

Quantifying damages: towards guidance for courts

Vereniging voor Mededingingsrecht

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Aim: guidance that fits within the legal reality

- 'search for the truth' versus practical approaches
 - commercial reality is complex (don't blame economists)
 - need to explain economic concepts in an accessible way
- differences in data availability and standards of proof
 - disclosure rules differ across jurisdictions
 - data availability differs at different stages of a case
 - courts in several Member States (eg, Germany, Italy, Sweden) have discretion to determine the damages value when evidence is limited

Guidance that fits within the legal reality (cont'd)

- principles of causation, remoteness, foreseeability
 - cartel damages: overcharge claim by actual purchasers more likely than lost-volume claim or claim by would-be purchasers
 - exclusionary conduct: actual loss versus lost profit and loss of chance

- European Commission objective:
 - 'provide pragmatic, non-binding assistance in the difficult task of quantifying damages in antitrust cases, both for the benefit of national courts and the parties'

(staff working paper accompanying
White Paper, April 2008, p. 60)

Main stages in any damages estimation

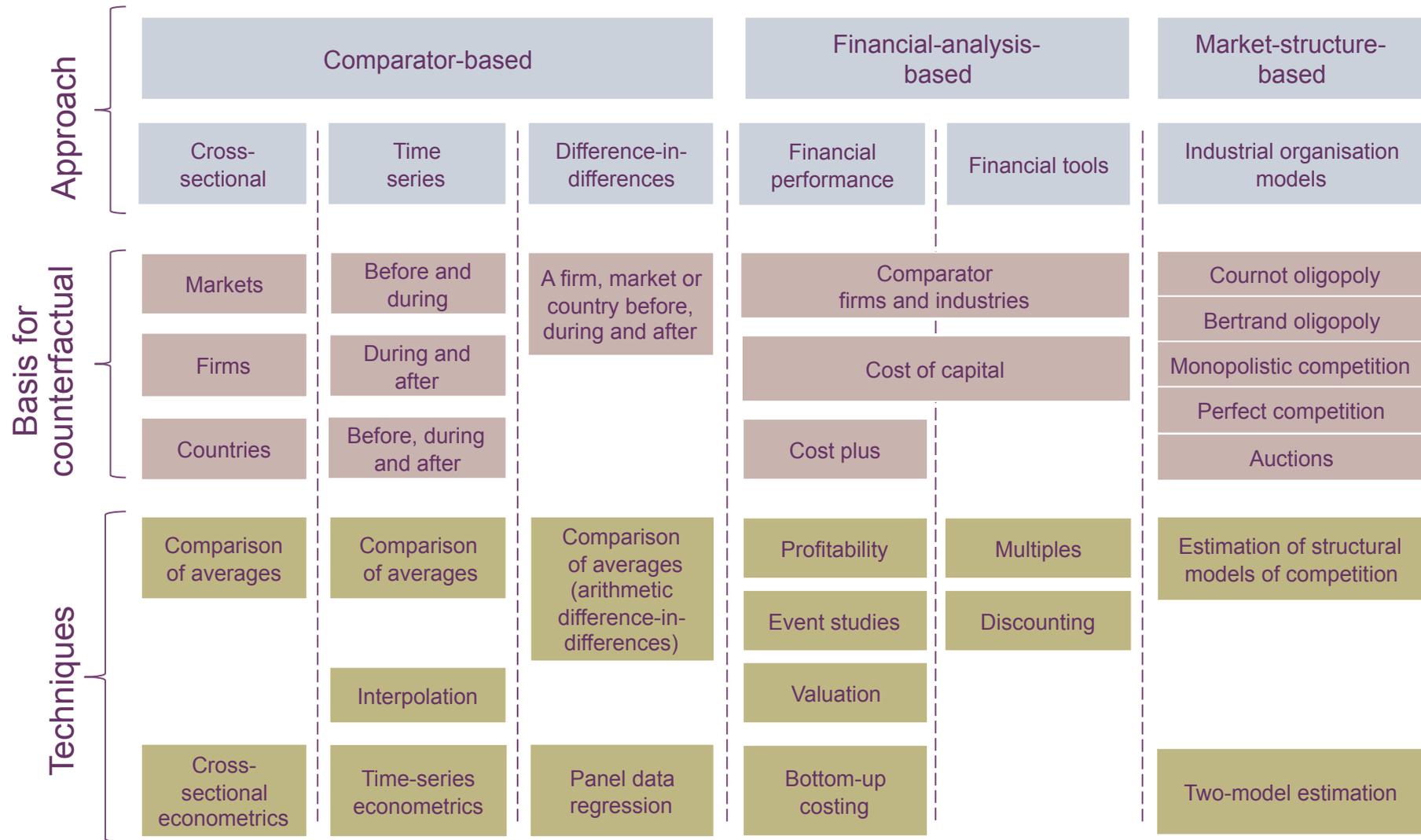
1. Determining the counterfactual ('but for') scenario

- usually the stage which involves most analysis (and debate)

2. Moving from the factual/ counterfactual to a final value

- includes discounting and applying interest
- can make a significant difference in damages estimates

Classification of methods and models

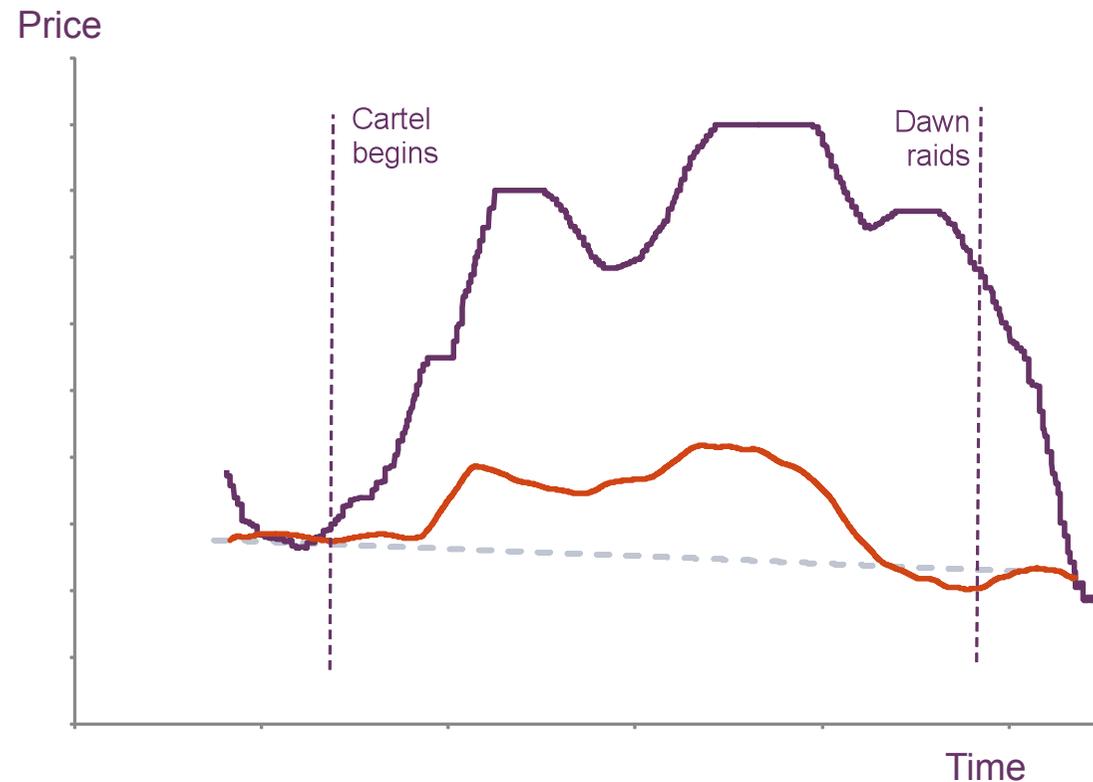


How to choose the right approach?

- within each approach there is a range of techniques from the simple to the more sophisticated
 - eg, simple averages versus regression in comparator-based approaches
- the appropriate method will depend on data availability and legal requirements
 - the methods are complements not substitutes; difficult to prescribe *a priori*
 - ‘pooling’ of (reliable) results is an acceptable method to get to single final value

Comparator-based Before, during, after example

- various techniques for estimating the counterfactual, ranging from simple to more sophisticated
 - comparison of averages
 - linear interpolation (dotted line), and with exchange rate adjustments (red line)
 - time-series econometrics



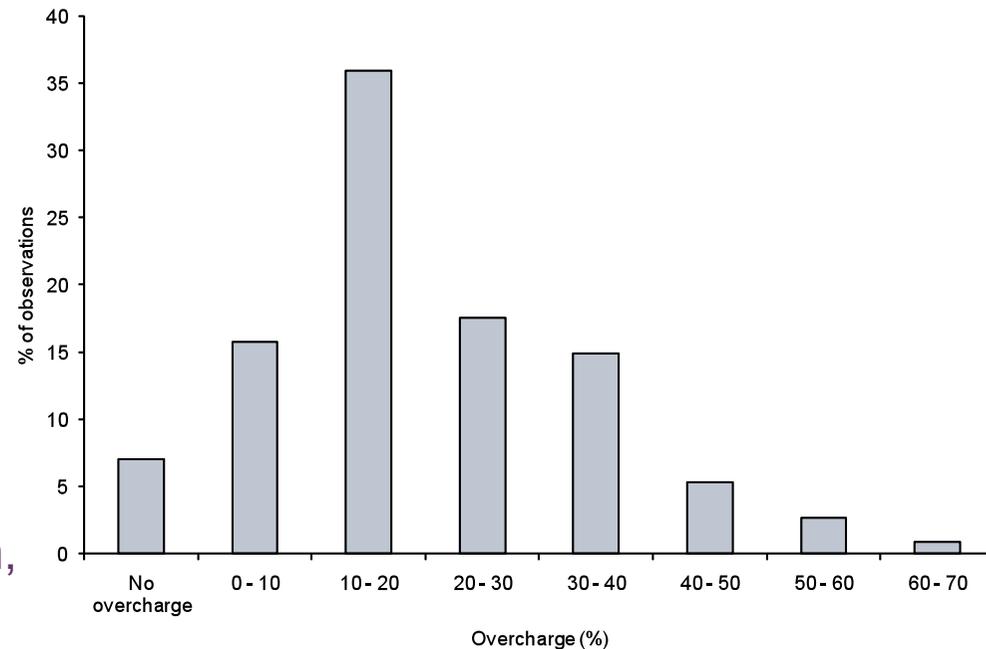
Conduit Europe v Telefónica

- exclusionary abuse: what is the harm?
- €6m claim by competitor
- comparator-based approach
 - comparison with market share in UK
 - econometric analysis
 - causation: other explanatory factors?
- only actual loss awarded (€670,000)
- approach used was too complicated?

Further insights

Overcharges observed in past cartels

- variation in observed overcharges is large
 - not informative to consider 'typical' values
- be careful with the data
 - 'overcharge' can be measured two ways
- useful background information, but case-by-case assessment required
 - no economic case for 'Hungarian'-style rules



Further insights

Pass-on of overcharges

- market structure—economic theory
 - perfect competition results in 100% pass-on, while (on certain assumptions) a monopolist passes on 50%
 - pass-on is zero if competitors bought input from non-cartelised market
 - no double-counting along the different layers of the chain
- other factors—micro-structure of price-setting
 - pricing friction and menu costs
 - uniform versus variable mark-ups
- empirical estimation where more data is available

Applying interest

The main current gap between the law and the economics?

- simple versus compound interest
 - ‘the obvious reason for awarding compound interest is that it reflects economic reality’

Sempra Metals [2007] UKHL 34

- statutory versus commercial interest rate (cost of debt)
 - ‘The Judgments Act rate is fixed for the benefit of unpaid judgment creditors. It is not normally an appropriate rate of interest to award in the context of a dispute between two businesses ... If Claymore or a company such as Claymore, had sought to borrow £750,000.00 over the period since June 2004, Claymore would have had to pay interest at more than 1% over base rate.’

Claymore v Nautilus [2007] EWHC 805 (TCC)

- cost of debt versus cost of capital
- where long time periods are involved, the impact can be huge

Final thoughts

- many claims settle, so there are relatively few judgments to give further guidance
- yet, the body of court precedent across Europe is growing
 - Austria, Denmark, France, Germany, Italy, Lithuania, Netherlands, Spain, Sweden, Switzerland and the UK
 - interesting precedent elsewhere too: USA, Canada, South Africa
- the economics and finance toolkit can be of use:
 - rich mix of simple and more sophisticated techniques
 - further insights into matters such as pass-on and interest
 - of relevance to damages outside competition law as well

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