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First thoughts on the CNMC Guide on Damages Quantification in Violations of Competition Law

On 21 July, the CNMC published the Guide on Damages Quantification in Violations of Competition Law.

The text (the “**Quantification Guide**”) is the result of a long drafting process in which the CNMC carried out two public consultations involving judges, lawyers, economists, experts, companies, academics and citizens.

From the point of view of those who act as legal representatives in many of these claims for loss and damage, there is a sense that the CNMC has accurately captured the reality and the difficulties faced by those who act in such proceedings.

In the Quantification Guide, the CNMC addresses, systematically, and in an orderly and explanatory manner, the issues of concern to those involved in these proceedings; in particular, concerning the process of the quantification of damages, which is an essential step in such proceedings. Regarding this process, the following should be noted:

- (i) The quantification of damages is a **complex and costly** process because it requires a comparison of the situation that the plaintiffs were in when they suffered the damage with the situation they would have been in if the violation had not occurred. In this hypothetical assessment of how market conditions would have evolved in the absence of the violation, questions of great complexity and specificity arise; and

- (ii) The process requires the handling of statistical concepts and, specifically, econometrics, with which the parties and the courts **may not be sufficiently familiar**.

This complexity and, frequently, its high economic cost, as well as the handling of concepts that are sometimes opaque for the parties and the courts, can generate situations of inequality in the defence of the parties and *ineffectiveness in the application of Articles 101 and 102 TFEU*. This inequality and ineffectiveness may be to the detriment of both plaintiffs and defendants:

- (i) The inequality generated may be to the detriment of plaintiffs if the complexity and cost of the quantification process become **disproportionate obstacles** that prevent them from enforcing their right to compensation for the damage suffered;
- (ii) But this inequality may also be to the detriment of defendants if the methods and techniques that they use in their defence generate mistrust or suspicion among the legal representatives involved in such proceedings, as they are complex techniques that are unfamiliar to the legal world.

Therefore, with the publication of the Quantification Guide, the CNMC is providing the courts and the parties involved with relevant information on the methods and techniques available for quantifying damages.

By disseminating this type of information, three objectives are achieved:

- The facilitation of **access to justice** which, in particular, enables victims to go through the process of obtaining compensation for the damage caused: this ensures the full effectiveness of Articles 101 and 102 TFEU.

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- It increases the **effectiveness** of claims for damages: claims become more predictable.
- It helps to ensure that the redress of the damage caused is **as close as possible** to the damage actually suffered (therefore, situations of undercompensation and overcompensation can be corrected).

We consider - and this was made clear by the European Commission in 2007 in the *Communication on the quantification of damages in claims for loss and damage* that accompanied the *European Commission's Practical Guide to the Quantification of Damages* - that the Quantification Guide itself neither increases nor decreases the requirement in terms of the level of evidence or the facts presented by the parties, but it does make relevant information available to the parties to be able to comply with the burden of proof required of them under the applicable legal rules. Similarly, it also provides the courts with relevant information so that they can assess the degree of accuracy of the method chosen, the *correctness* of the quantification process, and the *reliability* and *proportionality* of the quantification presented to them.

The description of typical conduct, the identification of the methods and techniques that can be used, the list of checks included in section 2.6 of the Guide, the practical examples and even the annexes with the glossaries of statistical and econometric terms and concepts all contribute very positively to the achievement of these objectives.

By achieving this threefold objective, the **legal certainty** of all parties involved is increased.

In short, with the publication of the Guide, we can conclude that the Commission:

- (i) Takes a further step towards safeguarding competition and the proper functioning of the internal market; and
- (ii) Also takes a further step towards the much-needed combined action of the public and private sectors, while safeguarding judicial independence, since the Quantification Guide is merely informative and has no binding legal effect.

It is, in short, a valuable resource, which will become all the more valuable the more it is used by the legal representatives involved in proceedings such as these. It is up to us to make the best use of it.

