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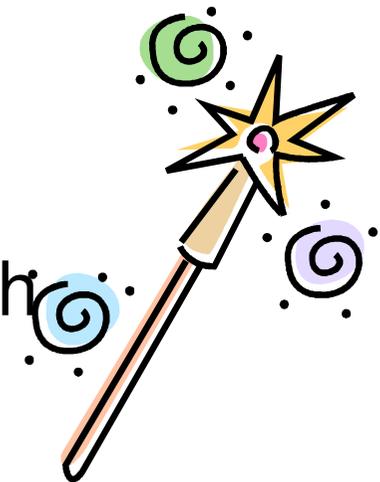
# Private antitrust enforcement

## Economist's remarks

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- Goal is to comment selectively on
  - A few practical aspects of damages quantification
  - Some “systemic” effects of private enforcement (or lack thereof)
- Not aiming to provide yet another
  - Taxonomy of methods for quantification
  - Focal figure for overcharges in cartels (which is equivalent to asking for a magic wand)



# Slow progress towards **full compensation**



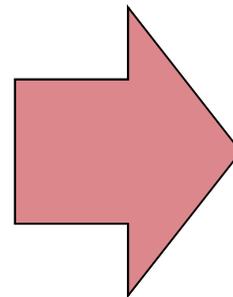
- Follow on cases are increasing
- Overall, a small share of infringement decisions is followed by action
- Some key jurisdictions, with a few cases elsewhere
- So damages have not been claimed for many cases, economy-wide this means
  - **Dis**incentives to infringe antitrust law are **not as strong** as they could be
  - Many have not been compensated and won't be for harm suffered
  - “Distributional” issues on the supply chain

# Proposed Directive focuses on compensation

*“Compensation for harm suffered means placing the injured parties in the position they would have been in had there been no infringement of Article 101 or 102 TFEU.”*

- Actions for damages should bring redress to those who suffered harm: no more no less than full compensation

- No punitive aspects
- No unjust enrichment
- Any “rules of thumb” rebuttable



Raising  
standards for  
quantification

Even if standard of “likely scenario” helpful

# We say **antitrust** infringement

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- But we really think cartels? Challenges for quantification differ in 101 and 102
  - The building bricks are the same: Actual and Counterfactual (=but-for the infringement)
  - Need to find convincing evidence of difference A-C
    - Cartels: typically lots of transactions have taken place but at the “**wrong**” price-quality level (when there are effects)
    - Exclusionary abuses: in many forms may have prevented transactions from taking place
      - fewer relevant historical data
      - more room /need for hypothetical scenarios and reliance on assumptions

- There is a presumption that cartels are harmful... that is to say we can start with a prior that damage is above zero
  - If goal of compensation this is a helpful starter for court cases but does not provide guidance on quantum: no good to have 10% figure if overcharge was 40% (...nor 20% if effect was 3%)
- **Too complex for judges....** But judges are used to call on experts (financial derivative, medical, ballistic, IP)
- **There is little data...** but companies have all invoices and shipments in record for years
  - Foggy records in the 'nineties perhaps
  - ... but as time goes by we will have better and better data and IS

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- *Passing on accepted*, which means indirect purchasers' claims
  - Requires analytical and empirical efforts
    - Not a big deal for disincentives to infringe perhaps (as long as damages suffered along the chain are claimed in full by either direct buyers or direct and indirect buyers)
    - Quite an issue for achieving “full compensation” no more no less, if the call on pass-on is wrong some have too little and some have too much compensation
  - As for the defence statement “You should always pass-on to mitigate” ... not without consequences!!
    - Let's not be naive about the effect of asking for higher prices downstream

# Where the stakes are high



- ... it is more likely to see claims
- thus large buyers much more than small buyers or final customers



- ....unless small buyers can easily aggregate (opt out)
- The bar is still quite high, even in follow-on

# Constraints to **private** enforcement / good settlements



- Public enforcer's decision binding, privileged proof.. but contains little on quantum
  - Ok to initiate proceedings
  - Not very helpful in quantification
- **Public enforcers : please tell us more on effects 😊** (also ties-in with fines setting and basis for settlements)
- Settlements in public enforcement (much more than leniency) “bury” evidence?
- Limits on disclosure
- Burden of proof on matters that concern third parties further down the chain Art 12-15
- Judges may not know who are the «experts»

# Quantification: best practice is out there... within reach



- Let's not be shy: some methods are better if there is data
- Most often **one has detailed** data in 101 cases (at times also in 102)
- Cases out there already encompass financial methods and various ways to use econometrics (time comparison or benchmarking)
- Simple methods should really be last resort
  - **don't** want to mix effects of market change and of the infringement
  - same methods widely used also for policy assessment, medical science, **stakes are high enough to care?**
  - models and stats are criticized but the alternative is to allow for even more discretion and less of a shared methodological basis?

# Thank You!



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