
Cartel Damages Assessment

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Nils von Hinten-Reed
Partner



Growing role of antitrust damages litigation

- n Commission White Paper asserts the basic right for parties who have been harmed by antitrust violations to claim and receive damages.
 - q “Any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an infringement of Article 81 or 82 EC. This principle applies to indirect purchasers.” (p.90)
- n These damages are broadly defined and meant to provide full compensation.
 - q “Victims of an EC competition law infringement are entitled to full compensation of harm caused. This means compensation for actual loss and for loss of profit, plus interest from the time the damage occurred until the capital sum awarded is actually paid.”

Growing role of antitrust damages litigation (*continued*)

- n The White Paper makes it easier and less costly to litigate for damages
 - q Easier to prove a violation
 - q Easier to prove fault
 - q Easier to get required information (expanded discovery)
 - q Allows for collective action to seek damages

- n The White Paper indicates the Commission will give non-binding guidance on the calculation of damages; e.g., recommending the use of an average overcharge in cartel cases
 - q Would put burden on defendant to show the simplified calculation would be inappropriate
 - q Would make it easier for claimants to meet the burden of proof of damages

- n The White Paper would retain the pass through defense in the case of cartel overcharges, but would require the defendant to prove there was pass through

Growing role of antitrust damages litigation

(continued)

- n White Paper proposals were adopted in part or in whole to make antitrust damages litigation more likely to succeed
 - q Produce higher average awards with greater certainty
 - q Reduce litigation costs
 - q Make the economics of litigation a better investment

- n Potential consequences
 - q More damages lawsuits filed
 - q More damages recovered

- n The only potential conflict with this outcome is contained in the Commission's proposals that would shield companies seeking immunity from private litigation risks

The general framework for assessing and quantifying damages

- n Need to compare
 - q The actual outcome with the wrongful conduct
with
 - q What would have been the outcome “but for” the wrongful conduct (the “counterfactual”)
 - q i.e., describe the essential differences for the claimant between the two situations

 - n Need to quantify the value to the claimant of the difference between these two outcomes
 - q Determine what compensation would make the injured party “whole” or equally well off as without the wrongful conduct or what constitutes full compensation
 - q Equivalently, value the differences to the claimant described in the first step of the analysis
 - q The focus on the claimant’s circumstances is important
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The challenges of damages analysis

- n To accurately create or predict the “but for” world
- n Provide credible evidence to support the “but for” scenario
- n Appropriately quantify financially the effects of the difference between the “but for” scenario and the actual outcome for the damaged party
- n Almost always the critical problem is separating the effects of the wrongful conduct from the effects of other factors that would have affected the economic welfare of the damaged party

Competition authority vs. courts

- n The economics of defending a cartel member before a competition authority and in litigation are similar
- n Both require
 - q Demonstrating there were factors present that limited the effect of the cartel
 - q Analysing what one can and cannot validly say about the effect of the cartel on raising prices
- n Damages litigation in addition requires addressing the pass-through defence

Factors that could affect the ability of the cartel to raise price

- n How effectively did cartel members communicate and enforce cartel decisions?
 - q Evidence of cheating among members
 - q Evidence of cartel breakdowns
 - q Evidence of ineffective communication

 - n Are there strong substitutes that constrain price?
 - q Demand side substitutes can constrain prices
 - n Relates to market definition
 - q Even substitutes not technically part of the relevant market can constrain a cartel

 - n Imports

 - n New entry
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Establishing the proper benchmark

- n Need to compare what prices would have been with and without the cartel during the cartel period
- n Potential methods for estimating prices without the cartel
 - q Benchmark of prices from another similar region with similar demand and supply conditions but without a cartel
 - n Often hard to find comparators
 - n Can be hard to know that this area was not also subject to a cartel
 - q Benchmark of before or after cartel
 - n Simple before or after comparison often misleading because of changes in other factors that affect price
 - n May be difficult to know when cartel begins or ends

Establishing the proper benchmark (*continued*)

- n The benchmark should be what prices would have been without the cartel
- n In most cases the market would be a highly concentrated oligopoly
- n In almost no cases would it be a perfectly competitive market
- n Therefore, it is almost never the case that cartel prices should be compared to perfectly competitive prices to determine the effect of the cartel

Controlling for other factors in comparing cartel and non-cartel periods

- n Need to have data for both the cartel and non-cartel period
 - q Where cartels have been long-established, the necessary non-cartel period data may not be available

- n Need to control for significant supply or demand variables that would affect prices
 - q Costs
 - q Prices of substitutes
 - q Demand

- n To do this econometrically one needs reasonable data on
 - q Prices
 - q Direct or marginal costs
 - q The price of substitutes
 - q Some general measure of demand

Examples of why you need to control for other variables

- n Prices may rise after a cartel ends because costs or demand have risen
 - q Clearly this does not mean that the cartel had caused prices to be lower

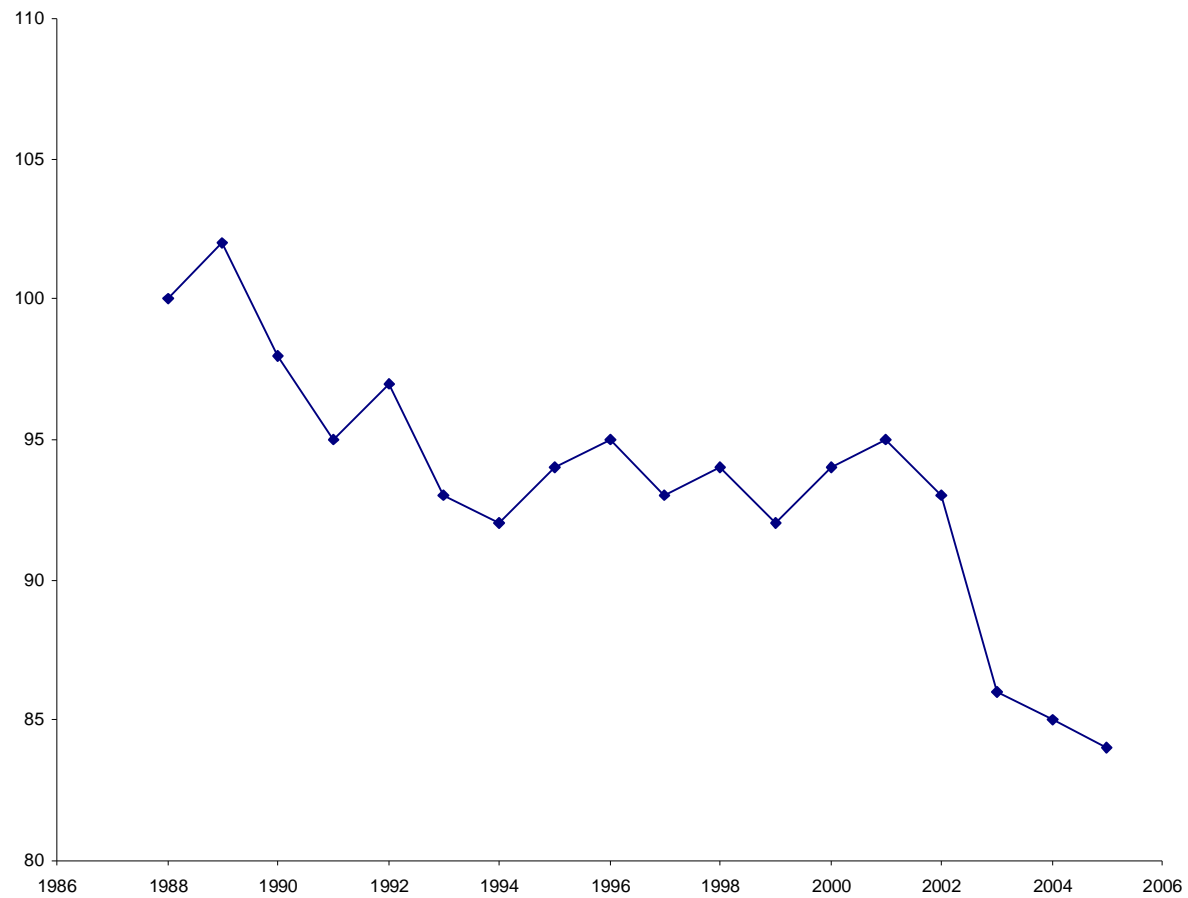
- n Prices may fall and then rise sharply after the end of a cartel to a higher average price
 - q Tells us nothing about the effect of the cartel without controlling for other factors

- n The start of a cartel may coincide with prices falling due to a reduction in demand
 - q Often prices fall throughout the cartel period because of excess supply
 - q Does not mean cartel was ineffective

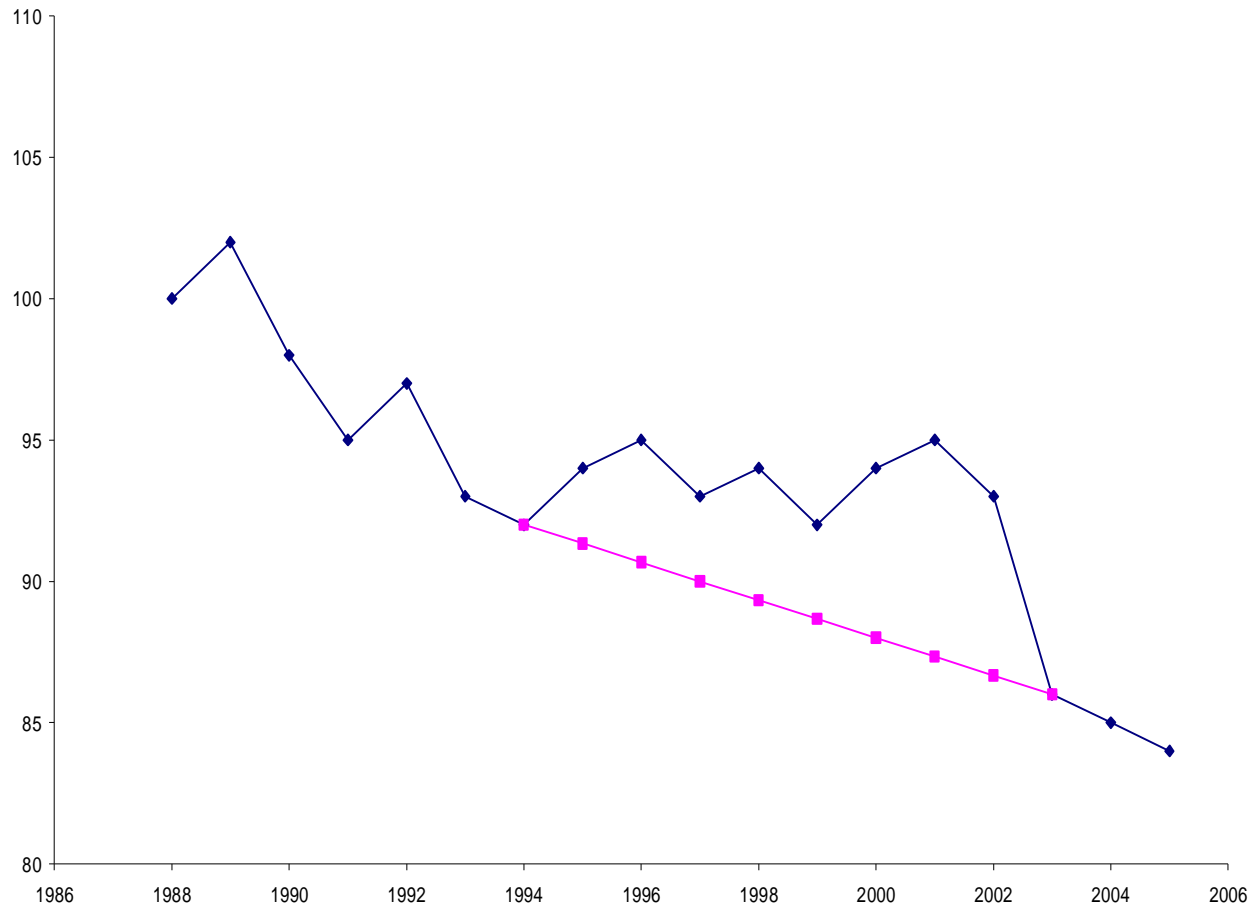
Four examples

- n Provide four hypothetical examples of the path of prices under a cartel
- n Assume cartel began in 1992 and ended in 2003

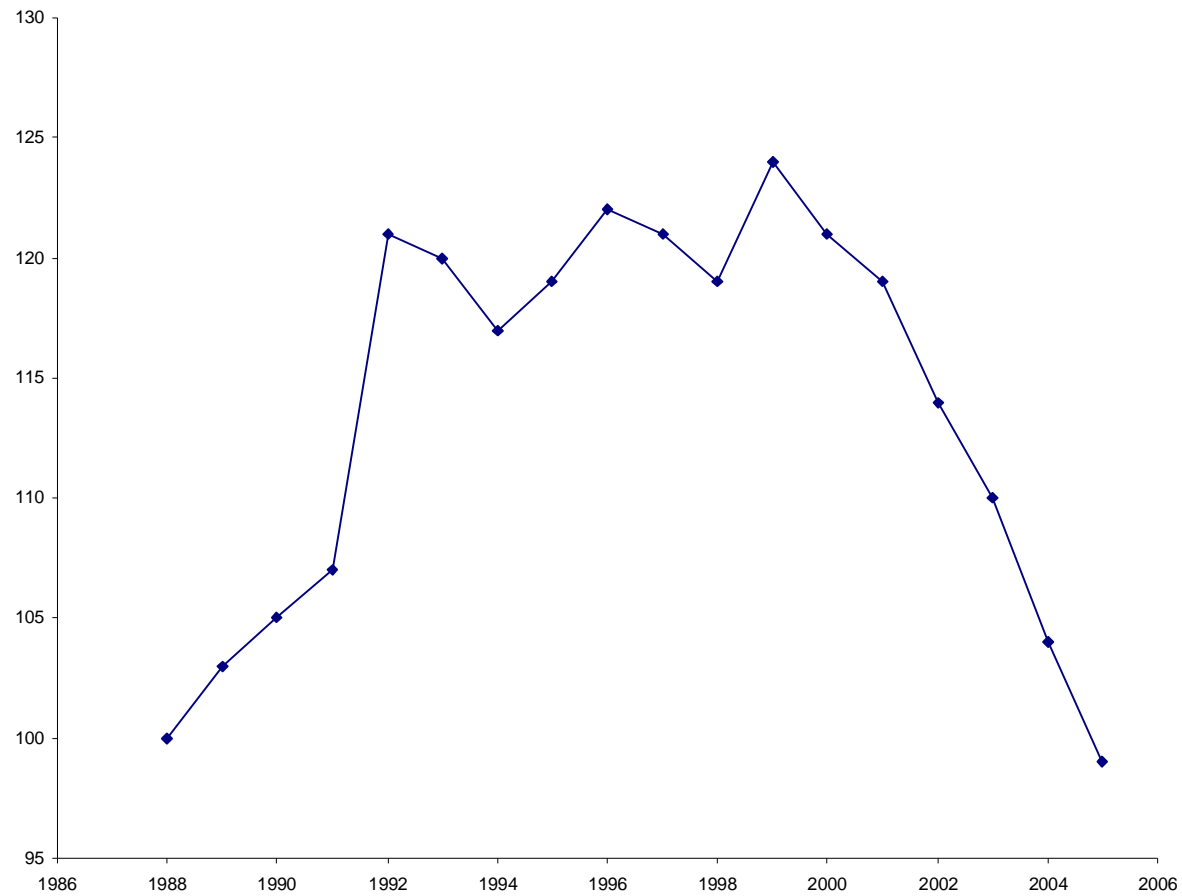
Example 1: effect of cartel unclear



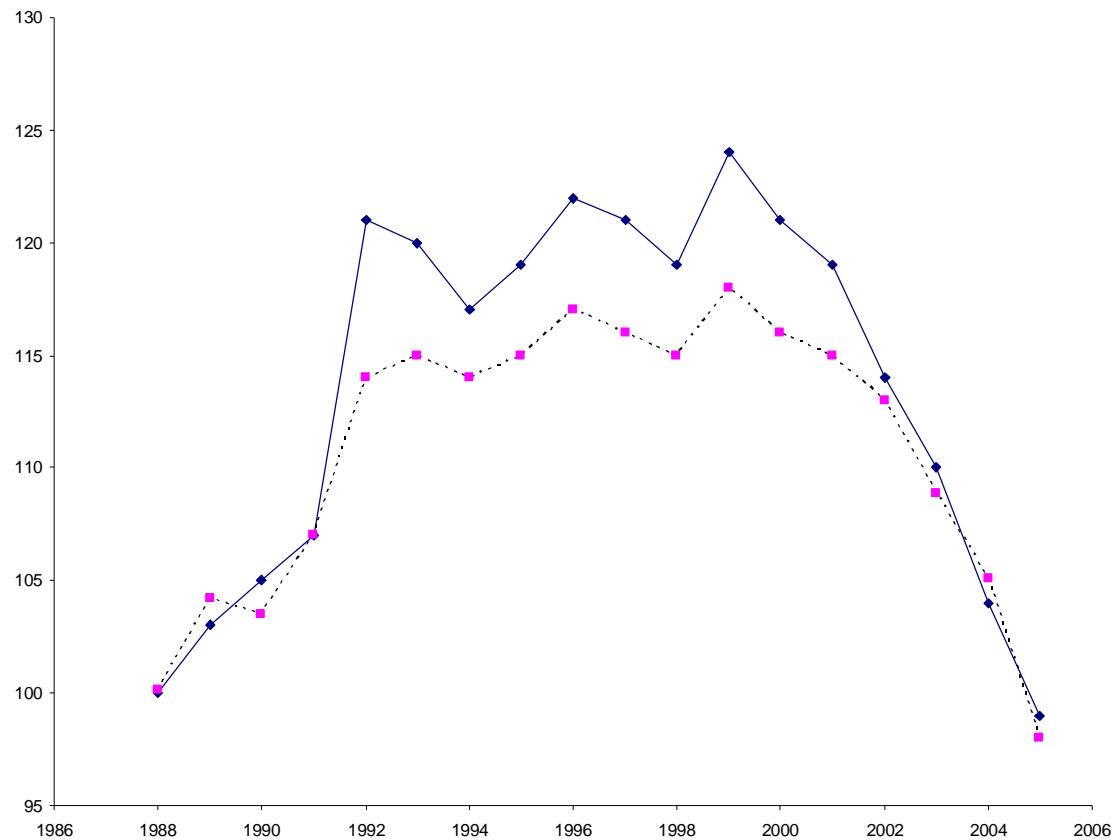
Example 1: effect of cartel unclear (cont.)



Example 2: apparently clear effect of cartel ...



Example 2: ... significantly reduced when compared to non-cartelised price series



Similarity of cartel behaviour and non-cartel behaviour

- n Cartel markets generally respond to supply and demand factors in the same direction as non-cartelized markets but not necessarily by the same magnitude
 - q If marginal or variable costs rise (e.g. increase in input prices), prices rise
 - q If demand falls, prices fall

- n From this it follows that one can tell very little about the effect of the cartel from price movements alone during the cartel period

Econometric approaches to measuring cartel effects

- n Econometric analysis can be used to measure the effect of the cartel on prices
 - q Accounts for the impact of a range of factors
 - q Create statistical model of the industry during both cartelised and non-cartelised periods
 - q Use this model to estimate the effect of the cartel on prices
 - n Potential difficulties
 - q Data availability
 - n Need at a minimum good price and direct (marginal) cost data
 - n Need data on other relevant supply and demand variables
 - n Ability properly to specify the appropriate statistical model
 - q Sometimes because of a correlation between factors affecting price one cannot separate the effects of other factors from the cartel
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Pass-through defence

- n Argument is that the claimant suffered no harm as it was able to “pass-through” the cartel price increase to its customers

- n What theory tell us
 - q Rises in prices to an intermediate producer will be passed through to some degree
 - n Perfectly competitive buyers’ market: 100% pass-through
 - n Monopolist with straight-line demand curve: 50% pass-through

- n Non-economic arguments against pass-through
 - n “The price increase was so small buyers would not bother to pass it through”
 - n “The price increase was so big the buyers were not able to pass it on”
 - n “Our buyers would not let us raise prices at all”

- n All of these non-economic arguments may be persuasive to a non-economist finder of fact who may be persuaded by buyer testimony

Pass-through defence (*continued*)

- n Perhaps the best way to counter the non-economic analysis of pass-through is statistical analysis of the effect of costs on prices
- n Estimate the effect of changes in input costs on the price that buyers sell their product for
 - q Note: use changes in all input costs, not just the costs of the cartelised product
- n It is fundamental in (virtually) all industries that costs and prices are strongly related
 - q Implies that the econometrics will almost always strongly support the argument that there is significant pass-through

Implication of the White Paper proposals for proof and measurement of cartel damages

- n The Commission would propose to prepare non-binding guidelines for determining cartel damages; e.g., such as estimating the average rise in price caused by cartels.
- n The problem with this approach is that most studies of cartel damages on which such estimates would be based rely on the “before and after” method of measurement and, therefore, in most cases are flawed.
- n Some estimate the average rise in price to be 20 – 30%. This could mean that a defendant facing fines of 10% of revenues plus damages of 30% could pay up a significant portion of its revenues during the cartel period in fines and damages.

Implication of the White Paper proposals (cont.)

- n The adoption of simplified methods of damage estimation could become a standard
 - q Defendants arguing for less damages would have the burden of proving actual damages were less than the standard
 - q Claimants wanting more would have the burden of proving actual damages were higher than the standard

- n The Commission has retained the pass through defence with a number of key assumptions
 - q Has put the burden of proof on the defendant to demonstrate pass through effects or lack thereof.
 - q Allows firms further down the distribution chain to seek damages and assumes that damages were passed along to their level, unless proven otherwise by the defendant.

Implication of the White Paper proposals (cont.)

- n Proving that pass through has or has not occurred often requires economic data that are difficult for defendants to obtain
- n Getting such data would require significant discovery including, in many cases, third party discovery
- n In total, the Commission's proposals will make the task of successfully defending cartel damage claims more difficult
 - q By presuming damages – e.g., some rise in cartel prices
 - q By putting the burden of proof on issues related to pass through on the defendant

Implication of the White Paper proposals (cont.)

- n Successful defences of cartel damages cases will depend upon sophisticated economic analysis based on good data
- n Appropriate discovery will be essential for defending cartel damages cases in the future.

Nils von Hinten-Reed
Partner, Competition Economists Group
Brussels and London

M: +32485793457

E: nvhr@ceg-europe.com

W: www.ceg-europe.com

