

EC Adopts Passing-On Guidelines to Assist Indirect Customers in Pursuing Damages Claims

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Following on from last summer's consultation[1], the European Commission has now adopted guidelines designed to provide national courts with guidance in estimating the share of overcharges based on infringements of competition law that were passed on to indirect purchasers and final consumers, also referred to as the 'Passing-on Guidelines'.

The complex equation of quantifying damages in the supply chain

The right to compensation can be exercised by anyone harmed by an infringement of EU competition law, either direct customers of companies having for instance participated in a cartel, but also indirect customers and final consumers. Indeed, indirect consumers may also suffer harm when direct customers are able to fully or partially pass on a cartel related price increase further down the supply chain.

Quantification of damages is a complex exercise for any claimant, either a direct or an indirect customer. However, determining the amount of overcharges at different levels in the supply chain can become particularly difficult, to ensure there is no over or under compensation, and to also capture all economic effects of the overcharge.

In that context, the Guidelines describe and explain the main existing principles that may help court and parties deal with this issue, including in relation to the flip side of pass-on: volume effects.

No "one-size fits all approach"

The Guidelines rightly point out that the great variety of factors which influence the passing-on of overcharges cannot provide a strict and pre-defined model in the identification and quantification of pass-on: there is no "one-size fits all approach" and each case will ultimately be fact specific. The various approaches described in the Guidelines are accordingly a toolkit that can be tailored to the specific requirements (and limits) of each case and market, working on a case by case basis.

The Guidelines are a non-binding instrument but, tracing their roots back to the Damages Directive - now transposed in all Member States - they should be considered as a "reference source for good practice" by national courts. Whilst demonstrating that there can be no 'standard approach' to pass-on, they should nevertheless assist national courts as well as stakeholders in defining a framework for the analysis.

It is also important to keep in mind that the examples developed in the Guidelines primarily focus on horizontal cartels (being probably the most telling examples) but they may also be a good reference source in relation to vertical restraints and abuse of dominance cases.

In that context, the Guidelines are meant to provide practical guidance to national courts, as well as indirect customers (as a 'sword') and defendants (as a 'shield'), by reference to the legal context and relevant economic theory. They are also useful for direct customer claimants, who from the outset need to be aware of possible pass-on arguments from downstream customers to assess the risks associated with their claim. Indeed, they could be caught in the crossfire of proceedings, facing potentially contradictory arguments from their suppliers and downstream (indirect) customer claimants.

As the European Commission points out: quantification can be a quite technical exercise but is nevertheless key for the success of antitrust damages actions. How will national courts interpret the Guidelines? Only time will tell.

Passing on guidelines

The European Commission's dedicated website – including other information on the quantification of harm in antitrust damages actions.