

Legal instruments for the estimation of harm

Quantification of harm: how to quantify and estimate the harm

EU Damages Directive Implementation – Half Time
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- Issues of quantifying harm
- Rules of the Directive
- Other legal instruments

Agenda

Issues of quantifying harm

- Three main issues:
 - What is harm?

not all types of harm caused by anticompetitive practices falls under definition of damages (**umbrella effect**, **loss of innovation**)
 - How do we calculate harm?

comparative and other methods
 - If calculation is not possible, how do we estimate harm?

legal instruments (judicial estimation, presumption, expert opinion)

Rules of the Directive

– Art. 17

- **Judicial estimation**

national courts empowered to estimate amount of harm if practically impossible or excessively difficult precisely to quantify harm

- **Presumption**

cartels cause harm (rebuttable)

- **Expert opinion**

national competition authorities may assist national courts to determine the quantum of damages

Country	Grounds	Amount
Austria	Unreasonable difficulty	Judge's discretion
Belgium	Mathematical certainty not possible	Reasonable amount
Czech Republic	Impossibility / excessive difficulty	Judge's discretion
Estonia	Impossibility	Judge's discretion
Finland	Impossibility or exceptional difficulty / cost	Reasonable amount
Germany	Proof of approximate amount of damage	Approximate amount
Hungary	Impossibility	Appropriate amount
Italy	Impossibility or exceptional difficulty	Equitable amount
Lithuania	Difficulty	Profit of plaintiff
Luxembourg	Impossibility	Equitable amount
Poland	Impossibility or difficulty	Appropriate amount
Slovenia	Impossibility / excessive difficulty	Judge's discretion
Sweden	Impossibility or excessive difficulty / disproportionate cost	Reasonable amount

Presumption

- Oxera study (2009)
 - 93% of cartel cases lead to an overcharge
- Connor / Lande (2006)
 - EU-wide cartels have an average overcharge of 28-54%
- Hungary
 - Section 88/C of the Competition Act
 - price fixing, market allocation, output limitation
 - overcharge was 10%
 - rebuttable

National Competition Authorities

- Amicus curiae
 - Art. 15 of 1/2003/EC Regulation
- Rüggeberg-Schinkel (2006): consolidated damages report
- Issues:
 - no sufficient evidence available
 - no sufficient expertise, resources (negative effect on public enforcement)
 - equality of arms

Expert opinion

- Expert evidence is generally admissible in Member States
- Issues:
 - costs
 - qualification
 - appointment

Separate procedure

- Separate phase
 - Czech Republic, France, Ireland, Italy, Malta, Netherlands, Poland, Spain
- Separate decision
 - Austria, Belgium, Denmark, Estonia, Germany, Hungary, Portugal, Slovenia



Thank you for your attention!

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