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Calculation of Damages in Transnational Antitrust Cases

Jeffrey Dorman*

I. Introduction

This article will discuss the nuts and bolts of putting together a damage study in an international antitrust setting. Many of the challenges of performing a trans-national antitrust damage study are analogous to the issues faced in a domestic damage study, but are more severe. For example, one of the biggest pitfalls in a domestic damage study is a damage analysis that fails to take into consideration different economic factors during the various time periods you are comparing. As an example, if the claimant contends that it had a sixty-percent market share at the beginning of the damage study and a twenty-percent market share at the end, after the alleged anticompetitive activity had occurred, and there have been a substantial number of entrants into the market during that time period, the damage analysis is not going to have very much credibility. At the extreme, the claimant runs the risk of having the study excluded because of its failure to account for those external factors which had nothing to do with the alleged conduct.

In addition to that, and probably even more to the point, many of the antitrust cases particularly in international settings involve more than one form of alleged anticompetitive activity. While this may also be true in a domestic setting, it is even more likely in an international setting. As an example, allegations of predatory pricing may be coupled with allegations of geographic bundling and other types of activities. Unless you are absolutely confident that each of these activities is going to be found by the court or jury to be actionable, you run a really severe risk by creating a damage study that has no ability to determine the injury traceable to each category of activities. Specifically, if your damage model assumes a finding that each type of alleged activity is actionable and if the court or jury

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finds that a significant portion of the alleged actions do not violate the antitrust laws (and are nothing more than good competition), there is a significant possibility that your damage study will be excluded. At the very least, the credibility of your damage study will be severely impaired.

This particular issue is of even greater moment in an international case where a “yardstick” damage methodology is used.¹ Such a damage study is highly susceptible to allegations that the time periods or geographic areas used as the yardstick are inapposite to the time period or geographic area where the alleged violation occurred. Some of the factors that may impact sales, market share or other damage metrics include: exchange rates, local competition laws, and barriers to entry that are indigenous to a particular market in Europe. These factors have to be accounted for when using the yardstick approach in any antitrust case, but particularly in an international case where the competitive factors probably vary greatly from country to country.

II. Modelling

A. Static Model

What tools are available in putting together a damage analysis? Damage models are broadly grouped into two general categories: static models and dynamic models. Static models are nothing more than a comparison of snapshots of the market. Before and after comparisons of profit, sales, and market shares are examples of static models. The snapshot comparison may be geographic (i.e., comparisons of the claimant’s market position in a geographic area unaffected by the alleged violation with its market position in the geographic area where the alleged violation occurred). The snapshot may be temporal (i.e., limiting the snapshot comparison to the same geographic area impacted by the alleged violation, but comparing the claimant’s market position during a time period unaffected by the alleged conduct with its position after the conduct

¹ A yardstick damage methodology uses data from an analogous time period or geographic area to estimate damages in the specific time period and geographic area relevant to the alleged violation. An example of one yardstick approach for a plaintiff who was prevented from entering France is to note that it was able to enter Germany and, after five years, achieve a 40% market share. The claimant under this approach would argue that conditions in France were sufficiently analogous to those in Germany that, but for the defendant’s conduct, it could have achieved a similar market share in France.

occurred). The snapshot comparison can also involve a trended analysis that (1) takes the status of the plaintiff prior to the time period of the alleged activity and trends it forward using some type of a statistical model or other mechanism which factors in changes due to economic conditions and projects the plaintiff's but-for status, assuming no anticompetitive activity, and (2) compares the trended projection of a but-for world with the actual world that has been impacted by the alleged violation.

B. Dynamic Model

An alternative to using a static model is a type of model that you will see used more and more in antitrust cases and elsewhere, called a dynamic model. In contrast to a comparison of snapshots, dynamic models actually attempt to estimate the damages as they occur. These can involve statistical models using simultaneous equations systems where it is assumed that the effects of various activities are going to simultaneously impact other activities within the same time period; they can involve recursive models where it is assumed that the equations feed into one another within the system or feed into different time periods that are being estimated; or they may involve a relatively new methodology that is now being used with increasing frequency in government contract cases, called System Dynamics Modeling ("SDM"). SDM involves a complex set of stock and flow equations, which can be either ordinary equations, differential equations or, in the more sophisticated models, first and second order difference equations that attempt to model a market's actual operation with a series of equations that are designed to mimic behavior of the various firms of the market, including that of the defendant.

C. Comparison: Static v. Dynamic

Both static and dynamic models have their own advantages and disadvantages. The three primary advantages of dynamic models are: (1) granularity (i.e., the ability to isolate the injury due to a specific category of actions or due to conduct that occurred in a particular country), (2) the ability to perform alternative computations very quickly, and (3) a close relationship between the damage and liability case. A dynamic model, properly constructed, is highly automated and, consequently, has the ability to isolate the effects of specific types of conduct. Thus, if a jury finds that some, but not all, of the alleged conduct is actionable, a well-constructed dynamic model can estimate the damage attributable to the portion of

the alleged conduct that is actionable. This is particularly important in the context of an international antitrust case where the court may, for example, determine that activities in three of the countries involved in the lawsuit are actionable but actions in a fourth country are not. In that event, if your damage model cannot differentiate between the impact of conduct in individual countries, you have a real problem. Moreover, it is much easier with these models to perform “what-if” scenarios. In addition, because a dynamic model attempts to calculate damages in the manner in which the injury was sustained, there should be a close correspondence between a dynamic model of damages and the proof offered in the liability case. Consequently, it should be easier for the trier of fact to understand the relationship between the violation and the injury. The two should reinforce one another.

On the other hand, static models are simpler to perform and to present. Dynamic models, particularly SDM models, are more complex with more moving parts. As a result, there is greater opportunity for the modeler to make serious mistakes in this type of damage study than in one based on a static model. While virtually any competent expert can use a static model, use of a dynamic model puts a premium on the technical qualifications of your damage expert.

III. Modelling Examples

The use of these two different types of models can be illustrated with the following three damage study charts. Chart One is a diagram of a simple price fixing case.² The nature of the damage in this case is relatively linear. The diagram demonstrates that the causation of injury is straight forward, and does not require one of the most complex models to quantify damages. If you do not need one of these more sophisticated, complex techniques, they should not be used. There are too many factors that can go wrong, and you may very well exceed both the quality of your data and the ability of your testifying expert to perform the analysis.

Chart Two diagrams a slightly more complex damage case.³ This is a hypothetical case involving damages incurred in a case of strict geographic bundling. Within the context of that, it should be noted that some of the arrows go both ways. When you have a

² See Appendix 1.

³ See Appendix 2.

diagram – and you should always diagram the way in which you believe your client has been damaged as a result of the alleged activity – in which the arrows are going in both directions, that is a clear indication that you have two activities that are either simultaneously interacting with one another, or they are recursively interacting with one another. Here, you have to make a determination as to whether a snapshot approach can adequately simulate the nature of those damages. The mere presence of simultaneity does not necessarily require you to use a dynamic model. However, if the nature of the damages that are contained within those double arrows predominate, and they are not adequately described within the context of one of the simpler, static models, you may have no choice but to use a dynamic model.

Finally, Chart Three is an example of a far more sophisticated damage hypothetical that involves a number of different types of activities.⁴ This is a clear example of a model that is going to be very difficult to capture using a simple, static model. If you choose to use that kind of a model, you have all of the potential pitfalls that have been discussed above – e.g., the possibility that the court will disagree that (a) the pricing behavior of the defendant was predatory, (2) there was actually any illegal bundling going on, or (3) the foreign conduct impacted the United States market.

If you elect to choose a simple model in this particular instance, you have to be very careful that it is done in a manner that allows you to differentiate between the various categories of alleged activities. When you put together a model diagram this complex, this is a pretty good indication that you are going to be better off using some type of dynamic model, at least as an alternative. You may choose to do both, but at least as for one of your alternatives, you will probably want to take a shot at trying to put together a dynamic model.

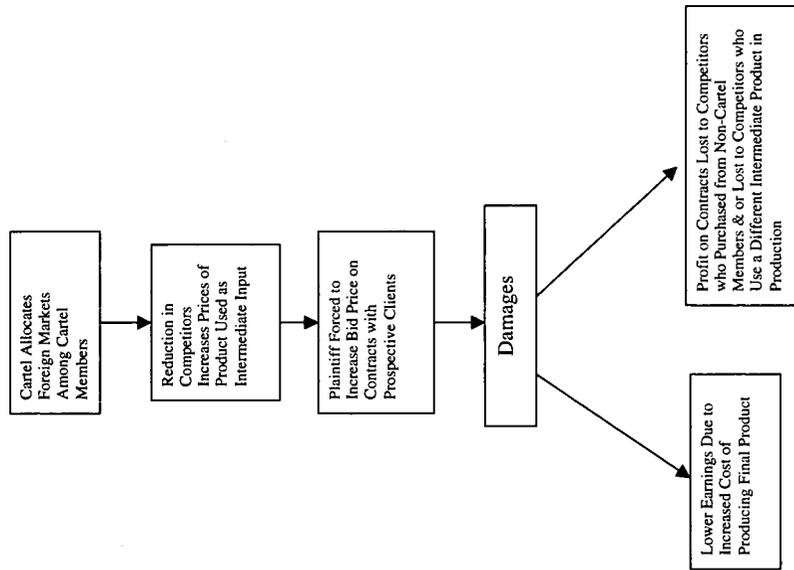
IV. Conclusion

In conclusion, when calculating damages in trans-national antitrust cases, a number of choices must be made in determining which model to use. The appropriate model must be chosen based on a number of factors including: the facts of your specific case, who the trier of fact is, and the ability of your expert to convey the model clearly and succinctly. Thus, the determination is not black or white and must be made with deliberation and knowledge.

⁴ See Appendix 3.

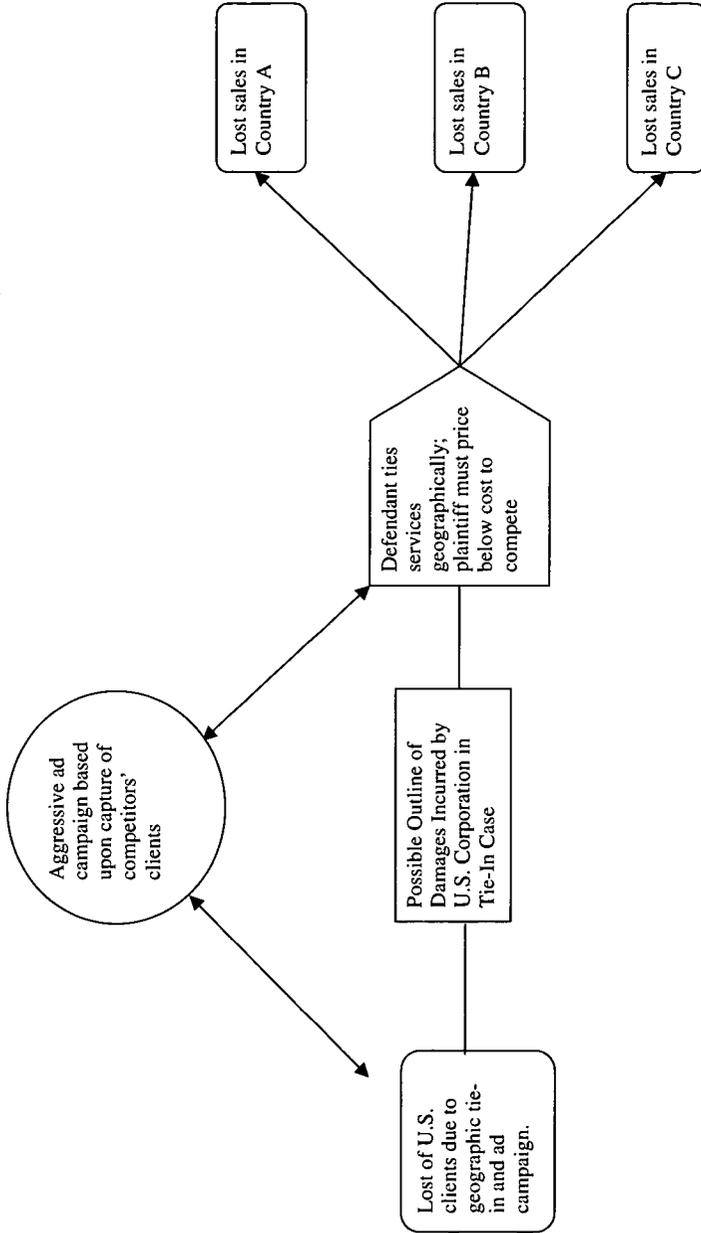
Appendix 1

Diagram of Damages in International Territorial Allocation Case



Appendix 2

Diagram of Damages in a Case Involving Geographic Bundling



Appendix 3
Diagram of Damages in a Case Involving International Service Bundling & Other Predatory Conduct

