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Damages arising from exclusionary practices: the Commission's Practical Guide and the experience of European national Courts

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1 Introduction

Most of the discussions on antitrust damages in Europe have dealt so far with cartel damages. In their report for the Commission, Renda et al. (2007), when discussing damages measurement, were mostly concerned with cartel damages. The seminal Oxera (2009) Report contained only a brief discussion of exclusionary damages, mostly cast in the frame work of economic theory, and it is fair to say that the earlier drafts of what later became the Commission's Practical Guide were largely concerned with cartel damages. Prosperetti-Pani-Tomasi (2009) and Fumagalli-Padilla-Polo (2010) were notable exceptions, but not much on exclusionary damages has been published since.

There are understandable reasons for this. On policy grounds, cartels are a clear policy priority, and on practical grounds getting damages or good settlements is easier in cartel than in exclusionary damages claims, as companies fear the negative publicity arising from cartel damages awards and, in some jurisdictions, their managers fear jail.

Proving and measuring damages is also more difficult in exclusionary cases, as:

- Causation issues are more complex. A margin squeeze – e.g. - infringes competition law, but does generate a damage only on competitors which were at least as-efficient, not on other competitors.
- Apportionment issues are more complex. A cartel victim suffers an overcharge damage (*damnum emergens*) which can usually be reasonably well distinguished from other factors which may have negatively affected him. On the other hand, the victim of an exclusionary abuse suffers lost profits, but some of these profits may have been lost for reasons which have nothing to do with the abuse.
- Mitigation is a relevant issue, as usually the victim of an exclusionary abuse is in a position to affect, at least to some extent, the size of the damages it suffers[1].
- Measurement issues are usually more complex than in cartel cases. In the latter the paramount issue is the measurement of the overcharge, while in exclusionary abuses causation, apportionment, and mitigation issues usually affect also the measurement stage.

[1] From a legal point of view, the matter of mitigation is more nuanced, as in some jurisdictions (e.g. France) mitigation is not considered to be necessary, while in others victims are required not to increase damages, but not really to decrease them (e.g. Italy).

As we shall discuss below, however, such difficulties need not to be overstated, as estimating damages arising from exclusionary behaviour is not really a new issue for national courts. In commercial damages, cases where the growth of a company has been hampered, or the company has been somehow excluded from a market, are relatively common, and here civil Courts have a lot of experience.

As we will discuss below, the approach that seems more fruitful is to combine the experience by national Courts with the methodological suggestions provided by the European Commission's Practical Guide[2].

In order to discuss these issues, in this paper we will start (Section 2) with a brief review of the major types of harm arising from exclusionary behaviour, and related major legal and economic issues.

After a summary of the Practical Guide's suggestions which are more directly useful in the estimation of exclusionary damages (Section 3), Section 4 will then discuss in some detail the methods for estimating this type of damages normally accepted by national Courts, in the light of a number of cases which we have been able to get hold of[3], occasionally considering – where directly relevant – also the US experience.

Be it as it may, Italy provides numerous interesting cases, and in this paper we will discuss them together with the European cases where a decision has been reached, and such a decision has been published, at least in summary form, in English, French or Spanish, which are the languages we are more familiar with.

Section 5 will summarize our main results.

2 Harm and damages: an overview

The foreclosed competitor will suffer, in general, a *damnum emergens*, a loss of profits, a loss of chance, and may suffer a loss of reputation. This section will briefly review how such damages components may arise from an abusive behaviour, and point out several legal and economic issues directly relevant to our discussion.

[2] I.e. the "*Practical guide quantifying harm in actions for damages based on breaches of article 101 or 102 of the treaty on the functioning of the European Union*", European Commission, 11.06.2013, SWD (2013) 205.

[3] Never an easy task, as the Commission'e National Court Cases Database must rely on institutional goodwill by member counties, which is not forthcoming. The *E-competitions* Bulletin (www.concurrences.com) provides a better source, which we have complemented with some decisions we had access to.

2.1 Behaviour, abusive behaviour and harm

While it can be safely assumed, absent passing-on, that a cartel causes a damage to all those who purchased from its members, an equivalent assumption may not be entertained for abusive conduct. Thus, an abusive exclusionary conduct damages competition, but does not necessarily damage a specific competitor.

This depends in part on the type of behaviour. Exclusive dealing, refusal to supply and predation are indeed likely to damage all competitors, or at least those who have been targeted by the dominant firm. But this is not necessarily the case for other types of abuses: if a dominant company makes use of English clauses, it is certainly infringing competition law, and foreclosing some of its competitors, but it may not have foreclosed those who were not really able to compete with it, e.g. because of costs, quality, or brand. Similar remarks apply to the finding of a price- or a margin-squeeze abuse, which is likely to cause damages to an as-efficient competitor, but not necessarily to less-than-efficient ones. Thus, even in follow-on abuse cases, proof of causality seems inescapable.

There are two further relevant issues concerning causality, as it is likely that a number of other factors affected the victim of an exclusionary abuse besides those arising by the abuse itself. Two sets of factors are particularly relevant from the point of view of causation:

- exogenous factors, such as changes in the market or in the behaviour of competitors other than those of the infringer, which may have affected significantly the economic situation of the infringement victim. How do we distinguish the effects of such exogenous factors from those of the infringing party?
- actions by the infringer which are not infringements. It is a fact of life that companies try to eliminate their competitors all the time, and this of course also applies to a dominant company, which is likely to undertake at the given time both infringing and non-infringing actions. How do we distinguish between those two types of actions? This is often not an easy question to answer.

2.2 Main heads of damages arising from exclusionary abuses

2.2.1 Actual loss (Damnum emergens)

Damnum emergens is typically a small component of the damages arising from exclusionary behaviour, at least when compared to the profits that have been lost, and indeed in several civil cases such a head of damages is not even claimed. Occasionally, e.g. when a competitor has been utterly prevented from entering the market, or has been thrown out of it, this may however be quite relevant.

Although the notion of *damnum emergens* is straightforward, in practice two issues may arise in its calculation.

First, from an economic point of view, it is quite obvious that only sunk costs and investments should be considered under such a heading: if the foreclosed firm has undertaken expenditures that it can recover, or that it can fruitfully use in order to generate alternative income streams, these should not be considered as part of the damage. From a legal point of view, the matter may be less clear: only in very few of the cases we have considered in this paper the Court explicitly considered the distinction between costs and sunk costs[4], and in several claims we are acquainted with the alleged *damnum emergens* covers costs that cannot be reasonable considered to be sunk.

A second difficulty may arise concerning the practical application of the distinction between *damnum emergens* and *lucrum cessans* – a common approach in many continental Courts.

Investments are sustained in order to generate a future income stream, which already includes the amortization of such investments. Calculating separately *damnum emergens* and the lost profits, and adding both components, would then inevitably lead to a double counting. This is a recurrent problem in the estimation of commercial damages[5], but seems to be quite frequent also in antitrust damages: in several margin squeeze cases we are acquainted with, the claimant typically requests both a loss of profits because it had to increase its prices thereby losing customers, and an actual loss because it had to absorb the higher price of the upstream input, without bothering to discuss how and to what extent these two heads of damages should be combined in his claim.

2.2.2 Loss of profits and mitigation

Lost profits are by far the largest component in most claims arising from exclusionary behaviour.

The notion of lost profits is straightforward, and most Courts in Europe seem to to accept that they should be broadly calculated in a manner which is reasonable from an economic point of view, i.e. as a difference between incremental revenues and incremental costs. However, on the basis of the

[4] A notable case which will be discussed below is *Telsystem v. SIP*, App. Milano, 26 November 1996, in *Giur. It.*, 1997, I, 2, 520; App. Milano, 24 December 1996, in *Danno e Resp.*, 1997, 602.

[5] For a general discussion, see Kantor (2008), ch. 4.

cases we are aware of, the notion of "incremental" is not often adopted, and Courts tend to reason in terms of variable costs, a close approximation in several cases, but of course not always.

On more general grounds, a significant difference across Europe regards mitigation, which is an important point as it is a very common occurrence in foreclosure cases that a competitor illicitly prevented from growing in a specific market, or entering that market, will very often grow elsewhere. Should we account for this when we calculate lost profits?

From an economic viewpoint, the answer is doubtlessly affirmative: as Judge Posner wrote in *Fishman v. Wirtz*[6] "*The principle of mitigation of damages,… is ... only opportunity cost by another name*", and this is uncontentious in the United States, where the Courts have consistently applied the principle that "*antitrust plaintiffs have an obligation to mitigate their damages*", [7] and clarified its limits.

Matters are very different in Europe, where mitigation is not admitted in some jurisdictions, such as France, where this is deemed to follow from the principle of "full compensation" (*tout le préjudice, rien que le préjudice*). Interestingly enough, Italian law has exactly the same principle, but it has derived from it a less rigid doctrine[8]: basically, victims are required not to aggravate their losses, and - in the light of the general principle of diligence - may be required to do something, although what exactly they should do is unclear[9].

In England, there is no mitigation principle as such, but the result is broadly equivalent[10]: as Judge Colman vigorously stated in in *Arkin v. Borchard*, "*The claimant's so-called "duty" to mitigate is a misnomer rendered respectable only by age. In reality the concept is that, if the claimant's conduct is such that it breaks the chain of causation between the claimed breach of duty on the part of the defendant and the loss, the claimant is not entitled to be compensated, for the claimant has failed to discharge the legal burden of proving the essential causal link between his loss and the defendant's breach of duty. There has been an intervening dominant cause*

[6] Court of Appeals, 7th Circuit, in *Fishman and Illinois Basketball v. Estate Of Arthur M. Wirtz* , 807 F.2d 520 (1977), par. 145.
[7] Court of Appeals, 2nd circuit, *Triebwasser v. AT&T*, 535 F.2d 1356, (1976), par. 10.
[8] For a general discussion, see Franzoni (2004) ch. 1, and Visintini (2005) ch. 9.
[9] According to the Corte di Cassazione (Cass. 9 February 2004, n. 2422, in *Riv. giur. edilizia*, 2004, I, 1320), the damaged party is required "*to undertake actions aimed at limiting the damage consequences [of the tort], but only those actions that are not exceptional or difficult, or may involve noticeable risks or sacrifices, should be considered as required in the light of the principle of ordinary care*".
[10] Gotanda (2007).

engendered by the claimant himself"[11]. It is unclear, however, to what extent the principle of the non-interruption of the chain of causation requires from claimants as active a behaviour as the one required under US law, where the requirement directly flows from a specific duty upon the claimant[12].

On the other hand, the European Court of Justice held in Mulder[13] – a Francovich liability case – that the reasonable diligence principle entails true-blue mitigation efforts, as *"the basis which should be taken for calculating the income which the applicants would have received in the normal course of events* [must be assessed by taking into account] *not only* [the income] *that the applicants actually obtained from replacement activities, but also that income which they could have obtained had they reasonably engaged in such activities. <u>This conclusion must be reached in the light of a general principle common to the legal systems of the Member States</u> to the effect that the injured party must show reasonable diligence in limiting the extent of his loss or risk having to bear the damage himself"*[14].

Thus, mitigation is certainly an unsettled area in the estimation of lost profits arising from exclusionary behaviour.

2.2.3 Loss of chance

A foreclosed company, besides lost profits, may suffer the loss of business opportunities when the foreclosure has prevented it from gaining specific knowledge, technology, or qualification, that would have allowed it to enter some other market in the future, or to acquire an entirely new profit stream in the market from which it has been foreclosed. If BadCo foreclose SmallCo from the market for public works in Sicily, SmallCo may lose the opportunity to acquire the necessary qualifications in order to participate to a consortium bidding to build the bridge of Messina - most likely a very profitable business.

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[11] *Yeheskel Arkin v. Borchard Lines Ltd. & Others* (2003) 2 Lloyd's Rep 225, (2003) Eu LR 287, (2003) 2 LLR 225, (2003) EWHC 687 (Comm), par. 536. Interestingly the Judge held that even if the claimant had suffered an exclusionary abuse, *"the rate policy adopted (by the Claimant)…was so unreasonable that it broke the chain of causation between the (Defendant's) rate policy… and the losses suffered during the relevant period. …The predominant cause of those losses was (the Claimant's) irrational failure to leave the market earlier*" (par. 562).

[12] The cases provided by Burrows (2004), ch. 6, concerning 'unreasonable inaction' and 'unresonable action' do not clarify this issue.

[13] *J. M. Mulder and others and Otto Heinemann v Council of the European Communities and Commission of the European Communities*, ECJ Judgement of 19 May 1992, Joined cases C-104/89 and C-37/90. European Court reports 1992 p. I-03061.

[14] Par. 32-34, emphasis added.

A special case here, often relevant in practice, is that of a competitor that was utterly excluded from the market, or was thrown out of it.

Claims are often prepared in such cases in full accord with Ambrose Bierce's definition of 'future' as "*that period of time in which our affairs prosper, our friends are true and our happiness is assured*"[15]. From an economic point of view, future is certainly not so pretty, particularly for new companies, which will have anyway a large probability to fail, absent any foreclosure, and indeed - as Hovenkamp notes - in these cases '"*loss of the opportunity to do business" describes the plaintiff's losses more accurately then "lost profits*"[16].

But if lost profits in these cases are treated as loss of chance and not as lost profits in the strict sense, their amount should be multiplied by the probability of their realization, and they could not therefore be awarded in full. This of course would be in full accord with an economist's approach, who calculates the expected value of uncertain future stream of profits[17].

As far as we can see this would also be the case under English law, where compensation for a loss suffered in the past must be based upon the balance of probabilities, and claimant must be compensated in full if it is more likely than not that the loss occurred. However, for a loss which may happen in the future, compensation must reflect the Court's assessment of the probability that the loss will materialize[18].

As we shall see below, some decisions reached by French, Spanish – and possibly Italian – Courts seem in broad agreement with such principle.

2.2.4 Loss of reputation

It is relatively rare[19] for a claim for exclusionary damages to include loss of reputation damages: probably, given the skepticism of the Courts vis-à-vis such damages, or at any rate their very conservative estimates of them, claimants prefer to concentrate on lost profits.

In many cases, however, it seems likely that such an item might be an important component of the total damage, especially when a competitor has been forced to exit the market, where it had acquired some positive reputation.

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[15] Bierce (1911).
[16] Hovenkamp (2005), p. 678.
[17] See Tye and Kalos (2008).
[18] See Burrows (2004), Ch. 4.
[19] In the cases analysed below, loss of reputation was claimed in several Italian cases (*Bluvacanze*, *Business Full Ring*, *OKCom*, *Intermatica* and *Teleunit*). It was granted only in *Bluvacanze*.

3 Damages from exclusionary practices in the Commission's Practical Guide

The Commission's Practical Guide devotes a brief section (Part 4) to damages arising from exclusionary practices.

Referring to the overall discussion offered in Part 2 of the Guide, the Commission mainly discusses "comparator methods", whereby the but-for scenario is constructed by:

1. referring to the profits of the harmed competitor before the infringement took place, possibly adjusting where necessary their values in order to take into account other relevant factors that may have adversely influenced them;
2. comparing the profitability of the harmed competitor in the market where the infringement took place to its own profitability elsewhere, or to that of a similar undertaking. In any case the "*product or geographic markets concerned should offer a sufficient degree of* similarity" [20]. Such an approach, according to the Commission, would be particularly useful when entry of competitors is entirely prevented, and therefore there are no useful information that can be gathered from pre-infringement periods;
3. employing simulation models, i.e. models built on the basis of economic theory. The Commission stresses that "*building a comprehensive model that replicates a range of specific features of the market in question, if it can be properly solved and evaluated, can increase the likelihood that the result of the simulation is a reasonable estimate for the hypothetical non-infringement scenario*"[21], and it recommends their use in the estimation of damages to existing competitors.

The Commission does not elaborate further how the other methods it presented in Part 2 of the Guide may be adapted to damages resulting from exclusionary behaviour.

This is no great loss for cost-based methods, i.e. calculations of what the harmed competitor's profits would have been in the but-for world, on the basis of an estimation of its likely profit margin absent the infringement, to be applied the harmed competitor's estimated costs[22].

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[20] See Practical Guide, Par. 204.

[21] See Practical Guide, Par. 104.

[22] In the Draft Guidance Paper (2011), at par. 94, footrnote 102, the Commission writes that "*Usually, the cost-based method is considered for quantifying price overcharges. The method, or elements of it, may, however, also be used for quantifying other forms of harm such as the profits lost by foreclosed competitors. For instance, the Oberlandesgericht Düsseldorf (Higher Regional Court, Düsseldorf), decision of 16 April 2008, case No VI-2 U*

However, as we shall see when reviewing the jurisprudence, the Commission should have devoted an adequate discussion to what it terms ‘methods based on financial analysis’.

In the very limited space[23] it devotes to them in Part 2 of the Guide the Commission clarifies that it includes under this broad definition several possible uses of financial models of the harmed competitor’s accounts[24], and notes that “*one advantage of financial methods is that in some cases the information necessary to apply them may be held by undertakings because of accounting requirements, or may even be publicly available, as may be the case of publicly traded companies*”[25].

As we shall see, such a brief discussion is insufficient, because it is exactly these methods that are employed in a large portion of cases where damages arising from exclusionary behaviour are litigated in civil Courts.

As we shall also see, there are two major variants of these methods:

- building the but-for scenario through plans and projections that the harmed competitor had formulated before suffering the consequences of the infringement, and which have been filed during the civil proceedings;
- building the scenario on the basis of a detailed projection done by the Court of the accounts of the harmed competitor before the infringement, in order to consider the effects both of the infringement and of the other relevant factors that would have affected, absent the infringement, its subsequent profitability.

4 Estimating damages: what do courts do[26]

We now turn to jurisprudence. As we shall see, Courts accept a variety of methods for the costruction of the but-for scenario, only occasionally fully conforming to a specific method, and make use of a variety of information sources, which may include what happened before the infringement, and what is happening elsewhere, but are almost invariably based upon a detailed analysis of the facts of the case, in the light of the evidence supplied by witnesses and experts. By doing so, Courts apply to antitrust damages the

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(kart) 8/06, 2 U 8/06 (Stadtwerke Düsseldorf), estimated the lost profits of a foreclosed competitor by considering the costs of the competitor and the likely profit margin expressed as a proportion of these costs”.

[23] Par. 114-118, amounting to less than one page.

[24] See Practical Guide, par. 116.

[25] Ibidem, par. 118.

[26] This section is partly based on Part III of Prosperetti, Pani and Tomasi (2009).

approach they normally use when assessing commercial damages, arising both from breach of contract and tort.

Indees, as we shall see, there is a clear preference of Courts for methods based on financial analysis, which account for 18 decision out of our sample of 30. This is a clear relative majority, as there are only four cases of before-and-after damage calculations, five cases of yardstick-based calculations, three cases making use of simulation models and only one making use of regression analysis.

Let us now review the decisions in our sample, from the point of view of the estimation method utilised, in an ascending order of frequency.

4.1 Simulaton models

Simulation models are based on the construction of an abstract model of a market, consistent with economic theory. The model is then used to construct a but-for world in the particular situation of the case being litigated.

Simulation models do not seem to be very popular on the basis of our case review, as we were able to find only two cases where they have been accepted as a basis for damage estimation, carried out by a Court's experts in both cases.

In *Brennercom I* and *Brennercom II*[27], the Milan tribunal liquidated small damages partially on such a basis. The Judge found it useful but not sufficiently reliable, as the model gave rise to a range of different results under different hypotheses concerning the number of firms, and the degree of substitutability among the products. Judge Tavassi therefore liquidated the damage on an equitable basis.

The decision is interesting because it points at an inherent frailty of simulation models in court: unless they happen to fit quite closely the facts of the case, their results may often be seen as not entirely reliable from the point of view of a judge that has to keep in mind that undue enrichment is not allowed under the law.

[27] Both cases derived from abuses of dominant position by Telecom Italia against a small operator. *Brennercom I* (*Brennercom S.p.A. vs Telecom Italia S.p.A*, Tribunale di Milano, Sezione Specializzata Proprietà Industriale, decision of 27 December 2013) followed-on an Italian ICA decision concerning a margin squeeze in mobile communications, and is currently under appeals. *Brennercom II* (*Brennercom S.p.A. vs Telecom Italia S.p.A*, Tribunale di Milano, decision of 3 March 2014, confirmed in appeal) followed-on a different ICA decision concerning a margin squeeze in data transmission on fixed lines.

In *Centrica Energia*[28] - a Spanish case concerning the market for electricity distribution - the model utilised for the simulation was not based on economic theory, but rather on an econometric prediction of what the number of customers would have been absent the abusive conduct, which had consisted in the refusal to supply essential commercial information by Endesa, the dominant company. The Court accepted the model, but it introduced substantial changes to its results on the basis of several factors, concerning both market features and customer behaviour, set forth by the defendant.

Therefore, the three cases basically confirm how Courts need to tailor the results of any simulation models to actual market conditions, and the other relevant facts of the case.

4.2 Before and after methods

Before and after methods are not employed very often in rulings concerning exclusionary damages: we could find only five cases in our 30-strong sample, one of them was struck in appeal (although not on a point relating to damage estimation) and two of them where somewhat unusual, being concerted refusals to deal.

In *Bottin Cartographes*[29], the Tribunal de Commerce of Paris decided that Google had abused of its dominant position on the general search market, and on the related markets of on-line advertising and cartography by offering illicitly low prices (of course equal to zero) for its Google Maps services. According to the Tribunal , damages to the claimant were apparent from the substantial increase in the number of cancellations, and it liquidated damages on an equitable basis, considering the turnover of the claimant before and after the alleged infringement. The decision was struck in appeal, as the Court d'Appel decided, considering also an opinion that it requested from the French ICA, that there was no infringement.

Turning to Italy, in *Bluvacanze*[30], a stand-alone case concerning a concerted refusal to deal by leading Italian tour operators against a discount travel agent, Judge Tavassi directly calculated the damages on the basis of claimant's sales before and after the exclusion, and of the retail margin that had been agreed between the claimant and the defendants.

[28] *Centrica Energia S.L.U.* vs *Endesa Distribucion Electrica S.A.*, Juzgado de lo Mercantil Barcelona, Judgement of 20 January 2011. Endesa had been previously declared by the Spanish Competition Authority as having committed an exclusionary abuse of a dominant position, not sharing essential commercial information with competitors.

[29] *Bottin Carthographes* vs *Google France et al*, Tribunal de Commerce de Paris, 15ème Chambre, Judgement of 31 January 2012.

[30] *Bluvacanze*, App. Milano, 11 July 2003, in *Danno e Resp,* 2004, 646.

In *Inaz Paghe*[31], a follow-on concerted refusal to deal case, the Milan Appeals Court appointed an expert who compared the yearly number of clients lost by the claimant before and after the exclusion, and attributed the increase entirely to the abusive behaviour. He also calculated a per-customer margin, and the expected duration of the contracts. These estimates were accepted by the Court, which however refused to award damages to Inaz for the lower rate of growth of its customers during the abusive behaviour, as this could have been the effect of several other causes which the expert had not sufficiently analysed. The Court also found that, after the end of the infringement , the claimant's customers were still increasing very slowly, and therefore causation was not fully satisfied.

In *Interbroker vs Raffineria di Roma et al*[32], the Rome Appeals Court decided that the defendants had foreclosed the claimant from the wholesale market for bitumen. The claimant had quantified its damage in €2.2 million, assuming that, absent the infringement, its activities would have continued for three years with increasing margins. The Court considered such hypotheses as utterly baseless, as Interbroker had just entered the market and could not therefore be taken to be an established business. The Court liquidated damages for €40,000 by assuming that the claimant would have had for the first year of the but-for scenario profits in line with those it had obtained in the months before the infringement. The Court carefully considered the choice of the period, by excluding several months in which the claimant's business should be taken to be in a start-up phase, and therefore not considered to offer as a valid comparator.

In *Agroservizi et al*[33], a case concerning the refusal to supply essential commercial information to competitors, the Court liquidated damages on an equitable basis taking into consideration the conclusions of a judicial expert, who had reconstructed the but-for scenario starting from the actual financial accounts of the claimant. In particular, the expert had estimated the margins the claimant had enjoyed before the infringement, and reconstructed the but-for margins on the basis of a detailed set of hypotheses, only for the products that he believed were likely to have been affected by the infringement.

[31] *Inaz Paghe vs Associazione Nazionale Consulenti del Lavoro,* Corte d'Appello di Milano, judgement of 10 December 2004

[32] *Interbroker S.p.A. vs Raffineria di Roma S.p.A et al,* Corte d'Appello of Rome, 31 March 2008. This was a follow-on case arising from an exclusionary agreement among competitors, which had jointly decided to offer a uniform wholesale prices to bitumen resellers such as Interbroker, in order to prevent them from offering discounts to final customers.

[33] *Agroservizi Srl et al vs Agenzia del Territorio*, Corte d'Appello of Milano, 4 April 2012.

4.3 Yardstick methods

Yardstick methods were marginally popular, as before-and-after methods in our sample, accounting for five cases out of 30. As we discussed above, such methods are based on the simple idea that the effects of an antitrust violation upon a firm may be inferred by comparing its situation (sales, profits) with that of an equivalent firm, which has been unaffected by the violation.

Of course, as the Commission's guide also clearly points out, the degree of similarity between the damaged firm and such a comparator, chosen as a benchmark, is crucial as it decrees the level of legal acceptability of the method.

Let us now summarise the cases in our sample.

In Spain, the method has been carefully examined by the Madrid Courts in *Conduit*[34], which denied the use of the UK as a relevant yardstick for assessing the loss of market share by the Spanish subsidiary of a major telephone directory operator, allegedly caused by the incumbent. The Court ruled that "*the differences between the British and Spanish markets are substantial, and therefore it does not seem admissible to utilise the former as a reference for the calculation of the lost market share by the claimant*"[35]. The smaller share of the Claimant in the Spanish market was also attributable to other factors, according to the Court, such as lower advertising investments.

In France, the Court in *Lescarcelle*[36] accepted the method in a case concerning funeral services, where the Montmorency market was deemed comparable to the Gonesse market in terms of 'yield', of what should probably be taken to be a sort of a standardised input.

However, the Paris Tribunal de Commerce in the recent *Outremer* case[37], concerning an abusive behaviour in the Antilles, refused a damage estimation based on a benchmark composed of different geographic markets, accepting instead a quantification based on financial analysis[38].

When examining the proposed benchmark, the judge observed that "*this type of approach is based upon very fragile hypotheses.. [as] we are told that the markets are comparable[but] no account is given of the qualitative*

[34] *Conduit Europe S.A. vs Telefonica de Espana*, Juzgado Mercantil numero 5 de Madrid, 11 November 2005, confirmed in appeal by the Audiencia Provincial de Madrid Sección n. 28, Decision n. 73/2006 of 25 May 2006, available in the Commission's National Courts archive.

[35] As summarized by the Audiencia Provincial de Madrid.

[36] *Lescarcelle/De Memoris v. OGF*, Cour d'Appel, judgement of 23 June 2004.

[37] *Outremer Telecom* vs *SA Orange Caribe et al*, Tribunal de Commerce de Paris, 15ème Chambre, judgement of 16 March 2015

[38] For further details, see Paragraph 4.4.1.

differences which may be substantial across operators… such as cultural factors, commercial strategies, pricing policies and quality of service". As the proposed benchmark was composed of Suriname, Montenegro, Malta and Bahrein, the Court indeed had a point here.

In Germany, in *Strom Tarif*, the Bundesgerichtshof ruled that regional electricity markets are not sufficiently comparable as to allow the use of yardsticks across them[39].

In Italy, the Rome Court of Appeals[40], in a follow-on case concerning data transmission with xDSL/SDH technologies, calculated the damage on the basis of a yardstick method, by calculating the loss of market share to the would-be entrants, which had been utterly prevented from entering the market, on the basis of the share they possessed in the broader market of data transmission with older technologies.

These cases are interesting, and clearly point at a high degree of cautiousness by the Courts in accepting proposed benchmarks, but are not sufficient to understand how a reasonable benchmark could actually be built. The Practical Guide provides some help, specifying that "*characteristics that could be relevant when considering the sufficient similarity of firms include their size, cost structure, customers and features of the product they sell*" (par. 50), and also that "*the products traded in the two geographic markets compared should be the same or, at least, sufficiently similar*"(par. 55).

Yes, but how similar is similar?

4.3.1 How similar is similar?

It is actually possible to answer this question, but in order to do so we need to consider a broader number of judicial decisions concerning benchmarks, and these are supplied by United States jurisprudence, where benchmarks have been evaluated in a large number of cases.

Under US law, the general principle is that *"an antitrust plaintiff who uses a yardstick method for determining lost profit bears the burden to demonstrate the reasonable similarity of the business whose earnings experience he would borrow"*[41]. However, such a burden *"does not shift to the defendant after the plaintiff has offered some bits of evidence arguably*

[39] This case is mentioned by Ashurst (2004), but no details are available.

[40] *Wind Telecomunicazioni v. Telecom Italia*; *Data Service S.r.l. v. Telecom Italia*; *Albacom S.p.A. v. Telecom Italia*; *Unidata S.p.A. v. Telecom Italia*, Court of Appeal of Roma, judgement of 20 January 2003.This followed Decision n. 9472 of 27 April 2001 by the Italian NCA.

[41] Court of Appeals, 5th Circuit, in *Eleven Line Inc. v. North Texas State Soccer Ass'n*, 213 F.3d 198 (2000), par. 47.

tending to support comparability", and therefore *"the lack of contrary evidence does not necessarily establish that the two markets are comparable"*.

A careful analysis of the five European cases we just analysed, and of 11 further US cases where benchmarks were discussed[42] (Table 1), allows an interesting insight: Courts seem to assess market comparability and firm comparability in a hierarchical order, by employing a two-stage test to the proposed yardsticks:

- first, both the defendant A and the proposed yardstick B must be firms operating in the same product market.
- second, in order for B to be considered as a valid benchmark,, it must be:
    - <u>either</u> that A and B also operate in the *same geographical market*, but of course B must not have been affected by the infringement,
    - <u>or</u> they operate in different geographical markets, *but B is really company A.*

The legal and economic rationale for such a two-stage test seems to be to decrease the size of the uncertainty concerning causation.

[42] *Bigelow v. RKO Pictures, Inc*., 327 U.S. 251, S.Ct. (1946); *Zenith Radio Corp. v. Hazeltine Research, Inc.* Argued Nov. 10, 1970, Decided Feb. 24, 1971, Rehearing Denied April 5, 1971; 79 F.2d 269 177 U.S.P.Q. 501, 1973-1 Trade Cases 74,446; *Agrashell, Inc. v. Hammons Products Company*, 71-1538, Court of Appeals 8th Circuit Submitted (1973); *Lehrman v. Gulf Oil*, 500 F.2d 659, Court of Appeals 5th Circuit (1974); *Jay Edwards Inc. v. New England Toyota Distributor*, Court of Appeals, 1st Circuit, 708 F2d 814 (1983); *Metrix Warehouse v. Daimler Benz Aktiengesellschaft*, 828 F.2d 1033 1044, Court of Appeals 4th Circuit (1988); *Business Full Company e Ring*, App. Roma, 20 January2003, in "*Il Diritto Industriale*", n. 6/2003. See Ashurst (2004) for *Valium*, *Strom Tarif* and *Arbeitsgemeinschaft Rheinausabau*.

Table 1 – USA and European case law considering the acceptability of a yardstick method in exclusionary damages

Case	Country	Same Product	Same Firm	Same geographic market	Yardstick accepted
Bigelow v. RKO Radio Pictures Inc	US	Yes	No	Yes	Yes
Zenith Radio Corp.	US	Yes	Yes	No	Yes
Agrashell	US	Yes	Yes	No	Yes
Lehrman v. Gulf Oil	US	Yes	No	Yes	Yes
Jay Edwards Inc v. New England Toyota Distr.	US	Yes	No	Yes	Yes
Metrix Warehouse	US	Yes	No	Yes	Yes
National Farmers v. Associated Milk Prod.	US	Yes	Yes	No	Yes
Home Placement Service., Inc. V. Providence Journal	US	Yes	Yes	No	No
Rose Confections v. Ambrosia Chocolate	US	Yes	Yes	No	No
William Inglis & V. Continental Baking	US	Yes	No	Yes	No
Eleven Line v. N. Texas Soccer Assn.	US	Yes	Yes	No	No
Strom Tarif	Germany	Yes	No	No	No
Conduit	Spain	Yes	Yes	No	No
Lescarcelle/De Memoris/OGF	France	Yes	Yes	No	Yes
Outremer vs Orange	France	Yes	No	No	No
Business Full Company Ring	Italy	Yes	Yes	Yes	Yes

Source: see text.

The economic performance of a company (be it measured by sales, market shares, profits or otherwise) indeed depends on a large number of variables, some of which reflect the characteristics of the firm (its products, history, technology, brand), and others those of the market (such as consumer demand, or the level of competition). The number of variables that can determine differences in performance between the two firms is thus very large, while ideally a yardstick method would require a *coeteris paribus* condition.

Courts seek therefore to reduce the number of exogenous variables.

Thus, in the first place, they rule out any comparison between companies producing different products, as differences in economic performance are likely to be associated with differences in costs and product demand, not necessarily with the infringement. This is the first stage of the test.

But even if the products are identical, or highly similar, there must be limits to the acceptable differences between the two companies. Thus, the second part of the test seeks to rule out situations in which there may be differences both on the demand side and on the supply side. Only differences in *one* of these factors are allowed, so that *either* market demand must be the same, and this requires the two companies to be in the same geographic market, *or* demand may be different (different geographic markets), but supply conditions must be the same, and this requires that the two companies are really the same company.

4.4 Methods based on financial analysis

Out of our sample of 30 decisions, 18 were based on what the Commission generally terms “financial analysis”. These can be further distinguished into groups. In the first, the but-for scenario is prepared by adjusting the actual economic and financial results of the claimant in order to try to eliminate the effects of the infringement. In the second, a business plan prepared by the claimant before it suffered the tort provides the basis to which an adjustment is applied. In both cases, the adjusted results or plans must be coherent with the facts of the case.

4.4.1 But-for scenarios prepared on the basis of an adjustment of actual claimant’s data

In several cases, European Courts have directly constructed a but-for scenario by taking actual data of the claimant and adjusting them in order to allow for likely developments absent the infringement, on the basis of a rather broad array of evidence.

In Sweden, in *Europe Investor Direct Aktiebolag and others*[43], concerning the refusal to supply essential business information, the Stockholm District Court undertook a highly detailed analysis of the data provided by the

[43] Cases T32799-05 and T34227-05, *Europe Investor Direct Aktiebolag and others v. VPC*, Stockholm District Court, judgement of 20 November 2008. For a broader discussion, see Andersson and Legnerfalt (2009).

claimant, awarding at the end damages on an equitable basis, in order to account for the fact that a part of the lost profits had been probably mitigated, and it was uncertain that they were wholly to be attributed to the infringement[44].

In *GT Linien*[45], the Danish Supreme Court quantified the damage on the basis of a detailed accounting reconstruction of the costs borne by the claimant, which however it corrected in order to account for factors which had not been duly considered[46] .

In *Forbruger-Kontakt*[47], the Court awarded damages based upon an analysis of accounting and market data. Lost sales were analysed in detail, and adjusted for services that the claimant did not actually offer. The price is that the claimant would have been able to apply to the lost customers were determined on the basis of its cost. The Court also accounted for factors that mitigated the claimant's losses, and in particular for the costs it had avoided through the loss of customers.

In *2Travel*[48] an exclusionary abuse concerning bus services in the city of Cardiff, the UK Competition Appeal Tribunal (CAT) awarded lost profits on the basis of a highly detailed analysis of lost sales directly arising from the infringement, but refused to award damages based on the value of the company which had gone into liquidation, as its failure was not due to the infringement, but rather to bad management and bad service. In doing so, the Court duly considered the opinions presented by the experts of the two parties, but observed that "*"we certainly do not consider that the opinion evidence in their reports must be used on a "take it or leave it" basis. It is for the Tribunal – based upon the factual evidence – to make an assessment of what would have happened in the counter-factual scenario, and this may very well involve re-working calculations done by the experts or adopting an approach which – although it draws on the work of both experts –*

[44]As Oxera (2009) reports, "*the court considered that it could not be excluded that office space and staff could have been used by other parts of the claimants' business that were not affected by the abuse. Similarly, because the economy as a whole was in recession during the period when the abuse took place, the claimants were unable to precisely identify which part of the losses were the result of the defendant's abusive conduct, and which part was caused by the general economic downturn*".

[45] *GT Linien A/S (under bankruptcy—subsequently GT Link A/S) v. De Danske Statsbaner DSB and Scandlines A/S (formerly DSB Rederi A/S)*, Højesteret *(*Danish Supreme Court), Case UFR 2005.2171H, judgement of 20 April 2005.

[46] "*The Supreme Court agreed with the defendant that the reconstructed accounts did not sufficiently take into account depreciations,reserves set aside for investments by the port and interest on its invested capital*", Oxera (2009).

[47] *Forbruger-Kontakt a-s (Søndagsavisen a-s) v. Post Danmark A/S*, Østre landsrets (Eastern High Court of Denmark), judgement of 20 May 2009. For a broader discussion, see Oxera (2009).

[48]*2Travel Group PLC (in liquidation)* vs *Cardiff City Transport Services Limited,* Competition Appeal Tribunal, 5 July 2012.

adopts neither approach completely. That is what has occurred in this case."

In *Albion Water*[49], CAT awarded lost profits for exclusionary practices by Dwr Cymru in respect of a network access charge[50], on the basis of a detailed calculation of the 'counterfactual' tariff that would have been charged by Dŵr Cymru absent the infringement of the tariff was calculated on the basis of accounting figures in the file, and the Tribunal also analysed whether there were other relevant costs that should have been considered in determining the cost of that the claimant would have borne in order to serve the lost customer.

The Tribunal also awarded loss of chance damages, as it considered that the claimant had lost the chance of tendering to supply water to a steel plant, as there was evidence that it was unhappy with its current supplier and had approached Albion asking them to tender. Lost profits for this customer were calculated by the CAT, and were reduced by one third, in order to reflect that it was likely, but not certain, that the new customer would have been actually won.

In *Outremer Telecom*[51], the Paris tribunal liquidated damages on the basis of a detailed technical report prepared by the claimant, which estimated its lost customers on the basis of the defendant's data, and calculated lost margins on the basis of reasonable hypothesis concerning churn rates. The tribunal found the report convincing, while, as we discussed above, rejecting the international benchmark which had been proposed by another claimant's expert.

Turning now to Italy, in *Valgrana*[52] the Turin Appeals Court directly calculated the profits lost by a cheese producer as a result of an illicit quota system enforced by a producers' consortium. The Court considered market data in order to estimate lost sales, and accounting data in order to calculate lost margins. It then proceeded to reduce its results in order to account of the fact that, absent the quarter, aggregate production would have been higher and the claimant would have obtained lower prices and lower margins.

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[49] *Albion Water vs. Dŵr Cymru*, Competition Appeal Tribunal, judgement of 28 March 2013.

[50] In earlier proceedings, the CAT had found that Dŵr Cymru had abused a dominant position by charging a competitor, Albion Water, an excessively high price for the use of its water pipes to carry Albion's water. This 'common carriage' tariff was found to constitute a 'margin squeeze' (as it did not allow Albion to compete profitably with Dŵr Cymru in supplying customers), as well as an excessive and unfair price, and was thus abusive on both bases.

[51] *SAS Outremer Telecom* vs *SA Orange Caribe et al*, Tribunal de Commerce de Paris, 15ème Chambre, judgement of 16 March2015.

[52] *Valgrana v. Consorzio per la tutela del Grana Padano*, App. Torino, 7 February 2002, in *Giur. dir. ind.*, 2002.

In *OKCom* and *Teleunit*[53] the Milan Tribunal liquidated overcharge damages to two telecommunications operators arising from a price squeeze concerning termination fees. In both cases, on the basis of judicial experts' reports, the Court accepted that the claimants had entirely borne the effects of the squeeze, and therefore their costs had increased, by amounts which were calculated on the basis of detailed accounting data. Having awarded damages as *damnum emergens*, the Court did not award lost profits damages.

In *Intermatica*[54], a case identical to *OKCom* and *Teleunit*, where the claimant had only sought lost profits, the Milan Tribunal awarded damages on the basis of a detailed analysis of accounting evidence concerning margins, and of customer trends.

Our review of the judicial decisions based on an adjustment of actual claimant's data therefore shows how Courts devote a substantial effort in analysing accounting and market data, and in developing of view as to how, and to what extent, these should be adjusted in order to generate a reasonable but-for world, specifically taking into account the characteristics of the claimants, the historical and expected development of the relevant market, of the importance of factors other than the infringement in influencing lost profits, and of the possibility that the damage has been somehow mitigated.

4.4.2 But-for scenarios based on plans and forecasts presented by the claimant

In several other cases, Courts considered but-for scenarios based at least to a large extent, upon plans and growth forecasts presented by the harmed competitor, which could reasonably be taken to have been formulated before the infringement.

In *Mors*[55], the Paris Appeals Court considered the budget prepared by the claimant before the infringing behaviour of the defendant, nominating an Expert. After careful analysis, he concluded that the company had not proved that, on the cost side, the deviation from the budget depended from the actions of the defendant. This was considered to be likely, but its precise amount could not be estimated. On the revenue side, lost sale could on the

[53] *OKCom S.p.A. vs Telecom Italia S.p.A*, Tribunale di Milano, judgement of 14 February 2013 and *Teleunit S.p.A.. vs Vodafone Omnitel NV S.p.A.*, Tribunale di Milano, judgement of 1 October 2013.

[54] *Intermatica S.p.A.* vs *Telecom Italia S.p.A.,* Tribunale di Milano, judgement of 14 May 2014.

[55]*Mors S.A. vs. Labinal S.A.*, Cour d'Appel de Paris, judgement n. 334 of 30 September 1998.

other hand be estimated in a detailed fashion, starting from an analysis of the potential market for the specific aircraft models for which the claimant was supplying components. The Court awarded lost profits to the defendant, but refused to grant damages for lost sales for equipment of other aircrafts models, as the defendant had not supplied any useful element to show that it had undertaken the investments that would have been required in order to serve such adjacent markets.

In *Verimedia*[56], where the claimant had been prevented from accessing a portion of the French advertising market because of the supply of inaccurate information by a leading market research company, the Versailles Court refused the damage estimation provided by the claimant, as it was based upon a business plan not containing any detailed analysis, redacted at a date which could not be clearly established. On the other hand it accepted that the claimant had lost the chance of penetrating more quickly and more effectively the television audience measurement market[57], and awarded damages on such a basis.

In *Cowes*[58], a case concerning access refusal, the Cour de Cassation cancelled the Appeals decision which had awarded damages for 7 million Euro as loss of chance to an operator which had been prevented from entering the ADSL market. The Court stressed that the business plan of the claimant was based upon hypotheses of technological development which were not consistent with the services it planned to offer, and that in any case the realisation of the business plan would have been prevented by its own precarious financial conditions.

In Spain, in *Antena 3*[59] case concerning the refusal to sell a crucial package of sports rights, a Madrid Court refused the defendant's position that the lost profits claimed by Antena 3 were simply *"sueños de fortuna"* ("*dreams of glory*"). If the claimant could have gained access to the sports rights, in the normal course of events, it could have indeed obtained profits, and the conduct of the Liga Nacional de Fùtbol had deprived Antena 3 of a substantial source of advertising revenues. The Court accepted the estimates of the lost profits presented by Antena 3, but considered it as a loss of chance, and not as lost profits, as the claimant had been illicitly excluded from bidding for the sports rights in an auction where there were two more

[56]*Verimedia S.A. vs. Mediametrie S.A. Secodip S.A. GIE Audipub*, Cour d'Appel de Versailles, 12 ème chambre, section 2, judgement n. 319 of 24 June 2004.
[57]For a broader discussion of the two French cases so far discussed, see Idot (2005) and Riffault-Silk (2008).
[58] *Cowes (ex Subiteo)* vs *Orange (ex France Telecom)*, Cour de Cassation, Chambre Commeciale, 25 March 2014, Cour d'Appel de Paris, 21 December 2012.
[59] *Antena 3 de Televisión vs. Liga Nacional de Fútbol Profesional*, Juzgado de Primiera Instancia Madrid, núm. 125/2005 (Núm. 4) of 7 June 2005.

participants. The Court therefore awarded only one third of the lost profits claimed.

In *Enron Coal*,[60] another case involving an auction, the Competition Appeal Tribunal refused a claim for loss of opportunity as it was convinced that, given the facts, the claimant had no real or substantial prospect of winning the contract for which it had tendered.,Even though the CAT agreed that defendants's abusive behaviour had placed the claimant at a competitive disadvantage, it did not follow from this that Enron had lost the chance of securing the contract. There were, the Tribunal found other reasons that would have prevented the success of the bid.

In UK, as we discussed above, *2Travel* brought[61] a follow on claim from an OFT decision in 2008 in which Cardiff Bus had been found guilty of abusing a dominant position within the market and operating with exclusionary intent. The Competition Appeal Tribunal liquidated only a small damage for lost profits[62] as it refused to accept that the insolvency of the claimant had been caused by the defendant's actions. In the decision, the Tribunal did not consider a business plan presented by the claimant to be at all reliable, as "*the projections in the … PwC Report were based not upon independent analysis of 2 Travel business, but came from 2 Travel itself…management was persistently and significantly over-optimistic in its projections as to how the business would perform in the future*". Furthermore, it found that "*it is impossible to understand how the projections in the PwC Report were derived*", and that in general 2Travel "*was a badly run company, with enourmous financial difficulties, even before [the exclusionary behaviour] and providing poor transport services. This is why the company failed*".

In Germany, the Higher Regional Court of Dusseldorf granted in *SWS Service*[63] damages to a company operating in the lottery market as a consequence of a concerted refusal to deal by German Lotteries, preventing private operators from accessing their distribution networks. The claimant, in order to show the reliability of its lost profits claim filed documents prepared before the infringing behaviour, i.e. a business plan prepared by an investment bank and research prepared by a specialised market research company. The judge carefully analysed this documents, and concluded that the claimant's business plan was credible.

[60] *Enron Coal Services (in liquidiation) vs English Welsh & Scottish Railway*, Competition Appeal Tribunal, judgement of 19 January 2011.
[61] *2Travel Group PLC (in liquidation) vs. Cardiff City Transport Services Limited*, Competition Appeal Tribunal, 5 July 2012
[62] See Paragraph 4.4.1.
[63] *SWS Service GmbH vs. Westdeutsche Lotteriegesellschaft*, Oberlandesgericht Düsseldorf , 9 aprile 2014 (VI-U Kart)10/12. For a discussion of the German cases, see Kuijpers et al (2015).

In *Telegate*[64], the Regional Court of Cologne, on the other hand, dismissed a claim for lost profits brought against Deutsche Telekom by a company offering telephone directory assistance, alleging the charging of excessive prices for data necessary for the claimant's business. Such prices were allegedly responsible for its lack of financial resources. The claimant submitted and economic opinion to that effect, but the Court found this to be too generic, as it merely argued in general terms that the claimant could have used additional funds for marketing activities and that these marketing activities could have resulted in a higher market share and in higher profits. The Court concluded that the claimant had failed to prove its lost profits through a credible business plan prepared before the infringement.

In *Telsystem*[65] - a case in which the incumbent had prevented a start-up firm from entering the market for closed user groups[66] - the Milan Appeals Court carefully analysed with the assistance of judicial experts the business plan which had been prepared by the claimant, according to which profits would have been considerable, as Telsystem would have been the first operator to supply such a service. The experts took a critical view of such a plan, and concluded that profitability would have been limited by lower-than-planned customer acquisitions, as the claimant did not have sufficient resources for an adequate advertising campaign. They further considered that its organisational structure would have been inadequate to sustain a substantial growth. Furthermore, as there were no real barriers to entry into the closed user group market, Telsystem would have enjoyed only a temporary first-mover advantage.

On the basis of this review, we should conclude that European Courts are willing to consider plans or forecasts as a basis for the claim insofar these are sufficiently detailed, broadly credible in the light of the characteristics of the claimant and the fact of the case, and the date in which such documents were prepared is reasonably certain and precedes the beginning of the litigation.

Secondly, Courts routinely subject to such plans to a detailed analysis, trying to assess to what extent both objective elements, and notably market conditions, and subjective elements, notably financial resources and organisational structure of the claimant, would have really allowed the goal is proposed in such plans to be attained, absent the infringing behaviour.

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[64] *Telegate AG vs Deutsche Telekom AG*, Landgericht Köln, 28 May 2013, 87 O (Kart) 7/06.

[65] *Telsystem v. SIP* App. Milano, 26 November 1996, in *Giur. it.*, 1997, I, 2, 520; App. Milano, 24 December 1996, in *Danno e Resp.*, 1997, 602.

[66] A technological Dodo, but that seemend rather bright-eyed at the time.

5 Conclusions

There are several open issues in the estimation of exclusionary damages by national courts in Europe, and we have tried in this paper to discuss the more relevant ones, with a special emphasis on those lying at the border between economics and the law. Their complexity however should not be over-emphasised.

In commercial damages, cases where the growth of a company has been hampered, or the company has been somehow excluded from a market, are relatively common, and here civil Courts have a very substantial experience in gathering, on the basis of an intelligent and well-organised analysis of the evidence available to them, what would have happened absent the illicit act. They may have never called this “constructing a but-for a world”, but this is precisely what they have been doing all along.

An interesting conclusion of the survey of the cases we have conducted in this paper is that Courts in Europe have been clearly leveraging, on the whole with great success, on their substantial experience to tackle relatively novel cases such as damages claims arising from exclusionary behaviour.

This is why we believe that the very useful work done by the Commission should be taken with a grain of salt when considering damages of this kind. While there is no doubt that in some cases simulation models and econometric techniques may be helpful, it is quite rare that theoretical models can be built as close to the facts of the case as is necessary to have any practical value in Court, and rare as well is a case where data availability and quality allow meaningful econometrics to be done.

This is the reason why, as we saw above, 18 out of the 30 judicial decisions we have analysed make use of various methods that the Commission generally bundles under the label of “financial analysis”. While several economists would probably consider them “unscientific”, the Courts seem to think them useful.

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