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Cartels and Damages: Guidelines on the Passing-on of Overcharges Published by the European Commission

by **Marco Hickey**

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Guidelines for national courts on how to estimate the share of overcharge passed on to the indirect purchaser, known as the Passing-on Guidelines, have been published by the European Commission.

The Guidelines are intended to offer practical guidance on how to estimate the passing-on of overcharges under EU Directive 2014/104 (Damages Directive).

The Damages Directive was introduced in 2014 to make it easier for victims of competition infringements to claim compensation before national courts in EU Member States. The Damages Directive was implemented into Irish law through the European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017.

Apart from new rules on the disclosure of evidence, joint and several liability and limitation periods, the Damages Directive also introduced measures to alleviate the claimant's burden of proof regarding the infringement and the harm suffered- in particular, it introduced the rebuttable presumptions that cartel infringements cause harm and that an overcharge is passed on to indirect purchasers if an infringement has caused an overcharge to a direct purchaser.

Although the legal presumption of harm shifts the burden of proof to the defendants, it is still for the claimants to demonstrate the extent of the harm that they have suffered in order to obtain damages. As recognised in the Damages Directive, the quantification of harm can constitute a substantial barrier, preventing effective claims for compensation as "[q]uantifying harm in competition law cases is a very fact-intensive process and may require the application of complex economic models."

One of the specific areas of dispute over the quantification of harm is the assessment of whether, and if so, to what extent, any harm has been passed on by the victims of the infringement (direct purchasers) to their own customers (indirect purchasers). The Damages Directive provided that the Commission shall issue practical guidelines to help estimate the amount of the overcharge which was passed on to indirect purchasers.

Passing on of Overcharges

Overcharges caused by a cartel can affect the customers of cartelists (direct purchasers), and 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 as an input. In other words, the direct purchaser may potentially (at least partially) pass on the overcharge caused by the cartel to its customers.

Passing-on occurs in two scenarios:

1. An infringer may use passing-on as a defence, claiming that its direct purchasers did not suffer harm as they have passed on the alleged overcharge to their own customers (i.e. the downstream passing-on or “shield” function).
2. An indirect customer may claim that it suffered harm because direct customers have passed on their overcharge (i.e. the upstream passing-on or “sword” function).

The Damages Directive explicitly specifies that indirect purchasers further down the supply chain (not just direct purchasers of the cartel) may claim damages from a cartel.

Background

In 2016, the Commission published a Study on the Passing-on of Overcharges, prepared by RBB Economics and Cuatrecasas, Gonçalves Pereira with the intention of providing practical guidance to judges and other practitioners on evaluating the plausibility of claims, on quantifying the effects of passing-on and on assessing the total extent of the harm suffered by a claimant.

On 5 July 2018, the Commission published draft passing-on guidelines, which were subject to a public consultation in which stakeholders could submit their views and comments.

This process led to the adoption of the Passing-on Guidelines on 1 July 2019 to help national courts estimate the share of price increases caused by a cartel that is passed on to indirect purchasers and final consumers.

Passing-on Guidelines

The Passing-on Guidelines are non-binding: there is no obligation for national courts to follow the Guidelines and they are without prejudice to the jurisprudence of the Court of Justice of the European Union. However, the Guidelines do set out best practice for the assessment of an overcharge and the passing-on of such overcharge.

The Guidelines explain the factors affecting the existence and magnitude of passing-on effects. The most important factors include:

1. the nature of the input costs subject to the overcharge (i.e. whether these costs are fixed or variable for the direct purchaser)
2. the question of whether the overcharge affects only one direct purchaser or all direct purchasers
3. the elasticity of demand faced by the direct purchasers
4. the strength and intensity of competition in the markets in which the direct and indirect purchasers are active

The Guidelines provide guidance on relevant sources of evidence, on whether a request to disclose evidence is proportionate, on a court’s 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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