



European Commission

Competition

LEAR Conference

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The Commission's private enforcement initiative: status and perspectives

Carles Esteva Mosso

Director for Policy & Strategy at DG Competition



Overview

- I. The EU's private enforcement initiative
- II. Quantifying harm in actions for damages
- III. Collective redress



I. The EU's private enforcement initiative

Context

- Full effectiveness of Articles 101 & 102 TFEU requires compensation of the harm suffered
(EUCJ 2001 in *Courage Crehan* and 2007 in *Manfredi*)
- Still today: many substantive and procedural obstacles
=> Most injured parties do not receive any compensation

Status

- 2005 Green & 2008 White Paper
- Current focus: Quantification & Collective redress
- Future legislative proposal on damages actions



II. Quantification



Quantification: context & background (1)

- Quantifying harm in damages actions can be a complex exercise
 - inherent difficulty of knowing what would have happened without infringement, i.e. need to establish a counterfactual
 - uncertainty about available methods, difficulties with economic evidence
- 2008 White Paper: announced a non-binding pragmatic framework to assist national courts when quantifying antitrust harm
 - => “soft approach”, no legislative change
- Preparatory works:
 - external studies (Oxera 2009, CEPS 2007, Ashurst 2005),
 - contributions of economic experts (practitioners and academics),
 - exchanges with specialised competition law judges
- 17 June - 30. Sept. 2011: public consultation on Draft Guidance Paper on quantifying harm in antitrust damages action (DGP)



Objectives & approach of DGP

- **Making information available** to courts and parties on existing quantification **methods & techniques**
- Providing **insights** into some **types of harm typically caused** by infringements & challenges in quantifying them
- **Not affecting the legal system of the Member States**, nor the standard of proof in damages actions
- **Recalling the EU principles** applicable to quantification in antitrust damages cases, esp.
 - Compensation for all types of harm (overcharge, loss of profits & interest)
 - principle of effectiveness can have implications on degree of precision expected in quantification exercise



Objectives & approach of DGP (2)

=> *à la carte* approach:

- A range of methods & techniques: from simple to sophisticated
- DGP explains the use and the strengths / weaknesses of methods & techniques
 - circumstances in which a method is well suited, or not
 - assumptions on which methods rely
 - data requirements, etc.
- Courts and parties choose the appropriate method & technique in the specific case, e.g. in view of
 - national procedural framework and legal tradition (standard & burden of proof; acceptance of approximate estimations; possibility of disclosure)
 - Circumstances of the given case (e.g. availability of data)
 - costs of applying a certain method & technique and their proportionality to the value of the damages claim



Structure of the DGP

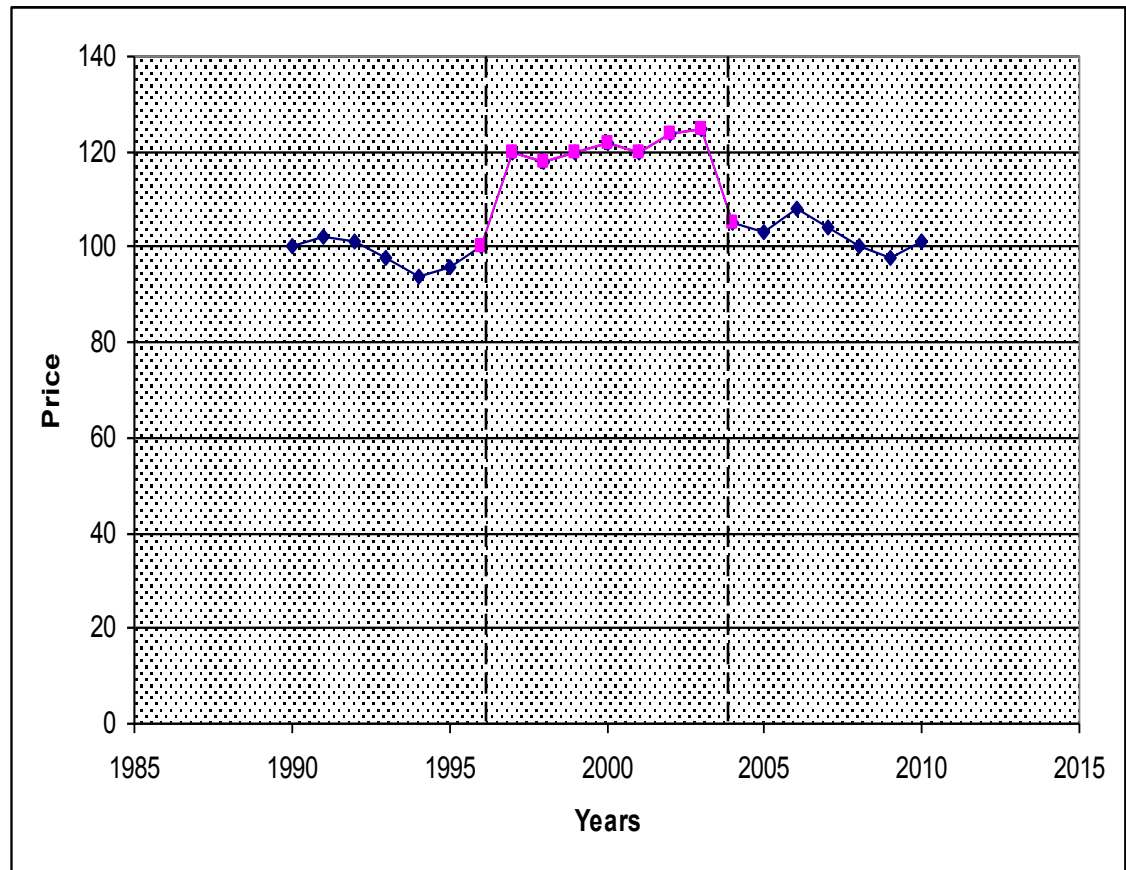
- **Part I** – general **legal context and principles** governing quantification of antitrust harm
- **Part II** – overview of main **methods & techniques to quantify harm** (applicable, in principle, to all types of harm)
- **Part III** – economic **insights & practical illustrations** on quantifying harm caused by **infringements leading to overcharges**
 - overcharges paid by direct customers of cartelists
 - passing-on issues (e.g. insights when (some) pass-on is likely)
 - loss of profits of business customers that passed-on overcharge
- **Part IV** – economic **insights & practical illustrations** on quantifying harm caused by **exclusionary practices**
 - loss of profits suffered by foreclosed competitors
 - overcharge harm to customers
 - specific issues: e.g. prevented entry of new competitors, loss of future profits



Example of quantifying a cartel overcharge

- First: **choose a method** to estimate counterfactual:
- For example, look at the time periods **before** or **after** the cartel (or **before and after**)

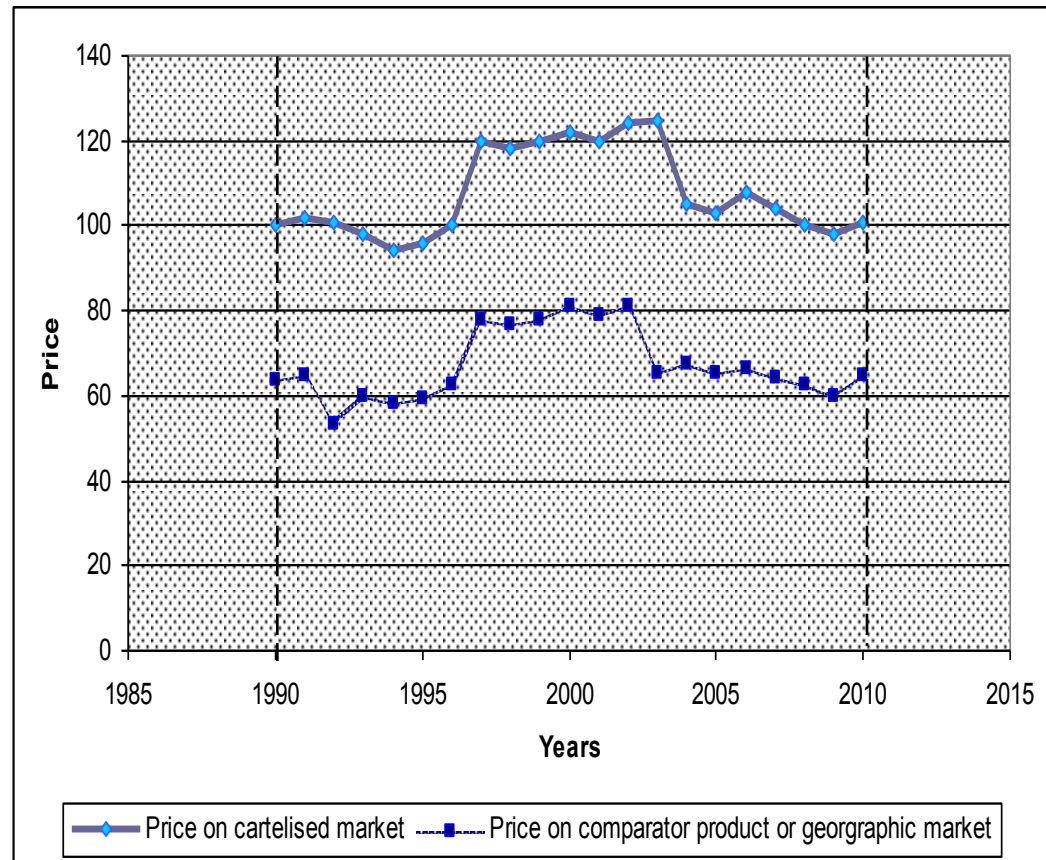
The vertical lines indicate the period when the cartel was implemented





Example of quantifying a cartel overcharge

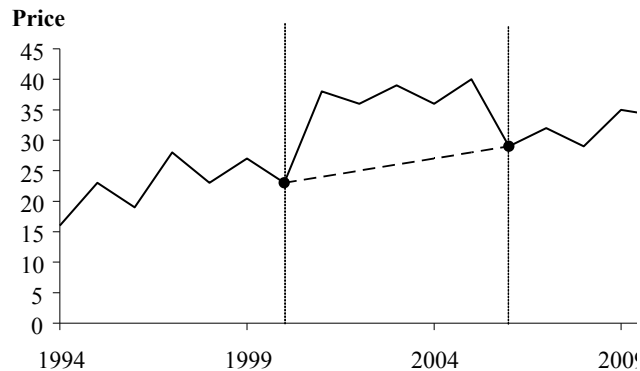
- Or look at a **comparator market** estimate how prices on the cartelised market may have developed without the cartel
- This comparator market could be
 - a different but sufficiently similar **product market**
 - a different but sufficiently similar **geographic market**



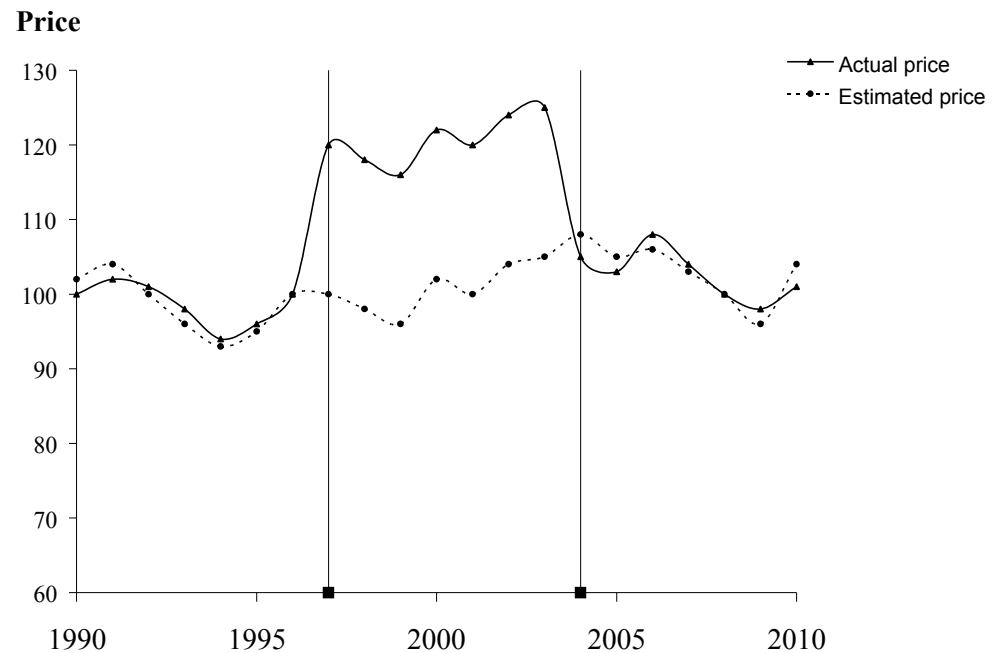


- Once the basic method has been chosen (e.g. comparison over time), a **technique** to implement the methods needs to be determined:
- **Simple** \Leftrightarrow **sophisticated** techniques, e.g.

linear interpolation



regression analysis





Illustrating typical effects of infringements (example: exclusionary practices)

- **phase I** - a dominant undertaking applies e.g. predatory prices and successfully excludes a competitor from the market
 - **competitor** suffers a **loss of profits**
 - customers may benefit from lower (predatory) prices
- **phase II** - once the competitor foreclosed, the dominant undertaking raises its prices (recoupment)
 - **competitor** continue to suffer **loss of profits**
 - **customers** may pay **higher prices (overcharge)** until successful (re-)entry of (new) competitor



III. Collective redress



COLLECTIVE REDRESS IN EUROPE TODAY

- Collective damages actions **available in half of the Member States; wide variety** in substantive scope, standing, etc.
- **Matter of fundamental rights: access to justice** for European citizens and businesses harmed by breaches of EU law
- **Matter of effective enforcement of EU law**
- 2011 (4 February – 30 May) Public consultation:
‘Towards a coherent European approach to collective redress’



MAIN TOPICS OF THE CONSULTATION

- How to achieve **effective and efficient redress**?
- What **safeguards** are needed to avoid abusive litigation?
- Who should have **standing** to bring collective actions?
- How to approach the issue of **funding**?
- Role of **collective consensual (out of court) dispute resolution**
- **Enforcement** of collective damages awards **across the EU**



RESULTS OF THE PUBLIC CONSULTATION

- **More than 300 contributions** from different stakeholders (most from DE, FR and UK):
 - around 120 businesses and business associations
 - around 80 consumers' organizations
 - around 60 legal experts (academics and practitioners)
 - 14 Member States (AT, BG, CZ, DE, DK, EL, FR, HU, IT, LV, NL, PL, PT, SE)
 - 5 competition authorities (FR, IE, IT, RO, UK)
- and more than **18 000 letters from citizens** (most from FR)



RESULTS OF THE PUBLIC CONSULTATION

- **Broad consensus:** it is useful to identify **general principles to guide EU initiatives on collective redress**
- **Divided views on follow-up measures:**
 - Call for **binding measures to set minimum standards**
(consumers, competition authorities, half of MS replies)
 - Call for **non-binding measures only**
(business, half of MS replies)
- Discussions in **European Parliament** still ongoing (report 11/2011)