Comments by Professor Bruce Lyons

on

European Commission Draft Guidance Paper

Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union

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1. The aim of the Guidance isset out on p.2 of the consultation 'is to offer assistance to courts and parties involved in actions for damages by making more widely available information relevant for quantifying harm caused by infringements of the EU antitrust rules'. The guidance is generally strong on broad techniques that might be used for quantifying harm, but is limited on how to distinguish between alternative economic evidence or disputes over the value of specific evidence.[1] In practice, such issues are likely to loom large in damages actions. The following comments are grouped as issues relating to data, econometrics and appropriate burden of proof. The latter draws attention to an important issue that distinguishes direct price raising from foreclosure damages.

Data issues

2. Nothing is said about the very serious difficulties of gathering appropriate data, some of which are inherent to competition damages actions. This is partly because much of the relevant data resides with the defendants, but also because of the Commission's understandable desire to maintain the power of leniency applications (firms would be less likely to seek leniency if it involved the provision of data that would enable successful or larger claims for damages). This is important because the courts should be made aware that claimants will often have to use limited information to substantiate their claim.

3. The central 'before and during' comparison technique for estimating the effects of anticompetitive behaviour can suffer from a fundamental flaw that systematically underestimates damages. The onset of anticompetitive behaviour is often triggered by an event that either has undermined or is expected to undermine profitability.[2] In such cases, prices may rise little or not at all, or even fall, following this behaviour.[3] However, consumers are still suffering from prices that are higher than they should be in a competitive

[1] For a discussion of the relative merits of some of the techniques discussed, though in the context of wider competition policy evaluation, see Stephen Davies and Peter Ormosi, 2010, 'Assessing Competition Policy: Methodologies, Gaps and Agenda for Future Research' *Centre for Competition Policy Working Paper* 10-19.

[2] The economics literature has a well-developed understanding of cartel breakdown, but it is much thinner on the origins of cartels. Levenstein and Suslow, in their classic review of the literature, write: 'Many studies report that a cartel was formed during a period of falling prices, but this is not always, or even usually, associated with falling demand (either for the particular product or in the general economy). Instead, falling prices were often the result of entry or the integration of previously distinct markets.' [Levenstein and Suslow, 'What determines cartel success?' *Journal of Economics Literature*, March 2006, XLIV, p.67]. See also Nicolas Schmitt and Rolf Weder, 'Sunk costs and cartel formation: theory and application to the dyestuff industry', *Journal of Economic Behaviour and Organization*, 1998, 36, 197-220. They find that the Swiss dysstuffs cartel anticipated the increase in post-war competition.

[3] For why cartels may gradually increase and decrease prices to avoid attracting attention, see Joe Chen and Joseph Harrington, 2006 'Cartel pricing dynamics with cost variability and endogenous buyer detection' *International Journal of Industrial Organization*, 24(6), pp. 1185-1212. For evidence that post-cartel prices do not return to the competitive level, see: de Roos, N. (2007) 'Examining Models of Collusion: The Market for Lysine' *International Journal of Industrial Organization*, 24, pp. 1083–1107; and Harrington, J. (2004) 'Post-Cartel Pricing During Litigation' *Journal of Industrial Economics*, 52, pp. 517–533.

market (i.e. there is still harm). More sophisticated techniques can sometimes help. The guidance might usefully make this point.[4]

Econometric issues

4. There is no discussion of statistical significance tests. This is an important omission because experts will inevitably argue about this. In truth, statistical significance should have only a limited role when a decision must be made despite the paucity of data, but this point is worth making so that a fog is not created around reasonable evidence.[5]

5. Another source of apparently esoteric debate will be the choice of estimation technique. The only mention of this is in footnote 78 (attached to #68[6]), but the last sentence is inaccurate. The choice of estimation technique depends on the characteristics of the data (or 'data generating process') and not on 'the general functioning of the industry in question'. All the reader really needs to be aware of is that a) there are various estimation techniques and b) one of these is likely to be most appropriate when analysing a particular data set.

6. In terms of presentation in the current draft, there are some attractive pictures which are very helpful for getting across the basic idea (between #62 and #73). My concern is that the real world is not as pretty – there is much more 'noise' in the data. Unless there is a warning, this may lead to false expectations on the part of the courts.

7. Although the guidance is already very long, brief mention of points 2-6 above is likely to be helpful as long as the phrasing avoids technicalities. There is plenty of room for editing out text elsewhere in the draft.

Burden of proof

8. It is not in the power of the guidance to direct national courts. However, judges fully understand the principle that an informational advantage of one party should naturally lead to that party holding the burden of proof. In the case of cartel damages, national courts should be encouraged to consider a rebuttable presumption of 20% price rise in the case of a convicted cartel (on the basis of evidence such as that discussed in #122-124). This is more

[4] The guidance helpfully uses fictitious examples which provide a related illustration of this point. In a natural desire to be contemporary, the dates range from pre-2008 to more recent crisis years. This naturally attracts the reader's attention to major shocks to the market that can affect a damages estimation.

[5] Statistical significance relates to the standard of proof, though not in a straightforward way. The standard of proof is quite distinct from the burden of proof discussed below. Footnote 90 attached to #83 mentions 'standard errors' used in a related but somewhat different context. However, this footnote is unlikely to help anyone who does not already understand statistics. The classic discussion of statistical significance and related matters on economic evidence is provided by Daniel L. Rubinfeld 'Econometrics in the Courtroom' *Columbia Law Review*, Vol. 85, No. 5 (Jun., 1985), pp. 1048-1097.

[6] #x refers to paragraph x of the Draft Guidance Paper.

equitable and efficient than the apparent status quo of a rebuttable presumption that the cartel did not raise prices. It would be helpful to bring this possibility to the attention of the courts.

9. In the case of cartels, damages in addition to a fine have a positive effect on deterrence. This is because the probability of detection times the size of fine is likely to be less than the payoff to cartel formation. Even in the unlikely event that it was not, there is no competition downside of excessive deterrence of cartels. However, there is a substantial danger of chilling competition in the context of business practices that may result in foreclosure but in other circumstances may be pro-competitive (e.g. quantity discounts, exclusive dealing). Excessive deterrence is possible if the penalties of a business practice are seen to be large in one case where it is anticompetitive, and consequently other businesses play safe in avoiding the practice in circumstances where it would be pro-competitive. Furthermore, the reward of damages can act as an incentive for a weak competitor to threaten a private action in order to induce a strong competitor to compete less aggressively. This does not mean that there should be no damages actions in foreclosure cases. However, alongside the informational advantages a competitor is likely to have in relation to the relevant calculation of damages (relative to the information available to customers), it does suggest that courts might reasonably place the burden of proof on the plaintiff (i.e. foreclosed firm). Once again, it would be valuable for the guidance to help the courts appreciate these important economic differences between cartels and foreclosure cases.

Detailed points

10. It will not be clear to the reader why dynamic models are particularly useful for foreclosure (footnote 92 attached to #86). Confusion is likely with repeated game models of collusion. Best deleted.

11. There is no discussion of consumers harmed by non-cartel members who raise price under the cartel's 'umbrella' (p.42), although a similar feature is mentioned under foreclosure issues (#194).

12. There is no explicit discussion of how to measure the change in quantity for the quantity effect (p.50-51).

13. There is no consistent discussion of consumer benefits (or harm) due to exclusionary practices. Harm is mentioned in #194, though the associated boxed example is more awkward than the one attached to #185. These cases can sometimes be an additional (spurious) weapon in a contractual dispute. National courts will have their own rules or precedents on freely entered contracts.

14. It is very hard to prove actual recoupment (box in #191). Indeed, the abuse would have to be discovered very late to observe this stage of the anticompetitive strategy. Indeed, Titan Airways would have to be very foolish if it was to try raising price above the pre-foreclosure

level while its foreclosed rival was complaining to the authorities. The recoupment discussion might be excised.

And finally…

15. I observe that it is very courageous of the Commission to provide the example in the box on p.56. The acquisition of Rawbeta by Eusolv should never have been allowed because it immediately led to a breach of Article 102. This global merger would undoubtedly have been reviewed under the ECMR and the Commission clearly got its merger decision wrong!

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