Master thesis

Admissibility of economic expert evidence and legal cost awarding rules in damage claim procedures

A Comparative study on the admissibility of the quantitative models and methods proposed by the Draft Guidance Paper for calculating damages in competition law procedures and legal cost awarding rules in the United States and the Netherlands.

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Foreword

Before you lies my master thesis, the final part of the master International Business Law at Tilburg University. I have written this thesis under the supervision of the European and International Public Law Department. During my study years at Tilburg University I have had special interest in Dutch and European Competition law. When I attended the course European Competition Law I became fascinated with the intentions of the Commission of creating a private enforcement culture in Europe. The Commission wants to achieve this without the procedural incentives used in private antitrust litigation in the US, which are seen to encourage frivolous litigation. As Member States in the EU have procedural autonomy, it remains to be seen if Commission’s intentions can be exercised effectively by all people in the Member States. In this thesis I will focus on two main aspects relating to increasing private enforcement of competition law in Europe, which are the admissibility of economic expert evidence in damage claim procedures and the cost awarding rules of litigation associated with the use of economic expert evidence.

I would like to thank Dr. Firat Cengiz for her patience and feedback in my search of a coherent and structured thesis. I also want to thank law firm Holland Van Gijzen Advocaten en Notarissen LLP for allowing me to combine an internship with my thesis activities. Furthermore, I’d like to thank my friends who have always made sure that hard work and social distractions can go hand in hand. Last, but foremost, I’d like to thank my parents and my sister who have always been the greatest motivation in achieving my life goals.

Amstelveen, June 2012,

Tommy Hurley
Chapter 1. Introduction

1.1 Problem description

A market where competition is not distorted or restricted has been explicitly stated as one of the objectives of the European Union ("EU") in the predecessor of the Treaty on the Functioning of the European Union ("TFEU").\(^1\) The Treaty on European Union ("TEU") does not highlight competition objectives as such, but states that the Union shall establish an internal market which shall work as ‘a highly competitive social market economy’.\(^2\) Through its enforcement, competition law is one of the most important subjects of European law in the creation and maintenance of a single market and a free market economy.\(^3\) As a result of the principles of direct effect\(^4\) and supremacy\(^5\) and the modernization of EU competition law\(^6\), private persons can start proceedings before the national courts against the infringement of Articles 101 and 102 TFEU. Article 101 TFEU prohibits decisions by associations of undertakings and concerted practices which may restrict competition and Article 102 TFEU prohibits abuse of a dominant position by an undertaking.

Private enforcement of EU competition law has been explicitly promoted by the current European Commissioner for Competition Policy, Joaquín Almunia.\(^7\) One of Almunia’s predecessors, Neelie Kroes, stated that private enforcement of EU competition law was important for the development of a “competition culture” in Europe.\(^8\) As we will see, it has been well established that every person who has suffered harm because of an infringement of EU competition law has a right to be compensated for that harm.\(^9\) Until this very day, there are no EU rules or laws governing the exercise of this right. It is for every national legal system of each Member State to lay down legal rules governing the exercise of the right to

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\(^1\) Draft Constitutional Treaty, article 3; and Treaty on the Functioning of the European Union (TFEU; Treaty of Rome, effective since 1958, last amendment December 2009).

\(^2\) Treaty on European Union (TEU), article 3.

\(^3\) ECJ, Case C 126/97, Ecovis Swiss v Benetton [1999], paragraph 36.

\(^4\) ECJ, Case C 26/62, Van Gend en Loos, [1963], and direct effect for Competition rules: ECJ, Case 127/73, BRT v. SABAM, [1974].

\(^5\) ECJ, Case 6/64, Falminio Costa v. ENEL [1964], 593.


\(^7\) Joaquín Almunia, Speech on Competition Policy: Public enforcement and private damages actions in antitrust European Parliament, ECON Committee, Brussels (Sep 22, 2011).


\(^9\) ECJ, Case C-453/99, Courage v. Crehan [2001].
compensation guaranteed by EU law (procedural autonomy of Member States of the EU). Because the EU does not have regulatory power over procedural rules in the Member States, the European Commission (“Commission”) can’t harmonize the procedural standards which are applied in Member States when dealing with damages actions arising from infringements of Competition law. However, the procedural rights to enforce EU competition law must be ensured before national courts in a way which does not render its exercise of rights conferred on individuals excessively difficult or practically impossible (principle of effectiveness). Moreover, the rules must not be less favorable than those governing damages actions for breaches of similar rights conferred by domestic law (principle of equivalence).

In an action before a national court for compensation of harm suffered because of an infringement of Article 101 or 102 TFEU, courts have to determine the amount to be awarded to the plaintiff in the event that the claim is approved. Assessing and proving the quantum of damages in actions for damages can be very difficult for both parties and courts. In competition Law cases this can be particularly difficult because of (among other factors) the lack of proof, admissibility of (expert) evidence, proving a causal link between the (alleged) infringement and the claimed damages and the high costs of litigation.

In the United States (“US”) private actions for infringements of antitrust rules account for roughly 90% of the antitrust law enforcement, whereas in Europe there have been very few successful private actions for infringements of EU competition law. Between 1962 and 2004, as few as 12 claims in respect to infringements of Community competition law before national courts have been successful for plaintiffs. Furthermore, only a total of 60 cases for damages actions for infringements of both EU competition law as national competition law have been publicly known to been judged at national courts until 2004.

Since the implementation of the modernization regulation in 2004 and Article 101 and 102 TFEU became wholly applicable in national courts, private enforcement has been growing much faster than the previous decades in Europe. Great steps in the process to develop a well-functional private enforcement of competition rules ‘culture’ in Europe have been made which will be discussed in chapter 2. However, there are still some major issues that private persons face when exercising the right to claim damages for infringements of both EU competition law and national competition law before national courts.

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11 Competition Policy Newsletter, Number 2 - 2004, p. 37.
This thesis will focus on two of those issues, which are the quantification of damages in competition law procedures and the associated costs awarding rules. The quantification of damages in procedures before national courts has received a lot of attention of the European Commission, the Directorate-General (DG) Competition and all parties involved in the last years. After the commission carried out a study on the quantification of damages, it released a Draft Guidance Paper which proposed methods and implementation techniques for the quantification of damages arising from Competition law infringements. National courts are slowly getting used to these methods, but still encounter difficulties in successfully exercising them. I will assess the legal possibilities and restrictions in the use of methods proposed by the Draft Guidance Paper in procedures before courts in the United States and the Netherlands when quantifying damages which arise out of Competition law infringements. Next to that, I will assess and discuss the rules regarding the awarding of litigation costs in general and the costs associated with expert evidence in the two jurisdictions. Finally, I will propose some policy changes with regard to facilitating the use of the methods proposed by the Draft Guidance Paper and associated litigation costs.

1.2 Research questions

The first research question is whether the methods and implementation techniques which are proposed by the Draft Guidance Paper can be admissible under Dutch law, and under what conditions? The second research question is, if any, what can be learned from the application and admissibility of economic methods in antitrust procedures in the United States when developing the admissibility of economic methods under the National law of the Member States in Europe, and in specific the Netherlands? The third research question is what impact legal rules regarding the reimbursement of costs associating with the use of economic expert evidence have on private competition litigation and what would be preferred cost awarding rules.

1.3 Master thesis structure

In Chapter 2, I will set forth the history of private enforcement of EU competition law and describe the evolution of the economic approach to Competition law that is taken place. Then, I will describe and discuss the main economic methods which are proposed by the Commission in the Draft Guidance Paper and describe the proposal of the Commission for the rules relating to the award of costs associated with private proceeding for damages claims. In chapter 3, I will start with the development of private
enforcement of antitrust laws in the US, give an overview of the application of the proposed methods by the Draft Guidance Paper and give an assessment of its admissibility before courts. Then I will discuss the one-way fee shifting rule under the Clayton Act. In chapter 4, first the development of private enforcement of competition law in the Netherlands will be set forth. Then the admissibility of the proposed methods of the Draft Guidance Paper will be assessed under Dutch law. Last rules regarding to the award of costs associated with proceedings for damages claims will be discussed and compared to the US. Finally, I will conclude my thesis with lessons that can be learned from the practice in the United States when developing the admissibility of the proposed methods of the Draft Guidance Paper and the development of rules regarding the award of costs of those procedures and translate these lessons to some policy proposals.

Chapter 2. Development of Private enforcement of EU competition law

First, I will provide a brief but complete overview of the development of the right for private persons to enforce damages actions for infringements of EU competition law (paragraph 2.1). Second, I will give an overview of the procedures based on Article 101 and 102 TFEU between 2007 and 2012 before national courts in the EU (paragraph 2.2). Then, I will describe and discuss the main economic methods which are proposed by the Commission in the Draft Guidance Paper (paragraph 2.3) and describe the proposal of the Commission for the rules relating to the award of costs associated with private proceeding for damages claims (paragraph 2.4). Finally, I will end with my conclusion (paragraph 2.5). Before reading the development of the right for private persons to enforce and claim damages under EU competition law, the reader should be aware of the following. On 1 December 2009, when the last amendment to the TEU and TFEU entered into force, Articles 101 and 102 TFEU replaced Article 81 and Article 82 of the EC treaty. Also on their turn, Article 81 and Article 82 of the EC treaty replaced article 85 and Article 86 of the EEC Treaty when the Council Regulation (EC) No 1/2003 came into force on 1 may 2004. In principle the content of the Articles was not amended, however I will describe the evolvement of the applicability before national and European courts with a private enforcement perspective. One last note, I will consistently refer to the community itself as its current form, the European Union (EU) instead of European Community (EC).
2.1 The development of the right for private person to enforce EU competition law

2.1.1 The early beginnings

Private enforcement of EU antitrust rules has been possible in the European Union since the 1957 Treaty of Rome, as Articles 81 and 82 (except Article 81(3)) of the Treaty were directly applicable in member states. In 1962, Regulation no. 17/1962 came into force, which effectively installed the enforcement of Articles 81 and 82 EC exclusively with the Commission. The European Court of Justice soon confirmed the principle of direct effect and supremacy, which gave private persons a theoretically possibility to start proceedings before the national courts against the infringement of EU competition law. However this possibility was scarcely known and legally impractical. As stated in the introduction, this construction resulted in as few as 12 claims in respect to infringements of Community competition law before national courts which have been successful for plaintiffs until 2004. Furthermore, only a total of 60 cases claiming damages for infringements of both EU competition law and national competition law have been publicly known to been judged at national courts until 2004.

Competition authorities in the Member States (both administrative authorities and courts) were empowered to take decisions under Article 81(1) which prohibited cartels and Article 82 which prohibited an abuse of a dominant position of the EC Treaty. However, it was problematic that the administrative authorities and courts were not competent to apply Article 81(3) which contained the rule that the Commission could grant an individual exemption for to certain agreements, decisions and concerted practices that met the conditions of Article 81(3) EC.

In 1973, the Commission already indicated that actions for damages can support public enforcement of infringements of EU competition law. In 1985, the Commission released their 15th Report on competition policy, stating that one of the priorities of the Commission was to ‘restore the

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15 ECJ, Case C 26/62, Van Gend en Loos, [1963].
16 ECJ, Case 6/64, Falminia Costa v. ENEL [1964], 593.
18 Ashurst Study, Supra note 12, p. 1.
20 Answer on a question of Vredeling, 10 April 1973, PbEG 1973, C 67/55.
role’ played by national courts in the implementation of Articles 85 and 86 of the EC Treaty. The Commission substantiated this by arguing that more frequent application of the law at the national level would increase competition awareness among the Community’s citizens and result in infringement being terminated earlier, whereas the Commission would be able to handle ‘serious cases’ of infringements of competition law. In 1993, the Commission released a Notice on the cooperation between national courts and the Commission in the application of Articles 85 and 86 of the EC Treaty. Next to the fact that the Notice confirmed the possibility of direct application of the EU competition law before national courts, it also laid down general rules to govern the process such as the removal of discrepancies between decisions issued by the Commission and judgments delivered by national courts. Also in 1993, one of the pioneers of the Ius Commune discipline, Walter van Gerven, in his quality of Attorney-General to the European Court of Justice (ECJ), pleaded in his conclusion in Banks for the recognition of a community right to obtain damages for infringements of directly enforceable rules of EU law. This was relevant, because there was no reference to the possibility of compensation for contracting parties and third parties for damages resulting from an agreement, concerted practice or a decision in violation of Article 81 and 82 of the EC Treaty. Therefore, because of the procedural autonomy it was up to the Member States to lay down the conditions under which private persons could claim damages or not. However, the Court of Justice did not respond at that time to this reasoning. Until the late nineties, judgments of the ECJ concentrated on the explicitly statement that Article 81(1) and Article 82 of the EC Treaty produced direct effects and created rights between individuals which must be safeguarded by national courts, and other judgments explicitly confirming the competence of national courts to apply Article 81(1) and Article 82 of the EC Treaty. The real breakthrough came in 1999 when the Commission referred to the possibility for national courts to grant damages to victims of competition law infringements and to the fact that this constituted a necessary complement to the public enforcement of

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22 Notice on the cooperation between national courts and the Commission in the application of Articles 85 and 86 of the EC Treaty (OJ EC 1993 C 39/1).
the competition rules. On top of that, the ECJ came with a judgment in 2001 that would set the landscape for private enforcement of Competition law.

### 2.1.2 Courage v. Crehan and Regulation 1/2003

In 2001, the European Court of Justice (ECJ) recognized in *Courage v. Crehan* that any victim of an infringement of Article 85 EC is entitled to obtain damages. The Court of Justice responded to different preliminary questions, and stated very explicitly about the right for private persons to enforce Competition law that *‘the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community’*. The judgment in the Courage v. Crehan case took away all doubt as to the possibility of the awarding of damages for an infringement of Article 85 or Article 86 of the EC Treaty.

On 1 May 2004, Regulation 17/62 was repealed by the new Regulation No 1/2003 accompanied with additional regulations and notices. Regulation 1/2003, also known as the modernisation regulation, made it possible for national competition authorities to apply Article 81 and Article 82 of the EC Treaty to its fullest extent. This also meant that the individual exemptions of restrictive agreements under Article 81(3) EC were abolished and companies could now make their own assessment as to whether their conduct was allowed under Article 81(3) EC. The regulation was also aimed at increasing national courts’ effectiveness, through organizational solutions (facilitating cooperation between national courts, competition authorities and the Commission) and solutions aimed at subject matter (ensuring of uniform application of the Community law). Member States still had procedural autonomy, but the regulation contributed to more consultation and collaboration between the Commission, national courts and national Competition authorities. The most important innovations of Regulation 1/2003 were Article 15(1) stating that national courts may ask the commission to transmit them information concerning the application of the Community competition rules, Article 15(2) stating that Member States are obliged to

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28 EC Council Regulation No. 1/2003, the 'Modernisation' Regulation.
forward a copy of any written judgment of national courts to deciding on the application of Article 81 or
Article 82 of the EC Treaty and Article 15(3) which allows national competition authorities to submit
written observations to national courts on proceedings pending. The Commission has been granted the
same right by Article 15(3), but only when ‘the coherent application of Articles 81 and 82 of the EC Treaty
so requires’.

Paragraph 7 of the preamble of Regulation No 1/2003 describes the role of National courts in
applying competition rules as: ‘when deciding disputes between private individuals, they protect the
subjective rights under Community law, for example by awarding damages to the victims of
infringements’. Regulation 1/2003 is intended to prevent incoherent enforcement of Community
competition rules in national court proceedings. 29 Although the implementation of the modernisation
regulation (1/2003) was a great step forward, in August 2004, a European Commission ordered study
(Ashurst study) concluded that there was an astonishing diversity of the laws in the Member States
concerning damages for infringements of EC competition law and ‘total underdevelopment’ of private
enforcement of Articles 81 and 82. 30 The Ashurst study supported their statement with the statistic
revealing that since 1962, the year in which Regulation no. 17 31 came into force, as few as 12 claims in
respect to infringements of Community competition law settled before common courts have been
successful for the plaintiffs. In paragraph 2.1.5. an update will be provided of the amount of procedures
before national courts in respect to damages claims for infringements of Competition law. As we next
discuss, the Commission itself admitted in the White Paper on modernization of the rules implementing
Articles 81 and 82 of the EC Treaty that Regulation No. 17/62 encouraged private enforcement of
competition law to a minor extent only. 32

29 Preamble Regulation 1/2003.
30 Ashurst Study, Supra note 12, p. 1.
31 Regulation No 17/62: First Regulation implementing articles 85 and 86 (now article 101 and 102 TFEU) of the Treaty,
32 White Paper modernization, Supra note 26, at Section 100 et seq.
2.1.3 The Green and White Paper

In 2005, the Commission published a Green Paper in which it expressed the opinion that the low degree of compensation of antitrust damages was due to legal and procedural obstacles in the Member States. The Green Paper identified the following obstacles: (1) access to evidence, (2) quantification of damages and procedural costs, (3) the passing-on defense, (4) standing for indirect purchasers and (5) interaction with public enforcement. For each of these obstacles, the Commission proposed a number of options for a more efficient system of damages actions for infringements of EC competition law. In 2006, the ECJ confirmed and extended the position it took in *Courage v. Crehan* with the *Manfredi* ruling: any individual that suffers damage as a result of a infringement of EU competition law is entitled to damages, including loss of profit and interest as from the day the damage occurred. Furthermore, the Court of Justice confirmed the obligation of Member States under EU law to provide practicable and effective rules and procedures for the enforcement of damage claims based on cartel activity. In December 2007, The Commission published a study concerning the economic and social impact of a higher degree of damages actions for infringements of EC competition law in Europe. The study was carried out by the Center for European Policies Studies in cooperation with Erasmus University Rotterdam. In 2008, the Commission published a White Paper containing a number of proposals to facilitate damages actions for infringements of EU competition law. A victim’s right to compensation for antitrust violations is at the heart of the White Paper. The White Paper embraces three basic principles. First, victims have the right to full compensation. Second, private enforcement should be a complement to, rather than a substitute for, public enforcement. Third, private enforcement must reflect European norms and values as opposed to those of other jurisdictions. Among other things, the White Paper discusses the introduction of representative actions and opt-in collective actions to facilitate access to damages procedures for victims suffering small and scattered damages and rules about the burden of proof. In the Staff working paper which accompanied the White Paper on damages, the Commission stated that given the widespread support for the suggestion in the Green

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33 Green Paper, Supra note 6.
34 ECJ, 13 Jul. 2006, C-295/04, Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA.
37 White Paper on Damages, Supra note 36, p. 2-3.
38 White Paper on Damages, Supra note 36, p. 3.
Paper for further guidance on the calculation of antitrust damages, the Commission intends ‘to draw up a framework to that end’. The objective is to provide pragmatic, non-binding assistance in the difficult task of quantifying damages in antitrust cases, both for the benefit of national courts and the parties.\(^{39}\)

On 26 March 2009, the European Parliament adopted a resolution on the White Paper pointing out that several issues dealt with in the White Paper such as mass and dispersed damages and information asymmetries occur not only in relation to damage actions for competition law infringements but also in consumer-related matters, referring to the DG Health and Consumers research on collective redress mechanisms. The European Parliament called for careful consideration as to whether and to what extent a horizontal or integrated approach should be chosen to facilitate out of court settlement and prosecution of damages claims.\(^{40}\)

Shortly after this calling from the European Parliament, a pre-draft for a directive on damages actions for competition law infringements based on the White Paper leaked out of the Commission in the beginning of 2009. However, the draft was withdrawn on 2 October 2009.

Experts in the Competition Law field stated that it was not the intention of the Commission to kill the potential Directive off, but it could be seen as a delay for the purpose of more consultation and mutual understanding between all parties involved.\(^{41}\) The European Parliament repeated its concerns on 9 March 2010 when it adopted a resolution which stated that any proposal on collective redress must respect the views expressed by the European Parliament in the resolution of 26 March 2009. This included that the European Parliament must be involved in the adoption of such act by means of the co-decision procedure.\(^{42}\)

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\(^{39}\) Staff working paper accompanying the White Paper on damages, (April 2008), Section 208.


2.1.4 Oxera Report and the Draft Guidance Paper

In December 2009, a study on the quantification of damages resulting from Competition law infringements (“Oxera report”) commissioned by DG Competition was published. The Oxera report is aimed at assisting the Commission in developing guidance for national courts and parties when they have the difficult task of quantifying damages in competition law cases. The report can be understood as the answer to the promise of the Commission which it made in the Staff working paper which accompanied the White Paper on damages. The Oxera report sets out two objectives which need to be considered when developing guidance in quantifying damages. First, it is important to determine the real value as close as possible as this corresponds to the full-compensation principle that guides the White Paper. Second, obstacles in private damages actions must be removed through approaches that are clear, easy to apply and fit within the existing EU and national frameworks. The quantification report provides a toolkit of methods, models and techniques (both theoretical and empirical) that can be used for quantifying damages. The Oxera report was intended to be used by the Commission in making of a Draft Guidance Paper, which eventually must lead to the definitive Guidance Paper or even a private enforcement Directive.

After the Commission assessed and discusses about the Oxera Report, they finally released the Draft Guidance Paper on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the functioning of the European Union (“Draft Guidance Paper”) in June 2011. From 17 June to 30 September 2011, DG Competition held a public consultation on a Draft Guidance Paper. The Guidance Paper provides insights into the harm caused by infringements of these rules to different categories of injured parties and, in particular, presents the main methods and techniques currently available to quantify such harm. The Commission plans to release the private enforcement Directive in June 2012. Personally, I suspect there will only be a final Guidance Paper and that it will be delayed until the end of 2012 or even the beginning of 2013 given that the attention of the European Parliament is currently focused at the economic and financial problems of the Member States.

44 Oxera report, supra note 43, p.3; Staff working paper accompanying the White Paper on damages, p. 60.
2.2 Figures procedures based on Article 101 and 102 TFEU before national courts

As a result of Article 15(2) of Regulation 1/2003, which states that Member States are obliged to forward a copy of any written judgment of national courts to deciding on the application of Article 101 or Article 102 of the EC Treaty, there is a database available on the Commission’s website which contains the recent figures about these procedures. There is a significant difference between the Member States in the amount of cases that have been submitted to the Commission. It could be a possibility that not all Member States accurately comply with their article 15(2) obligation of Regulation 1/2003. For means of comparison, I have compared the figures from the six most active Competition Law countries in the EU between 2007 and April 2012. The results are that there were 59 procedures in Germany, 64 procedures in Spain, 1 procedure in Italy, 3 procedures in the Netherlands, 19 procedures in France and 6 procedures in the United Kingdom.\(^{48}\)

I conclude two things from these figures. First, the amount of procedures in private enforcement of EU competition law has increased enormously in comparison with the situation before 2004 (which were 60 in total). Second, it should be stressed out that the figures as described above do not accurately reflect the actual state of private enforcement of competition law within the mentioned Member States. For instance, from interviews with Dutch competition lawyers I concluded that there are a couple procedures based on EU law now pending before the Dutch courts. However, these cases take many years to come to a judgment they are expected in the coming years or not at all if the cases are settled. Next to that, there is no obligation on the Member States to notify the Commission of cases applying the national provisions equivalent to Articles 101 and 102 TFEU. For example, in Germany there have been hundreds of court judgments on national Competition law in the last decade.\(^{49}\) There is also no notification of settlements. It commonly has been debated that expectably there are many settlements in competition law cases. Because secrecy is almost always a condition to settlements\(^{50}\), these figures remain unknown. The state of private enforcement in the US and the Netherlands will be extensively discussed in Chapter 3 and 4.

\(^{48}\) See the database at: http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/.
\(^{50}\) Private enforcement of Community competition law: modernisation and the road ahead, D. Woods, A. Sinclair and D. Ashton, Directorate-General Competition, Unit A-1, the Competition Policy Newsletter, 2004 at page 32.
2.3 Quantification of damages in the Draft Guidance Paper

2.3.1 Introduction

One thing must be noted before the Draft Guidance Paper is discussed. One must bear in mind when discussing the quantification of damage arising out of infringements of EU competition law what the EU concept of ‘full compensation’ for that damage can be. The answer to that is a major policy concern which the White Paper wanted to address: ‘to date in practice victims of EC antitrust infringements only rarely obtain reparation of the harm suffered. This does not do justice at the principle that any victim of an competition law infringement has the right to full compensation’. Full compensation consists of the concepts ‘damnum emergens’ and ‘lucrum cessans’. In principle, the concepts ensure the compensation of actual damage and lost profit. In Manfredi the Court of Justice repeated this definition of full compensation when it stated that victims of infringements of EU competition rules are entitled to compensation for actual loss and for the loss of profit, plus interest from the time the damage occurred until the capital sum awarded is actually paid.

2.3.2 Quantification of harm in the Draft Guidance Paper

The framework for damages estimation consists of two stages in both the Oxera report and the Draft Guidance Paper. The first stage is determining the counterfactual scenario (also called the ‘but for’ scenario). When calculating the damage arising from an antitrust infringement there is always an assessment required of what would have happened in a hypothetical situation where the infringement had not taken place. For this assessment it is important to know (1) what type of competition law infringement is causing what type of harm (e.g., overcharging prices or exclusionary conduct), (2) what types of plaintiffs have been harmed (e.g. end-consumers or competitors) and (3) what is the market and industry context in which the harm has arisen (e.g. mature or new market). When the value of the hypothetical non-infringement variable has been established (e.g. the price or sales volume), that price is compared with the actual circumstances (e.g. the price actually paid by an injured party). The resulting difference can be used to than quantify the harm. The Draft Guidance Paper covers techniques of quantifying damages from all three approaches as proposed in the Oxera report: comparator-based methods, cost-based methods (Oxera: financial analysis-based) and simulation models (Oxera: market

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51 White Paper on Damages, Supra note 36, p. 2.
52 See Opinion of Advocate General Capotorti in Case 238/78 Ireks-Arkady GmbH v Council and Commission [1979] ECR 2955, paragraph 9: damnum emergens as reduction in a person’s assets and lucrum cessans as loss of an increase in those assets.
structure-based). In the Draft Guidance Paper there is one financial analysis-based approach left from the Oxera report, namely the cost-based method which can be used to estimate the counterfactual price of a product (also known as ‘bottom-up costing’).

The Commission gives roughly the same comparative methods as the Oxera Report:

- Comparison with data from other geographic or product markets\(^{54}\) (cross-sectional comparisons): comparing different geographic or product markets. This is also known as the ‘yardstick’ or ‘benchmark’ approach.
- Comparison over time on the same market: analyzing prices before, during and/or after the time of the infringement of the same geographic market.
- Combining comparisons over time and across markets (difference-in-differences method): combining the cross-sectional comparison with the time-series comparison. Here, the change in price over time is analyzed and compared with the change in price over the same time period with a different geographic or product market.

The Commission states that once a suitable comparator-based method for establishing a non-infringement scenario has been chosen, there are various techniques to implement the method in practice. The Draft Guidance Paper makes a difference between simple techniques (e.g. averages and interpolation) and more ‘sophisticated’ techniques like regression analysis. The Draft Guidance Paper stresses out that all comparator-based methods are capable of being implemented through regression analysis provided that sufficient data observations are available.\(^{55}\) In practice, comparison-based approaches are popular, but should be handled with care when there is no good candidate for comparison (e.g. a different product or geographic market).\(^{56}\) In the next paragraph, an example and advantages and disadvantages of comparator-based methods will be discussed.

The cost-based method (financial analysis approach) can also be used to estimate the hypothetical non-infringement price per unit. In principle the cost-based method consists in using some measure of production costs per unit, and adding a mark-up for a profit that would have been ‘reasonable’ in the

\(^{54}\) Draft Guidance Paper, Supra note 46, p. 17 - 19.
\(^{56}\) Assonime (2011), ‘Comments on the draft Guidance Paper on “Quantifying harm in actions for damages based on breaches of article 101 or 102 TFEU”, p.5.
non-infringement scenario. The estimate for a non-infringement price per unit is compared to the price per unit actually charged by the (alleged) infringing undertaking(s). This method is best suited in cases where there is a likely price overcharge (e.g. in cartels). In practice, many plaintiffs have difficulties gathering enough cost data because it may be in possession of the opposing party or a third party.

The market structure-based approach is identified as simulation models in the Draft Guidance Paper. Simulation models can also estimate the hypothetical non-infringement situation. The models range from monopoly models to perfect competition models. Prices are likely to be highest (and sales volumes lowest) in a monopoly and prices are likely to be lowest (and sales volumes highest) in a situation of perfect competition. Based on these theoretical insights, simulation models can be built to estimate the prices (or other variables) that are likely to have prevailed in the market had an infringement of Article 101 or 102 TFEU not taken place. Although the possibility of simulation models has been welcomed for its useful insights in practice, there is criticism that the models can be very complex and are a costly instrument.

Although the Oxera Report and the Draft Guidance Paper have been a great step forward in the development of efficient private enforcement ‘culture’ in Europe, there has been criticism on the practical advice that they offer. Parties involved and National courts do not only want to know which models and methods can be used, but also how they can make an assessment of the ‘best-practice’ method in each specific case. The pros and cons are very limited in the Draft Guidance Paper, and during the consultation period a question to the Commission that has been raised a lot is if the final Guidance Paper can be expanded with a more practical chapter for parties and National courts in choosing a method for quantifying damages given all the facts of a specific case. Some consultation instances have

57 Draft Guidance Paper, Supra note 46, p. 34.
58 See both: Assonime, Supra note 56, p.6; and Draft Guidance Paper, Supra note 46, p. 36.
59 Draft Guidance Paper, Supra note 46, p. 31.
60 Assonime, Supra note 56, p. 6.
even proposed a ‘tool-set’ to provide courts and parties with practical advice in choosing which method or model suits a specific case.\footnote{See for example the consultation of Compass Lexecon, ‘Draft Guidance Paper on Quantifying the Harm in Actions for Damages: Some Comments’, Oct, 10 2011.}

### 2.3.3 Choice of method and implementation technique

Both the Oxera report and the Draft Guidance Paper stress out that the choice of which technique can implement the comparator-based method in practice depends on various aspects of the given case. In particular the legal requirements and factual circumstances are important. For example, in a case where there is not much data (e.g. price observations) available it is likely that parties and the court prefer a simple technique like averages over time. In practice, strengths and weaknesses of different methods and models which are proposed in the Oxera Report and the Draft Guidance Paper must be highlighted and submitted by the parties and their consultants in judicial proceedings before National courts. Experience and a understanding of the models and methods for quantifying damages is relevant for any legal or economic consultant who will be working in the field of Competition law and also for the National courts, as the courts only then can value and judge the arguments that parties submit in favor or against the estimated damages. The Draft Guidance Paper states that it is not the intention of the Commission to argue against the use of direct evidence and that under the applicable national rules, and in accordance with the principles of effectiveness and equivalence, it can be sufficient for the parties involved to provide facts and evidence on the quantum of damages that are less detailed and/or sophisticated than the methods and techniques discussed in the Draft Guidance Paper.\footnote{Draft Guidance Paper, Supra note 46, p. 8.}

As the Draft Guidance Paper states that all comparator-based methods are capable of being implemented through regression analysis, the admissibility of this method before national courts of the Member States will be crucial in the success or failure of the proposed econometric approach to the quantification of damages. In the Draft Guidance Paper the Commission stresses out that regression analysis requires an extensive number of data observations and a good understanding of the industry concerned.\footnote{Draft Guidance Paper, Supra note 46, p. 28-29.} Regression analysis uses statistical techniques to investigate patterns in the relationship between economic variables and measures to what extent a certain variable is influenced by other variables that are not affected by the infringement. As a result, regression analysis is a way to account
for alternative causes for the difference between the compared data sets. The use of regression methods before courts will almost always require the use of an expert economist or statistician, and a competent and solid model will usually requires the use of a multiple regression analysis. The key difference between “simple” and “multiple” regression is that the first type of regression is capable of relating a single independent variable to the variable whose value is sought. By contrast to this, multiple regression is capable of relating more than one independent variable to the variable whose value is sought. When using multiple regression, it is important to distinguish the concept of correlation from causality. In statistics and econometrics, correlation is the extent of correspondence between the ordering of two variables. Correlation is positive or direct when two variables move in the same direction and negative or inverse when they move in opposite directions. Whereas causality can be described as the direct relationship between cause and effect, i.e. a specific infringement must actually have resulted in injury to another. Evidence that two variables are correlated does not in itself support the conclusion that the two are causally linked. In most legal jurisdictions, it is for plaintiff to prove a causal relationship between the harm suffered and an EU competition law infringement. In practice, quantification of damages and proving a causal link between the damages and the infringement can be closely linked.

Courts in the EU have mainly used simple (straightforward) implementations of comparator-based methods without regression analysis, often on the basis of averages. For example, if the relevant market where the infringement took place charged an average price of €15 over a certain time period and the compactor market(s) charged an average price of €10 in the same price period, the difference of €5 (or 50%) can be seen as the overcharge. However, the comparator based methods (such as yardsticks) based on averages have a shortcoming, which is that they do not account for other factors besides the infringement that may have caused the price difference (e.g., less demand in the relevant market, entry of a new competitor or incompetence of the management). With the use of more sophisticated

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66 Ibidem.
67 Collins English Dictionary.
69 Oxera, Supra note 43, p. 41.
70 See for example: Landgericht Dortmund (Regional Court, Dortmund), decision of 1 April 2004, Case No 13 O 55/02 Kart (Vitaminpreise); WuW/DE-R 1352.
econometric models, the impact of the infringement itself is isolated from other explanatory factors.\(^{71}\) An econometric model like regression seeks to ‘control’ for those other explanations and incorporates them as additional explanatory variables in the model. As a result, the model isolates different effects/explanations from one another, and may show that while the other explanations account for some of the lost sales, the remainder of the loss is still explained by the infringement.\(^{72}\) Unfortunately, the Draft Guidance Paper states that to this day little experience exists with more sophisticated econometric analysis in actions for competition law damages before courts in the EU.\(^{73}\) As we will see in Chapter 3, anticompetitive damages are very commonly assessed with either the before and after approach or the yardstick method and implemented with multiple regression in antitrust cases before US courts.

### 2.4 Proposals Green and White paper on damages with regard to fee-shifting rules

For the purpose of assessing the chance of success for the proposed methods of the Draft Guidance Paper, I will compare fee awarding rules of attorney’s and expert’s costs in the US and the Netherlands. The Commission stated in the green paper on damages actions that the loser-pays rule, which is employed by most Member States in different forms, can have a decreased effect on the incentive to sue, especially in cases where the damages claimed are low and when the outcome of the case is difficult to assess upfront.\(^{74}\) The Commission proposed to consider a mandatory fee-shifting rule (cost protection order) like the rule under Section 4 of the Clayton Act, which will be discussed in Chapter 3.\(^{75}\) This rule would protect plaintiffs in the exercise of their rights while at the same time work as a mechanism against unmeritorious litigation.\(^{76}\) The White paper on damages actions did not expressively promotes this option, but rather it states that Member States should consider cost rules which guarantees that plaintiff, even if unsuccessful, does not have to pay for all defendants costs.\(^{77}\) Exception should be made in cases where plaintiff acted in a ‘manifestly unreasonable manner’\(^{78}\), which

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\(^{71}\) Oxera, Supra note 43, p.3.  
\(^{72}\) Oxera, Supra note 43, p. 41.  
\(^{73}\) Draft Guidance Paper, Supra note 46, p. 30.  
\(^{74}\) Green Paper, Supra note 6, at 2.5.  
\(^{75}\) Ibidem.  
\(^{77}\) White Paper on Damages, Supra note 36, at 18.  
\(^{78}\) Green Paper, Supra note 6, at 2.5.
has not been motivated but can be seen as something like the bad faith exception under the Clayton Act. Literature states that when a mandatory fee-shifting rule is introduced in Europe, it can be expected that (1) the number of cases filed will increase, (2) the net costs of trial for defendants will increase, (3) there will be a higher probability of settlements.\textsuperscript{79} In Chapter 3 and 4, I will assess both rules and conclude on which rule would be preferable in the light of increasing the use of the proposed methods by the Draft Guidance Paper and a private enforcement ‘culture’ in general.

2.5 Conclusion

In 2004, the Ashurst study concluded that there was a state of ‘total underdevelopment’ of private enforcement of Articles 81 and 82 EC before national courts in Europe. Because of efforts of the Commission and case law of the ECJ, private enforcement of EU competition law has gained awareness with all parties involved. In recent years, the Commission has opted for a ‘more economic approach’ in the field of Competition law. This resulted in a Draft Guidance Paper on the quantification of harm in actions for damages based on breaches of Article 101 or 102 TFEU. The Commission proposes methods and models which can be used before national courts when proving damages which are suffered because of an alleged infringement of Competition law. Legal rules and practices regarding awarding of damages for competition law infringements vary significantly across jurisdictions and across cases within those jurisdictions. According to the case law of the Court of Justice, in the absence of any further Community rules concerning the calculation of damages, it is for the domestic legal system of each Member State, and ultimately for the national judge, to determine the requirements the plaintiff has to fulfill when proving the amount of the damage suffered as a result of a competition law infringement. The Commission proposes to consider a mandatory fee-shifting rule (cost protection order) in situations where the effective private enforcement of competition laws cannot be guaranteed.

In the next two chapters, I will assess the legal possibilities and admissibility of the methods proposed by the Draft Guidance Paper in procedures before national courts in the United States and the Netherlands when quantifying damages which arise out of Competition law infringements. I will also compare legal rules governing the awarding of costs of litigation and expert evidence in both the US and the Netherlands and discuss which rules are preferred to ensure an effective private enforcement culture, which has well-balanced litigation incentives for both plaintiffs and defendants.

\textsuperscript{79} Impact Study, Supra note 35, p. 182.
Chapter 3. Admissibility and costs of the methods from the Draft Guidance Paper in the US

First, I will briefly set out the development of the enforcement of antitrust laws in the United States (paragraph 3.1) and the development of private enforcement of those laws (paragraph 3.2). Second, I will briefly state something about claiming damages in general (paragraph 3.3). Third, I will discuss the admissibility of expert evidence under the Daubert test (paragraph 3.4) and the admissibility of the methods proposed by the Draft Guidance Paper (paragraph 3.5). Fourth, the rules which relate to the recovery of plaintiffs’ and defendants’ costs will be discussed (paragraph 3.6). Last, I will finish with my conclusion.

3.1 General development antitrust enforcement in the United States

The United States antitrust law is regarded by many authors as the oldest set of laws which deals with problems regarding to abuse of concentration and illegal concerted practices which may restrict competition. In the 1880s and 1890s, there was a rapidly growing of large manufacturing conglomerates which controlled almost whole markets by using ‘devices’ like a board or community to eliminate destructive competition, which were called “trusts” (e.g. in the railroad market). Small firms complained of unfair business practices adopted by their large competitors, which allegedly wanted to drive them out of business. Small businesses had enough political force and public sympathy which led to adoption of anti-trust laws in many US states. However, these laws could do very little against agreements which involved more than one state. The Interstate Commerce Act of 1887 began a shift towards federal rather than state regulation of the bigger businesses, as it was designed to prevent unfair business practices in the railroad industry. Congress acknowledged the need for a comprehensive federal law when it passed the Sherman Antitrust Act in 1890 (Sherman Act). As Senator John Sherman put in 1890: “If we will not endure a king as a political power we should not

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80 I do not support this claim as the English Statute of Monopolies of 1623 can be viewed as the oldest antitrust law, although it was not a very practical law. Interestingly, the treble damage provisions of the English Statute of Monopolies of 1623 have been imported by the United States in the Clayton Act (Clifford A. Jones, The growth of private rights of action outside the US, 2004, 16 Loy. Consumer L. Rev. 409).


83 49 USC.A. § 1 et seq.


85 15 USC. § 1-7).
endure a king over the production, transportation, and sale of any of the necessaries of life”. The Sherman Act made it illegal to try to restrain trade or to form a monopoly and the Act remains the core of antitrust policy today. The Sherman Act did not prohibit mergers unless formed with the intention to monopolize the market using unfair methods of competition. The Clayton Antitrust Act of 1914 ("Clayton Act") was therefore introduced to extend anti-trust legislation to cover mergers capable of reducing competition. The Clayton Act also specified particular prohibited conduct such as price discrimination, created exemptions, and introduced the possibility of treble damages for private antitrust suits. Also in 1914, the Federal Trade Commission Act (FTC Act) created the Federal Trade Commission (FTC), an independent agency that should regulate unfair trade practices. The Robinson-Patman Act of 1936 amended the provisions on price discrimination of the Clayton Act. The Celler-Kefauver Act of 1950 amended the provisions of the Clayton Act relating to mergers, by extending cross-ownership prohibition among competitors to both asset and stock transactions. The Hart-Scott-Rodino Act of 1976 amended the Clayton Act and gave the DOJ and the FTC the power to review all mergers above a certain size threshold.

The antitrust Acts are enforced by different authorities and parties. First, they are enforced by the Antitrust Division of the Department of Justice (DoJ) since 1933. The Department is the only entity entitled to seek criminal sanctions for antitrust violations. It is also entitled to seek civil injunctions against conduct violating any of the antitrust laws; to sue for treble damages on behalf of the United States; and to review mergers and acquisitions. The FTC also enforces antitrust laws at the federal level, but lack the criminal jurisdiction of the DoJ. Unlike the DOJ, the FTC does not

87 Ibidem.
88 15 USC. § 12-27, 29 USC. § 52-53.
89 Motta, M. Supra note 82, p. 5.
90 15 USC § 41-58.
91 15 USC. § 13.
92 15 USC. § 18.
93 15 USC. § 18a
94 Motta, M., Supra note 82, p. 6.
96 15 USC. § 25.
97 15 USC. § 15a.
98 15 USC. §§ 18, 18a.
seek monetary fines. It’s typical sanction is the "cease and desist" order or, in a merger case, an injunction or an order to divest-in general, equitable measures.\textsuperscript{99} Third, State attorney Generals play a role in the enforcement of antitrust rules through litigation to protect the wellbeing of their citizens before the federal and state courts. In general, this function stems from and has been developed through the application of the ‘\textit{parens patriae}’ doctrine,\textsuperscript{100} which means that a state can create its standing to sue; the state declares itself to be suing on behalf of its people.\textsuperscript{101} Fourth and last, antitrust Acts are enforced by private persons.

\subsection{3.1.2 Current state private enforcement of antitrust laws}

For almost 100 years, private enforcement of the antitrust laws through damages actions has played a major role in the development of US antitrust jurisprudence.\textsuperscript{102} However, during the first fifty years of Sherman Act enforcement only 175 private suits were filed and, of these, the plaintiffs were successful in only thirteen.\textsuperscript{103} After that, studies revealed a much larger role for private antitrust suits. A 1970 study by Richard Posner estimated that between 1890 and 1969, 9,728 private antitrust suits were filed in the United States and up to 1965, the ratio of private to public cases tended to be 6:1.\textsuperscript{104} Now, the ratio of private to public cases has risen to the 20:1 range, with around 800 private antitrust cases and 40 public antitrust cases filed per year.\textsuperscript{105} Because of comprehensive discovery rights for plaintiffs, the awarding of treble damages, possibility of contingency fees and the one-way fee shifting rule there are a lot of incentives for plaintiffs to bring damages actions and incentives for defendants to settle. The settlement rate of antitrust issues in extremely high in the US, ranging from 75\% to 98\% in different

\begin{thebibliography}{99}
  \bibitem{100} Cengiz, F. (2006), ‘\textit{The Role of State Attorneys General in US Antitrust Policy: Public Enforcement through Private Enforcement Methods}’, ESRC Centre for Competition Policy and School of Law, University of East Anglia, CCP Working Paper, p. 5.
  \bibitem{101} Section 4C of the Clayton Act, supra note 9.
\end{thebibliography}
studies. Besides the discussion of the awarding of costs of trial, these aspects fall outside of this thesis’s scope.

3.2 Claiming damages

The objective of antitrust damages under US law is to restore the plaintiff to the economic condition in which it would have been “but for” the violation. As the Eighth Circuit Court of Appeals stated, “an antitrust plaintiff’s damages should reflect the difference between its performance in a hypothetical market free of all antitrust violations and its actual performance in the market infected by the anticompetitive conduct.” To obtain a financial recovery in a private action, the plaintiff must prove three distinct elements: (1) an antitrust violation; (2) antitrust injury, and (3) damages. Besides these elements, a plaintiff is required to have a legal standing to sue. The element of proving an antitrust violation, although difficult, speaks for itself and falls outside the scope of this thesis. The element of an antitrust injury means that damages can be recovered only for injuries that flow from the wrongful anticompetitive conduct, e.g. like overcharges which arise out of the antitrust violation. The element of damages can be proved with economic expert evidence which will be discussed in the next paragraphs.

3.3 Admissibility of economic expert evidence: the Daubert test

In the US, the admissibility of expert evidence is assessed by the judge at the start of the trial. In the 1993 case *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (“Daubert”), the Supreme Court replaced the pre-existing and restrictive ‘general acceptance test’ of admissibility of expert testimony which was established in 1923 with the Frye v. United States ruling. The main underlying principles of *Daubert* are to present the jury with expert evidence that is "relevant to the task at hand" and which rests "on a

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112 293 F. 1013 (D.C. Cir. 1923). The Frye test limited admissibility of expert opinions to those that were accorded widespread acceptance within the relevant discipline.
reliable foundation".113 Daubert established a three-part test: (1) is the expert qualified to testify competently on the matters at hand?, (2) is the methodology employed by the expert sufficiently reliable (i.e. sufficient facts or data)?, and (3) has the expert applied the principles and methods reliably to the facts of the case?114 In general, the expert evidence can only be admitted if these criteria are met. Reliability of the scientific method used is assessed by looking at four important factors: (1) can the applicable theory or method be empirical tested, (2) is the theory or method subject to (positive) peer reviews and publications, (3) can the error rates of methods be checked and (4) is the theory or method generally accepted in the relevant scientific community. The focus of Daubert's admissibility test is on the expert's methodology and not on the conclusions of the expert.115 Although the Daubert test is now the law in federal court and over half of the states, the Frye test remains the law in important jurisdictions like California and New York.116

A 2010 study of PwC117 concluded that between 2000 and 2010 there were 86 Daubert challenges in antitrust cases against the use of economic expert evidence, which resulted in the (partially) exclusion of 35 (41%) economic experts testimony's. The study showed two interesting results. First, the exclusion of the economic expert evidence in most cases follow because of misuse of the proposed economic method and not because of the method itself (67%). This lack of reliability is most frequently a result of the use of too little valid data rather than the quantity of data.118 Second, the aspect of relevance leads to a substantial number of exclusions (39%). This is remarkable, because it relates to the questions (i.e. task) that client and/or attorney presented to the expert to be answered. This indicates that parties who hire their own expert often give order to conduct a study which is not relevant for the estimation of the damages in the light of the circumstances of the case. 15 years after Daubert, data has showed that most of the Daubert challenges are against the admissibility of plaintiff's expert evidence,119 probably due to

113 Daubert, 509 US at 584.
114 Daubert, 509 US at 589.
115 Daubert, 509 US at 595.
fact that is has become a ‘litigation practice’ for defendants.\footnote{Gavil, A.L. (2001), ‘Daubert Comes of Age’, Antitrust: summer edition, p. 6.} Recent case law shows that many courts also take issue with experts who inadequately explain the economic foundation for their opinions, because experts ‘do not explain connections’\footnote{Champagne Metals v. Ken-Mac Metals, Inc., 458 F.3d 1073, 1079 (10th Cir. 2006).} or ‘fail to explain the economic basis of the opinion’,\footnote{Worldwide Basketball & Sports Tours, Inc. v. NCAA, 273 F. Supp. 2d 933 (S.D. Ohio 2003).} and ‘did not show an explanation of how they arrived at their market definition’.\footnote{Plush Lounge Las Vegas LLC v. Hotspur Resorts Nevada Inc., No. 08- 56953, 2010 WL 893495 (9th Cir. Mar. 15, 2010).} It will be likely to assume that this practice will be seen in national courts in the Member States of the EU in the coming years, as we have seen in Chapter 2 that the courts have little to no experience with econometric analysis.\footnote{See note 70 and 71.} Expert economic evidence can also be excluded on the basis of unreliable if the expert does not use all the relevant information that \textit{both} parties set forth in pleadings and testimonies, but only facts and information from its client. This is an interesting warning for the Netherlands which I will further discuss in paragraph 4.8

3.4 Admissibility quantification methods Draft Guidance Paper

If an expert’s opinion on the calculation of damages is challenged under \textit{Daubert}, the courts need to be especially cautious of excluding the expert opinions. The Supreme Court has traditionally recognized a lenient standard for the admission of evidence regarding the estimating of antitrust damages because the ‘wrongdoer is not entitled to complain that damages cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.”\footnote{Story Parchment v. Pasterson Parchment Paper Co., 282 US 555, 562 (1931).} Subsequently, courts have concluded that the burden of proof regarding uncertainty as to the amount of the damage is judicially placed on the wrongdoer.\footnote{Contemporary Mission, Inc. v. Famous Music Corp., 557 F.2d 918, 926 (2d Cir. 1977).} This more lenient standard of proof coincides with the fact that US courts recognize that precise antitrust damages calculations are often difficult or impossible.\footnote{Korenbilt, C.M. (2012), ‘Quantifying Antitrust Damages: Convergence of Methods Recognized by US Courts and the European Commission’, CPI Antitrust Chronicle, p. 7.} In United States courts, anticompetitive damages are very commonly assessed with either the before and after approach (benchmark) or the yardstick method.\footnote{Rubinfeld, D.L. (1985), ‘Econometrics in the Courtroom’, 85 Colum. L. Rev. 1048.} Both of these methods are consistent with the comparator-based methods discussed in the
Guidance Paper. However, courts in the US are in some cases open to alternative methods besides the “generally acceptable” as described above. In the United States, methods as proposed in the Draft Guidance Paper are frequently implemented with the use of multiple regression and other econometric methods in cases brought by the competition authorities and in private litigation. Court in the US may require a regression analysis in order to have solid estimates and isolate the effect(s) of the infringement from other effects. In addition, evidence can be accepted if the model sufficiently accounts for all other explanations in addition to the effect(s) of the infringement.

After the introduction of the Daubert test, US courts have showed that they are likely to admit expert evidence containing quantitative analysis if it has one or more of the three ‘common approaches’ for measuring antitrust damages, the before-and-after approach, a yardstick or benchmark approach, and regression analysis. As these methodologies are generally reliable, courts exclude these specific types of econometric evidence mainly on the basis of application issues, such as an insufficient data set and insufficient explanation of the method’s economic foundations and conclusions. This is not only very logical, it looks like the introduction of the Daubert test when dealing with econometric expert evidence has worked very well and is less sensitive to abuse like in other areas of antitrust law. This is because of the fact that exclusion of econometric expert evidence is mainly concluded due to a failure of the application of the econometric expert evidence or an insufficient motivation by the expert, and these factors are controlled by the challenged party itself. Furthermore, this practice has shown to be an excellent execution of the general motivation behind Daubert, which was to exclude baseless testimony from a trial.

129 In the case Conwood Co. v. United States Tobacco Co., 290 F.3d 768 (6th Cir. 2002) the Court allowed for an untested methodology (market-share projections) even when the conventional methodologies were available.
132 Ibidem.
3.5 Cost allocation: recovery of plaintiffs’ and defendants’ costs

Under the so-called American Rule, each party must bear its own cost of litigation, including attorneys’ fees. However, Section 4(a) of the Clayton Act entitles prevailing plaintiffs in private antitrust actions to recover, in addition to treble damages, their reasonable attorneys’ fees and expert fees. There is no provision in the Clayton Act which gives prevailing antitrust defendants the right to recover attorney’s fees. There is a difference in the cost awarding rules regarding court appointed expert witnesses and expert witnesses which are hired by parties itself. A prevailing party which have hired an own expert for the quantification of damages is limited to a statutory reimbursement rate of $40 per day. This is extremely low when compared to average costs of antitrust experts. In the US, it has been estimated that antitrust experts cost at minimum $300,000. At $40 per day, this would entail 7,500 (!) days of expert work. There is a lot of criticism at the moment in the US at the statutory limit of $40 per day for non court-ordered experts. The second circuit noted recently that a situation where plaintiff’s costs of experts are higher than the damage claim itself with no real reimbursement possibility “cannot be what Congress intended when it included strong private enforcement mechanisms and incentives in the antitrust statutes”. The Supreme Court stated as much as 25 years ago that the statutory limit of $40 applied “absent explicit statutory authority to the contrary”. Congress never picked up on this legislative change. To me, this is a missed opportunity because an antitrust violation should not go unpunished on the basis that possible plaintiffs lack the possibility to recover high, but reasonable, expert fees. A court ordered expert witness is entitled to “reasonable compensation” as determined by the court. The judge has a lot of discretion in determining what “reasonable compensation” is. As we will see in paragraph 4.6, this is similar to the discretion a judge in the Netherlands has. In the US, court ordered experts increase litigation costs for the unsuccessful litigant because in most cases parties will retain their own experts. The Clayton Act should be amended that it includes ‘reasonable expert fees’

138 28 USC § 1821(b).
139 AMEX III, 667 F.3d 204 (2d Cir. 2012), at 217.
140 Ibidem, at 218.
142 Federal Rules of Evidence (FRE), Rule 706(c).
143 ABA Antitrust Section (1979), ‘Expediting Pretrials and Trials of Antitrust Cases’, p. 58.
for both court ordered experts and hired experts by parties. Judges should have the discretion to look at the circumstances of each case to decide what is reasonable and not be bound by a statutory limit.

A prevailing antitrust defendant may only recover attorneys’ fees and expert fees under the bad faith exception, which is, especially with per se violations like price-fixing agreements, hard to prove in antitrust cases. The bad faith standard has an objective and subjective component. The objective component requires the defendant to show that the infringement allegations are “objectively baseless”. Allegations are objectively baseless if “no reasonable litigant could realistically expect success on the merits.” The subjective component requires showing that the plaintiff demonstrated subjective bad faith, which relates to the intent to deceive or mislead another in order to gain some advantage. If the objective component is not met, there is no need to assess the subjective component. Litigation resulting without merit does not constitute bad faith. It is very difficult to prove bad faith under the US standard and consequently plaintiffs have many incentives to start even the most frivolous antitrust litigation. I will propose a different bad faith test under Dutch law in paragraph 4.7, which will balance incentives for both plaintiffs and defendants. US Congress adopted this fee shifting provision favoring prevailing plaintiffs, with the intention that the private civil damages remedy should benefit the "great mass of people" rather than "rich corporations and rich men." Although there is something to say for the critics on the fee shifting provision because of the enormous incentives for plaintiffs to bring even frivolous suits to court, there are some serious arguments which support the current US system. First, plaintiffs who lack resources to pay for their own costs or have so little resources that they cannot take the risk of losing will be deterred from bringing an antitrust case when there would be a defendants’ attorneys’ fee provision. This situation can be very unfair, because it could be the defendant that drained the plaintiff of its resources with the antitrust violation. An extra problem here is that the risk of losing is

144 See Miracle Mile Assocs. v. City of Rochester, 617 F.2d 18, 21 (2d Cir. 1980).
146 Indus., Inc. v. Eran Indus., Inc., 500 F.3d 1369, 1374 (Fed. Cir. 2007)
150 21 Cong. Rec. 2564 (1890).
difficult to estimate, as antitrust issues generally present complicated factual and legal issues. Second, the bad faith exception serves as a deterrence effect on frivolous litigation. The literature is divided as to the impact of fee allocation schemes on the incentives of private parties to litigate antitrust infringements and the probability of settlements. In Chapter 4, a comparison between the one-way fee shifting rule and the loser-pays principle will be discussed when we look at the procedural rules in Netherlands and the proposal of the Commission in the Green and White paper on damages.

3.6 Conclusion

The quantification methods proposed by the Draft Guidance Paper are very common in private litigation of antitrust laws in the US. US courts have showed that they are likely to admit expert evidence containing quantitative analysis if it has one or more of the ‘common approaches’ for measuring antitrust damages, which are in most cases the before-and-after approach and the a yardstick or benchmark approach. Although the Daubert test is important for judges in assessing the relevance and reliability of the expert’s evidence, there is a more lenient standard for expert evidence regarding quantification of damages. This is because damages arising out of antitrust infringements are difficult to be calculated precisely and the infringer of antitrust law can in general not complain that damages cannot be measured with exactness. Although this lenient standard with regard to the accuracy of damage calculation is welcomed, we have seen from the PwC study and case law that there are still a lot of (partially) exclusions of economic expert evidence relating to problems with the (1) exercise of irrelevant tasks by experts, (2) lack of reliability with regard to the application of data used, (3) insufficient application of all the facts provided by parties, and (4) explanation of economic foundations for experts opinions and conclusions. Section 4(a) of the Clayton Act entitles prevailing plaintiffs in private antitrust actions to recover, in addition to treble damages, their reasonable attorneys’ fees and expert fees. Expert fee awards for non-court ordered experts are limited by a statutory rate of $40 per day. This should be amended in such a manner that a judge has the discretion to award ‘reasonable’ fees for both court ordered experts as non court ordered experts. The US ‘bad faith’ exception is very narrow and will not prevent frivolous litigation in Europe if a similar exception is introduced. The incentive of legal fee recovery for plaintiffs is needed to encourage private parties to litigate complicated antitrust cases, which outcome is uncertain and could cost the plaintiff resources is doesn’t have.
Chapter 4. Admissibility and costs of the methods from the Draft Guidance Paper in the Netherlands

First, I will briefly set out the development of the enforcement of competition laws in the Netherlands (paragraph 4.1) and the development of private enforcement of those laws (paragraph 4.2). Second, I will briefly state something about claiming damages in general (paragraph 4.3). Third, I will discuss the admissibility of damage testimony and expert evidence in general under Dutch law (paragraph 4.4) and the admissibility of the methods proposed by the Draft Guidance Paper under a Dutch Daubert standard (paragraph 4.5). Fourth, the possibilities for the reimbursement of costs of expert evidence will be discussed. Fifth, the rules which relate to the recovery of plaintiffs’ and defendants’ costs will be discussed (paragraph 4.7). Sixth, I will provide a possible solution for problems relating with the reliability of expert evidence and the costs associated with them (paragraph 4.8). Then I will shortly discuss the possibility of a mandatory Competition court or ‘competition damage institution’ (paragraph 4.9). Last, I will finish with my conclusion (paragraph 4.10).

4.1 General development competition law enforcement in the Netherlands

There has been a competition Act in the Netherlands since 1956. At that time, there was no explicit competition authority which enforced this Act and the Minister of Economic affairs had the possibility to enforce the Act criminally if there were restricting competition practices that were contrary to the public interest. This was little practical because of the fact there was no general prohibition of cartels and abuse of dominance and in 1998 competition law in the Netherlands gained substantial stature through the enactment of the Dutch Competition Act (Competition Act) of 1 January 1998, which replaced the old Act. The abuse-system was replaced by a prohibition-system, and the Netherlands quickly lost the reputation of a cartel paradise. The Competition Act is enforced by the Dutch Competition Authority (“NMa”). The NMa also applies Articles 101 and 102 TFEU in relation to agreements, decisions and concerted practices affecting competition in The Netherlands. The NMa was founded in 1998 primarily to enforce the Competition Act. The Competition Act applies to all companies and associations of entrepreneurs who produce or offer goods and/or services on the Dutch

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154 ibedem.
market. The current Competition Act is based on the prohibitions and exemptions of the TFEU and in
general, the restrictive practices prohibited by Article 6 and Article 24 of the Competition Act are similar
to the prohibited practices under Article 101 and 102 TFEU.\textsuperscript{157} The NMa can impose administrative fines
for infringements of the cartel prohibition and the prohibition of abuse of dominance in the Competition
Act and for infringement of article 101 and 102 TFEU.\textsuperscript{158} There is no criminal prosecution possible under
the current Competition Act. However, the Minister of Economic Affairs and Justice has announced the
preparation of a bill which would effectuate a dual system of law enforcement (administrative and
criminal) in the Netherlands.\textsuperscript{159} Dutch competition law can also be enforced by private persons.

4.2 Current state private enforcement in the Netherlands

As we have seen in Chapter 2, there are no EU rules or laws governing the exercise of the right to
claim damages for infringements of EU competition law. It is for every national legal system of each
Member State to lay down legal rules governing the exercise of the right to compensation guaranteed by
EU law (procedural autonomy of Member States of the EU). The procedural laws which govern the
exercise of the right to claim damages are mostly governed by Book 6 of the Dutch Civil Code. When the
introduction of the Competition Act was discussed in the Dutch parliament, the Minister explicitly stated
that there was a great role for private parties to enforce the Competition law in the Netherlands. The
Minister also stated that private parties had a responsibility to enforce competition law when their
interests are harmed and that private enforcement results in a faster solution to competition issues than
public enforcement.\textsuperscript{160}

Experience with private enforcement of competition law in the Netherlands is increasing rapidly,
in some specific procedures faster than others. However, the use of the proposed methods of the Draft
Guidance Paper for calculating competition damages before the national courts can count on little to no
experience. In the literature, there are no reported figures about the exact public to private ratio in the

\textsuperscript{157} There is a general exemption to Article 6 of the Competition Act which provides for the exemption of restrictive practices
below a turnover of 5.5 million for goods and 1.1 million for services, and for restrictive practices by parties below a 10%
market share (Article 7 Competition Act).

\textsuperscript{158} Article 57 of the Dutch Competition Act.

\textsuperscript{159} Kamerstukken II 2005/06 30 071, nr. 27, Wijziging van de Mededingingswet als gevolg van evaluatie van die wet, 16 June
2006.

\textsuperscript{160} Kamerstukken II 1995/96, 24 707, nr. 3, p. 41, § 11.1.
Netherlands. The database of the Commission which collects all decisions of national courts in the Member States that are based on Article 101 or 102 TFEU shows that between 2004 and may 2012 there have only been 21 rulings in the Netherlands, from which only 3 ruling since 2007.\footnote{See Database at http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/?ms_code=nld.} Total figures of court proceedings based on national competition law are unknown, as only 2% of Dutch court rulings are published.\footnote{See http://www.rechtsvordering.nl/rechtspraaknl-moet-alle-uitspraken-publiceren.} From literature we know that yearly tens of cases are (partly) based on national competition law, mostly procedures based on (parts of) agreements that are possibly void on grounds of Article 6 paragraph 2 of the Dutch competition law.\footnote{Lierop Van, W.A.J. and Pijnacker Hordijk, E.H. (2007), ‘Privaatrechtelijke aspecten van het Mededingingsrecht’, Kluwer, p. 50.} For comparison, when we look at NMa’s annual reports from 2004 until 2011, the number of investigations of competition law infringements was in total 176, of which in 75 cases the NMa decided to impose a fine for the infringement.\footnote{Stable annual figures for the NMa: 2004: 21 cases; 2005: 20 cases; 2006: 26 cases; 2007: 25 cases; 2008: 22 cases; 2009: 24 cases; 2010: 20 cases; 2011: 18 cases. See http://www.nma.nl/documenten_en_publicaties/jaarverslagen__als_banner_/..} It is impossible to give an accurate public to private enforcement ratio, but it could well be that if that all procedures based on national and European competition law from 2004 until now outnumbers the public enforcement cases by far. However, this thesis focuses on private damage claim based on competition law in the Netherlands, and there is not much experience (yet) with these procedures. From personal interviews with the largest law firms in the Netherlands, I know of 7 collective cases which are now proceeding before court based on a damage action. In these cases, individual claims are transferred for collection to a foundation or association, which can then claim damages in name of transferee itself. No ‘real’ economic transition of the claim is envisaged, because it would constitute a violation of Dutch law.\footnote{Fiducia-prohibition of Article 3:84-3 of the Civil Code (“CC”).} In all of these cases, damage claims are bundled from direct purchasers. In general, these plaintiffs have enough financial resources (or insurance) to borne procedural risks of paying for the litigation costs. Although most cases are far in proceeding, no case has arrived at the calculation of damages. It is important to note that damage claim actions in the Netherlands can take many years to reach a ruling. Cases that only reach first instance take on average one year to one and a half year to be concluded.\footnote{See for example Rb. Arnhem 1 February 2006, 125793 / HA ZA 05-660 which took 1 year to reach a ruling.} Cases that go to the second instance, the Higher Court, take on average 4 years to be concluded.\footnote{See for example Gerechtshof Amsterdam, 11 March 2011, LJN: BL7056 which took almost 5 years to reach a ruling.} Competition cases in the Netherlands that reach the Supreme Court can take up to or more than a
decade to be concluded. Rather than these procedures, summary proceedings asking for interim injunction are very popular in the Netherlands. The summary proceeding is particularly suitable for competition cases where plaintiff claims a court injunction to seize anti-competitive behavior by defendant or a court order to supply in refusal to deal case. However, these proceedings are not possible when the legal issues are too complex for the court to rule without further facts, pleadings and expert evidence and claims for damages are, although theoretically possible, as a rule dismissed.

Like in the US, many competition conflicts are solved through settlements rather than in court. Because of the confidential nature of most settlements, it is impossible to give an accurate number of the competition conflicts that have been solved through settlements the last ten years. The fact that there are so little damage claims bases on competition cases before national courts in the last years may indicate that settlements have been very successful in the Netherlands. Some lawyers working in the competition field have indicated that many damage claims are withdrawn and end in out-of-court settlements before reaching a judgment at court. There is a theoretically possibility in the Netherlands of using a ‘class action’ for financial settlement to approve and declare a settlement binding by the Amsterdam Court of Appeal. If the settlement is approved, all injured parties are bound to the settlement except for those that “opted-out” of the approved settlement within 3 months. However, this class action settlement has not yet been used by victims of competition law infringements.

4.3 Claiming damages

In the Netherlands, a plaintiff can claim damages based on the general rules of tort under the Dutch Civil Code. The most important conditions for liability are: (1) an unlawful act; (2) attribution of the unlawful act to infringer; (3) damages and (4) a causal link between the unlawful act and the damages.

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168 See for example HR 12 August 2011, LJN: BO6770 which took more than 8 years to reach a ruling.
170 Ibidem.
171 For example the settlement involving around 1,000 civil claims against a large number of construction companies for bid rigging in the Netherlands in 2005; the settlement of Interpay with 12,000 claims for infringement of Dutch competition law in 2009; pending settlement for price-fixing between Dutch breweries and Dutch trade association for the hotel and catering industry. See Banning N.V., IGLG TO: Cartels and Leniency 2010, p. 182.
172 Pels Rijcken & Drooglever Fortuijn N.V., IGLG TO: Competition Litigation 2011, p. 118.
174 Article 7:908-2 CC.
The first two conditions are in principle met when it’s proven that competition rules have been violated. In practice, it can be very difficult to prove the amount of damages suffered. In the next paragraphs I turn to the specific topics of my comparative analysis, which are the admissibility of the proposed quantification methods for damage calculation as expert evidence before national courts in the Netherlands and the allocation of legal costs associating with these methods between parties before courts in the Netherlands.

4.4 Admissibility of damage testimony and expert evidence in general

Under Dutch law, it is possible to hire an expert to make a damage report and attach it with the summons. In most cases, defendant will also hire a damage expert like an accountant to substantiate its defense. If the reports contradict each other, there is a ‘battle of experts’. A judge may then order an expert report of a third party, which will answer the specific legal issues that are asked of him. Parties will have the opportunity to comment on the appointment of the specific expert and to ask the expert questions. If the court appoints an expert, Dutch law prescribes as a principle that the deposit of the costs of the expert must be paid by plaintiff. Experts can advise on all relevant aspect of competition law. For the purpose of my comparative analysis, I focus on the experts who quantify the damages suffered due to an infringement of competition law. In principle, anyone can be an expert. However, for the quantification of damages suffered, normally an accountant or economic expert is used. The judge is more or less completely free in the valuation of an expert’s opinion and evidence, as he determines the cogency of evidence. The same rule applies if an expert is appointed by the judge himself.

As a general rule, damages are determined "in a manner most appropriate to its nature". In the Netherlands this determination is usually done by looking at the damage suffered by the plaintiff. It is also possible to determine the damages by looking at the illegal profit made by the defendant. This is

175 Article 194, Code of Civil Procedure ("CPP").
177 Ibidem, at 4.7.
178 Article 223-2 CCP.
179 There is no provision in Dutch law that sets a threshold for an expert.
180 Article 152-2 CCP.
181 HR 5 December 2003, LJN: AN8478.
182 Article 6:97 CC.
uncommon and after a request of plaintiff hereto, a judge has the discretion to award the request or not.\textsuperscript{183} Dutch law does not provide a limit in the amount of damages that can be awarded. A judge however, has the discretion to limit the amount of damages.\textsuperscript{184} This could happen for example if defendant has already paid public monetary sanctions and could go bankrupt because of the awarding of actual damages to plaintiff. The combination of the factor that the judge has the discretion to valuate (expert) evidence freely and the rule that damages are determined “in a manner most appropriate to its nature” make it that all proposed methods of the Draft Guidance Paper are theoretically allowed in Dutch courts.

In principle, damages in the Netherlands consist of full compensation for actual damages; this is the actual calculation of damages.\textsuperscript{185} Similar to how the Commission states it, the amount of damages should as far as possible put the plaintiff in the same financial position that he would have been if the infringement of competition law did not occur.\textsuperscript{186} This is done with an ex-post (at time of the trial) analysis. If the actual damage cannot be calculated, the judge has the discretion to estimate the damages.\textsuperscript{187} Damages for competition law infringements can also be abstractly calculated\textsuperscript{188}, e.g. by calculating damages irrespective of the actual damages suffered by plaintiff. This could be done for example by looking at the price at which a product from defendant is bought and comparing it to the ‘normal’ market price without taking into account if plaintiff has mitigated its damages by buying replacing products. Abstract calculation of damages for lost profits has been denied by Dutch courts.\textsuperscript{189}

I would support the abstract calculation of damages under Dutch law for the calculation of competition law infringements. This calculation is well suited for simple comparator-based methods as proposed in the Draft Guidance Paper such as the before-and-after method and the yardstick method based on averages. If a company charges €15 to plaintiff in the period of the infringement and the comparator market price is €10 in the same period, then plaintiff should get awarded with the

\begin{footnotesize}
\begin{enumerate}
\item Article 6:104 CC.
\item Article 6:109 CC.
\item Article 6:95 CC.
\item White Paper on Damages, Supra note 36, p. 6.
\item Article 6:97 CC.
\item HR 28 January 1977, NJ 1987, 174 m.nt. ARB.
\end{enumerate}
\end{footnotesize}
difference. First, this would prevent complications regarding own fault of plaintiffs and the issues regarding proof of the harm mitigation obligation.\textsuperscript{190} Second, the deterrent effect on companies planning to infringe competition law will be greater if they are liable for the whole overcharge without looking at the actual loss of the plaintiff. However, this can only be an option for actual damages as judges do not allow abstract calculation of lost profit.

4.5 A Dutch \textit{Daubert} test?

As a general rule in the Netherlands, a judge does not have to explicitly motivate the reasons as to why expert evidence is admissible and/or used in court.\textsuperscript{191} The Supreme Court stated that only if the proposed expert evidence of a party is challenged in court and the evidence is crucial is the resolving of the applicable legal issue, the judge has to motivate its reasons for allowing specific evidence in trial.\textsuperscript{192} A party can challenge the expert himself, the theory/methods used or a combination of the two. The Dutch Supreme Court has developed a reliance test of expert evidence in courts themselves in 1998.\textsuperscript{193} This reliance test is still applicable case law and used in criminal lawsuits.\textsuperscript{194} There has been no ruling yet that this reliance test is applicable to all expert evidence in both civil and criminal procedures, however I assume that this was the intention of the Dutch Supreme Court. When a judge is confronted by expert evidence he should assess the reliance of that evidence by answering five questions:

1. What is the education, profession and experience of the expert?
2. Does the expertise extend to the legal matter at hand?
3. Which method did the expert use?
4. What is the reliability of the method?
5. To what extent did the expert professionally apply the method?

The five questions are a combination of the three general admissibility questions and the four reliance questions of \textit{Daubert}. The first and second question relate to the qualification of the expert and is similar to the first part of the \textit{Daubert} test, which tests if the expert is qualified to testify competently on the

\textsuperscript{190} Article 6:101 CC.
\textsuperscript{191} Article 152-2 CCP.
\textsuperscript{192} HR 14 March 1989, \textit{NJ} 1989, 747.
matters at hand. The fourth and fifth question relate to the reliability of the method and whether it has been reliably applied by the expert. These questions seem to be very similar to the second and third part of the Daubert test which tests the reliability of the method and to what extent the expert applied method reliably to the facts of the case. However, the fifth question tests whether the method is applied professionally and reliably by the expert and not if the method is applied reliably to the facts of the case. This difference is probably explainable because of the fact that the Daubert test is in the form of an input-control, where the selection is done at the gate, i.e. before trial. In the Netherlands the expert evidence is tested in the form of output-control, where the valuation of expert evidence is done by the judge at the end of the trial and imbedded in the ruling.\footnote{Zippro, E.J. (2008), 'Privaatrechtelijke handhaving van mededingingsrecht', Deventer: Kluwer, p. 610.} If the US Daubert test is compared with the Dutch test I conclude that the aspect of reliability is not relevant for the question if evidence is admissible, but rather reliability plays a role in the valuation of the evidence by the judge when deciding the case. Although not yet seen in Dutch courts, I assume that like in the US, the before-and-after method and yardstick/benchmark method will be presumed reliable in itself when a judge valuates the expert evidence. Because judges have little to no experience with the more sophisticated methods proposed (multiple regression), it would be wise to start with test cases that use simple techniques like the before-and-after method based on averages. These more simple methods also satisfy the condition that a method is well accepted in the scientific community and broadly publicized and discussed. From experiences with the proposed methods in the US, we know that courts attach great value to the substantiation and explanation of the conclusions which arise out of the application of the before-and-after and yardstick method; the basic economics of the proposed expert’s method should therefore be presented with expert’s conclusion. In paragraph 4.8, I will discuss a possible solution to reliance and relevance problems with the proposed economic expert evidence by the Draft Guidance Paper which have been indicated in the US.

4.6 Reimbursement of costs of expert evidence

The basic principle in the Netherlands is that the loser pays all costs, which includes the amount of court fees, court appointed experts and witnesses.\footnote{Article 237-1 CCP.} Courts can mitigate the costs which are made needless and unnecessary caused by a party.\footnote{Ibedem.} This implies that in general all costs are compensated if
they are reasonable for the purpose of the trial and do not constitute an excessive amount. The basic principle does not cover the awarding rules relating to hired economic experts and attorney’s fees. Like in private antitrust cases under the Clayton Act in the US, there are different rules that regulate the possible reimbursement of costs of expert evidence and the costs of attorney in the Netherlands.

A party who hires an expert to provide economic evidence relating to the determination and calculation of damages can get his or hers costs reimbursed as extrajudicial costs under Dutch law. These costs are subject to a ‘double reasonableness’ test. If a party wants to see the expert costs reimbursed, the expert evidence must have been reasonable necessary for the calculation of the damages and the amount of the damage evidence must be reasonable. In principle, all experts’ costs can be reimbursed as long as the costs are reasonable. From the US experience with the proposed methods of the Draft Guidance Paper we know that they can be very costly, depending on the specifics of the case. The judge decides if costs made by an expert are reasonable and does not have to motivate that as such, unless he refuses the costs. In case law, reasonableness of the costs associated with the calculation of damages is foremost assessed by looking at the nature of the damages (e.g. are the damages complicated and does the calculation require specific expertise or are the damages a common occurrence) and the costs of the damage report in relationship with the total damage claim. I suspect that in competition cases where quantification methods such as the before-and-after and yardstick method are reasonably necessary for the calculation of the damages, the court will not quickly deny or reduce the amount of expert costs awarded. I do however fear for the more ‘sophisticated’ damage reports (such as a multiple regression study) which are expensive and difficult to understand. Because there is no experience with these methods yet, courts could find the study needless because of the fact that simple comparator-based-methods provide reliable estimations that they can assess and understand. This could result a mitigated awarding of expert’s costs made by parties. This problem can be overcome with a court ordered expert, which I will further explain in paragraph 4.8.

198 Article 6:96-2b CC.
4.7 Cost allocation: recovery of plaintiffs’ and defendants’ attorney’s fees

In the Netherlands, the losing litigant has to pay for the other party’s attorney(s) in accordance with the so-called liquidated tariff.\textsuperscript{203} This tariff scheme states that only legal fees for specific services and acts of attorneys can be compensated. Although these liquidated tariffs are not binding on courts, judges in principle award attorney fees based on the scheme.\textsuperscript{204} The procedural actions in the scheme are limited, and the fee award almost never covers the actual legal fees which a party has to pay.\textsuperscript{205} With relatively low damages claims, this is especially true because the attorney costs will be relatively high with respect to the claim. In principle, I support the system of liquidated tariffs. However, in competition law cases these limited rates will not provide incentives to plaintiffs with little or no financial resources and as a result do not increase private damage actions for infringements of competition law.

Like under antitrust litigation in the US, I would opt for a ‘real’ or ‘reasonable’ reimbursement of attorneys’ fees, especially in Dutch competition law cases. The ideal future to me for private enforcement of competition law in Europe would be that it develops to a situation where small buyers in the vertical chain and end consumers that have been harmed by competition law infringements can claim damages without great risk of having to pay high attorneys and expert costs. In most cases like this, it will be Goliath against David, because of the difference in financial resources. With the liquidated tariff, big companies can financially ‘exhaust’ plaintiffs by extending the trial time and time again until plaintiff lacks enough financial resources to continue the trial. However, without a binding rule that a defendant in competition law cases cannot recover attorney’s costs, the risks for plaintiffs of paying huge amounts of legal fees will become only higher with a ‘reasonable’ reimbursement rule. I would suggest one key-difference as opposed to the US fee-shifting rule under the Clayton Act, which is that a prevailing plaintiff should have the possibility to get all his or hers ‘reasonable’ attorney’s costs back and a prevailing defendant should only get his or hers attorney’s costs back according to the maximum of the liquidated tariff scheme in the next to discuss ‘bad faith’ litigation. To me, a situation where defendants cannot recover any costs of litigation leads to frivolous litigation of competition law which can ultimately result in over-deterrence.

\textsuperscript{203} http://www.rechtspraak.nl/Procedures/Landelijke-regelingen/Sector-civiel-recht/Pages/Liquidatietarief-Rb.en-en-gerechtshoven.aspx
\textsuperscript{204} Ibidem.
Like in the US under the Clayton Act, this ‘fee-shifting’ rule must be combined with the exemption that plaintiff did not bring the case under ‘bad faith’. As seen in paragraph 3.7, the US bad faith exception consists of an objective and subjective condition. The objective US condition looks like the Dutch concept of ‘reasonableness and fairness’. The subjective US condition is similar to the Dutch concept of deception. Evidence of these conducts will be very difficult to prove as a defendant. Because I find the US bad faith exception to narrow to prevent frivolous litigation, I propose a ‘broader’ bad faith exception. A Dutch ‘bad faith’ exemption should be twofold; (1) the plaintiff must show sufficiently plausible grounds that defendant infringed competition law (this can be tested with the provided evidence at the summons procedure), and (2) plaintiff should show that damages arising from that infringement are sufficiently plausible (no precise calculation necessary). As discussed in Chapter 3, the bad faith exemption will be hard to prove in cases with per se violations of competition law. Next to that, when plaintiffs start follow-on procedures after the NMa constitutes a violation of competition law it will be safe to assume that plaintiff can only be liable for attorney’s costs under the second condition (plausible damages) of the Dutch bad faith exception. The two conditions must be assessed by the judge at the end of the summons procedure, but before detailed analysis of the damages are made in a second phase (see next paragraph).

4.8 Possible solution for the reliance of expert testimony and the associated costs

To make damages claims for infringements of competition law more attractive in the Netherlands, especially for plaintiffs with little financial resources, I would propose that as a general rule there is no damage testimony allowed at the first phase of a damage claim procedure, where there must be decided if there is a infringement of competition law against the plaintiff (summons procedure). At a second stage, the judge could order for an expert which can then calculate if there are damages, and if so, which amount. In the Netherlands, this could be well fit within the court order of a ‘schadestaatprocedure’.

This is a specific procedure for the calculation of damages which can be ordered if the judge concludes that damages for the plaintiff are sufficiently plausible but the judge is not capable yet of calculating or estimating the amount of damages. It could be an option that parties are still allowed to provide for own economic expert evidence. However, because of the fact that the judge ordered for an independent expert it could well be that the costs of a party expert cannot be reimbursed because the costs will not

206 Article 612 CCP.
pass the ‘double reasonableness’ standard (see paragraph 4.6). This structure can be coupled with my proposed rules associated with the awarding of court fees, attorney’s fees and costs of court ordered and non-court ordered expert testimony which have been set forth in paragraph 4.6 and paragraph 4.7. At the end of paragraph 4.9 I will provide an overview of the proposed structure including the cost awarding rules.

I see multiple advantages in this structure. The first is that it would prevent a ‘battle of experts’ and the double costs that arise from this battle. As a result, plaintiffs with little financial resources do not have to bear the risks of paying for expert damage testimony until a competition law infringement is proven. On top of that, it will be fairer for a defendant because often he will be ‘forced’ to hire a damage expert early in the trial (first phase) to defend himself against the damage claim. Second, the judge can monitor the costs made by the expert, because Dutch law prescribes that costs associated with the determination and calculation of the damages can only be reimbursed insofar as the costs are reasonable. This reasonableness will differ from case to case and is very difficult to assess upfront. The ultimate costs can then be awarded to the defendant, which then knows it has to pay for only one damage report which has been realized with reasonably costs, instead of two or three damage reports. Third, a mandatory court appointed expert would fit well within the conceptions of the parliamentary history which stated that the reliability of an court appointed expert can be assumed after consultation with both parties and the subsequently appointment by the court.\textsuperscript{207} Also, two problems which we have seen with the \textit{Daubert} test in the US can be overcome in this structure. If one court ordered expert has specific instruction from both parties (under supervision of the judge) in calculating possible damages, there will most likely be no problem with the exercise of irrelevant tasks by experts (e.g. answers which are not specific to the facts of the case). Next to that, because both parties will provided (almost) all facts at the first stage of the proceeding and both have the right to provide the expert with questions there will probably be a very low chance that the expert insufficiently applied the facts provided by parties (e.g. by using only selective facts from one party). Fourth, this structure would solve the disincentives of the loser-pay principle (litigation of uncertain and small damage claims, see paragraph 2.4) and constitute a cost protection order as discussed by the Commission in the Green paper on damages (see paragraph 2.4). Fifth, because the total damage claim procedure is divided in to two phases defendants which have been found liable of infringing competition law in the first phase will have an incentive to

\textsuperscript{207} Parlementaire geschiedenis nieuw bewijsrecht, 1988, blz. 331.
settle the case with plaintiff before the second phase start. As a result, defendant will not have to pay for the costly economic expert testimony and because of the procedural risk of the second phase provide plaintiff with a reasonable settlement offer. Last, and perhaps most important, the right to claim damages which arise out of competition law infringements is guaranteed for all people and not only those who have enough financial resources. The proposed structure ensures this and therefore reflects the principle of effectiveness. For defendant, the deterrence effect on unlawful conduct will increase when an effective private enforcement is in place.

4.9 Creation of Competition court or ‘competition damage institution’

A last possible option for this litigation structure could be to create a Competition court or ‘competition damage institution’ which would provide the court with an experts which answers the questions relating to the quantification of damages. This rule could be mandatory or optional. A similar structure can be seen in Spain, where civil courts may request the Competition Court to issue a report on the origin and quantum of damage.\(^{208}\) The advantage of this option will be that a court or institution of independent experts can build upon more expertise with all the proposed methods of the Draft Guidance Paper (both simple and sophisticated methods). These experts can asses for parties and judges which method will be most suitable for the specifics of each case. To build upon expertise with all the proposed methods of the Draft Guidance Paper it would be preferable that the Competition court or ‘competition damage institution’ is mandatory for the damage reports. My prediction would be that if parties and courts build up experience and trust with this system, all methods proposed by the Draft Guidance Paper can be used which will result in calculation of accurate actual damages and an effective protection of the right for private persons to enforce competition laws for harm suffered due to competition infringements.

Summary policy proposal private enforcement of damage claims:

First phase: summons procedure

- No expert damage testimony allowed.
- Determination of possible infringement of competition law.
- Are damages for plaintiff sufficiently plausible? (If so, to second phase)
- Assess merits damage claim ('ex-post') under the Dutch bad faith exception (1. was infringement plausible? and 2. were damages plausible?) (paragraph 4.7).
- If no bad faith, ‘reasonable’ attorney’s costs for defendant (paragraph 4.7).
- If bad faith, attorney’s costs of liquidated tariffs for plaintiff (paragraph 4.7)
- Court fees for losing party in summons procedure (paragraph 4.6).

Second phase: damage calculation procedure

- Mandatory court ordered expert with specific task of calculating damages (paragraph 4.8).
- Dutch Daubert test: qualification of expert and reliability of method (paragraph 4.5 and paragraph 4.8).
- Cost of ‘reasonable’ economic expert testimony for defendant (paragraph 4.6 and paragraph 4.8).
- Optional: parties still allowed to provide own economic expert evidence but passing ‘double reasonable’ test will be at own risk (paragraph 4.8).
- Possible Introduction of Competition Court or Damage Institution (paragraph 4.9).

4.10 Conclusion

Private enforcement of competition law has become a common litigation practice in the Netherlands. However, damage claim actions are still rare. Damage claim procedures in the Netherlands are mainly conducted through collective actions from direct purchasers, which seem to have a substantial damage claim and “deep pockets”. In theory, all proposed methods of the Draft Guidance Paper can be used in proceedings in the Netherlands as judges have the discretion to valuate an expert’s opinion and evidence. Under Dutch law, an admissibility test for expert evidence has been developed which is very similar to the US Daubert test. Important factors are reliability of the method and to what extend the expert applied to method reliably to the facts of the case. The costs associated with the proposed methods of the Draft Guidance Paper can be reimbursed by the prevailing party as long as it
was reasonable to make the costs and the amount is reasonable. Since there is little to no experience with the proposed economic methods, it will be wise to start test-cases with simplified comparator-based methods because judges can understand these methods and subsequently valuate them as reasonable. The loser-pays principle in the Netherlands can have a negative effect on litigation for private persons who do not have “deep pockets” and have a damage claim of which the success is difficult to assess upfront. A mandatory ‘reasonable’ reimbursement of attorney costs for plaintiffs coupled with a ‘bad faith’ exemption would provide for more effective legal incentives for both plaintiffs and defendants. A possible solution to assure reliance of economic expert evidence in courts and to make damages claims for infringements of competition law more attractive in the Netherlands, would be to introduce that as a general rule there is no damage testimony allowed at the first phase of a damage claim procedure, where there must be decided if there is a infringement of competition law against the plaintiff (summons procedure). At a second damage calculation phase (schadestaatprocedure), the judge could order for an independent expert which can then calculate if there are damages, and if so, which amount.
Chapter 5. Conclusion

At the start of the 21st century the Commission started explicitly promoting private enforcement of competition rules in Europe. One important aspect in creating an effective private enforcement culture is to ensure that damages which arise out of competition law infringements can be quantified in damage claim procedures. The Commission released a Draft Guidance Paper which contained economic methods for the quantification of competition law damages. Because there is little to no experience with the methods proposed by the Draft Guidance Paper, the paper is indented to guide parties and courts in building experience with the proposed methods. The quantification methods proposed by the Draft Guidance Paper are very common in private litigation of antitrust laws in the US. US courts have showed that they are likely to admit expert evidence containing quantitative analysis if it has one or more of the ‘common approaches’ for measuring antitrust damages, which are in most cases the before-and-after approach and the yardstick or benchmark approach. The admissibility of expert evidence is regulated by the Daubert test in the US. Although the Daubert test is important for judges in assessing the relevance and reliability of the expert’s evidence, there is a more lenient standard for expert evidence regarding quantification of damages. This is because damages arising out of antitrust infringements are difficult to be calculated precisely and the infringer of antitrust law can in general not complain that damages cannot be measured with exactness. Although this lenient standard with regard to the accuracy of damage calculation is welcomed, we have seen from studies and case law that there are still a lot of (partially) exclusions of economic expert evidence relating to problems with the (1) exercise of irrelevant tasks by experts, (2) lack of reliability with regard to the application of data used, (3) insufficient application of all the facts provided by parties, and (4) explanation of the economic foundations of experts’ opinions and conclusions. In the US, defendants can’t recover the costs of litigation except in cases where plaintiff acted in ‘bad faith’. The incentive of legal fee recovery for plaintiff is needed to encourage private parties to litigate complicated antitrust cases, which outcome is uncertain and could cost the plaintiff resources it doesn’t have.

Although the Commission wants to create an effective private enforcement culture in Europe, it stated that it does not want the use the procedural incentives which are in place in US antitrust enforcement, which can result in frivolous litigation without merit. The methods proposed by the Commission in the Draft Guidance Paper are theoretically all admissible under Dutch law. The admissibility of the methods is part of the assessment a judge makes when evaluating the evidence in his
or hers ruling. From experience with the proposed methods in the US under the *Daubert* test, issues with the admissibility of economic expert evidence mainly concern the reliability of the application of the method to the specifics of the case and a lack of explanation of the economic foundations and conclusions of expert’s findings. Under Dutch law, an admissibility test for expert evidence has been developed which looks like the US *Daubert* test. This test will not constitute limitations in the use of the proposed methods by the Draft Guidance Paper in itself. However, it can be expected that similar application problems by experts as seen in the US can lead to the disregard of economic expert evidence before Dutch courts. Because legal cost awarding rules in the Netherlands are limited, parties will almost never see their full legal costs reimbursed. Damage claim procedures in the Netherlands are mainly conducted through collective actions from direct purchasers, which seem to have a substantial damage claim and “deep pockets”. The loser-pays principle in the Netherlands can have a negative effect on litigation for private persons who do not have “deep pockets” and have a damage claim of which the success is difficult to assess upfront. A mandatory ‘reasonable’ reimbursement of attorney costs for plaintiffs coupled with a ‘bad faith’ exception would provide for more effective legal incentives for both plaintiffs and defendants. From a procedural perspective, a possible solution to assure reliance of economic expert evidence in courts and to make damages claims for infringements of competition law more attractive in the Netherlands, would be to introduce that as a general rule there is no damage testimony allowed at the first phase of a damage claim procedure, where there must be decided if there is a infringement of competition law against the plaintiff (summons procedure). At a second stage, the judge could order for an expert which can then calculate if there are damages, and if so, which amount. This procedural ‘structure’ could be coupled with the creation of a Competition court or ‘competition damage institution’ which provides the court ordered expert to answer the questions relating to the quantification of damages. Advantages are that (1) there will no longer be a ‘battle of experts’, (2) the costs of the expert evidence is monitored by the judge and will subsequently pass the double ‘reasonable test’, (3) problems relating to reliability of an expert and his economic evidence like under the *Daubert* test can be solved because parties both subject their questions to an independent expert and under supervision by the judge, (4) the structure would solve the disincentives of the loser-pay principle (litigation of uncertain and small damage claims) and constitute a cost protection order as discussed by the Commission, (5) the structure will result in effective settlements because the total damage claim procedure is divided into two phases and defendants which have been found liable of infringing competition law in the first phase will have an incentive to settle the case with plaintiff before the
second phase start with an reasonable settlement offer. Last, and perhaps most important, the right to claim damages which arise out of competition law infringements is guaranteed for all people and not only those who have enough financial resources. The proposed structure embodies this right and therefore reflects the principle of effectiveness. For defendant, the deterrence effect on unlawful conduct will increase when an effective private enforcement framework is in place.
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