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# Recent Developments in European and Hungarian Competition Law

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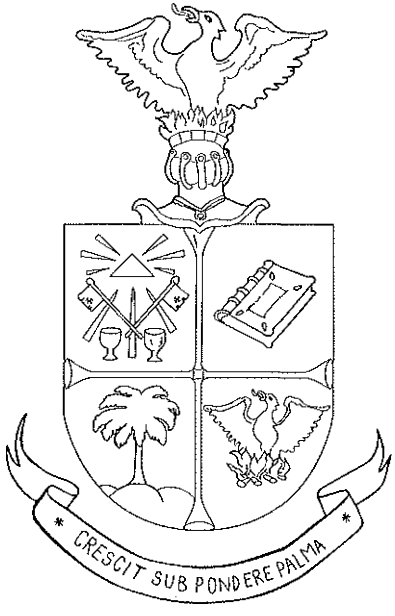


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# Quantifying Harm in Action for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union – Some Remarks on the Draft Guidance Paper of the European Commission

The full effectiveness of the EU antitrust rules (Articles 101 and 102 TFEU) requires that any individual can effectively claim compensation for the harm caused by an infringement of these rules. Damages actions based on an infringement of these rules complement public enforcement by allowing those who have been harmed to receive compensation for their harm. While the right to compensation is recognised by EU law, a range of obstacles currently stand in the way of injured parties effectively receiving the compensation to which they are entitled.

In its 2005 Green Paper on damages actions for breach of the EC antitrust rules, the Commission identified difficulties in quantifying the harm suffered by injured parties as one of the key issues in antitrust damages actions. In its 2008 White Paper, Commission announced its intention to draw up a framework with pragmatic, non-binding guidance on quantifying the harm suffered in such actions.

In June 2011 the Commission launched a draft Guidance Paper. The main aim of it 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 Paper therefore provides insights into the harm caused by infringements of these rules to different categories of injured parties and, in particular, presents the main methods and techniques currently available to quantify such harm.

The Guidance Paper is purely informative, does not bind national courts and does not alter the legal rules applicable in the Member States to damages actions based on infringements of Article 101 or 102 TFEU. In particular, whether any and, if so, which of the methods and techniques described in the Guidance Paper are considered appropriate to use in a given case before the courts of the Member States depends on national law applied in accordance with the above-mentioned EU law principles of effectiveness and equivalence. Relevant considerations in this respect are likely to include whether a certain method or technique meets the standard required under national law, whether sufficient data are available to the party charged with the burden of proof to apply the method or technique and whether the burden and costs involved are proportionate to the value of the damages claim at stake. Excessive difficulties in exercising the right to damages guaranteed by EU law and therefore concerns in view of the principle of effectiveness could arise, for instance, through disproportionate costs or through overly demanding requirements regarding the degree of certainty and precision of a quantification of the harm suffered. It may be that national courts, in a particular case, can use pieces of

direct evidence relevant for the quantification of harm, such as documents produced by an infringing undertaking in the course of business regarding agreed price increases and their implementation or assessing the development of its market position. The availability of such evidence may play an important role when a court decides whether any, and if so which, of the methods and techniques set out below are necessary to be used by a party to meet the required standard of proof under applicable law.

In the followings I would like to give a short summary of this document, the most important part of it, and at the end to make some comments.

## 1. The right to compensation

Everyone who has suffered harm because of an infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) has a right to be compensated for that harm. The Court of Justice of the EU held that this right is guaranteed by primary EU law. Compensation means placing the injured party in the position it would have been in had there been no infringement. Therefore, compensation includes reparation not only for actual loss suffered (damnum emergens), but also for loss of profit (lucrum cessans) and the payment of interest. Actual loss means a reduction in a person's assets; loss of profit means that an increase in those assets, which would have occurred without the infringement, did not happen.

In so far as there are no EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of this right to compensation guaranteed by EU law. Such rules, however, must not render excessively difficult or practically impossible the exercise of rights conferred on individuals by EU law (principle of effectiveness), and they must not be less favourable than those governing damages actions for breaches of similar rights conferred by domestic law (principle of equivalence).

In an action for compensation of harm suffered because of an infringement of Article 101 or 102 TFEU, national courts have to determine the amount to be awarded to the claimant in the event that the claim is well-founded. Assessing and proving the quantum of damages in actions for damages is often difficult. This is particularly true in competition law cases. National law – which has to be laid down and applied in accordance with the rules and principles of EU law referred to in paragraphs 1 and 2 above – determines the legal framework in which courts fulfil their function of adjudicating disputes between parties.

Within their respective legal frameworks, legislators and courts have often adopted pragmatic approaches in determining the amount of damages to be awarded. For instance, they have established presumptions and allowed for the burden of proof to shift, e.g. once a party has provided a certain amount of facts and evidence. Also, the law of the Member States may provide that the illicit profit made by the infringing undertaking(s) plays a role — either directly or indirectly — in estimating the harm suffered by injured parties.

## 2. General approach to quantifying harm in competition cases

Compensation for harm suffered aims to place the injured party in the position in which it would have been had the infringement of Article 101 or 102 TFEU not occurred. Quantification of harm suffered therefore requires the actual position of the injured party to be compared with the position in which this party would have been but for the infringement. This assessment is sometimes called 'but-for analysis'.

The central question in antitrust damages quantification is hence to determine what is likely to have happened without the infringement. This hypothetical situation cannot, however, be observed and some form of estimation is therefore necessary to construct a reference scenario with which the actual situation can be compared. This reference scenario is referred to as the 'non-infringement scenario' or the 'counterfactual scenario'.

The type of harm for which the claimant seeks compensation determines which kind of economic variables (such as, for instance, prices, sales volumes, profits, costs or market shares) need to be considered. For example, in a cartel leading to higher prices for customers of the cartelists, a non-infringement price will need to be estimated to have a reference point for comparing it with the price actually paid by these customers. In an abuse of dominance case leading to the market foreclosure of competitors, the profits lost by these competitors may be measured by comparing their actual turnover and profit margins with the turnover and profit margins they were likely to have generated without the infringement.

It is impossible to know with certainty how a market would have exactly evolved in the absence of the infringement of Article 101 or 102 TFEU. Prices, sales volumes, and profit margins depend on a range of factors and complex interactions between market participants that are not easily estimated. Estimation of the hypothetical noninfringement scenario will thus by definition rely on a number of assumptions. In practice, the unavailability or inaccessibility of data will often add to this intrinsic limitation.

For these reasons, quantification of harm in competition cases is, by its very nature, subject to considerable limits as to the degree of certainty and precision that can be expected. There cannot be a single 'true' value of the harm suffered that could be determined, but only best estimates relying on assumptions and approximations. Applicable national legal rules and their interpretation should reflect these inherent limits in the quantification of harm in damages actions for breaches of Articles 101 and 102 TFEU in accordance with the EU law principle of effectiveness so that the exercise of the right to damages guaranteed by the Treaty is not made practically impossible or excessively difficult.

The Guidance Paper outlines a number of methods and techniques that have been developed in economics and legal practice to establish a suitable reference scenario and to estimate the value of the economic variable of interest (for example, in a price cartel the likely price that would have been charged for the product had the infringement not occurred). The methods and techniques are based on different approaches and vary in terms of the underlying assumptions and the variety and detail of data needed. They

also differ in the extent to which they control for factors other than the infringement that may have affected the situation of the claimant. As a result, these methods and techniques may be more or less difficult, time-consuming and cost-intensive to apply.

Once a value for the relevant economic variable (such as, price or, for instance, profit margins, or sales volumes) in the hypothetical non-infringement scenario has been estimated, a comparison with the actual circumstances (e.g. the price actually paid by the injured party) is necessary to quantify the harm caused by the infringement of Article 101 or 102 TFEU.

Addition of interest will also need to be considered. The award of interest, pursuant to the applicable national rules, is an essential component of compensation for harm suffered through infringements of rights conferred by the Treaty. As the Court of Justice has emphasised, full compensation for the harm sustained must include the reparation of the adverse effects resulting from the lapse of time since the occurrence of the harm caused by the infringement. These effects are monetary devaluation and the lost opportunity for the injured party to have the capital at its disposal. National law may account for these effects in the form of statutory interest or other forms of interest, as long as they are in accordance with the above-mentioned principles of effectiveness and equivalence.

### 3. Structure of the guidance paper

The basis of a claim for damages is the submission that an infringement of Article 101 or 102 TFEU adversely affected the situation of the claimant. Broadly speaking, two principal categories of harmful effects of such infringements can be distinguished:

(a) Infringers can exploit their market power by raising the prices their direct customers pay. Among the infringements having such effect are exploitative abuses within the meaning of Article 102 TFEU. Undertakings can also raise prices to their customers by engaging in the kind of practices forbidden by Article 101 TFEU. Typical examples are price fixing, market sharing or output limitation cartels.

Raised prices mean that the customers who purchase the affected product or service pay an overcharge. Moreover, a rise in prices may also lead to less demand and may entail a loss of profits for customers who use the product for their own commercial activities.

(b) Undertakings can also infringe Articles 101 and 102 TFEU by excluding competitors from a market or reducing their market share. Typical examples are abuses of a dominant position through margin squeeze, predatory pricing or tying, or certain vertical exclusivity agreements between suppliers and distributors that infringe competition law. Such practices have a significant effect on competitors, who suffer harm as they forego business opportunities and profit in this market. Where foreclosure of competitors is successful and competitive pressure in a market diminishes, customers will be harmed too, typically by a rise in prices.

Infringements of Articles 101 and 102 TFEU can also have further harmful effects, for example adverse impacts on product quality and innovation. The Guidance Paper

focuses on the two principal categories of harm and the categories of injured parties. The methods and techniques described in the Guidance Paper may, nonetheless, also be relevant in damages actions concerning other types of harm and other injured parties.

Part 3 of the Guidance Paper addresses specifically the quantification of the kind of harm referred to in paragraph 18(a). This part includes a description of the basic effects on the market of price increases resulting from an infringement and illustrates how these types of harm (in particular the harm resulting from the payment of an overcharge and the harm associated with a reduction in demand) can be quantified.

Part 4 of the Guidance Paper addresses specifically the quantification of the kind of harm referred to in paragraph 18(b). This part includes a description of the possible effects of the exclusion of competitors from a market and illustrates through examples how these types of harm (namely the loss of profit of the excluded competitor and the harm to customers) can be quantified.

The main methods and techniques available to quantify the harm resulting from infringements of Article 101 or 102 TFEU are common to all kinds of harm caused by such infringements. Part 2 of the Guidance Paper therefore provides a general overview of these methods and techniques. In particular, it gives more information on the basic assumptions on which these methods rely and explains their application in practice.

## 4. Methods and Techniques

The strength of all comparator-based methods lies in the fact that they use real-life data that are observed on the same or a similar market. The comparator-based methods rely on the premise that the comparator scenario can be considered representative of the likely non-infringement scenario and that the difference between the infringement data and the data chosen as a comparator is due to the infringement. Whether the level of similarity between infringement and comparator markets or time periods is considered sufficient in order to perform a comparison depends on national legal systems. Where significant differences exist between the time periods or markets considered, various techniques are available to account for such differences.

### *4.1. Methods for establishing a non-infringement scenario*

#### 4.1.1. Comparison over time on the same market

One frequently used method consists in comparing the actual situation during the period when the infringement produced effects with the situation on the same market before the infringement produced effects or after they ceased. For instance, where an undertaking abused its dominant position by foreclosing a competitor from the market during 2004 and 2005, the method could look at e.g. the competitor's profits during the infringement period and its profits in 2002 and 2003 when there was not yet an infringement. Another example would be a price fixing cartel that lasted from 2005 to

2007 where the method could compare the price paid by the cartel customers during the infringement period with the price paid by customers in a period after the infringement, e.g. in 2008 and 2009.

An advantage of all methods comparing, over time, data from the same geographic and product market is that market characteristics such as the degree of competition, market structure, costs and demand characteristics may be more comparable than in a comparison with different product or geographic markets. However, also in comparisons over time it happens that some differences between the two data sets are not only due to the infringement. In such cases, it may be appropriate to make adjustments to the data observed in the comparator period to account for differences with the infringement period or to choose a different comparator period or market. For instance, in the case of a long-lasting infringement, the assumption that e.g. prices of 10 years ago would have remained unchanged over time absent the infringement is probably overly strong and may lead to opting e.g. for a comparison with the pre-infringement period and the post-infringement period.

#### 4.1.2. Comparison with data from other geographic markets

Another comparator-based method consists in looking at data observed in a different geographic market for the purpose of estimating a non-infringement scenario. These may be data observed across the entire geographic comparator market or data observed in relation to certain market participants only. The same type of comparison can, in principle, be undertaken with regard to any other economic variable, e.g. the market shares, profit margins, rate of return on capital, value of assets, or level of costs of an undertaking. A comparison with the commercial performance of firms active on another geographic market that is unaffected by the infringement will be particularly relevant in cases of exclusionary behaviour.

The choice of a geographic comparator market may also be influenced by uncertainties about the geographic scope of an infringement. Geographic markets on which the same or a similar infringement occurred are, in principle, not good candidates for being used as comparator markets. Also neighbouring markets on which no similar infringement occurred may still have been influenced by the anticompetitive practices on the infringement market (e.g. because prices on the neighbouring market were raised in view of the increased prices on the infringement market and lesser competitive pressure emanating from this market). A comparison with such markets will not show the full extent of the harm suffered, but they may, nonetheless, constitute a useful basis to establish a lower-bound estimate of the harm caused on the infringement market. This means that a party to an action for damages could, in principle, safely choose to rely on the comparison with a geographic market that was influenced by the same or a similar infringement, in particular where such influence is likely to have been rather small.

### 4.1.3. Comparison with data from other product markets

Similar to the comparison across geographic markets is the approach to look at a different product market with similar market characteristics. For example, in a case of exclusionary behaviour partially foreclosing a company selling one product, the profit margin earned by that company in the infringement market could be compared with the profit margin for another product that is traded (by a similar or the same company) in a distinct but similar product market.

The considerations discussed in the context of geographic comparator markets are, mutatis mutandis, also likely to be relevant for the choice of a suitable comparator product market. They will often relate to the degree of similarity between the two product markets. In particular, the comparator product should be carefully chosen with a view to the nature of the products compared, the way they are traded and the characteristics of the market e.g. in terms of number of competitors, their cost structure and the buying power of customers. Uncertainties as to whether a potential comparator product market was affected by the infringement or a similar infringement of Article 101 or 102 TFEU can also play a role.

### 4.1.4. Combining comparisons over time and across markets

Where sufficient data are available, it may be possible to combine comparisons over time and comparisons across markets. This approach is sometimes called the 'difference in differences' method because it looks at the development of the relevant economic variable (e.g. the price for flour) in the infringement market during a certain period (difference over time on the infringement market) and compares it to the development of the same variable during the same time period on an unaffected comparator market (difference over time on the non-infringement market). The comparison shows the difference between these two differences over time. This gives an estimate of the change in the variable produced by the infringement and excludes all those factors that affected both the infringement and the comparator market in the same way. The method is thus a way to isolate the effects of the infringement from other influences on the relevant variable.

A simple example derived from the flour cartel may illustrate the method: assume that a before, during and after comparison reveals an increase in price of € 40 per 100 kg bag of flour in the Member State where the cartel occurred between 2005 and 2008. Looking at an unaffected geographic market over the same period may show that prices for flour rose by € 10 per 100 kg bag due to increased costs for an input product (cereals). Assuming that the increased input costs also concerned the infringement market, a comparison of the different development of prices on the infringement and the comparator market would indicate the price difference caused by the flour cartel. In the example, this would be € 30 per unit.

The strength of the "difference in differences" method is therefore that it can subtract out changes unrelated to the infringement that occurred during the same time period as

the infringement. It rests, however, to a large extent on the assumption that these other changes affected both markets similarly. The considerations regarding the application of the comparison over time and across market methods, in particular the need for sufficient similarity, are also relevant for the difference in differences method. From a practical point of view, this method usually requires a range of data from different markets and periods of time that may not always be easy to obtain; lesser amounts of data may, however, still allow lower-bound or approximate estimates to be derived.

### *4.2. Implementing the method in practice: techniques for estimating the price or other economic variable in the non-infringement scenario*

Once a suitable comparator-based method for establishing a non-infringement scenario has been chosen, various techniques are available to implement this method in practice. These techniques differ mainly in the degree to which they rely on individual or average data (e.g. price observations), and in the degree to which the data observed in the comparator market or period are subject to further adjustment. As a consequence, these techniques differ in the amount of data they require in order to be carried out.

#### 4.2.1. Simple techniques: individual data observations, averages, interpolation and simple adjustments

Depending on the requirements under applicable national law and on the circumstances of the case, especially the degree of similarity between the infringement market and the comparator market or period, the data observed may be compared directly, i.e. without further adjustments, with the data observed in the infringement market.

The amount of data observed for the variable of interest (e.g., in the flour cartel example, the price for flour) in the comparator markets or comparator time periods may range from only one or very few data observations (i.e. the price observed in a small number of transactions) to a large number of data observations. In bidding markets, for example, auctions may occur very infrequently and at the time of the damages estimation only the price observed in the one tender after the infringement may be available. A similar situation could occur in industries where long-term contracts are common. It may be appropriate to use damages estimations based on single data observations where these are sufficiently representative for the period of interest.

Where looking at comparator markets or time periods produces a greater number of data observations, e.g. the prices paid by the injured party in a series of post infringement transactions, or the prices paid by a number of customers in another geographic market, these data observations can be used either individually or in the form of averages.

The use of various forms of averages or other forms of data aggregation can be appropriate, provided that like with like is compared. For example, where a wholesaler claims damages for having purchased a product in January, May, July and October 2009 from the participants in a price cartel and where the chosen method is comparison

with another geographic market, the monthly average prices paid in that market by the same type of customer (wholesaler) during the same months may be the appropriate reference point (i.e. comparing January data with January data, May data with May data, and so forth). Comparing data from the same months will, for instance, account for seasonal differences over a year and thus make the comparison more reliable. If, however, little monthly price variation exists, the average price on the comparator market for the entire year of 2009 may be considered an appropriate indicator. It may also be the case that yearly data or other average data (e.g. aggregated industry data) are simply the only information available. Legal systems in the Member States may generally allow parties to rely on average data whilst granting the defendant the opportunity to show that significant differences exist, and they may require the use of more disaggregated data where available.

### 4.2.2. Regression analysis

Regression analysis uses statistical techniques to investigate patterns in the relationship between economic variables and to measure to what extent a certain variable of interest (e.g., in the flour cartel example, the price for flour) is influenced by other variables that are not affected by the infringement (e.g. raw material costs, variations in customer demand, product characteristics, the level of market concentration). Regression analysis therefore makes it possible to assess whether, and by how much, factors other than the infringement have contributed to the difference between the value of the variable of interest observed on the infringement market during the infringement period and the value observed in a comparator market or during a comparator time period. Regression analysis is thus a way to account for alternative causes for the difference between the compared data sets. All comparator-based methods are, in principle, capable of being implemented through regression analysis provided that sufficient data observations are available.

In a regression analysis, a number of data observations for the variable of interest and the likely influencing variables are examined by means of statistical techniques. The relationship identified is usually described in the form of an equation (referred to as a 'regression equation' or 'regression model'). This equation makes it possible to estimate the effects of influencing variables on the variable of interest and to isolate them from the effects of the infringement. Regression analysis estimates how closely the relevant variables are correlated with each other, which may in some instances be suggestive of a causal influence of one variable on the other.

There are two main approaches to carrying out a regression analysis for damages estimation, depending on whether only data from non-infringement periods (markets) are used to build the regression equation or whether, in addition to non-infringement data, also data from within the infringement period (market) are used. If only data from non-infringement periods are used to estimate the regression, the regression equation would be used to 'forecast' the effect on the variable of interest during the infringement

period on the basis of the pattern identified outside this period ('forecasting approach'). Where, in addition, also data from the infringement period (market) are used to estimate the regression, the effect of the infringement would be accounted for in the regression equation through a separate indicator variable (called 'dummy variable'). Whether it is more appropriate to apply the forecasting or the dummy variable approach will depend on the circumstances of the case.

### 4.2.3. Choice of techniques

In a given case, the choice of technique will usually depend on a range of aspects, in particular the legal requirements and the factual circumstances of the case. Considerations relating to the standard and burden of proof are likely to be very relevant in practice.

Econometric techniques can increase the degree of accuracy of a damages estimate and may thus help in meeting a higher standard of proof if required under applicable rules. Whether regression analysis is required (possibly in addition to other evidence available) to meet such a standard, and on which party the burden of proof falls in this respect are questions of applicable law, including the EU law principle of effectiveness. It should be considered that carrying out an econometric analysis usually requires a significant number of data observations, which may not always be accessible. Moreover, it may also be that in a given procedural situation the applicable standard of proof does not require the party charged with the burden of proof to go further than the techniques mentioned above. This could be because the national legal system concerned considers the markets or periods compared as sufficiently similar and the estimate of damages resulting from the simple comparison as sufficiently accurate for what the party has to show in the given procedural situation. It may also be that the legal system, in view of the damages estimation presented by a claimant and the data that are reasonably accessible to him, provides for a shift of the burden of proof from the claimant to the defendant. In such a situation, the defendant may consider carrying out a regression analysis to rebut the submission of the claimant.

Considerations of proportionality may also play an important role, as the gathering of data and their econometric analysis can entail considerable costs (including those of third parties) that may be disproportionate to or even exceed the value of the damages claim at hand. Such considerations may also become relevant with a view to the principle of effectiveness.

Courts in the EU have mainly used straightforward implementations of comparator based methods without regression analysis, often on the basis of averages. They have also accepted simple adjustments to the value of observed data when it is quite straightforward to identify a differentiating factor between an infringement market (or period) and a comparator market (or period). To date, little experience exists with econometric analysis in actions for antitrust damages before courts in the EU, although such techniques can, as described above, provide valuable help in quantifying the harm suffered through infringements of Article 101 or 102 TFEU.

Courts in the EU sometimes also apply a 'safety discount', i.e. they deduct from the observed data values an amount sufficient, under the standards of applicable law, to take account of uncertainties in a damages estimate. Regression analysis can also be considered to account for these other possible influencing factors, and to obtain a "lower bound estimate" of the damages incurred.

## 5. Simulation models, cost-based analysis and other methods

Alongside comparator-based methods, other methods exist to establish an estimate for the hypothetical non-infringement situation. Such other methods include, in particular, the simulation of market outcomes on the basis of economic models, and the approach to estimate a likely non-infringement scenario on the basis of costs of production and a reasonable profit margin.

### *5.1. Simulation models*

Simulation methods draw on economic models of market behaviour. Economic studies on how markets function and how firms compete with each other have shown that markets with certain characteristics may allow the likely outcomes of market interaction to be predicted, for instance the likely price or production levels or profit margins. The branch of economics known as industrial organisation has developed models of competition for various types of markets that can simulate such outcomes. These models range from monopoly models to, at the other end of the spectrum, perfect competition models. Intermediate models designed to reflect firm behaviour in oligopolistic markets are, in particular, those designed originally in the 19th century by the economists Augustin Cournot and Joseph Bertrand and numerous extensions and variations of the Cournot and Bertrand models. These include, in particular, also dynamic oligopoly models based on game theory that take into account the repeated interaction between firms in the market.

Prices are likely to be highest (and sales volumes lowest) in a monopoly and prices are likely to be lowest (and sales volumes highest) in a situation of perfect competition. The particular oligopolies described by Bertrand ('Bertrand oligopoly') in markets with differentiated goods and by Cournot ('Cournot oligopoly') will normally lead to prices and volumes somewhere between perfect competition and monopoly levels; the exact outcome depends on the number of firms in the market and barriers to entry, on the degree of differentiation between them and their products and on other characteristics of the market at hand, such as demand characteristics (especially, how sensitive customers are to changes in price), and the capacities and cost structure of producers.

*5.2. Cost-based method*

Another approach to estimating the likely prices that would have emerged absent the infringement is provided by the cost-based method. This method consists in using some measure of production costs per unit, and adding a mark-up for a profit that would have been 'reasonable' in the non-infringement scenario. The resulting estimate for a per unit non-infringement price can be compared to the per unit price actually charged by the infringing undertaking(s) to obtain an estimate of the overcharge.

Different types of production costs may be suitable for implementing the cost-based method, depending on the characteristics of the industry concerned. It is, however, essential to ensure that the treatment of costs and margins is consistent. For example, if variable costs (i.e. costs that vary with the level of production) are considered as the basis of this exercise, a gross margin (i.e. the margin earned once variable costs have been deducted) should be added to calculate the price. It should also be noted that the relevant cost for determining prices may be not only the cost of the infringer, but also the cost of one of its competitors (e.g. if the price in the market is determined by the least efficient producer).

*5.3. Other methods*

The methods described in this Guidance Paper are those that have received most consideration so far in legal practice and academic scholarship. They should, however, not be seen as an exhaustive list, firstly, as the methods described could further evolve or others could be developed in practice.

Secondly, there are methods not discussed in this Guidance Paper could nonetheless prove useful, in particular, in order to establish an upper- or lower-bound or approximate estimate109 for the harm suffered. Especially where the legal systems provide for the possibility of an approximate estimation, national courts have opted for pragmatic techniques rather than a sophisticated implementation of the methods set out in Sections A and B above to establish the amount of damages to be awarded to injured parties. For instance, in cases where a new entrant has been foreclosed in breach of Article 101 or 102 TFEU, business plans have sometimes been used as a source of information on the likely profits of a business, albeit in some instances adjusted depending on the market circumstances or through the use of data from a comparator market or undertaking.

It is for national courts to establish whether, under the applicable rules, a method can be accepted for the quantification of harm in a given case, provided that the principles of effectiveness and equivalence of EU law are observed.

## 6. Choice of methods

Each of the methods can, in principle, provide useful insights in relation to all infringements of Article 101 or 102 TFEU and the different types of harm such infringements tend to produce. In particular, they make it possible to estimate not only the amount of illegal

price overcharge in a price fixing cartel but also, for example, the sales volume or the profit lost by a company suffering harm through an exclusionary abuse by a dominant competitor.

It should be stressed that it is only possible to estimate, not to measure with certainty and precision, what the hypothetical non-infringement scenario is likely to have looked like. There is no method that could be singled out as the one that would in all cases be more appropriate than others. Each of the methods described above has particular features, strengths and weaknesses that may make it more or less suitable to estimate the harm suffered in a given set of circumstances. In particular, the methods differ in the degree to which they are simple to apply, in the degree to which they rely on data that are the outcome of actual market interactions or on assumptions based on economic theory and in the extent to which they take into account factors other than the infringement that may have affected the situation of the parties.

In the specific circumstances of any given case, the appropriate approach to quantification must be determined under the applicable rules of law. Relevant considerations may include, alongside the standard and burden of proof under applicable legal rules, the availability of data, the costs and time involved and their proportionality in relation to the value of the damages claim at stake. The costs to be considered in this context may not only be those incurred when the party bearing the burden of proof applies the method, but also include the costs for the other party to rebut its submissions and the costs to the judicial system when the court assesses the results produced by the method, possibly with the help of a court-appointed expert. The costs and burden for an injured party and their proportionality may become particularly relevant with a view to the principle of effectiveness. Moreover, the decision under applicable law as to whether and, if so, which of the methods and techniques described in this Guidance Paper should be used may also depend on the availability of other evidence, for instance documentary evidence produced by the undertakings on the course of business showing that an illegally agreed price increase was actually implemented at a certain amount.

It may be that in a given case the application of several methods (e.g. comparison over time and comparison across geographic markets) is envisaged, either alternatively or cumulatively. Where two different methods yield results that are similar, such findings may lead a legal system to attribute stronger evidentiary value to the damages estimate, possibly a lower bound, based on these methods. Where, however, the application of two methods produces apparently contradictory results (especially when two opposing parties each rely on a different method), it is normally not appropriate either to simply take the average of the two results nor would it be appropriate to consider that the contradictory results cancel each other out in the sense that both methods should be disregarded. In such a scenario it would rather be appropriate to examine the reasons for the diverging results and to carefully consider the strengths and weaknesses of each method and its implementation in the case at hand.

## 7. Remarks

It is not an easy task to understand this Guidance Paper immediately, however, it contains a lot of useful information and tools for practising lawyers. Probably the main problem is that the rules of the EU competition law are too wide and not clear enough. If we have a look at the Hungarian Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition, we can find the rule of the 10% presumption. According to 88/C. § in lawsuits instituted for the enforcement of any civil claim against any person alleged to be an accomplice in any agreements and concerted practices between companies in violation of Section 11 of this Act or Article 81 of the EC Treaty aiming, directly or indirectly, for the fixing of prices, to secure a dominant position in the market, or for establishing production or sales quotas, for the purpose of determining the impact of the infringement on the price charged by the infringer, it shall be treated - until proven otherwise - that the infringement distorted the price to the extent of ten per cent.

This Hungarian rule makes the decisions on quantifying harm in actions for damages based on breaches of Art. 101 or 102 TFEU much easier, and could be a good example for other national or even for EU legislation. In this case such complicated Guidance Paper would not be necessary.