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Quantifying Harm in Actions for Damages Based on Breaches of Art. 101 or 102 of the Treaty of the Functioning of the European Union

Comments of the European Competition Lawyers' Forum (ECLF) on the EU Commission's Draft Guidance Paper

Contents

1. Introduction

1.1 This Paper is submitted on behalf of the European Competition Lawyers Forum ("ECLF") in response to the European Commission's public consultation on the Draft Guidance Paper on Quantifying Harm in Actions for Damages Based on Breaches of Art. 101 or 102 of the Treaty on the Functioning of the European Union ("Draft Guidance Paper"). The ECLF is a group of practitioners in competition law from around 80 law firms across the European Union.

1.2 This Paper has been compiled by the ECLF Working Group on the Quantification of Damages (see Annex 1) and does not purport to reflect the views of all ECLF members. While the Paper has been circulated within the Working Group for comment, its content does not necessarily reflect the views of the individual members of the Working Group or of their law firms.

1.3 The ECLF welcomes the opportunity to comment on the Draft Guidance Paper, and supports the Commission's general objective to facilitate meritorious private damages actions in competition cases. A better understanding on the part of all parties involved - claimants, defendants, their advisors, and judges – of the main methods and techniques available for quantifying harm will serve a useful purpose in this context.

1.4 The need for maintaining a sound balance between public enforcement and private enforcement has been underlined in earlier ECLF submissions. Also, it goes without saying that the Guidance Paper must not side with either claimants or defendants in cartel damage cases. The ECLF has members representing claimants as well as members representing defendants in such cases.

1.5 In line with the ECLF's focus and expertise, the following comments are submitted from the point of view of practising lawyers. They do not assess in any detail the economic methods and techniques presented in the Draft Guidance Paper.

2. Summary of the views expressed in this Paper

The views presented in this Paper may be summarized as follows:

- While the Draft Guidance Paper is addressed primarily to courts, the ECLF appreciates that it will be beyond its scope to provide judges with all the materials they need to understand, question and ultimately assess quantification methods and techniques. The ECLF acknowledges the Paper's limited objective of

providing a high level overview of quantification methods. However, this should be clearly spelled out in its introductory paragraphs. Also, a somewhat more critical approach towards economic quantification techniques would appear appropriate.

- The Guidance Paper should emphasise its non-binding character to avoid any confusion in litigation before national courts.

- The Draft Guidance Paper overstates the principle of effectiveness. The choice among various economic methods of calculating damages should not normally be affected by the principle of effectiveness. The many references to the principle of effectiveness may lead judges to accept inappropriate quantification methods on the basis that EU law justifies or even requires such methods.

- The Draft Guidance Paper understates the significance of "direct evidence". The final version should make it clearer that the assessment of damages is primarily based on real-life evidence and not on theoretical quantification models.

- The final version of the Guidance Paper would benefit from a certain re-organisation, a concentration of examples at the end of each chapter, and a clear set of caveats in the introduction.

3. Purpose of the Guidance Paper

3.1 The Draft Guidance Paper, pursuant to its introduction, aims at offering assistance to "courts and parties". While assistance to parties (and in particular claimants) may turn out to be the most practical impact of the Guidance Paper, the Draft Guidance Paper appears to address itself primarily to national judges. For instance, paragraph 7 states that 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".[1] Paragraph 102 comments that national courts "generally opt for pragmatic techniques" rather than a sophisticated implementation of the methods set out in the previous sections of the Guidance Paper.

3.2 These statements appear to reflect the view that national courts will lead the process of quantifying damages, in particular by selecting the methodology by which quantum is assessed. This does not accord with the reality of private damages actions in at least the

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1 See also *Rainer Becker* and *Christian Vollrath*, Draft Guidance Paper on Quantifying harm in antitrust damages actions, Presentation dated 13 July 2011, p. 5: "Courts and parties choose the appropriate method & technique in the specific case".

majority of Member States. In practice, it is mostly the parties - primarily the claimant but also the defendant - who will decide which quantification methods are being used in damages litigation. The claimant obviously has an interest in demonstrating the size of its loss and in doing so will, often relying on economic expertise, choose one or more methods which it considers appropriate. The defendant may choose to introduce its own expert evidence, and in doing so may select a different quantification method. The court, however, is much less likely to issue an order or otherwise instruct on the use of a particular method. In most Member States the court will decide, based on all the evidence presented to it, on the size of any loss caused to the claimant.[2] Even in Member States where the court appoints its own independent expert, the choice of a suitable quantification method will usually be made by the expert, not by the court.[3]

3.3 The role of the judiciary in follow-on litigation typically consists of understanding, questioning and ultimately assessing, against the background of national rules on the burden of proof and potential alleviations of proof, the economic arguments presented to it by the parties' experts and potentially by the court's own expert. The Guidance Paper only takes a relatively small step towards facilitating this task. For instance, the Guidance Paper is extremely short on the description of the requirements (data and other) underlying the various quantification methods, and does not contain any "health warnings" on potential deficits and flaws of such methods and techniques. It does not identify the pertinent questions a judge (or a party) should ask when faced with a given method of quantification, nor does it describe in any detail the typical weaknesses of the various techniques or the ways in which they may be manipulated.

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2 This is the situation, for instance, in Cyprus, Germany, and Spain. In the courts of England and Wales the process of obtaining expert evidence is also led by the parties. After the defence is served, parties will attend a case management conference at which they formally inform the court, among other matters, of the expert evidence that they intend to submit. Parties exchange expert reports and then put any supplementary questions directly to one another's experts (Civil Procedure Rules, Rule 35). It is common for parties' experts to meet before the hearing and attempt to narrow down the issues in dispute. The court may at its discretion cap the number of experts or require the appointment of a single joint expert for reasons of costs, but its role in the exchange of expert evidence is limited.

3 In Belgium, it is for the court to determine the level of damages to be awarded to the claimant. The court will often appoint an economic expert to prepare an opinion and the parties in the proceedings will be given the opportunity to submit their observations on the expert's opinion (which they will often do by appointing their own experts, who will submit reports challenging all or part of the findings of the expert appointed by the court). A similar situation exists in the Netherlands where it is also for the court to establish the amount of damages. In practice, however, the parties will usually present economic evidence and counter-evidence (just like in Germany and other countries where the claimant bears the burden of proof regarding quantum). In Denmark, submissions by each party's own expert will not normally be admissible. However, the parties (not the judges) take the lead in formulating questions to the experts, thereby controlling the choice of quantification models that will eventually be the basis for the court's assessment.

3.4 The ECLF agrees with the Commission's approach not to rank the various methods and techniques for the quantification of damages according to their (perceived) reliability or usefulness. However, the Commission's rather uncritical approach to quantification methods may easily create the incorrect impression that all aspects of these methods are uncontroversial among economists[4] and equally reliable, subject to some data requirements.[5] While the Draft Guidance Paper describes that the various methods may be appropriate to quantify damages, subject to the circumstances and data requirements, much less guidance is given regarding their respective down-sides and limitations.[6] Also, after explaining the elements of compensation in paragraph 1, the Guidance Paper should clarify that the application of quantification techniques must not result in an overcompensation of damages.[7]

3.5 The ECLF appreciates that it will be beyond the scope of the Guidance Paper to enable national judges to ask all the right questions when faced with conflicting economic evidence, or when having to assess the quality of an opinion prepared by their own expert. These limitations should be clearly spelled out in the introductory paragraphs of the Guidance. Also, a somewhat more critical approach towards economic quantification techniques would appear appropriate. The Paper should make clear that its purpose is to present a rather high-level overview of the main tools available for quantifying damages, but not more than that.

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4 In its introduction of the Draft Guidance Paper the Commission invites comments from all stakeholders, but does not seem to specifically address economists.

5 Example: "It may be appropriate to use damages estimations based on single data observations where these are sufficiently representative for the period of interest" [paragraph 58].

6 For instance, caution should be used regarding aggregated industry data on cost and profits, as this may blow up the "damage" of market participants lacking proper control of their cost (cf. paragraph 41). In a similar vein, the Guidance Paper should avoid statements that could easily be misinterpreted by non-economists. For example, at one point regression analysis is described as a possible method for obtaining a "lower bound estimate" of the damages incurred (see paragraph 84 of the Draft Guidance Paper). While it may be obvious to an economist that this statement is no longer valid when the regression analysis is biased (e.g., subject to an omitted-variable bias), a national court might come under the impression that a regression analysis will always yield a reliable lower bound for the actual damage. Given the high evidential value that is usually afforded to guidelines from the Commission, such statements can easily lead to misunderstandings and unproductive quarrels.

7 It is a recognized principle of European Union law that compensation should not lead to unjust enrichment of the victim of an infringement of EU law, see e.g. the analysis contained in the Opinion of Advocate General Cruz Villalón, 7 December 2010, Case C-398/09 – *Lady & Kid and others*, para. 35 et. seq. and judgment of the European Court of Justice, 20 September 2001, Case C-453/99 – *Courage*, para. 30.

4. Non-binding character, evidentiary value

4.1 The amendment of the Draft Guidance Paper suggested in paragraph 3.5 above could also reduce the risk that courts might consider the Guidance as authority, or even as binding authority, for their assessment of the quantification of damages.

4.2 The ECLF appreciates that paragraph 7 of the Draft Guidance Paper clarifies the paper's purely informative, non-binding character. Nevertheless, given the Commission's general role as a decision maker and lawmaker, and given the repeated reference to the principle of effectiveness (see section 5 below), national courts may easily come under the impression that the Guidance Paper as currently drafted has legal force and that they are obliged to follow it, or that they are required to give more weight to theories described in the paper, than to other methods for calculating damages. This may affect arguments presented by the claimant and the defendant alike. The ECLF suggests that the final version of the paper gives more room to an explanation of the paper's non-binding character.

4.3 The ECLF observes that there is a difference between the issue of the (non-)binding character of the Guidance Paper and the question of whether it may be cited as an authority regarding the economic methods and techniques presented by it. Parties using one or several of the quantification methods described in the Commission's Guidance Paper are likely to quote the Paper as evidence in order to lend credibility to their arguments. Even if a court fully appreciated the non-binding character of the Guidance Paper and the fact that it cannot be a source of law, the court might struggle to define the weight it should give to such quotations.

4.4 Examples of national competition law litigation in which non-binding Commission documents have been cited as evidence must be abundant. The House of Lords decision in *Crehan v Inntrepreneur*[8] indicates that an English court will determine the evidential weight to be accorded to any statement of the Commission, and the weight to be given will depend on the nature of the statement. Spanish civil courts applying EU (and national) antitrust rules regularly invoke European Commission Notices as a legal basis for their judgments.[9] The Notices are also commonly quoted by the authorities, courts and parties in the Polish antitrust proceedings.[10] This implies that

8 *Crehan v Inntrepreneur* [2006] UKHL 38.

9 See, for instance, Judgments of the Spanish Supreme Court of 9 May 2011, 11 May 2011 and 13 June 2011.

10 See, for instance, Decisions of the OCCP President of 26 August 2010 (DOK-8/2010) and 20 December 2010 (RKT43/2010), Judgment of the Competition and Consumers Protection Court of 29 May 2008 (XVII Ama 53/07), Judgment of the Court of Appeal of 13 February 2007 (VI Aca 819/06) and Judgments of the

parties can submit non-binding EU notices as legal evidence in private antitrust lawsuits.[11]

4.5 The vast majority of notices and guidelines issued by the Commission in the area of competition law describe the Commission's own current or intended enforcement practices.[12] It appears, however, that the Commission has very little experience of its own in relation to the quantification of damages in legal actions. Its conclusions in the final Guidance Paper will therefore be based on the submissions received from a variety of sources including, *inter alia*, legal and economic practitioners and academics. The Commission may want to consider including into the Guidance Paper some cautious wording as to its evidentiary value.

5. Principle of effectiveness is overstated

5.1 A particular aspect which might contribute to a court's impression that the Guidance Paper, or the quantification methods presented therein, are authoritative, is what the ECLF perceives as an overstatement of the principle of effectiveness. The Draft Guidance Paper contains no less than a dozen references to the principle of effectiveness, not only as a reminder, but in relation to the detailed methods of assessing damages (see, for instance, paragraphs 71, 81). These repeated references suggest that, beyond a mere provision of a toolbox of economic methods and techniques that may be of use for the purpose of quantifying damages in a competition case, the intention of the Guidance Paper is rather to lend the authority of the Commission to underline perceived obligations of national courts as regards the principle of effectiveness.

5.2 In the absence of harmonization at EU level, it is for the national legal systems to design the remedies and legal procedures that private litigants may rely upon in order to obtain compensation for damages suffered as a consequence of a violation of EU law, including the EU competition rules. This is, provided that the principles of equivalence and effectiveness are respected. The latter implies that national law must not render enforcement of the EU competition rules impossible or excessively difficult.

Polish Supreme Court of 18 February 2010 (III SK 24/09) or of 3 September 2009 (III SK 9/09); in the latter case the Supreme Court clearly stated that the EU provisions, rules, case law and guidelines may be invoked in cases having no union aspect only as an ancillary basis for interpretation of the Polish provisions.

11 See, for instance, Judgment of the Spanish Supreme Court of 30 June 2009, in which the appealing party submitted three Commission Notices as evidence of its appeal claims.

12 A current exception appears to be the Commission Notice on the enforcement of State aid law by national courts.

5.3 However, when it comes to the issues addressed in the draft Guidance Paper, the ECLF believes the principle of effectiveness has a very limited role to play, if any. The Draft Guidance Paper does not (and in the view of the ECLF should not) purport to deal with the rules and procedures of national law that are relevant for the burden of proof in competition cases with respect to establishing an infringement, the existence and the amount of damages suffered, or the causal link between the damages claimed and the infringement. When it comes to methods and techniques that may be relied upon by the parties (viz. their economic advisors) in a national court case, or applied by an expert appointed by a national court, the choice of whether and how to apply such techniques is not a matter that is driven by the principle of effectiveness. Indeed, the ECLF believes that quantification techniques are more of a "technical" matter than a matter in which fundamental principles of EU law should determine the choices to be made by the parties or the courts.

5.4 It goes without saying that "it is incompatible with the principle of effectiveness if national courts impose on (...) private litigants criteria for proof of an infringement of Article 81 EC or 82 EC that are so onerous as to render such proof impossible in practice or excessively difficult".[13] However, this kind of extreme situation is not at stake here. The principle of effectiveness does not provide a useful tool to assess which methods or techniques can or may be applied in given case. There are *a priori* no good reasons why the principle of effectiveness might be invoked by a private litigant to argue that a national court should give more or less weight to a particular economic method or technique to assess the level of damages suffered when confronted with a different method or technique or with economic or factual evidence of whatever nature challenging the inputs used for or outcomes reached by applying a given method or technique. In the view of the ECLF, the Draft Guidance Paper overstretches the principle of effectiveness by repeatedly underlining its alleged role in the context of quantification of damages.

5.5 Numerous references to the principle of effectiveness throughout the final version of the Guidance Paper would create the risk of judges feeling compelled to accept quantification methods which from the point of view of sound economics are inappropriate in a given case. Moreover, overstretching the principle of effectiveness might lead to undesirable results as it may provide private litigants – claimants or defendants as the case may be – an incentive to raise procedural objections invoking EU law in order to complicate the course of the national procedure. The ECLF therefore recommends to keep the discussion

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13 Cf. Opinion of Advocate General Kokott, 19/02/2009, Case C-8/08 – *T-Mobile Netherlands and Others*, para. 87.

of the principle of effectiveness to a minimum and to concentrate it in one place in the beginning of the Guidance Paper.

6. "Direct evidence" is understated

6.1 The Guidance Paper as currently drafted focuses very much on how economic models can be best employed for purposes of quantifying harm in damages actions. While economic theory is no doubt important, the ECLF believes that the Draft Guidance Paper may understate the significance of what the Commission terms "direct evidence" – which however may more properly be called just "evidence". The Draft Guidance Paper acknowledges that such evidence may play a role in the quantification of damages and that nothing in the Guidance Paper should be understood as arguing against the use of such evidence. However, as currently drafted, the Guidance Paper may lead national judges and parties to believe that such evidence can at best provide "useful information" and that the availability of such evidence may primarily play role when it comes to the decision as to whether and, if so, which economic theories and models should be employed (paragraphs 7-8, 26).

6.2 The ECLF is concerned that what might be perceived as a bias in favor of economic theory does not fully reflect the reality of litigation but, in fact, tends to oversimplify the nature of litigation. In some cases, inexperienced litigants may be led to believe that damages actions are largely a theoretical exercise where the claimant does not have to prove its case based on evidence. In other cases, national judges may overemphasize economic models even though there is substantial other evidence to demonstrate and prove harm to the required legal test.

6.3 For that reason, the ECLF suggest that the passages in the Guidance Paper which address the role of evidence in damage actions (especially paragraphs 7-8, 26) should be redrafted to make it clearer that the assessment of damages may – perhaps even primarily – be based on "real-life" evidence (witness testimony, contemporaneous documents such as invoices, etc.) and not theoretical models on quantification of damages. The ECLF believes that the Guidance Paper may be even more helpful particularly to judges by reminding the reader that evidence is a crucial part of any litigation, that theoretical models on quantification of damages may not be enough on their own, and that such models may need to be backed up with other evidence.

6.4. The ECLF acknowledges that the role of evidence in damage claims and, in particular, the extent to which claimants should be granted access to such evidence in the hands of either defendants or even competition authorities, is highly controversial. Many Member

States place strict limits on the powers of their courts to compel disclosure by defendants and third parties, and competition authorities tend to be concerned about their leniency programmes if they had to make their files available to claimants (especially leniency submissions). Therefore, the ECLF would not encourage the Commission to elaborate on the matters of evidence in the Guidance Paper. These may be issues that are more appropriately for the European and/or national legislators to decide.

6.5 As recognized by the Commission, the current situation is that courts making their own assessments of damages tend to do so less on the basis of economic analysis than by reference to presumptions and estimates. The ECLF agrees with the Commission[14] that national rules on alleviations of the burden of proof, shift of the burden of proof, presumptions, judicial estimates, etc. should be left untouched. These rules are representative of the variations intrinsic in a decentralized system of private enforcement.[15] However, if the Guidance Paper were to list and describe those practical approaches used by the courts in various Member States to facilitate the task of assessing damages, it might initiate a fruitful debate over their merits and/or provide a source of best practice for legislators across Europe.

7. Re-organisation of paper, technical points

7.1 The ECLF agrees that it is useful for Guidance Paper to explain the types of harm that anticompetitive conduct may bring about, namely caused by a rise in prices and harm caused by exclusionary practices. It is similarly useful to distinguish between the persons that may suffer damages from anticompetitive conduct, i.e. competitors, direct customers or suppliers, as the case may be, and indirect customers/suppliers. The Commission discusses these points mainly in Part 3 and Part 4 of the Draft Guidance Paper. The ECLF would invite the Commission to consider whether the readability of the Guidance Paper might be improved by starting out with these two parts and thus to introduce the reader to the subject matter with a general description and analysis of the possible effects of illegal price rises and exclusionary practices, before discussing possible methods and techniques that can be used to quantify the harm. In other words: first describe the context, then the toolkit. Reversing the order may also be helpful in avoiding some repetitions and duplications and thus in streamlining the Guidance Paper.

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14 See paragraphs 4 and 5 of the Guidance Paper.

15 For instance, Hungary has introduced a statutory rebuttable presumption for cases involving hard-core cartels so that the Hungarian courts are entitled to assume an infringement results in an unlawful overcharge of 10%. It is open to claimants to argue that the overcharge applied in practice was higher than 10%. The burden of proof then passes to the defendant to argue that the claimant suffered less damage or that it otherwise passed that damage on to its own customers.

7.2 The Guidance Paper as currently drafted discusses a number of hypothetical case examples. The ECLF agrees that specific examples may prove to be very useful to the reader to better understand how the various economic models may play out in a real case. This effect may be even better served if the case examples were provided at the end of the relevant section (as the Commission tends to do in policy guidelines on substantive issues), rather than referring to them at various times throughout each section.

7.3 The ECLF calls into question whether the Commission is well-advised, as a matter of principle, to include in the final version of the Guidance Paper references to decisions rendered by national courts, which are still under appeal.[16] While it is not excluded that a party or judge studying the Guidance Paper will notice the caveat and verify whether the particular point has been upheld on appeal, this is by no means certain. In fact, the Guidance Paper may end up containing statements which the Commission would not have made if it had known that a particular decision has been overturned on appeal.

7.4 Finally, the ECLF would invite the Commission to revisit the introductory sections of the Guidance Paper with a view to alerting the reader particularly as to the limited purpose and scope of the Guidance Paper. In other words, the introduction should be clear in terms of what the Guidance Paper is not intended to be or to achieve.

7.5 For example, there should be a sufficiently clear and detailed reference to the non-binding nature of the Guidance Paper. It may also be useful to explain more broadly that the Guidance Paper is limited to the issue of quantifying harm, while there are many other complex issues that both national judges and the parties to a private litigation will be facing. For example, the Draft Guidance Paper makes only brief reference to the causal relationship between infringement and damage, and only as one of a list of various factors which are subject to national competition rules. [17] While the ECLF would not

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16 The Draft Guidance Paper cites, in particular, the controversial decision by the German Oberlandesgericht Karlsruhe which is quoted in paragraphs 26 (footnote 27), 38 (footnote 40) and 84 (footnote 89). The Federal Supreme Court has meanwhile overturned and remanded the decision on appeal (the Supreme Court decision is not yet published). In paragraph 169, the Draft Guidance Paper refers to a decision of the Stockholm tingsrätt which was also under appeal (footnote 154). The appeal has been decided and the case is pending before the Swedish Supreme Court.

17 In practice causation is often a greater obstacle to a successful damages claim than quantification. Many Member States have legal mechanisms by which courts can relax the standard of proof for quantum. In Italy and Austria, for instance, courts will have discretion to apply a lower standard of proof for quantum if the precise scope of the loss would be difficult or impossible to prove (see s.273 of the Austrian *Zivilprozessordnung* and Article 1226 of the Italian Civil Code). A similar approach has been established by case law in England, where the High Court has acknowledged that the English courts have long been willing to take a "pragmatic view" of the degree of certainty with which claimants must plead and prove damages

recommend the Commission to elaborate on issues of causation, the Guidance Paper should have a clear statement to the effect that litigation involves several steps and it is not simply a matter of quantifying the alleged loss. Otherwise claimants might come under the impression that damages actions are straight-forward matters where the real issue is one of quantification, as opposed to proving whether the claimant should be awarded any damages at all.

(*Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch), [2008] 2 All ER 249). Causation, on the other hand, must normally be proven and the courts of most Member States will not accept a lower standard of proof on this point (Italian courts may deem the causal nexus between infringement and harm to be proved adequately in view of common business experience where the causal nexus is otherwise difficult to establish - for example, where an anti-competitive infringement is the most likely explanation for a price increase.)

Annex 1 – Participants

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