FOCUS: Quantification of Antitrust Damages (PART III)

Three documents, one purpose

Our third special issue is focused on the Communication from the European Commission and the Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty. As mentioned in our the European Commission has published on June 11, 2013 the mentioned Communication and two further documents aimed at fostering private claims based on antitrust infringements (proposal of Directive and recommendation about collective redress mechanisms).

The context

Competition Law is one of the main tools of the European Union to establish an internal market with equal and fair conditions for each participant. In the last decade the European Commission has been developing common rules and recommendations in order to minimize the harm caused by infringements of articles 101 or 102 TFEU. The main objective of the so-called Private Enforcement of Competition Law is to repair the harm suffered because an infringement. Therefore the European Commission has proposed in June a new package of measures in order to harmonize certain aspects of the national private law rules applicable to these claims, a collective redress recommendation and finally the communication on the quantification of harm that we will describe here.

It is well known that private damage actions face serious difficulties in practice. One of the most difficult problems is how to quantify the harm suffered by the claiming victim. Judges and experts calculate usually the harm suffered comparing the actual position of the claimant with the position he would find himself in case the infringement did not take place. This analysis is based on complex economic techniques that can vary from jurisdiction to jurisdiction and can be of difficult interpretation for national Judges. Furthermore it is impossible to establish how the conditions would have been in the absence of the infringement. National rules determine the appropriate standard of proof and the degree of precision of the analysis. Nonetheless this national judges have often to rely on estimations and complex expert opinions.

The economic analysis has to be carried out by specialists and can be expensive. If the analysis seems to be too complex or cost intensive then the victims could desist and avoid proceedings.
In order to reduce the uncertainty that can be originated in the quantification of harm the European Commission has drafted a Practical Guide that can help national courts and parties making information on quantifying harm widely available.

The Practical Guide is non-binding in order to respect national rules and traditions and it can be applied within the framework of national burden of proof rules.

The content of the Practical Guide (“Guide”)

The Guide is divided in four parts: legal context, methods and techniques, quantification in rise of prices, quantification in exclusionary practices.

I. Purpose
Claims for damages can be based on different types of infringements. Notwithstanding this the Guide focuses on the most common types of infringements: price increases and so called exclusionary practices such as abuse of a dominant position through margin squeeze, predatory pricing or tying or even vertical exclusivity agreements. The Guide shall provide information for National Courts and the involved parties in order to estimate the quantum of the suffered harm provoked in the most common types of infringements of Competition Law.

II. Methods and techniques
Part II of the Practical guide describes the main methods and techniques that can be applied in order to quantify the harm caused through competition law infringements. The document also explains how to apply these tools in practice. The most common methods seek to assess about what would have happened without the infringement comparing the market before and after the illicit conduct. This method is also known as comparator based method. The Guide also describes further methods with their particular features and strengths and weaknesses. The Guide leaves it open to the National Courts to evaluate which method is suitable for each case. Notwithstanding this, the Guide also provides considerations on the choice of the method. It shall also be highlighted that more direct evidence if available can also provide useful information for the calculation of the damages.

III. Price cartels
The Guide goes through the basic effects on the market of price increases and explains how these effects can be quantified including the harm associated with a reduction in demand. The price increase can cause harm to direct or to indirect customers, so that both parties could have a right for compensation. The estimation of such harm in these cases is particularly difficult since part or even the complete overcharge could have been passed to the next distribution chain.

If the infringement leads to an increase of prices two types of harm have to be considered: Harm caused to direct and indirect consumers that have to pay more
for each product and the harm caused if fewer of the products are bought due to the price increase. The Guide expressly refers to the so called Oxera Study, Quantifying Antitrust Damages carried in 2009. According to this external study 93% of all cartel cases considered in that study lead to an overcharge.

IV. Exclusionary practices
The quantification of the harm caused through the exclusion of competitors or a reduction of their market share prohibited by article 102 TFEU is described in Part IV of the Guide. Exclusionary practices provoke loss of profit to competitors caused by reduced sales or cost increases. This situation can affect or decrease the market share of the competitor affected by the abuse of dominant position. The Guide also explains how to quantify the harm caused to customers in these cases.

Our view

The Commissions’ Practical Guide facilitates the general access to information and assessment about how to quantify the suffered harm and therefore determine the amount of the claim.

As stated above this evaluation is complex and cost intensive, so that victims could even desist in their claims. The Guide is therefore a useful tool that can simplify this difficult task. Of course it shall be considered as a Guide for information purposes with non-binding character since the quantification has to be done case by case.

The Guide will also finally help to spread knowledge among Judges and interested parties.

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In order to re-open the debate, the Osservatorio Antitrust welcomes brief opinions from legal experts and business community members.

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