



Dogs of war: what can economists do in non-US-style antitrust class actions?

*Cry 'Havoc!' and let slip the dogs of war,
That this foul deed shall smell above the
earth.*

Julius Caesar, Act III

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Europe doesn't like US-style class actions

- The EC, in its recent Working Document: “*Towards a Coherent European Approach to Collective Redress*” (February 2011) states that: “[The US] system contains strong economic incentives for parties to bring a case to court even if, on the merits, it is not necessarily well founded. These incentives are the result of a combination of several factors, in particular, the availability of punitive damages, the absence of limitations as regards standing (virtually anybody can bring an action on behalf of an open class of injured parties), the possibility of contingency fees for attorneys and the wideranging discovery procedure for procuring evidence. The Commission believes that these features taken together increase the risk of abusive litigation to an extent which is not compatible with the European legal tradition.”
- It is unclear if/what the Commission will do, but it is likely that in Europe we will not see punitive damages nor opt-out class actions.

Economists and class actions in Europe

- The US model : two-stage (certification and trial); lay juries; treble damages. So the economist needs to survive Daubert; assist in pre-trial procedures (discovery); during certification hearings help convincing the judge to let the case go to trial; scare the defendant into settlement with large damage estimates. Also, economists are witnesses, and are cross-examined.
- Europe is different: in most jurisdictions there isn't a two-stage procedure, just the trial; discovery is very limited; there are no juries in civil cases, so that litigation takes place in front of professional judges; multiple damages are very unlikely, as they conflict with the legal culture; economists are not witnesses.
- Thus, the role of economists in Europe will be more 'classical', assisting Counsel to prove (or disprove) illicit behaviour, causality, commonality, and to estimate damages.
- We will discuss here a few points, referring to a hypothetical class action following a cartel, concentrating on those that seem specifically relevant for class actions.

Two and a half important legal points

- It is always indispensable to prove a direct and immediate causal link between the illicit action and the damage. However, in most European jurisdictions, the court may assume as a rebuttable presumption the principle of *id quod plerumque accidit* (what normally happens). Thus, the economist may have an important role in proving the damage, on the basis of a reasonable presumption, showing to the Court that, on the basis of generally accepted economic principles, B would in general directly follow from A.
- In most continental legal systems (England is different) Courts enjoy broad powers in damages estimation. This has different legal justifications: quantification is a matter of fact in France, i.e. subject to very limited scrutiny by higher courts; Courts have an explicit power (e.g. Spain, Italy and The Netherlands) to award “reasonable” damages, even when a quantification is not possible, providing only a very broad description of his logic in assessing the damages. In all these cases, the economist may be able to suggest to the Court a reasonable interval in which the damages will lay.
- In class actions, both points may be particularly relevant: although it may never be written in the law, it seems very likely that most judges will be somewhat more generous to claimants in terms of standards of proof than they would otherwise be in traditional civil cases.

Passing-on

- From a European perspective, the issue of ‘standing’ will probably be solved along the lines suggested by the European Court of Justice in *Crehan* by allowing both direct and indirect purchasers the right to stand.
- Whatever the legal solution to the ‘standing’ issue, as we can safely assume that passing-on is a fact of life, economics will be useful to ascertain its extent, so it may be relevant both in ‘shield’ or ‘sword’ actions.
- This may not often be an econometrics-intensive job, as most European Courts do not like statistics, and are (understandably) suspicious of models based on many hypotheses. It may be useful, in a class action, to provide just a reasonable first approximation.
- For example: in general, the portion of the overcharge which is passed-on is given by $Z = 1/(1+e*k)$, where e is the demand elasticity and k the elasticity of supply (Van Dijk and Verboven, 2005). If k is close to one (i.e. AVC are almost constant), Z can be easily estimated from e .

Proof of damages

- Proof is a legal issue. However, in most systems, Courts may decide on proof on the basis of the principle of *id quod plerumque accidit* (what normally happens), and this is important where a class is broad, and there is some variance inside the class;
- Economics may help. I love pasta, and was a victim of a pasta cartel: sadly, I throw away my supermarket receipts, and could only find a few. Thus, strictly speaking, I could only claim overcharge for those receipts. However, an economist may prove that Italians, on average, eat 30 Kg/year of pasta, and the Court may evaluate damages on the basis of such a (rebuttable) presumption.
- Economics may also help to provide a presumption concerning the overcharge. We are all aware of the available methods (before and after, etc.), but the cartel may have sold a large number of products (again, consider pasta), and the precise determination of the overcharge may require lengthy and expensive research.
- On the other hand, referring e.g. to OXERA 2009, an economist may argue that the median overcharge is about 18%. Again, the Court may take this value as a rebuttable presumption, in order to calculate the damage.

Commonality

- In the US, Rule 23 requires that “*the class members' claims share common questions of law or fact*”. A class judgement should also be more efficient than individual judgements, e.g. when “*common questions of law or fact common ‘predominate’ over class member specific questions, and that proceeding by way of class action would be ‘superior to other available methods’ for resolving the dispute*”.
- This is a mixture of legal and practical requirements. The former will certainly characterise any class action procedure in Europe, where it will be necessary to prove that all the claimants suffered a direct and immediate damage caused by an illicit action.
- Economics may be used to support commonality : the cartel has led to different price increases for spaghetti, maccheroni and egg tagliatelle, but the dispersion of price increases is small, so that pasta eaters are a class because they share a common question of fact.
- Economics may also supply arguments against commonality: the cartel of pasta producers increased prices to distributors, which may or may not have increased prices to consumers: the pricing decisions of distributors is an intervening cause, so that all pasta eaters share a common question of law, but not of fact. On the other hand, an economist may argue that elasticity of demand for pasta is about one, so that Z is about $\frac{1}{2}$: half the price increase has been passed-on and so there is sufficient (residual) commonality on the basis of the ‘what normally happens’ criterion.

Broader damages

- Cartel victims pay the overcharge, and do not buy some pasta they would have otherwise bought. For an economist this is foregone consumer surplus, but from a tort law point of view, this would arguably be a loss that in theory could be indemnified, but never is (how to prove that I did not buy an extra packet of spaghetti because of the overcharge?).
- However, if linearity of the demand curve is a reasonable hypothesis, and demand elasticity is known, we can approximately calculate the size of the aggregate welfare loss, and its percentage value vis-à-vis the income transfer to the cartel, and thus estimate a sort of ‘mark-up’ that should be applied to the overcharge suffered by a pasta purchaser in order to compensate her for the ‘lost pasta’. If demand elasticity is 0.5 and the overcharge is 30%, this ‘mark-up’ would be about 7.5%.
- This approach may be criticised, but it may be useful to remember that – when judges are allowed some latitude in damage assessment – an approximate result may well be sufficient.

Havoc!

- Economists have a lot to do in class actions, even in countries having a legal system very different from the US.
- But they need to tailor their approach on the specific legal rules concerning causation and damages evaluation: a transplant of US-style econometrics-intensive studies would not be very useful in many jurisdictions.
- There is in any case a lot of work to do, for the lawyers (to whom Shakespeare was obviously referring), and for their followers, the economists.