

# Quantifying harm from exclusionary practices

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## GP identifies key distinguishing features of damage estimation from exclusionary abuses

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- Exclusionary practices can result in an initial disadvantage for the infringers and in better prices for customers in the short term (e.g. predation – see par. 162)
- Full exclusion of a competitor not necessary for consumer harm to arise. Key question is whether competitive constraints have been weakened (Par. 166)
- Damage from exclusionary abuses are typically claimed by competitors of the dominant firm (rather than customers)
- Par. 164 states that rivals can be hurt by abusive behaviour in two main ways:
  - An increase in costs (e.g. access to key input is denied)
  - A reduction in revenues (e.g. due to rebate scheme by dominant firm)
- In practice though, these effects tend to be closely interrelated
  - Higher costs may render a particular business model unviable
  - Loss of revenues may lead to higher unit cost

## Damage assessment likely far more complex than in cartel cases

- Data availability issues are likely more serious than in a cartel
  - *“In many exclusionary practices cases, data from after the infringement may not be available, particularly if the infringement produced effects that may alter the structure of a market, for instance when the competitor is excluded from the market and there are barriers to re-entry in the short term, or when the competitor has lost market shares that could be difficult to regain because of network effects” (Par. 175)*
- Infringement may prevent the entry of a potential competitor. This raises exceptionally difficult questions:
  - What market share would the new entrant have achieved? (Par. 180 and fn 169)
  - What time frame should be used to calculate the damage? (Par. 188)
- Consumer harm may result from reduced choice
  - In differentiated product markets entry of new product not only pushes price down but increases consumer choice. The first effect is similar to an overcharge, whilst the second is not obvious to quantify

## Standard of proof for damage claims

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- Commission makes clear its desire for damage claims to happen and for judges not to be scared by the apparent complexity of exercise
- *“Assessing the profits that a company would have made may depend on such a number of factors that it could be appropriate to provide for less demanding requirements when it comes to quantification”* (Par. 173)
- GP seems to suggest that empirical analysis can be based on a small number of observations – but unclear whether/why courts should accept “light touch” standards of empirical analysis
  - This contrasts with the approach taken by Commission in merger analysis – often quite critical when any imperfection perceived in econometric approaches
  - Ultimately, complexity and uncertainty are likely to favour defendants in damages claims
  - But damage assessment is complex and inherently speculative. In its attempt to demystify the complexity of the exercise, the GP may have gone overboard at times

## Reduced form v structural models

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- GP focuses mainly on various benchmark comparisons
  - *“The non-infringement scenario could be reconstructed by comparison with the performance of the same undertaking in a time period that was not affected by an infringement, a similar undertaking on the same market ... or the performance of the same or a similar undertaking in a market other than the one in which the exclusionary practice occurred” (Par. 174)*
- These are so-called reduced-form models – contrast with analytically more ambitious approaches that consider the two states of the world in a more holistic setting
- Parallels debate on merger analysis techniques: e.g. price-concentration studies v merger simulation as means to assess effect that a change in market structure has on price
- But data requirements of robust simulation are huge – and “solution” to this problem is frequently to rely on highly restrictive assumptions (as acknowledged at par. 174)
  - **This is a very risky approach though since theory considerations may end up dominating any practical empirical assessment**