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# Estimating damages to competitors from exclusionary practices in Europe: a review of the main issues in the light of national Courts' experience

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## 1 Introduction

Most of the discussions on antitrust damages in Europe have dealt so far with cartel damages<sup>1</sup>. There are obvious policy reasons for this (cartels are a clear policy priority), analytical reasons (cartel damages are less difficult to measure than those arising from exclusionary behaviour), and also more down-to-earth reasons (most of litigation experience in antitrust damages comes from the United States, where cartels supply a juicier area of activity than monopolization to ‘private attorney generals’<sup>2</sup>).

This is a pity: quite often, dominant companies foreclose competitors, causing several types of damages to them, and then to consumers, who will suffer from a lower output, and/or will be denied the increase in utility deriving from access to new or better-quality goods. Given that in Europe avoiding abusive behaviour by dominant companies is a policy goal that receives far more attention than in the United States, a reasonable development of private actions for damages resulting from exclusionary behaviour from dominant companies (‘exclusionary damages’) is a relevant policy objective.

On the other hand, this is a complex task, as:

- In private actions of this kind, competitors face competitors, and may have rational incentives to use the claim as a competitive weapon. If successful, in a decision or a settlement, the claimant expects to obtain substantial sums, and, or, important concessions from the dominant firm. Incentives to bring claims are here, therefore, not as weak as in most cartel cases.
- There are complex causation issues in exclusionary damages, which are not normally relevant in cartel damages: while the victim of a cartel can do little to increase or decrease its damages – with the obvious exclusion of passing-on (see below) - this is not the case for the victim of an exclusionary abuse, whose loss of profits may be attributable – wholly or partly – to its own decisions.
- A related point is mitigation, where different national approaches exist. While in the United States there is a clear obligation upon the victim of an antitrust offence to mitigate its damages, this is not the case in many European jurisdictions: in some of these (e.g. France) mitigation is not required, and any costs met by the claimant in mitigating damages will not be reimbursed, while in others victims

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<sup>1</sup> *Ex multis*, see Connor (2008). In their report for the Commission also Renda et al. (2007), when discussing damages measurement, are mostly concerned with cartels damages. Schmidt (2008) provides some discussion from a legal point of view.

<sup>2</sup> For recent American soul-searching on this, see Rosch (2008).

are required not to increase damages, but not really required to decrease them (Italy).

As a consequence, from a policy point of view, it would seem that the reasons that have been provided by the Commission in the White Paper for fostering private actions in Europe are at best far weaker for exclusionary behaviour than in the case of cartels.

Thus, while in the field of cartel damages importing some of the analytical techniques developed in the United States will certainly be very useful, the estimation of exclusionary damages in Europe calls for more complex, nationally-tinted analysis, which takes into account several legal factors, and recognizes that damages of this kind are not really a new issue for national courts in Europe. In commercial damages, cases where the growth of a company has been hampered, or it has been excluded somehow from a market, are relatively common, and here Courts have a lot of experience that should be appropriately understood and built upon: it is generally unwise to teach one's grandmother to cook eggs.

In order to discuss these issues, in this paper I will start (Section 2) with a brief review of the major types of harm arising from exclusionary behaviour, within which will be discussed the major legal and economic issues. Section 3 will then discuss in some detail the methods for damage estimation accepted by Courts in Europe, in the light of a number of cases which I was able to get hold of<sup>3</sup>, considering – where relevant – also the US experience. Section 4 will summarize the main points of my argument.

Where appropriate, given that the Commission's plans to publish a document providing guidance to national courts concerning the estimation of antitrust damages, some remarks will be provided concerning issues that might be addressed in such a document.

## **2 Harm and damages: an overview**

The foreclosed competitor will suffer, in general, a *damnum emergens*, a loss of profits, a loss of chance, and may suffer a loss of reputation. Consumers may suffer as well, from a restriction in output and/or from the unavailability to them of the new goods, or better goods, produced by the foreclosed competitor. This section will briefly review how such damages components may arise from abusive behaviour, and point out several legal

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<sup>3</sup> Never an easy task, as the Commission's National Court Cases Database must rely on institutional goodwill by member countries, which is not forthcoming. The *E-competitions* Bulletin ([www.concurrences.com](http://www.concurrences.com)) provides a better source, which I have complemented here with some decisions to which I was lucky to have access. In the discussion below, I have also drawn upon my knowledge of some pending or settled cases, about which no details are in the public domain.

and economic issues, some of which might benefit from some form of discussion or guidance coming from the Commission.

### *2.1 Behaviour, abusive behaviour and harm*

While it can be safely assumed, absent passing-on, that a cartel causes a damage to all those who purchased from its members, an equivalent assumption may not be entertained for abusive conduct. Thus, an abusive exclusionary conduct damages competition, but does not necessarily damage a specific competitor.

This depends in part on the type of behaviour. Exclusive dealing, refusal to supply and predation are indeed likely to damage all competitors, or at least those who have been targeted by the dominant firm. But this is not necessarily the case for other types of abuses: if a dominant company makes use of English clauses, it is certainly infringing competition law, and foreclosing some of its competitors, but it may not have foreclosed those who were not really able to compete with it, because of costs, quality, or brand. Similar remarks apply to the finding of a price- or a margin-squeeze abuse, which is likely to have caused damages to an as-efficient competitor, but not necessarily to less-than-efficient ones, and may apply to tying. Thus, even in follow-on cases, proof of causality seems inescapable.

A second issue concerning causality is that when a dominant company has been found to engage in abusive behaviour, this does not automatically imply that any loss of profits experienced by its competitors should be causally attributed to such behaviour, as a dominant company will have most likely performed other aggressive acts against its competitors, some of which may turn out to be entirely legitimate. This problem has been addressed some time ago by the United States Supreme Court, which ruled in *Brunswick*<sup>4</sup> that ‘*plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful*’. Over time, this requirement has morphed – with some exceptions – in a burden upon the plaintiff to prove *disaggregation*, i.e. specifically what part of its losses were caused by the abusive behaviour<sup>5</sup>. While such a burden of proof is likely too excessive, the general point is quite valid: even in follow-on cases, plaintiffs should be granted only the damages that were caused by the abusive behaviour.

In the light of the above, in case the Commission decided to pursue the proposal it set forth in the White Paper that any final NCA decision be

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<sup>4</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

<sup>5</sup> For a discussion, see Charnas (1984). Tomlin (2004) provides a recent discussion of this point with a reference to *Netscape v. Microsoft*.

considered as a non-rebuttable proof in follow-on civil cases, it would seem necessary that it specified that this would apply only to a cartels: otherwise, the proposal would transform a finding of abusive behaviour in an irrebuttable proof that each and every competitor have been damaged by the behaviour, which would seem unreasonable<sup>6</sup>.

In any case, some guidance from the Commission on the issue of causality in article 82 offences would probably be useful to national courts.

## 2.2 Harm to competitors

### 2.2.1 *Damnum emergens*

*Damnum emergens* is typically a small component of the damages arising from exclusionary behaviour, at least when compared to the profits that have been lost, and indeed in several civil cases it is not even claimed. Occasionally, e.g. when a competitor has been utterly prevented from entering the market, or has been thrown out, this may however be quite relevant.

Although the notion of *damnum emergens* is straightforward, in practice two issues may arise in its calculation.

First, from an economic point of view, it is quite obvious that only sunk costs and investments should be considered under such a heading: if the foreclosed firm has undertaken expenditures that it can recover, or that it can fruitfully use in order to generate alternative income streams, these should not be considered as part of the damage. From a legal point of view, the matter may be less clear: only in one of the cases I have considered in this paper the Court explicitly considered the distinction between costs and sunk costs<sup>7</sup>, and in several claims I am acquainted with the alleged *damnum emergens* covers costs that cannot be considered as sunk.

Thus, this may be a matter in which some clarification from the Commission might be useful to national courts.

A second difficulty may arise concerning the practical application of the distinction between *damnum emergens* and *lucrum cessans* – a common approach in many continental Courts.

As investments are sustained in order to generate a future income stream, which already include the amortization of such investments. Calculating separately *damnum emergens* and the lost profits, and adding both

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<sup>6</sup> For a broader critical discussion of some of the White Paper's proposals, see Prosperetti (2008).

<sup>7</sup> *Telsystem v. SIP*, App. Milano, 26 November 1996, in *Giur. It.*, 1997, I, 2, 520; App. Milano, 24 December 1996, in *Danno e Resp.*, 1997, 602.

components, would then lead to a double counting. This is a recurrent problem in the estimation of commercial damages<sup>8</sup>, but would seem to be, at least potentially, quite frequent also in antitrust damages.

Let us consider, e.g., a margin squeeze case, in which the dominant firm supplying an essential input has increased its price to one of its competitors, at a level where an as-efficient competitor could not profitably operate. The claim here could consist entirely of lost profits, if claimant is able to prove that it has passed on the price increase in its selling prices, and has lost profitable business as a result. Alternatively, it could consist entirely of *damnum emergens*, if the claimant is able to prove that it has fully absorbed the price increase, thus decreasing its own profits. The claim can of course be a linear combination of the two types of damages, but they cannot be simply added, as this would lead to a double counting. This is quite a frequent occurrence, at least in some claims.

Again, some clarification on this from the Commission might be useful for national courts.

### 2.2.2 *Loss of profits*

Lost profits are by far the largest component in most claims arising from exclusionary behaviour. The notion is straightforward, and there are no great differences among legal systems in Europe on this: significant differences however exist on the matter of mitigation. This is an important point, as mitigation may in practice be a very common occurrence in foreclosure cases: if the competitor is illicitly prevented from growing in the market, or entering a market, very often it will grow elsewhere.

Should we account for this when we calculate lost profits?

From an economic viewpoint, the answer is doubtlessly affirmative: as Judge Posner wrote in *Fishman v. Wirtz*<sup>9</sup> “*The principle of mitigation of damages,... is ... only opportunity cost by another name*”<sup>10</sup>.

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<sup>8</sup> For a general discussion, see Kantor (2008), ch. 4.

<sup>9</sup> Court of Appeals, 7<sup>th</sup> Circuit, in *Fishman and Illinois Basketball v. Estate Of Arthur M. Wirtz*, 807 F.2d 520 (1977), par. 145.

<sup>10</sup> The Law & Economics literature provides a normative rationale for this: “*victims should be induced to optimally mitigate their losses, so that damages should be restricted to the optimally mitigated losses plus the mitigation costs ... This way, the victim is induced to take these optimal measures. After all, not taking these measures leads to higher losses that are not fully compensated, and taking more than the optimal measures increases the costs, but not the damages. The injurer is confronted with the costs (both of the losses and the mitigation measures)*”, Visscher (2008). For a broader discussion, see also Wittman (1984), Shavell (2004), and Lambert (2006).

Indeed, this is uncontentious in the United States, where the Courts have consistently applied the principle that “*antitrust plaintiffs have an obligation to mitigate their damages*”, and clarified its limits:

- in *Triebwasser v. AT&T*, the 2<sup>nd</sup> Circuit held in general that “*it is apparent that the plaintiffs have an obligation to mitigate their damages*”, and that “*whatever reasonable costs are undertaken to secure (mitigation) are therefore reparable*”<sup>11</sup>. Similar principles were applied by the 5<sup>th</sup> Circuit in *Golf City v. Wilson Sporting Goods*<sup>12</sup>, where the Court refused to accept that mitigation would have been impossible given the market characteristics, by stating that, if this was the case, such a factor had to be taken into account only when evaluating the amount of damages;
- the duty to mitigate is so stringent, that it can be *presumed* that indeed mitigation took place, as was held by the 2<sup>nd</sup> Circuit in *Borger v. Yamaha*<sup>13</sup>;
- in *Malcom v. Marathon Oil*<sup>14</sup>, the 5<sup>th</sup> Circuit clarified further that in a mitigation failure defence “*the burden of showing that the victim of tortious conduct failed to minimize his damages rests with the wrongdoer....The defendants must show that the injured party's conduct was unreasonable and aggravated the harm.*” Claimant has at most the burden to prove that its efforts to mitigate the damage were reasonable, as “*requiring an antitrust plaintiff to prove such a negative as a lack of alternative supply places too great an obstacle in the way of antitrust recovery. The greatest burden that reasonably could be placed on him would be the burden to show the reasonableness of his mitigation efforts.*”<sup>15</sup>

Matters are very different in Europe, where mitigation is not admitted in some jurisdictions, such as France, where this is deemed to follow from the principle of “full compensation” (*tout le préjudice, rien que le préjudice*). Interestingly enough, Italian law has exactly the same principle, but it has derived from it a less rigid doctrine<sup>16</sup>: victims are required not to aggravate their losses, and - in the light of the general principle of ordinary care - may be required to do something, although what exactly is unclear. According to the Corte di Cassazione, the damaged party is required “*to undertake actions aimed at limiting the damage consequences [of the tort], but only*

<sup>11</sup> Court of Appeals, 2nd circuit, in *Triebwasser v. AT&T*, 535 F.2d 1356, (1976), par. 10.

<sup>12</sup> Court of Appeals, 5th circuit, in *Golf City v. Wilson Sporting Goods*, 555 F.2d 426, (1977), par. 60.

<sup>13</sup> Court of Appeals, 2<sup>nd</sup> Circuit, in *Borger v. Yamaha Int. Co.*, 625 F.2d 390, (1980).

<sup>14</sup> Court of Appeals, 5<sup>th</sup> Circuit, in *Malcom v. Marathon Oil*, 642 F. 2d 845, (1981), par. 63.

<sup>15</sup> par. 64.

<sup>16</sup> For a general discussion, see Franzoni (2004) ch. 1, and Visintini (2005) ch. 9.

*those actions that are not exceptional or difficult, or may involve noticeable risks or sacrifices, should be considered as required in the light of the principle of ordinary care*<sup>17</sup>.

In England, there is no mitigation principle as such, but the result is broadly equivalent<sup>18</sup>: as Judge Colman vigorously stated in *Arkin v. Borchard*, “*The claimant’s so-called “duty” to mitigate is a misnomer rendered respectable only by age. In reality the concept is that, if the claimant’s conduct is such that it breaks the chain of causation between the claimed breach of duty on the part of the defendant and the loss, the claimant is not entitled to be compensated, for the claimant has failed to discharge the legal burden of proving the essential causal link between his loss and the defendant’s breach of duty. There has been an intervening dominant cause engendered by the claimant himself*”<sup>19</sup>. It is unclear, however, to what extent the principle of the non-interruption of the chain of causation requires from claimants as active behaviour as the one required under US law, where the requirement directly flows from a specific duty upon the claimant<sup>20</sup>.

On the other hand, the European Court of Justice held in *Mulder*<sup>21</sup> – a Francovich liability case – that the reasonable diligence principle entails true-blue mitigation efforts, as “*the basis which should be taken for calculating the income which the applicants would have received in the normal course of events [must be assessed by taking into account] not only [the income] that the applicants actually obtained from replacement activities, but also that income which they could have obtained had they reasonably engaged in such activities. This conclusion must be reached in the light of a general principle common to the legal systems of the Member States to the effect that the injured party must show reasonable diligence in limiting the extent of his loss or risk having to bear the damage himself*”<sup>22</sup>.

To the extent of that the Court's rulings on matters of Francovich liability may be directly applicable to cases of damages arising from competition

<sup>17</sup> Cass. 9 February 2004, n. 2422, in *Riv. giur. edilizia*, 2004, I, 1320.

<sup>18</sup> Gotanda (2007).

<sup>19</sup> *Yeheskel Arkin v. Borchard Lines Ltd. & Others* (2003) 2 Lloyd’s Rep 225, (2003) Eu LR 287, (2003) 2 LLR 225, (2003) EWHC 687 (Comm), par. 536. Interestingly the Judge held that even if the claimant had suffered an exclusionary abuse, “*the rate policy adopted (by the Claimant)...was so unreasonable that it broke the chain of causation between the (Defendant’s) rate policy... and the losses suffered during the relevant period. ...The predominant cause of those losses was (the Claimant’s) irrational failure to leave the market earlier*” (par. 562).

<sup>20</sup> The cases provided by Burrows (2004), ch. 6, concerning ‘unreasonable inaction’ and ‘unreasonable action’ do not clarify this issue.

<sup>21</sup> *J. M. Mulder and others and Otto Heinemann v Council of the European Communities and Commission of the European Communities*, ECJ Judgment of 19 May 1992, Joined cases C-104/89 and C-37/90. European Court reports 1992 Page I-03061.

<sup>22</sup> Par. 32-34, emphasis added.



breaches – and this is the authoritative view of Toth (1997) - it would then appear that the legal landscape is rather complex across Europe on the issue of mitigation.

This is another area where some thoughts coming from the Commission might be useful to national courts, at least in those countries where mitigation is not squarely ruled out.

A more mundane point on lost profits estimation, of a technical nature, is a possible divergence between the economic approach, where these should be calculated on the basis of incremental revenues less incremental cost, and the legal approach, where these incremental notions may not be entirely clear. Again, on the basis of the cases I am aware of, I was not able to find any clear instance in which the notion of incremental cost has been taken into account, while in several claims this issue is fairly blurred.

This is another issue where some guidance from the Commission could be useful to national Courts.

### 2.2.3 *Loss of chance*

A foreclosed company, besides lost profits, may suffer the loss of business opportunities when the foreclosure has prevented it from gaining specific knowledge, technology, or qualification, that would have allowed it to enter some other market in the future, or to acquire an entirely new profit stream in the market from which it has been foreclosed. If BadCo foreclose SmallCo from the market for public works in Sicily, SmallCo may lose the opportunity to acquire the necessary qualifications in order to participate to a consortium bidding to build the bridge of Messina - most likely a very profitable business.

In most countries, this is recognized as a legitimate component of the damage, and is estimated in an economically sensible way by multiplying the lost profits by the probability that they would indeed materialise.

This would seem a special problem, but it may not be, if loss of chance is also taken to be the point of view from which Courts should assess damages to a competitor that was utterly excluded from the market, or was thrown out of it.

This is likely to be a contentious point, as claims in such cases are prepared in full accord with Ambrose Bierce's definition of 'future' as "*that period of time in which our affairs prosper, our friends are true and our happiness is assured*"<sup>23</sup>. From an economic point of view, future is certainly not this, particularly for new companies, which will anyway fail (absent any

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<sup>23</sup> Bierce (1911).

foreclosure) with a high probability<sup>24</sup>, and indeed - as Hovenkamp notes - in these cases "*loss of the opportunity to do business*" describes the plaintiff's losses more accurately than "*lost profits*"<sup>25</sup>.

But if lost profits in these cases are treated as loss of chance and not as lost profits in the strict sense, their amount should be multiplied by the probability of their realisation, and they could not be awarded in full. This of course would be in full accord with an economist's approach, who calculates the expected value of uncertain future stream of profits<sup>26</sup>.

As far as I can see this would also be the case under English law, where compensation for a loss suffered in the past must be based upon the balance of probabilities, and claimant must be compensated in full if it is more likely than not that the loss occurred. However, for a loss which may happen in the future, compensation must reflect the Court's assessment of the probability that the loss will materialize<sup>27</sup>.

As we shall see below, some decisions reached by French, Spanish – and possibly Italian – Courts seem in broad agreement with such principle.

Again, some discussion coming from the Commission on this would probably be helpful to national Courts.

#### 2.2.4 *Loss of reputation*

It is relatively rare<sup>28</sup> for a claim for exclusionary damages to include loss of reputation damages: probably, given the skepticism of the courts vis-à-vis such damages, or at any rate their very conservative estimates of them, claimants prefer to concentrate on lost profits.

In many cases, however, it seems likely that such an item might be an important component of the total damage, especially when a competitor has been forced to exit the market, where it had acquired a reputation.

Yet again, this would be a useful topic for the Commission to address.

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<sup>24</sup> Around 60%, in the United States.

<sup>25</sup> Hovenkamp (2005), p. 678.

<sup>26</sup> See Tye and Kalos (2008).

<sup>27</sup> See Burrows (2004), Ch. 4.

<sup>28</sup> In the cases analysed below, loss of reputation was claimed in *Bluvacanze* and *Business Full Ring*, two Italian cases. It was granted only in the first case.

### 2.3 *Harm to consumers*

From an economic point of view, foreclosure will lead to consumer harm via a lower output, and higher prices. It may also lead to other types of losses, as consumers may be deprived of the opportunity to purchase better-quality goods, or new goods from the foreclosed competitor.

Both of these effects are very difficult to estimate, but an interesting point is that the latter is seldom mentioned in antitrust damages discussions, while it may often be quite relevant, as a common motivation for illicit foreclosure is indeed to prevent a competitor from offering a better product. The effect of foreclosure on prices would seem less difficult to analyse, but in fact there are several problems concerning the construction of a but-for world<sup>29</sup>. Thus, neither component of the damage to consumers arising from foreclosure is likely to be estimated with any degree of precision,

In several jurisdictions there will also be legal problems in any claim for such damages, as they may be deemed to be a consequence, but not a direct nor immediate consequence, of the illicit behaviour. Finally, it could be contended that these are social damages which are part of the rationale for imposing an administrative fine.

As far as I can see, the issue will therefore remain of a purely theoretical interest.

## 3 **Estimating damages: what do courts do**<sup>30</sup>

Having discussed some general issues in the previous section, we now turn to damages estimation in European Courts<sup>31</sup>:

In all judicial systems in Europe the award of damages should make the victim "whole". This requires the construction of what in the US is known as a but-for scenario, which is identical to the actual scenario except for the harmful effects of the abusive behaviour. For the construction of such an hypothetical scenario, Courts accept a variety of methods, some of which may be brought under two of the headings of the standard methods developed in the US Courts for antitrust damages, base upon what happened before the behaviour took place ("before and after method"), or to some other company, very similar to the one which has been affected by the

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<sup>29</sup> Perfect competition? Cournot, Bertrand, von Stackelberg oligopoly? See Blair – Piette (2006).

<sup>30</sup> This section is partly based on Part III of Prosperetti, Pani and Tomasi (2009).

<sup>31</sup> As mentioned above, the discussion will be based on a non-representative sample of cases, which are simply those in the public domain, and those I was able to get hold of. Thus, the discussion should be seemed as entirely introductory, and likely to be extended, and possibly modified, as more cases become available.

infringement, but that it has not been subject to its effects ("yardstick method").

The analysis of the available European case-law shows, however, how courts very often do not accept the mechanical application of one method or the other, but rather tend to construct the hypothetical scenario using a variety of information sources. These may include what happened before the infringement, and what is happening elsewhere, but are always based upon a detailed analysis of the facts of the case, in the light of evidence supplied by witnesses and experts. In doing so, they apply to antitrust damages the approach they have been following for a long time when assessing commercial damages, arising both from breach of contract and tort.

*Faute de mieux*, I shall label this below "analytical methods", although they are not a method in the strict sense.

### 3.1 *Before and after methods*

Before and after methods are infrequently employed in rulings concerning exclusionary damages. The only two cases about which I was able to find sufficient details are both Italian.

In *Bluvacanze*<sup>32</sup>, a stand-alone case concerning a concerted refusal to deal by leading Italian tour operators against a discount travel agent, Judge Tavassi directly calculated the damages on the basis of claimant's sales before and after the exclusion, and on the retail margin that had been agreed between the claimant and the defendants.

In *Inaz Paghe*<sup>33</sup>, a follow-on concerted refusal to deal case, the Milan Appeals Court appointed an expert who compared the yearly number of clients lost by claimant before and after the exclusion, and attributed the increase entirely to the abusive behaviour. He also calculated per-customer margin, and the expected duration of the contracts. These estimates were accepted by the Court, which however refused to award damages to Inaz for the lower rate of growth of its customer base during the abusive behaviour, as this could have been the effect of several other causes. The Court also found that, after the end of the behaviour, the claimant's customers when increasing very slowly, and therefore the causation requirement was not satisfied. This is therefore a classic example of the problems arising from before and after methods: when does 'after' begin?

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<sup>32</sup> App. Milano, 11 July 2003, in *Danno e Resp*, 2004, 646.

<sup>33</sup> Provvedimento n. 7983, caso I308, *Inaz Paghe / Associazione Nazionale Consulenti del Lavoro*, of 3 February 2000.

### 3.2 Yardstick methods

Yardstick (or benchmark) methods are based on the simple idea that the effects of an antitrust violation upon a firm may be inferred by comparing its situation (sales, profits) with that of an equivalent firm, which has been unaffected by the violation. Of course, the degree of similarity between the damaged firm and the *representative firm*, chosen as a benchmark, decrees the level of legal acceptability of the method.

Yardstick methods are potentially very useful, as they seem to be able to cut the numerous Gordian knots that besiege damage assessment in exclusionary cases. I will then analyse them in some detail, in order to see if any criterion for their acceptability might be distilled from case-law.

Let us first have a look at the US, where they have been evaluated in a large number of cases. The general principle, as laid out by the 5<sup>th</sup> Circuit, is that “*an antitrust plaintiff who uses a yardstick method for determining lost profit bears the burden to demonstrate the reasonable similarity of the business whose earnings experience he would borrow.*”<sup>34</sup>

The requirements for such a ‘reasonable similarity’ have been clarified by several cases – which – as summarised by the 1<sup>st</sup> Circuit, “*cases employing [the yardstick method] have recognized that product, firm and market comparability are all relevant factors in the selection of a proper yardstick*”<sup>35</sup>. In that case, the Court ruled in favour of the defendant, as the claimant had shown that several features of the two markets were comparable, but had omitted to consider several others, among which – crucially - the degree of competition.

The Court proceeded to give guidance on the use of yardstick methods, clarifying that “*the burden of proving comparability, while not particularly onerous, rests with the plaintiff and does not shift to the defendant after the plaintiff has offered some bits of evidence arguably tending to support comparability*”. It also clarified that “*the lack of contrary evidence does not necessarily establish that the two markets are comparable*”<sup>36</sup>.

Thus, even if claimants have to satisfy in the US a ‘lenient standard’ in order to prove the size of their damages, the requirement of ‘*product, firm and market comparability*’ set in *Home Placement* must be fully satisfied, as several other cases have clarified. E. g.:

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<sup>34</sup> Court of Appeals, 5<sup>th</sup> Circuit, in *Eleven Line Inc. v. North Texas State Soccer Ass’n*, 213 F.3d 198 (2000), par. 47.

<sup>35</sup> Court of Appeals, 1<sup>st</sup> Circuit, in *Home Placement Service., Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1207, (1987), p. 120, added emphasis.

<sup>36</sup> *Ibidem*, p. 1207.

- in *Rose Confections Inc. v. Ambrosia Chocolate Co.*<sup>37</sup>, the 8<sup>th</sup> Circuit refused to accept as a valid yardstick the market share of the claimant in a different geographic market, which included a third competitor, which was presumed to have an impact on claimant's profits, but had been ignored in the claim;
- in *William Inglis & Sons Baking Co. v. Continental Baking Co.*<sup>38</sup>, the 9<sup>th</sup> Circuit refused the proposed yardstick as, absent "*meaningful economic similarity between Inglis and these other companies, the use of their profit margins to project Inglis' earnings was mere speculation*";
- in *Farmington*<sup>39</sup>, the Court refused the proposed yardstick as there were relevant differences between the product mixes and distribution networks of the two firms;
- in *National Farmers v. Associated Milk Producers*<sup>40</sup> the role of a whitiness was crucial to convince the Court "*despite these [differences between the two market] the Court found, as a matter of law, that the expert's testimony sufficiently proved the amount of damage*".

Several interesting yardstick cases have been decided in various EU countries.

In Spain, the method has been carefully examined by the Madrid Courts in *Conduit*<sup>41</sup>, which denied the use of the UK as a relevant yardstick for assessing the loss of market share by the Spanish subsidiary of a major telephone directory operator, allegedly caused by the incumbent. The Court ruled that "*las diferencias entre el mercado británico y el español son significativas, por lo que no parece admisible que se utilice como referencia por el cálculo de la cuota de mercado que debería tener la demandante*"<sup>42</sup>. The smaller share on the Spanish market was also attributable to other factors, according to the Court, such as lower advertising investments<sup>43</sup>.

<sup>37</sup> Court of Appeals, 8<sup>th</sup> Circuit, in *Rose Confections Inc v. Ambrosia Chocolate Co.*, 816 F.2d 381, 393-394, (1987).

<sup>38</sup> Court of Appeals, 9<sup>th</sup> Circuit, in *William Inglis & Sons Baking Co. v. Continental Baking Co.*, 942 F.2d 1332,1341 (1991), p. 1342.

<sup>39</sup> Court of Appeals, 1<sup>st</sup> Circuit, in *Farmington Dowel Products Co. v. Forster Mfg. Co. Inc., et al.*, Nos. 7324, 7334, 421 F.2d 6110 A.L.R.Fed. 266 (1970).

<sup>40</sup> Court of Appeals, 8<sup>th</sup> Circuit, in *National Farmer's Org. v. Associated Milk Producers*, 850 F.2d 1286, 1294-98 (1988), par. 41.

<sup>41</sup> *Conduit Europe S.A. contro Telefonica de Espana*, Juzgado Mercantil numero 5 de Madrid, 11 november 2005, confirmed in appeal by the Audiencia Provincial de Madrid Sección n. 28, Decision n. 73/2006 of 25 May 2006; text available at: [http://ec.europa.eu/comm/competition/antitrust/national\\_courts](http://ec.europa.eu/comm/competition/antitrust/national_courts).

<sup>42</sup> As summarized by the Audiencia Provincial de Madrid.

<sup>43</sup> Ibidem, p. 36.

In France, the Court of *Lescarcelle/De Memoris v. OGF*<sup>44</sup> accepted the method in a case concerning funeral services, where the Montmorency market was deemed comparable to the Gonesse market in terms of ‘yield’.

In Germany, Courts seem to be reluctant to accept the method: in *Strom Tarif* the Bundesgerichtshof ruled that regional electricity markets are not sufficiently comparable<sup>45</sup>.

In Italy, the Rome Court of Appeals<sup>46</sup>, in a follow-on case concerning data transmission with xDSL/SDH technologies proceeded to employ itself a yardstick method, by calculating the loss of market share to the would-be entrants, which had been utterly prevented from entering the market, on the basis of the share they possessed in the broader market of data transmission with older technologies.

Taken together, the available cases (see Table 1, where some more<sup>47</sup> are supplied) would seem to suggest that Courts apply a two-stage test of proposed yardsticks:

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<sup>44</sup> Cour d’Appel 1ère chambre, section G, arrêt du 23 Juin 2004.

<sup>45</sup> This case is mentioned by Ashurst (2004), but no details are available.

<sup>46</sup> App. Roma, 20 gennaio 2003, in *Foro it.*, 2003, I, 2474, (*Wind Telecomunicazioni c. Telecom Italia; Data Service S.r.l. c. Telecom Italia; Albacom S.p.A. c. Telecom Italia; Unidata S.p.A. c. Telecom Italia*). This followed Decision n. 9472 del 27/04/01 by the Italian NCA.

<sup>47</sup> *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, S.Ct. (1946); *Zenith Radio Corp. v. Hazeltine Research, Inc.* Argued Nov. 10, 1970, Decided Feb. 24, 1971, Rehearing Denied April 5, 1971; 79 F.2d 269 177 U.S.P.Q. 501, 1973-1 Trade Cases 74,446; *Agrashell, Inc. v. Hammons Products Company*, 71-1538, Court of Appeals 8<sup>th</sup> Circuit Submitted (1973); *Lehrman v. Gulf Oil*, 500 F.2d 659, Court of Appeals 5<sup>th</sup> Circuit (1974); *Jay Edwards Inc. v. New England Toyota Distributor*, Court of Appeals, 1<sup>st</sup> Circuit, 708 F2d 814 (1983); *Metrix Warehouse v. Daimler Benz Aktiengesellschaft*, 828 F.2d 1033 1044, Court of Appeals 4<sup>th</sup> Circuit (1988); *Business Full Company e Ring*, App. Roma, 20 gennaio 2003, in “*Il Diritto Industriale*”, n. 6/2003. See Ashurst (2004) for Valium, Strom Tarif and Arbeitsgemeinschaft Rheinausabau cases.

**Table 1 – USA and European case law considering the acceptability of a yardstick method in exclusionary damages**

		<b>First Condition</b>	<b>Second Condition</b>		<b>Acceptance Yardstick</b>
<b>Case</b>	<b>Country</b>	<b>Same Product</b>	<b>Same Firm</b>	<b>Same geographic market</b>	
Bigelow v. RKO Radio Pictures Inc	US	Yes	No	Yes	Yes
Zenith Radio Corp.	US	Yes	Yes	No	Yes
Agrashell	US	Yes	Yes	No	Yes
Lehrman v. Gulf Oil	US	Yes	No	Yes	Yes
Jay Edwards Inc v. New England Toyota Distr.	US	Yes	No	Yes	Yes
Metrix Warehouse	US	Yes	No	Yes	Yes
National Farmers v. Associated Milk Prod.	US	Yes	Yes	No	Yes
Home Placement Service., Inc. V. Providence Journal	US	Yes	Yes	No	No
Rose Confections v. Ambrosia Chocolate	US	Yes	Yes	No	No
William Inglis & V. Continental Baking	US	Yes	No	Yes	No
Eleven Line v. N. Texas Soccer Assn.	US	Yes	Yes	No	No
Valium	Germany	Yes	No	No	No
Strom Tarif	Germany	Yes	No	No	No
Conduit	Spain	Yes	Yes	No	No
Lescarcelle/De Memoris/OGF	France	Yes	Yes	No	Yes
Business Full Company Ring	Italy	Yes	Yes	Yes	Yes

*Source: see text.*



- First, both companies must be in the same relevant market.
- Second, if they are, it either must be that:
  - they both operate in the *same geographical market*, but of course B must not have been affected by the infringement, or that
  - they operate in different geographical markets, *but B is really company A*.

The legal and economic rationale for such a two-stage test seems to decrease the size of the uncertainty concerning causation.

The economic performance of a company (be it measured by sales, market shares, profits or otherwise) depends on a large number of variables, some of which reflect the characteristics of the firm (its products, history, technology, brand), and others those of the market (such as consumer demand, or the level of competition). The number of variables that can determine differences in performance between the two firms is very large, while ideally a yardstick method would require a *coeteris paribus* condition.

Courts seek therefore to reduce the number of exogenous variables. Thus, in the first place, they rule out any comparison between companies producing different products, as differences in economic performance are likely to be associated (also) with the differences in costs and demand for the products, not necessarily with the infringement. But even if the products are identical, or highly similar, there must be limits to the acceptable differences between the two companies.

The second part of the test would thus seem to seek to rule out situations in which there may be differences both on the demand side and on the supply side. Only differences in *one* of these factors are allowed, so that *either* market demand must be the same, and this requires the two companies to be in the same geographic market, *or* demand may be different (different geographic markets), but supply conditions must be the same, and this requires that the two companies are really the same company.

As we saw from the review of the cases above, in any case Courts make extensive use of witnesses in order to check if, even when a yardstick passes both stages of the test, other differences exist that may impair the test results. The test provides, in other words, a necessary condition, not a sufficient condition.

### 3.3 Analytical methods

In many damages cases, not deriving from antitrust offences, Courts examine detailed reconstructions of but-for scenarios which are not based

upon quantitative methods, but rather upon the critical analysis of business plans or projections of the claimant's economic and financial situation, had the behaviour that generated the damage not taken place. Courts are very good at that, and they are skilled in combining this type of evidence with the examination and cross-examination of witnesses and of other documents.

Broadly speaking, the legal requirement for such hypothetical plans are that they must be coherent with the market trends that could be reasonably expected when the business plans were made, and that they would have been sustainable by the claimant, given its material and financial resources. Typically, such a reconstruction can be based upon the critical analysis of documents that were prepared by the claimant before it suffered the tort, or starting from its actual economic and financial results and going backwards, try to eliminate the effects of the illicit behaviour.

In theory, econometric methods could be used to reconstruct such a but-for scenario, but this is a rare occurrence, as they require the construction of complicated models on the basis of data sets where degrees of freedom are often not enough, and outliers are common. It is also generally difficult to combine their results with the numerous pieces of evidence that a Court typically is confronted with, that may consist of documents and statements by witnesses.

Let us now look briefly at Court activities in Europe.

In France<sup>48</sup>, in a case concerning braking equipment to be supplied to British Aerospace, for Airbus A330 and A340 models to be sold to some airlines, Mors claimed damages from Labinal and Westland, who enjoying a substantial monopoly on the market, which had prevented Mors to become their supplier. Mors claimed 93,2 million francs for lost profits on the A330 and A340 market, and 40 million for lost profits on "*marchés adjacents*", i.e. for different models

The Court's expert concluded that the lost investments claimed by Mors were excessive on the basis of Mors' own initial budget, while the company "*n'explique ni ne démontre en quoi le dépassement du budget prévisionnel des études trouve son origine dans les agissements de Labinal*". Some of the additional expenditure might be attributed to the defendant's action: "*il paraît très probable que le retard dans la signature du contrat a contraint Mors à renforcer son action commerciale*", but the precise amount could not be estimated and the Court did not allow full redress for it. Lost sales were estimated in a detailed fashion, starting from an analysis of the potential market for A330 and A340 aircrafts, and of the penetration of the particular braking system in that market. He concluded that "*Mors avait une*

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<sup>48</sup>*Mors S.A. vs. Labinal S.A.*, Cour d'Appel de Paris, 1ère chambre, section A, arrêt n. 334 of 30 September 1998.

*vocation naturelle à une part de marché, au minimum égale à celle de son seul concurrent Labinal, au maximum de 70% pour mieux prendre en compte sa qualité de fournisseur de première source, alors que sa part de marché effective s'élève actuellement, tout avion confondu, à 25% ”.* The Court agreed, and ruled that Labinal's exclusionary practices “*ont fait perdre à Mors une chance très certaine d'obtenir un tel positionnement sur le marché spécifique*”, but only for planes to be supplied by Air France, Lufthansa and UTA.

The Court did not award any damages for lost sales in adjacent markets, as “*Mors ne fournit aucun élément de nature à établir qu'elle a mis en oeuvre les moyens techniques et financiers nécessaires au développement pour chaque programme d'avions de chaque constructeur aéronautique d'un TPIS offrant une originalité ou une avancée sur le plan technologique ou un avantage tarifaire significatif pour les compagnies aériennes*”. No damages could be awarded as “*rien ne [permet] de relever un lien entre les pratiques anti-concurrentielles et le fait que cette société ne soit pas implantée sur le marché d'autres avions*”.

In *Verimedia*<sup>49</sup>, where the claimant had been prevented from accessing a portion of the French advertising market because of the delayed supply of inaccurate information by a leading market research company - the Versailles Court refused the damage estimation provided by the claimant. This was largely based upon a business plan which was not based on any detailed analysis, redacted at a date which could not be clarified: a “*«business plan» ne saurait avoir de caractère probant quant au quantum du préjudice allégué dès lors que ce document se borne à mentionner des chiffres d'affaires et des résultats comptables ... ; qu'il n'est appuyé d'aucune analyse sérieuse et que la date à laquelle il a été établi, controversée entre les parties, reste incertaine*”<sup>50</sup>. The Court also held that the claimant had some responsibility, as its requests had been imprecise. However, it held that, while the claimant had suffered no lost profits, it had suffered “*une perte de chance de pénétrer plus rapidement et plus efficacement le marché de l'audit de télévision*”, and awarded “*tous préjudices confondus*”, the sum of 100.000 euro<sup>51</sup>.

In Spain, in a case concerning the exclusionary sale of a crucial package of sports rights, a Madrid Court refused the defendant's position that the lost profits claimed by Antena 3 were simply “*sueños de fortuna*”<sup>52</sup>. If the claimant could have gained access to the sports rights, in the “*decurso*

<sup>49</sup>*Verimedia S.A. vs. Mediametrie S.A. Secodip S.A. GIE Audipub*, Cour d'Appel de Versailles, 12<sup>ème</sup> chambre, section 2, arrêt n. 319 of 24 June 2004.

<sup>50</sup> Cour d'Appel de Versailles, 24 June 2004.

<sup>51</sup>For a discussion of the French cases, see Idot (2005) and Riffault-Silk (2008).

<sup>52</sup> “*dreams of glory*”.

*normal de las cosas y de las circunstancias especiales del caso concreto*”<sup>53</sup>, it could have indeed obtained profits, and conduct by the Liga Nacional de Fútbol had deprived Antena 3 “*de una fuente sustancial de ingresos por publicidad... además en sus primeros años de funcionamiento*”<sup>54</sup>. The Court accepted the estimates of the lost profits presented by Antena 3, and it adjusted them by assuming that the claimant - had it not been illicitly excluded from the bidding for the sports rights, where only two firms were included- would have had a one-third probability of winning the bid.

In Italy the Milan Appeals Court ruled in 1996 in a very interesting case (*Telsystem c. SIP*<sup>55</sup>), where the incumbent had totally prevented a start-up firm from entering the market for closed user groups<sup>56</sup>. The Court’s experts analysed in a highly detailed fashion the business plan which had been prepared by the claimant for several years ahead. According to this, profits would have been considerable, as Telsystem would have been the first operator to supply such a service, thereby creating a base of faithful, high-spending customers. The experts took a critical view of such a plan. They analysed the potential market and concluded that future profits would have been highly dependent upon four factors: advertising expenditure, commercial capabilities, organisational capabilities and human resources.

On the basis of the claimant's resources, they concluded that the business plan highly overestimated customer acquisition, because Telsystem would have been unable to spend sufficient resources in advertising and its organisational structures were rather weak,. Furthermore, as there were no real barriers to entry into the closed user group market, Telsystem would have enjoyed a non-permanent first-mover advantage: the same services would have been offered rather quickly by other, larger companies. Consequently they reduced substantially the claim for lost profits, and awarded some damages for loss of chance.

#### 4 Conclusions

There are several open issues in the estimation of exclusionary damages by national courts in Europe, and I have tried in this paper to discuss the more insidious ones, that lie at the border between economics and the law. Of course, there are many others, mainly of a technical nature, and on all these some clarification coming from the Commission is likely to be useful for the fostering of meritorious actions in Europe.

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<sup>53</sup> “*normal flowing of facts and of the particular circumstances of the specific case*”.

<sup>54</sup> “*of an important source of advertising revenues ... in particular during the first years of its activity*”.

<sup>55</sup> App. Milano, 26 novembre 1996, in *Giur. it.*, 1997, I, 2, 520; App. Milano, 24 dicembre 1996, in *Danno e Resp.*, 1997, 602.

<sup>56</sup> A technological Dodo, but that seemend rather bright-eyed at that time.

On the other hand, it should be kept in mind that while national Courts do not have often much experience in cartels, which actually were legal in some countries until not so long ago, and here may particularly benefit from a straightforward importation of US experience and techniques, in exclusionary damages national Courts are building upon their very rich experience in commercial damages: several breaches of contract, and some torts, have effects on the claimant which are quite similar to those of an exclusionary abuse.

Any input coming from the Commission on these issues should keep this into account.

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