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What's the damage?

MEASURING HARM FROM EXCLUSIONARY PRACTICES

In Europe, it has become increasingly common for claimants to follow competition law infringement decisions by the European Commission (EC) - or a national competition authority - with private actions for damages in national courts. But these decisions do not automatically write customers or competitors a cheque. Anxious to help claimants achieve compensation, the EC has opened up a debate, in which Frontier Economics has participated, over the obstacles to private litigation.

European Union law provides that any citizen or business that has suffered damage as a result of a breach of competition rules (Articles 101 and 102 TFEU, formerly Articles 81 and 82) is able to claim compensation from the party that caused the harm, and member states are required to establish an effective legal framework that makes exercising this right a realistic possibility. However the EC is concerned that injured parties rarely obtain reparation, and so has opened a debate over how private actions for damages could be facilitated. One of the perceived obstacles is the difficulty of establishing the quantum of loss in a national court. So the EC intends to draw up a framework, with non-binding

guidance, for the quantification of damages from competition law infringements. With this aim, it recently hosted a workshop of economic experts, in which Zoltan Biro of Frontier Economics participated. The workshop covered harm to customers from price overcharges, usually by cartels; and harm to competitors from exclusionary practices, which is the focus of this bulletin.*

ONE STEP AT A TIME

Where a breach of competition rules has been found in a decision by the European Commission, this will - under European Union law - constitute binding proof of infringement in civil proceedings for damages in a national court. In some member states, such as Germany and the UK, the same applies to an infringement decision by the national competition authority. A claimant can then rely on this to determine the form and duration of the unlawful practice, and the products and companies to which it related.

However, it is unlikely that a competition law infringement decision will itself be sufficient to support a claim for damages. It will not necessarily imply that a competitor was actually damaged, and the published decision may not contain an assessment of whether, and to what extent, a competitor was harmed. The EC will intervene under Article 102 TFEU where a dominant firm's conduct is capable of hampering competition, as well as where it has already done so. Moreover, abusive conduct will be identified on the basis of the "as-efficient competitor" test (e.g., by reference to the prices and costs of the dominant firm), without necessarily establishing whether there was in fact such a competitor. Similarly, under Article 101 TFEU, an agreement will be considered to restrict competition if it is capable of creating (or contributing to) foreclosure effects.

Imagine, for example, that a dominant firm is found to have applied an unlawful exclusionary rebate scheme to retailers. An infringement decision may determine the "required share" that competitors would need to have achieved in order profitably to overcome the dominant firm's rebates, and to state that this exceeded the "contestable portion of sales" that were, potentially, available to them. However:

- an infringement decision is unlikely to establish how the "contestable portion of sales" would, under normal competitive conditions, have been apportioned across the dominant firm and its competitors. So it may provide an upper bound to the level of "but-for" sales, but not an assessment of the sales that competitors would actually have achieved; and
- it cannot be assumed that any additional "but-for" sales would necessarily have been made at the same prices as the sales competitors did secure. In the "but-for" world, the dominant firm might, for example, have applied a non-abusive form of discounts to the contestable portion of sales targeted by its unlawful rebate scheme.

A competition law infringement decision will often contain findings of fact by the EC or a national competition authority, which may be of relevance in a follow-on damages action. But in a national court a claimant will usually need to

adduce additional factual (and perhaps expert) evidence in order to establish the causation and the quantum of any loss.

There are two possible limbs to a follow-on claim for damages:

- the implementation by the dominant firm of a form of conduct capable of causing a reduction in the level of sales and/or margins that competitors were able to achieve during the infringement period - potentially causing an immediate and direct loss of profits; and
- a consequent impairment of the ability of rivals to compete with the dominant firm, e.g., as a result of reduced investments in productive assets, an inferior reputation with customers, or lost learning-by-doing effects - potentially causing a further loss of profits, which could persist long after the infringement period.

In practice, a claimant may often focus on the first, as any immediate and direct loss of profits during the infringement period may be easier to evidence and prove. In order to show any further harm, a claimant would face the evidentiary burden of establishing what actions and timeframe would naturally have dictated the growth of its business, and demonstrating that these were adversely affected by a reduction in its sales and/or margins during the infringement period. A claimant would also need to prove that it would have earned profits above the cost of capital from the additional investments that it would have made.

One can, however, readily envisage scenarios in which such longer-term harm could represent the major source of any loss. Consider, for example, a new entrant that, in the face of abusive conduct by a dominant firm, ceased to invest in developing its business. The lost profits associated with the investments that the entrant had actually made might be relatively small, compared with the lost profits associated with the additional investment opportunities denied to it. This issue will likely be most relevant in those cases where the exclusionary practice persisted for a prolonged period and where, as a result, a claimant would have had the time to develop its business substantially but for the abuse.

SEARCHING FOR COMPARISONS

The approach to measuring harm will often involve some form of comparator analysis: establishing how the sales and the margins achieved by the claimant compare with the same firm's (or a similar firm's) performance in a time period, geography, product and/or customer base that was not subject to the unlawful practice. Temporal ("before-and-after") comparators are commonly employed when quantifying harm from overcharges by cartels. But these may be of more limited use in relation to exclusionary practices because:

- there may be no relevant "before" period, since exclusionary conduct is often used to halt entry and expansion by smaller rivals rather than to oust established competitors; and
- the effects of an exclusionary practice may persist long "after" the infringement period, making it difficult to draw a meaningful comparison.

However, the issues associated with determining what constitutes a reasonable comparator are essentially the same as in cartel damages cases. It is key to identify whether the economic factors determining the comparator levels of sales and margins are similar to those that would - but for the unlawful practice - have applied in the relevant time period, geography, product and customer base; and where there are material differences, to make appropriate adjustments (possibly using regression techniques). And it is important to ask whether the reason that a potential comparator was not subject to the unlawful practice itself undermines its comparability. For example, was the potential comparator abuse-free because the dominant firm was in a stronger position (and so did not need to rely on the exclusionary conduct) or in a weaker one (and so the exclusionary conduct would not have been effective)?

Imagine, once again, that a dominant firm applied an unlawful exclusionary rebate scheme to retailers. Suppose it did so market-wide, but a subset of retailers decided to forgo the rebates and to stock a competitor's products instead. In bringing a follow-on claim for damages, this competitor could be tempted to use the share of sales that it achieved with this subset of retailers as an estimate of the share of sales that it might have achieved market-wide. However, this subset of retailers demonstrated a relatively strong preference for stocking the claimant's product through their willingness to forgo the dominant firm's rebates. One might therefore expect the share of sales that the claimant achieved with these retailers to be higher than the share it would naturally have achieved elsewhere.

CONCLUSION

The most commonly-claimed competition damages are for overcharging by cartels. Quantitative economic analysis, often based on comparators, is regularly used to estimate the prices that would have prevailed "but for" the cartel behaviour. Calculating damages to competitors arising from exclusionary practices tends to be more difficult. The source of any loss may be indirect, and temporal comparators may be of more limited use. One also needs to evaluate the "but-for" performance of specific competitors, based on their individual capabilities, as well as the overall competitive evolution of an industry. This bulletin has discussed the types of evidence and analysis likely to be relevant, and the associated challenges. The EC itself faces a challenge in providing national courts with guidance that offers insights into the underlying issues and quantitative methods that can readily be applied.

** This bulletin is based on Zoltan Biro's written contribution to the EC workshop, published on the DG Competition website.*

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