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**The quantification of damages caused by
an infringement of Art. 101 or Art. 102
TFEU: Is arbitration really a short cut?**

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for the

Ph.D in Law & Economics

2011-2014

5 KEYWORDS

1. Damages
2. Arbitration
3. Game theory
4. First Order Arbitration (FOA)
5. Alternative Dispute Resolution (ADR)

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ABSTRACT

The quantification of damages for a breach of the EU antitrust rules, Article 101 or 102 TFEU, is complex, demanding and time consuming.

Over the last few years, it has become one of the main issues in policy discussions within the European Union (EU). In particular, the European Commission (EC) investigated and revealed that the procedure for the quantification of damages caused by a breach of EU antitrust laws not only requires expert economic and econometric skills, but varies from Member State to Member State. As a consequence of this disparity, the EC issued new guidelines to render uniform the procedure for the quantification of damages caused by antitrust breaches across Member States and adopted new regulations to encourage private actions for damages.

The latter aim at encouraging the use of alternative dispute resolution (ADR) methods, most notably arbitration, to resolve antitrust disputes as they provide a more expedient process and a fairer solution than a national court judgment. Indeed, the *Fastweb S.p.A vs. Telecom Italia S.p.A*¹ case demonstrates how parties can reach completely different quantifications of damages. In particular, Telecom Italia's damages amounted to Euro 8 Million while Fastweb estimated Euro 644 Million of damages. This divergence was mainly due to the difference in the approaches used by the two parties: Fastweb used the benchmarking approach whereas Telecom Italia initially applied the analytical approach and then the so-called "before and after" methodology.

Furthermore, what we learn from this case is the tendency of the parties to behave strategically. Indeed, each of the parties tried to pull the decision of the arbitrator in its favour.

Therefore, arbitration may be compared to a non-cooperative or Bayesian game. Indeed, an antitrust dispute is characterised by asymmetric information. Hence, the parties thereto act strategically in order to push the arbitrator to issue a settlement in their favour. As a result, both parties are incentivized to make extreme offers, the effect of which is to slow down

¹ The documents are private and so they cannot be quoted. However, we thank the Italian University Luiss Guido Carli to have provided us with these documents.

the arbitration proceedings and lead the arbitrator to reach a settlement which does not correctly quantify the damages suffered.

Thus, we shall apply the game theory to arbitration disputes. Since there are no game theory models explaining strategic behaviours of the parties in arbitration cases for the quantification of damages caused by the infringement of competition law, we examine game theory models applied to the First Order Arbitration (hereinafter “FOA”) methodology, which is the renowned form of arbitration commonly applied in the determination of US baseball player salaries.

We analyse three different models, which broadly show the evolution of game theory applied to the FOA in the last 26 years. These three models are the Gibbons model “*Learning in equilibrium models of arbitration*” (1988), the Kilgour model “*Final-Offer Arbitration and Risk Aversion in Bargaining*” (2007) and the Deck, Farmer and Zeng model “*Amended Final Offer Arbitration is promising; Evidence from the Laboratory*” (2004).

An examination of these three models highlights the importance of requiring a system that has the double effect of encouraging the parties to avoid adopting extreme positions as well as converging in their offers.

The amended final offer arbitration (AFOA) seems to comply with both these requirements. Nevertheless, the fact that it involves a punishment could prove counter-productive by discouraging the parties from actually selecting arbitration as an ADR method to resolve their disputes. Thus, to be an effective private action for damages caused by an infringement of Article 101 or 102 TFEU, arbitration must be structured in a manner that enables the arbitrator to reach a fair settlement, encourages the parties to converge in their offers and incentivises the parties to actually select such arbitration mechanism to resolve their disputes.