



Private enforcement of EU competition law

Guidelines on passing-on of overcharges

The views expressed are purely those of the speakers and may not in any circumstances be regarded as stating an official position of the European Commission

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Overview

- **What is passing-on?**
- **Purpose and scope of the guidelines**
- **The legal framework**
- **Quantification of passing-on and the volume effect**

What is passing-on? (1)

- Article 16 of the Damages Directive:
 - The Commission shall issue guidelines for national courts on how to *estimate the share of the overcharge* which was *passed on to the indirect purchaser.*

What is passing-on? (2)

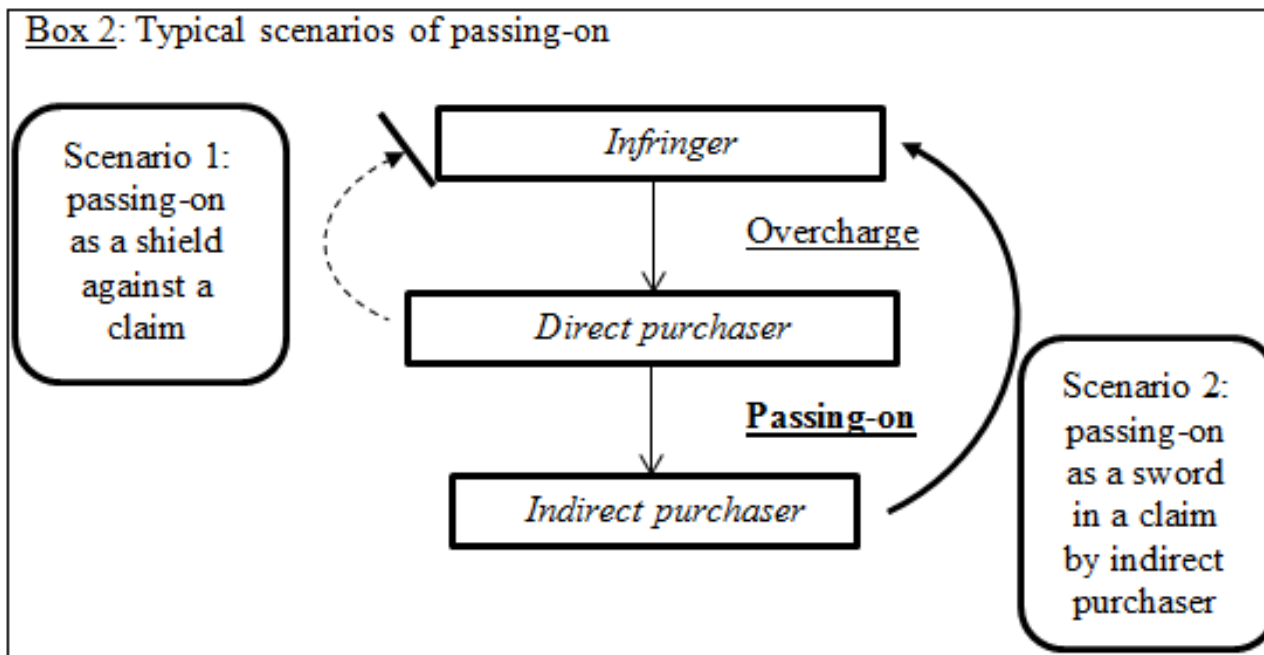
- **Overcharge:**
 - The price difference between the price actually paid [**by a direct customer**] and the price that would have prevailed in the absence of the infringement of competition law

-Article 2 (20) of the Directive

What is passing-on? (3)

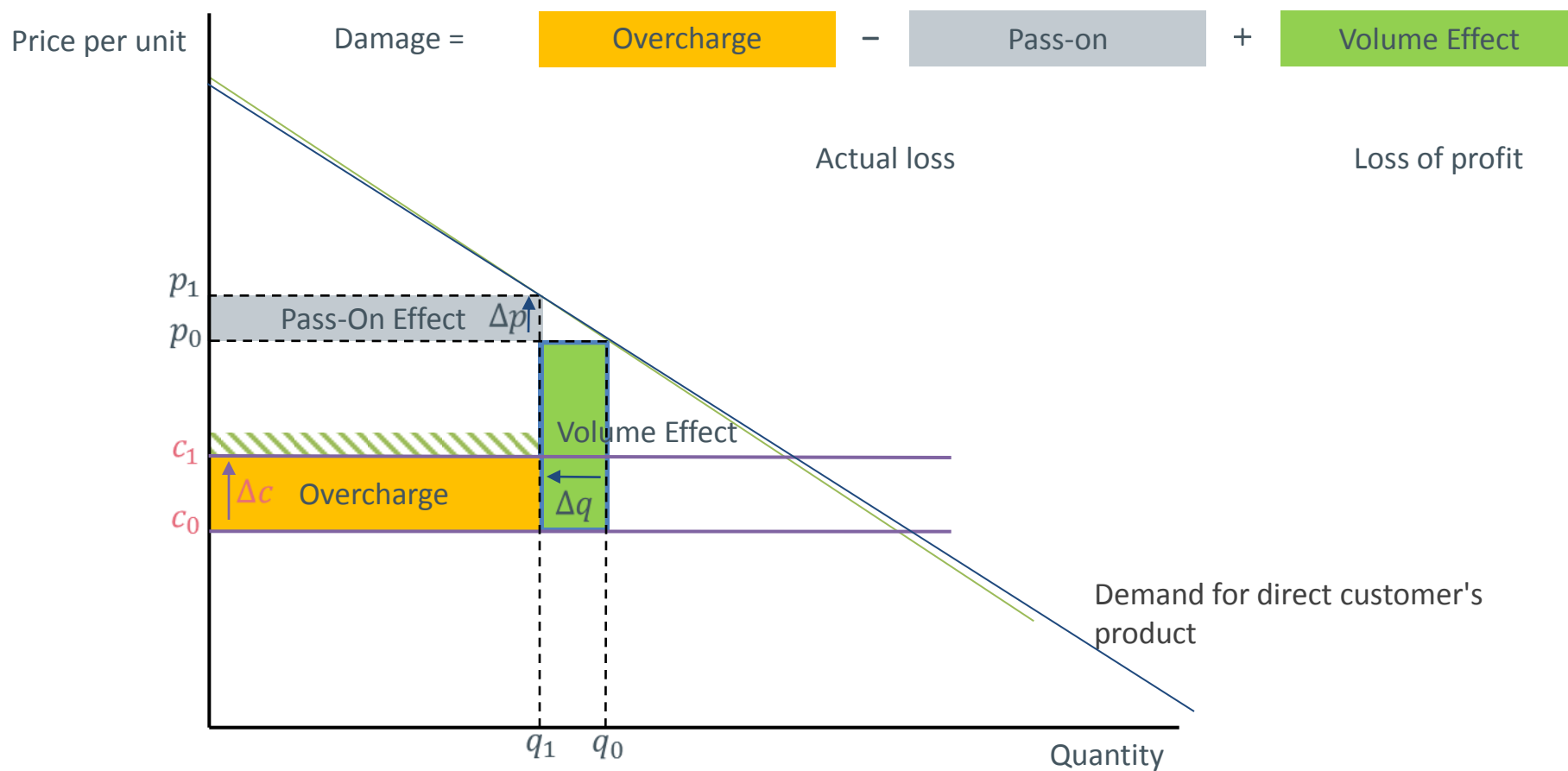
- **Pass-on effect:**
 - The price difference between the price actually paid [**by an in-direct customer**] and the price that would have prevailed in the absence of the infringement of competition law

What is passing-on? (4)



The components of damages: 3 rectangles

Example: direct claimant, passing-on defence, volume effect



Purpose and scope of the guidelines

- Provide **courts, judges** [other stakeholders] with **practical guidance** on quantifying the passing on of overcharges:
 - *Summarize the legal framework*
 - *Explain the role of economic theory*
 - *Overview of approaches for quantification*
 - *Examples of evidence needed for quantification*
 - *Advice on managing the process with economic experts*

Passing-on legal framework

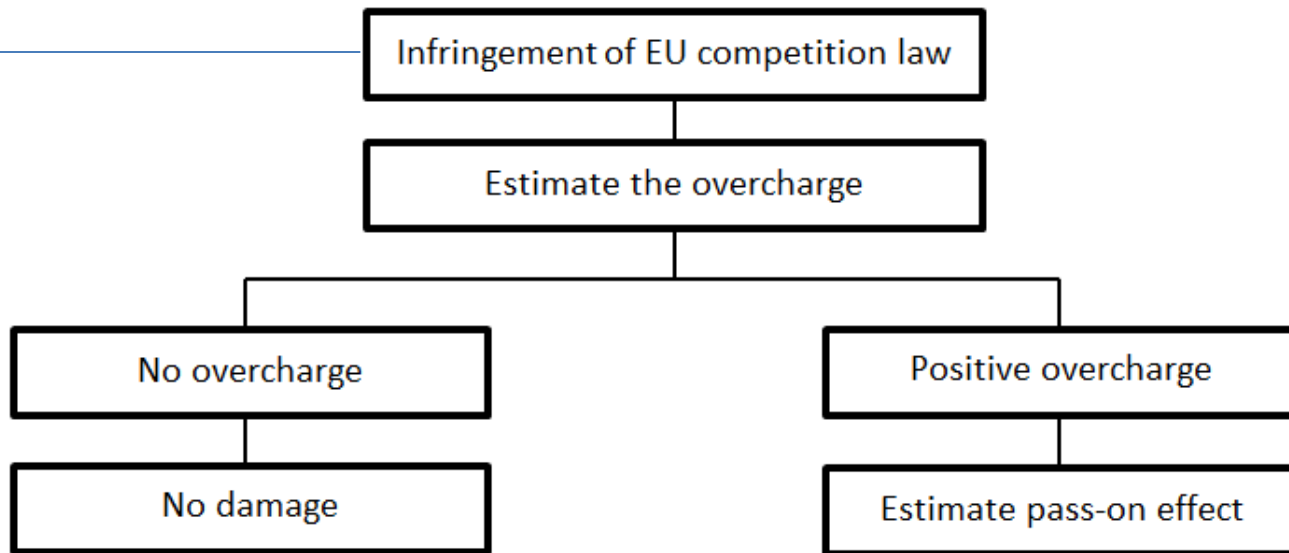
- Legal framework, The Damages Directive Article 3:
 - *"Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed."*
- In economic terms:
 - Compare the market where the infringement took place with ***a market where the infringement did not take place***



THE COUNTERFACTUAL

- The purpose of the counterfactual is to isolate the effect of the infringement from other factors affecting prices
- The counterfactual is hypothetical and cannot be directly observed
 - Different methods and techniques available

The sequence of damage estimation



- » *An infringement of competition law found by a final decision of a competition authority is deemed to be irrefutably established for the purposes of an action for damages (Damages Directive Article 9)*
- » *It shall be presumed that cartel infringements cause harm (Damages Directive Article 17)*

Quantification step 1: The overcharge



Strasbourg, 11.6.2013
SWD(2013) 205

COMMISSION STAFF WORKING DOCUMENT

PRACTICAL GUIDE

QUANTIFYING HARM IN ACTIONS FOR DAMAGES BASED ON BREACHES OF
ARTICLE 101 OR 102 OF THE TREATY ON THE FUNCTIONING OF THE
EUROPEAN UNION

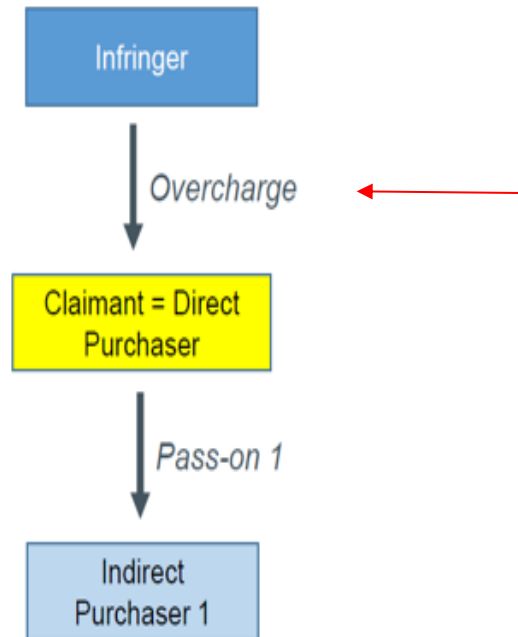
Accompanying the

COMMUNICATION FROM THE COMMISSION

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

{C(2013) 3440}

Scenario 1



COMPARATOR BASED APPROACH

Quantification step 2: The pass-on effect



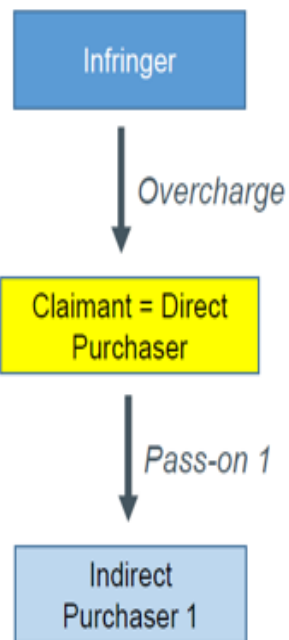
Brussels, XXX
[...] (2018) XXX draft

COMMUNICATION FROM THE COMMISSION

Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser

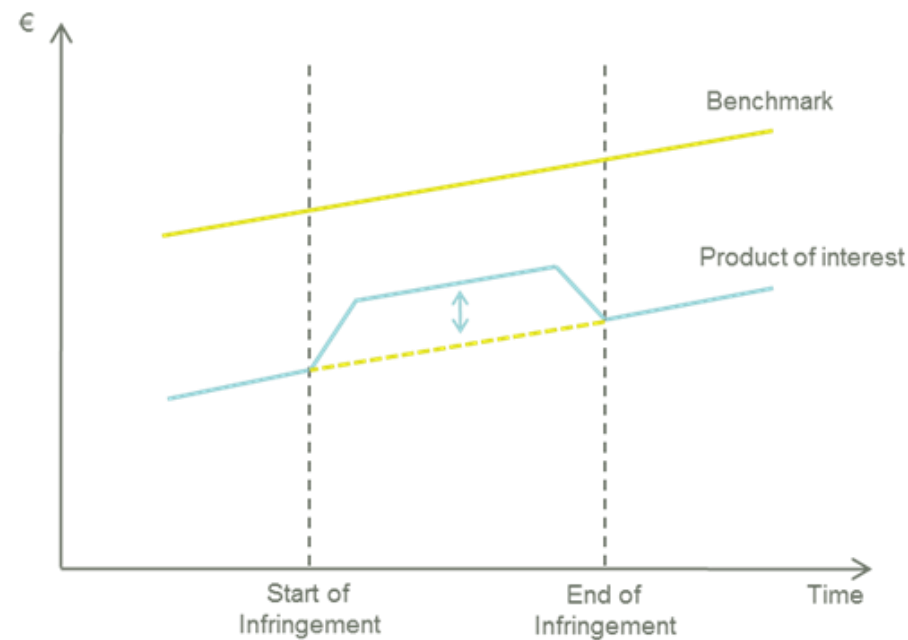
COMPARATOR BASED APPROACH

Scenario 1



Quantification – actual effects

The main comparator-based method of "direct" counterfactual estimation



Double comparison:

- across time
- across "markets" (comparators)

Comparators (benchmarks):

- proxy for counterfactual
- have to be "similar" to product of interest but **unaffected** by infringement

Difference 1: main product

- infr. vs. non-infr. Period

Difference 2: comparator

- infr. vs. non-infr. Period

Difference-in-differences (=impact):

- Difference 1 – Difference 2

See **Quantification Guide** for more on comparator based methods

Quantification – actual effects

- **The court's power to estimate**
 - The Damages Directive Article 17:
 - The MS shall ensure that the courts are empowered to **estimate the amount of harm** if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis on the evidence available
 - Guidelines on passing-on of overcharges:
 - The national courts must base their assessment of harm on
 - Firstly, the information reasonably available
 - Secondly, strive for an approximation which is plausible

Quantification step 2 – data and information needed

The collection of data/information should focus on the construction of the counterfactual

Data collection in three steps

1. Prevailing market characteristics may provide indications of the plausibility of passing-on in the first place
 - Existing court decisions
 - Parallel civil proceedings
 - Market studies
 - Decisions from competition authorities describing the market dynamics

Quantification step 2 – data and information needed

The collection of data/information should focus on the construction of the counterfactual

Data collection in three steps

2. Other documents of qualitative nature
 - Internal documents on
 - Pricing
 - Strategy
 - Contracts
 - Financial reporting

Quantification step 2 – data and information needed

The collection of data/information should focus on the construction of the counterfactual

Data collection in three steps

3. Quantitative data
 - Actual prices
 - External factors influencing prices
 - GDP growth (demand)
 - Inflation
 - Costs of other inputs

Quantification – actual effects

- **The use of economic experts**
 - The rules on expert evidence vary significantly between different Member States

Courts deal directly with experts appointed by the courts	Courts seek advice from court appointed experts
France	Belgium
UK	Germany
The Netherlands	Hungary
	Denmark
	Italy

Quantification – actual effects

- The use of economic experts

Box 3: Example of a case involving evidence provided by economic experts¹

In a case pending before a UK court, economic experts representing each side (the infringer and the claimant) had proposed their own distinct method for estimating pass-on. The judge expressed concerns about the potential complexity of the expert evidence, and requested the parties' experts' to reach an agreement on the proposed approach to economic evidence on pass-on before any disclosure was ordered. If the experts failed to reach an agreement on the approach, the judge would hear submissions on the respective approaches, including an explanation of what each expert proposed, the information required and the cost of the exercise, and then decide which method should be applied.

High Court of England and Wales, *Emerald Supplies v. British Airways Plc*, HC-2008-000002

What is the role of economic theory in damages cases?

Economic theory may...

- provide a framework for assessing evidence
E.g. explain the incentives of a firm to adjust prices in response to an overcharge
- assist judges when deciding on disclosure requests
E.g. question why certain pieces of information are relevant
- form a basis for discerning the credibility and reliability of different economic explanations
E.g. may eliminate implausible explanations of passing-on effects



Thank you!

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