is a presumption that “unfair competition” (such as counterfeiting, malicious falsehood, slander of goods through false advertising, disorganization of a competitor etc....) 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.

In most countries (both civil law countries and common law countries), there is no presumption that an antitrust violation necessarily causes an antitrust injury.

As Blair and Page put it (The role of economics in defining antitrust injury and standing, in Managerial and Decision Economics, Vol 17, 127-142 , 1996) : “ The cases in which antitrust violations may be found without any antitrust injury fall into two overlapping groups. First there are cases in which no actual anticompetitive result need to be shown to establish the substantive offence; second we have cases in which the substantive antitrust rule prohibits conduct that never causes anticompetitive harm”.

As regards the second category of cases mentioned by Blair and Page (cases in which the substantive antitrust rule prohibits conduct that never causes competitive harm), it can be expected that in Europe such cases will be much rarer in the future because in recent years antitrust enforcement has moved from a form based toward an effect based approach.

An example of the first category in US law would be section 7 of the Clayton Act which prohibits mergers that may substantially lessen competition.. Thus the mergers prohibited under section 7 of the Clayton Act are not necessarily mergers which have or would have restricted competition.

In France, practices which “have the object” or “may have the effect” of restricting competition are prohibited by article 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 anticompetitive 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 behaviors 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 some bidders on a public procurement have exchanged information but another bidder, not party to the exchange of information, has won the with a bid 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 effect in practice.

One of the consequences of the ways in which the French competition law is written is that the competition authority, having the choice between several possibilities in order to qualify 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 “potentiality” or the “object” of lessening competition without investigating further whether it had an anticompetitive effect.

If the competition authority chooses to minimize 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.

c) 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 United Kingdom where the assessment of compensation is a question of law since 1966 (cf Ward vs James)).

French civil courts therefore have a very wide 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 either 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 (Cour de cassation). 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.

Some French authors (cf J. G. Viney and P. Jourdain: *Les effets de la responsabilité* 2^{ième} ed. LGDJ 2001) have denounced the lack of control of the French Supreme Court on the assessment of harm and on the compensation of victims in damage cases. They have argued that this lack of control leads lower courts to make different appraisals of the magnitude of similar harm and thus to a lack of legal predictability. They have also argued that this lack of predictability and the variability in the assessment of harm by the courts raises questions about whether the principle of “integral compensation” was in fact anything more than an empty statement. They have argued that the Supreme Court should at the very least request lower courts to spell out the categories of harm suffered by the victims, the factual elements on which they base their evaluations of harm for each category of harm as well as the methodology used to assess the damages.

One wonders whether the discretion left to French courts to assess damages without having to justify or even explain how they arrived at the assessed value effectively guarantees the right given by the Treaty that those who suffer harm from an infringement of articles 101 and 102 of the treaty receive compensation.

d) The importance of general legal context and of the case law on the conditions under which courts will assess the economic harm caused by antitrust violations.

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”;

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 defense. Otherwise victims (such as distributors or retailers) who have passed on to the final consumers the price surcharge inflicted on them by a cartel or an abusive dominant position could claim damages for the full overcharge they have been subjected to and enrich themselves without cause and 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 economic analysis in damage claims resulting from

antitrust violations affecting commercial partners. Indeed, the combination of these principles requires that the percentage of passing-on must be precisely assessed (which requires an investigation in the competitive conditions of the downward market).

e) What economic harm can be compensated ?

Second, in many countries not all injuries reflecting the anticompetitive effect of a violation can be compensated. For example, in French commercial law, under Civil Code article 1382 (and in some other European countries) only injuries that are caused by the violation can be compensated and the harm must be directly related to the violation, current and certain.

e-1) The harm must be direct

Under French law, consumers would presumably 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 on the market was lower than it would have been otherwise. Indeed, in such cases the courts would be likely to find that the harm to the consumers is only indirectly related to the violation.

Similarly, the suppliers of an input to a product on a cartellized market would probably not be successful in claiming damages against the cartel members even though they may have suffered harm from the cartel (since the restriction in output meant that the cartel members bought less input than they would have had the market been competitive) because they may have a difficult time establishing that they are the direct victims of the antitrust violation. In

the US, according to Bair and Page, they would also usually be denied recovery on the ground that they lack standing.

Along the same lines, the “Reference Guide on Estimation of Economic Losses in Damages Award” produced by the Federal Judicial Center of the Department of Justice focuses only on direct damages when it states: “Where the plaintiff is the customer of the defendant or purchases goods in a market where the defendant’s antitrust misconduct has raised prices, damages are the amount of overcharge.(...) Where the plaintiff is a rival of the defendant, injured by exclusionary or predatory conduct, damage are the lost profits from the antitrust misconduct”.

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

e-2) The harm must be certain

The fact that in order to be compensated damages must be certain 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 anticompetitive violation. Indeed the market equilibrium in the counterfactual is hypothetical rather than certain.

Also the requirement that in order to be compensated the harm to the plaintiff from the antitrust violation 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 of an anticompetitive practice to assess the harm suffered by a particular victim.

For example, consumers priced out of a market because of the increased price due to an anticompetitive agreement or an exploitative abuse of dominance would in many instances have a difficult time in court establishing that the harm they have suffered from the antitrust violation 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 bought more of the product or service considered.

Also, regarding exclusionary practice cases 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 victim of the antitrust violation.

However, as will be discussed below, estimating the aggregate increase in price from a violation can 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 they suffered).

A hypothetical or a future harm cannot be compensated under French civil law and the courts assess the harm at the time of the judgment.

It is therefore debatable whether exploring “practical experiences regarding the estimation and proof of future harm” (as the text convening this meeting suggests) would be helpful or indeed be considered relevant for judges in countries with laws similar to French law.

e-3) The harm must be current

The question of at what point in time the economic harm of an antitrust violation should be assessed is a legal question and the situation is not the same in all countries.

Unlike what occurs in 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 (for example, a sudden increase in demand for the product) are not usually eliminated when assessing the harm due to the violation.

Also, unlike what is true in common law countries, under French law victims of violations of the law do not have a duty to mitigate their harm. This lack of duty to mitigate is intended to protect victims and to avoid the possibility that violators may avoid having to compensate their victims because of unrelated favorable events. However, this is at odds with what sound economic analysis would suggest.

f) 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 shoulders of 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 United Kingdom, the judge does not conduct any investigation (similarly to France). However the parties, their counsels and their experts have a “duty of fairness to the Court” which supersedes their obligations to their clients. Such a duty of fairness to the court does not exist under French procedural law.

Courts are likely to be more impressed by the arguments put forth by lawyers and the parties’ experts in countries where they have a duty of fairness 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, in particular in countries where lawyers and parties' experts do not have a duty of fairness to 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.

g) Should competition authorities be required to quantify the aggregate damage of the anticompetitive practices they sanction?

There are a number of sub-issues to be considered:

- 1) Are competition authorities well placed to provide such an assessment of (aggregate) damages ?
- 2) Are the decisions of the national competition authorities binding on civil courts ?
- 3) Would an assessment of the global harm created by an anticompetitive practice be useful for damage claims in civil proceedings ?

First, it should be noted that competition authorities in many countries (and the EC Commission) have resisted the idea of calculating the damages associated with the violations they sanction.

The reasons given by competition authorities to refrain from computing the harm from violations they sanction tends 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, then the quantitative assessment by national competition authority of the aggregate harm from violations increases not only the quality of rulings in civil claims but also increases 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 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 competition 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 competition authority will not systemically estimate the harm caused by violations.

Second, the situation is quite diverse across countries with respect to whether decisions of competition authorities are binding on the courts.

In France and in a few civil law countries, civil courts are not bound by decisions of the competition authority (unlike in the UK where an amendment to the Competition Act establishes that the decisions of the OFT or the CAT are binding for civil courts in follow on damage proceedings or in Germany where decisions of the Bundeskartellamt, unless they are appealed, and the final decisions of foreign competition authorities and courts are binding on civil courts). Nevertheless, even in France, decisions of the competition authority play an important role because, in general, civil courts tend to align themselves with the decision of the competition authority on the issue of whether or not there was a violation.

Third, 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 very useful information about the market and the counterfactual that can be useful to courts and also suggest an appropriate methodology to assess the harm from the violation.

h) Procedural techniques to facilitate the dialogue between the experts and the 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 damage case, there is a risk that courts will be overwhelmed by the technicalities of the expertises and confused by the differences in the assessments of the experts of opposing parties. 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 damage 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. For example the court has to decide what the counterfactual is to define the mission of the expert. If the court does not define the counterfactual, the expert may end up substituting his own assessment of what the counterfactual should be.

The question then is how to ensure that courts will have a sufficient level of understanding of economics to ensure that they will fully grasp the differences between the parties' experts or or to instruct their own experts. This is a challenge in civil law countries where judges (or lawyers) until recently had 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 specialized competition court (such as the Competition Appeal Tribunal in the United Kingdom) 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 to help 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 both to make experts more realistic and prudent in their claims and to facilitate understanding by the court of the points of disagreements.

Finally, at the methodological level it is clear that on the one hand judges cannot (unless they sit on a specialized court) become fully knowledgeable about economic methodology but that, on the other hand, having some notions of basic scientific methodologies can help them understand better what the experts are saying and help them assess the general "quality" of the expertise with which they are presented. In that respect, the use of the Daubert criteria of

“relevance” and “reliability” to assess the quality of expertise can be a great help for courts.