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Quantifying Damages in Civil Proceedings: A Pragmatic Approach

Raphaël De Coninck*

Chief Economist Team

DG Competition

*The views expressed are those of the speakers and do not necessarily reflect those of DG Competition or the European Commission



Introduction

- The Commission's 2008 White Paper on antitrust damages actions identified a number of obstacles that victims of antitrust infringements often face to obtain compensation.
- One of the measures that the White Paper announced was the preparation of non-binding practical guidance on the quantification of antitrust damages to offer assistance to national courts and parties involved in private actions for damages.
- DG Competition commissioned an external study (Oxera / Kominos et al., December 2009) and held a workshop with economic experts (January 2010).



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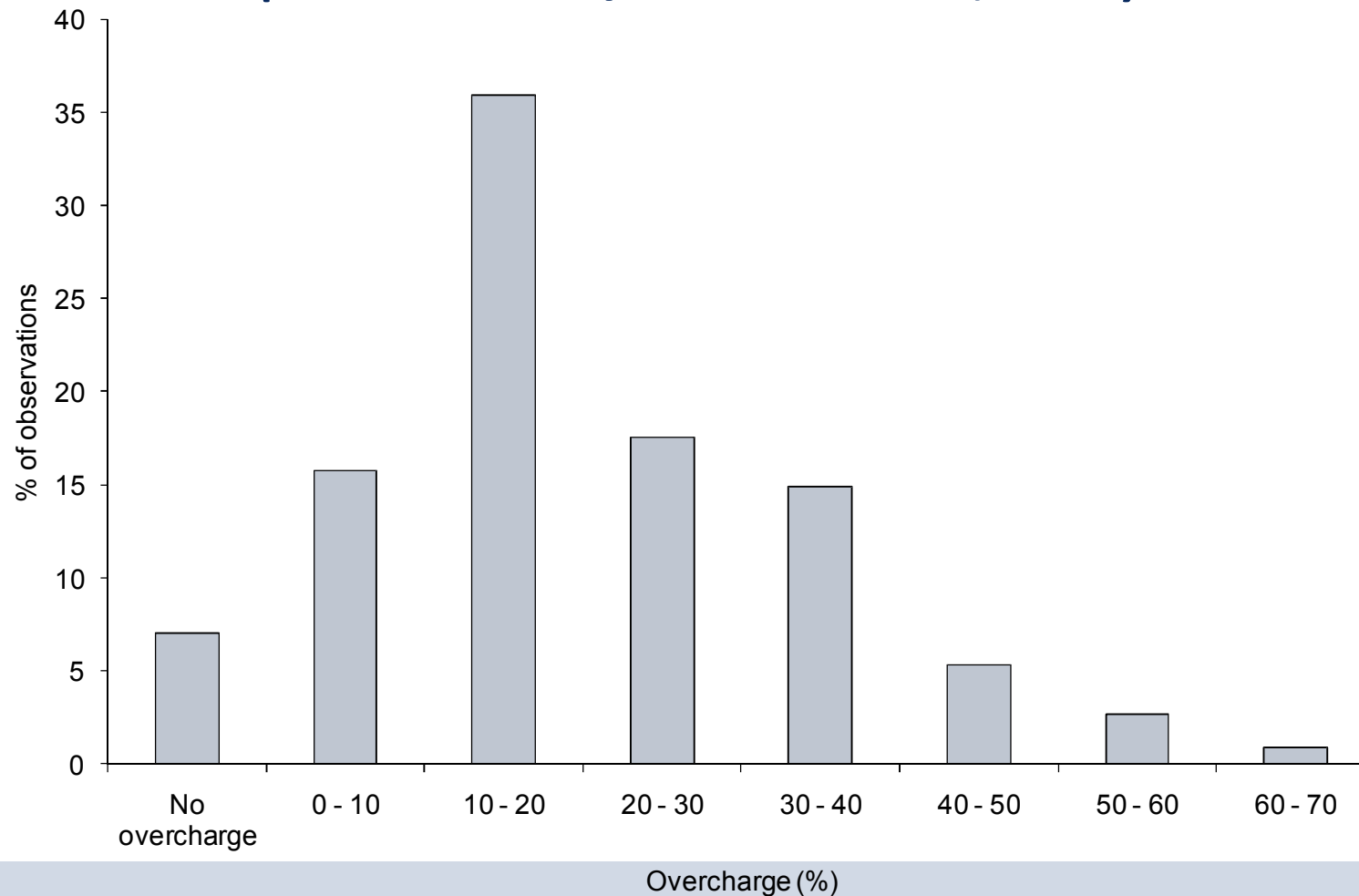
The need for a case-specific approach



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Distribution of cartel overcharges in a sample of empirical studies (source: Oxera/Kominos et al., 2009)





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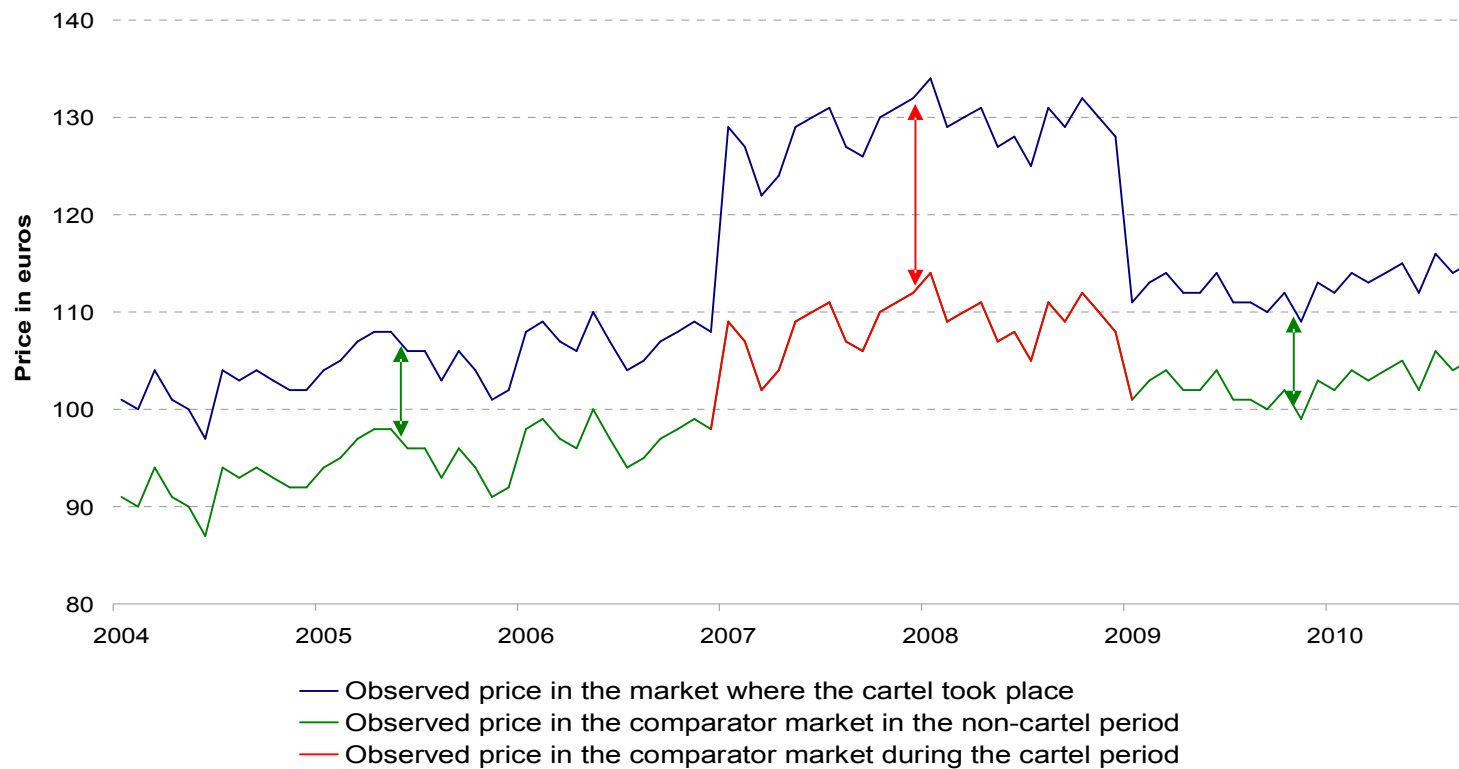
Simple comparisons



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Methods used for the estimation of antitrust damages: an illustration





Some Considerations

- When did the infringement start?
- When did it finish?
- Is it better to compare to periods before or after the infringement (or both)?
- Is the comparison group sufficiently similar?
- Is the comparison group unaffected by the infringement?
- What other factors are likely to have affected the variable of interest?



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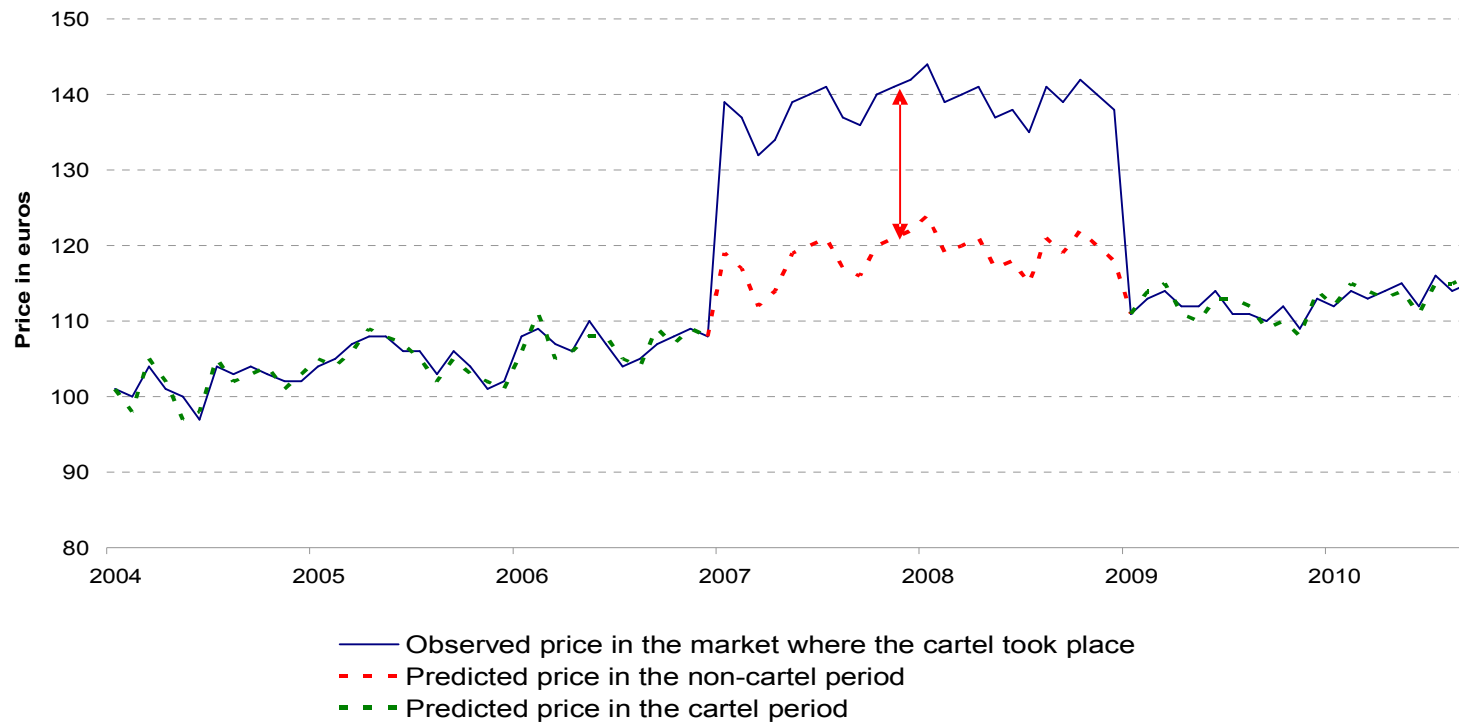
Regression Analysis



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Illustration of observed and counterfactual prices obtained using regression analysis





Some considerations

- Regression analysis can be seen as a refined implementation of the comparison methods discussed above.
- Regression analysis is an intuitive technique that addresses the shortcomings of simpler comparison-based techniques.
- The key questions for assessing this evidence are largely the same as for the naïve comparisons mentioned above.
- Regression analysis must be performed with great care and attention to the underlying market specificities to meet adequate quality standards. Otherwise, it may also lead to inaccurate damages estimation.



Also...

- Don't ignore volume effect!
- How to deal with pass-through along the supply chain?
 - Direct estimation of price effect
 - Pass-through estimation
 - Some insights
- Link between pass-through and volume effect.



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Which method(s) to choose?



Methods rely on different assumptions and their accuracy varies

- The yardstick method attributes all the difference between the infringement and comparator market to the infringement, while there may be a wealth of unrelated factors driving these differences.
- Similarly, the before-after method assumes that all the difference between the infringement and non-infringement period is attributable to the infringement, while these may also result from unrelated changes in the market.
- Difference-in-difference addresses some of these issues, but critically depends on the similarity of the infringement and control groups.
- Then again, econometric analysis can make these simple comparisons more accurate, as it provides a way to control for effects unrelated to the infringement.



Trade-off

Accuracy versus ease of implementation:

- On the one hand, simple comparisons are straightforward to implement, but may reveal quite inaccurate.
- On the other hand, econometric analysis requires some more work and data, but may provide a significantly more accurate answer.



In practice

- What will be deemed acceptable depends on the specificities of the case, data availability and the applicable legal rules (in particular regarding the standard and burden of proof).
- If the underlying assumptions of the simplest methods appear reasonable given what is known of the case, limited data is available and the burden/standard of proof are relatively low, simple comparisons may be found acceptable.
- However, if significantly more accurate answers can be obtained at a limited cost, regression analysis would provide good a balance between accuracy and ease of implementation.



Conclusion

- It is important for judges to appreciate the main factors driving apparently conflicting damages estimations presented by opposing parties.
- The process can only be meaningful if the various economic experts involved can thoroughly cross-check the analysis that has been performed.