

# Track Changes

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## CARTEL DAMAGES CLAIMS: EUROPEAN COMMISSION GUIDELINES TO ESTIMATE THE PASSING-ON OF HARM CAUSED BY CARTELS

The number of cartel damages claims before national civil courts in Europe has dramatically increased over recent years. The Damages Directive (2014/104/EU) and its implementation into national law have removed a number of obstacles faced by the alleged victims claiming cartel damages before national courts.

One of the greatest challenges in cartel damage litigation is the quantification of the harm suffered by the claimant as a result of the cartel. In their defence of the claim, cartelists often argue that the claimant has passed on the overcharge down the supply chain (so-called passing-on defence). The Damages Directive provided that the European Commission (**'Commission'**) shall issue practical guidelines to help estimate the amount of the overcharge which was passed on to indirect purchasers.

On 1 July 2019, the Commission published its "Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser" (**'Passing-on Guidelines'**). The Passing-on Guidelines are intended to offer practical guidance on how to estimate the passing-on of overcharges and are the result of a long process. In 2016, the Commission published an in-depth economic "Study on the Passing-on of Overcharges". The publication of a draft version of the guidelines in 2018 was followed by a public consultation during which stakeholders could express their views and comment on the draft.

### PASSING-ON OF OVERCHARGES

Overcharges caused by a cartel may affect not only customers of cartelists (direct purchasers), but also buyers further down the supply chain (indirect purchasers). If a direct purchaser pays a higher price for a product due to a cartel, it may decide to charge higher prices to its own customers when selling on this product or when selling products for which it used the cartelized product. In other words, the direct purchaser may potentially (at least partially) pass-on the overcharge caused by the cartel to its customers.

Passing-on of overcharges is relevant in two procedural scenarios. On the one hand, passing-on is invoked as a 'shield' against damages claims by cartelists (passing-on defence). If the claimant was able to pass-on the overcharge to its own customers, the harm suffered by the claimant is reduced by the amount passed on. On the other hand, passing-on is also used as a 'sword' by indirect purchasers claiming damages from a cartelist. The Damages Directive explicitly specifies that indirect purchasers further down the supply chain (not just direct purchasers of the cartelist) may claim damages from a cartelist.

## PRACTICAL IMPORTANCE OF THE PASSING-ON GUIDELINES

The Passing-on Guidelines aim to provide practical guidance to national courts and the parties of an action for damages. They set out the economic theory of passing-on and describe the economic methods used to quantify and estimate passing-on. The practical emphasis of the Passing-on Guideline is underlined by numerous references to examples and precedents before national courts.

The guidelines highlight that the passing-on of overcharges involves two types of passing-on effects: When a direct purchaser passes on the overcharge to an indirect purchaser, the latter will have to pay a higher price, i.e. it will face a *price effect*. Economic theory however suggests that the indirect purchaser will also reduce its demand in response to the higher price so that the direct purchaser sells less. The value of the sales that are lost is referred to as the *volume effect* of passing-on.

The Passing-on Guidelines explain the factors affecting the existence and magnitude of both passing-on effects (i.e. the price effect and the volume effect). The most important factors include (i) the nature of the input costs subject to the overcharge (i.e. whether these costs are fixed or variable for the direct purchaser), (ii) the question of whether the overcharge affects only one direct purchaser or all direct purchasers, (iii) the elasticity of demand faced by the direct purchasers, and (iv) the strength and intensity of competition in the markets in which the direct and indirect purchasers are active.

In addition to economic guidance, the Passing-on Guidelines also help assess procedural aspects of passing-on in cartel damages claims. They provide guidance on relevant sources of evidence, on whether a request to disclose evidence ("discovery") is proportionate, on the courts' power to estimate passing-on, and on procedural instruments available to courts to deal with parallel claims from purchasers at different levels in the supply chain.

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