

Kluwer Competition Law Blog

The European Commission publishes a new study on the passing-on of overcharges

Benoît Durand, Iestyn Williams (RBB Economics) · Tuesday, November 8th, 2016

In October 2016, the Commission published a new study on the passing on of overcharges. A key objective for the Study is to provide judges and other practitioners who are not economic experts with clear insight into the economics of pass-on and the methods that can be used to quantify passing-on and volume effects. The Study offers a thorough yet accessible review of the economics of pass-on, drawing in particular on practical experience in the implementation of quantitative methods.

When a customer brings a damage claim arising from an overcharge which has been caused by an infringement of competition law, three distinct elements contribute to the magnitude of the harm suffered. First, there is the “*overcharge*” itself; that is, the increase in costs that the claimant may have suffered. Second, the claimant may have responded to this overcharge by adjusting its own prices upwards, thereby at least partially offsetting the adverse effect of the overcharge on its profit margins. This is the “*passing-on effect*”, which reduces the harm suffered by the claimant. Third, since passing-on results the claimant’s prices being increased, the claimant will almost invariably lose sales volumes, and the profit margins associated with those sales. This is the “*volume effect*”. It is inextricably linked to the pass-on effect and contributes to the overall harm suffered.

Passing-on at one level of the supply chain will lead to an overcharge of the same magnitude at the next level downstream. For this reason, while passing-on by a claimant can reduce the harm it suffers, it does so at the expense of the claimant’s own customers, causing harm downstream. Passing-on therefore provides the basis for downstream claims, as well as for the “pass on defence” against upstream claims.

A failure to account properly for the passing-on and volume effects may substantially affect an estimate of the quantum of damages. However, the European Commission’s [practical guide](#) on quantifying harm, published in 2013, focuses primarily on the overcharge, offering limited practical advice on estimating these two other components of damages. The EU Damage Directive (2014/104) addresses this deficit, calling on the Commission to develop guidelines to assist judges and courts in evaluating the passing-on and volume effects. To inform the preparation of those guidelines, economic consultancy RBB Economics and law firm Cuatrecasas, Gonçalves Pereira were commissioned to produce a study on the passing on of overcharges. The Study has now been [published](#).

The Study highlights the critical issues faced in analysing pass-on and volume effects, and offers

guidance on the questions that economic experts must address. (The Study includes a check-list of those questions for judges, which can be used as an aid to navigate and evaluate economic evidence.) The treatment of the volume effects arising from passing-on that are highlighted above offers one example. These have often been ignored in practice. The Study shows that they can have a substantial impact on the magnitude of damages, even offsetting the passing-on effect in some cases. Thus, perhaps counter-intuitively, raising the passing-on defence may cause damages to be increased rather than reduced.

The Study highlights the vital role that the market environment plays in shaping the extent of passing-on. Whether the overcharge has affected all the claimant's competitors (industry-wide overcharge), just the claimant (firm-specific overcharge), or an intermediate situation prevails, will affect the extent of passing-on, as will the intensity of competition. Exactly which of the claimant's costs have been affected by the overcharge can also be expected to have a significant bearing on the magnitude of passing-on. This underscores the importance of developing economic analysis that is tailored to the specifics of the individual case.

The Study presents a number of approaches to estimating the passing-on and volume effects. It shows in particular how the counterfactual methods that are familiar from the estimation of overcharges can be extended to quantifying the pass-on and volume effects too. However, this requires appropriate adjustments to be made, and the Study explains how to accomplish these.

Adjustment to control for potential confounding influences, is usually critical if reliable damages estimates are to be produced. For example, the claimant's prices may have increased not only as a consequence of the infringement but also due to other factors affecting its costs, and the analysis will need to control appropriately for these other effects. When sufficient, suitable data are available, multi-variable regression analysis can be used to disentangle the impact of the infringement from the influence of other factors. In practice, experts may have to rely on more qualitative approaches if data limitations prevent more robust quantitative analysis, or if the time and cost associated with such analysis would make it disproportionate. This will affect the precision with which damages can be estimated however.

In conclusion, the Study provides a comprehensive, accessible review of the economics of pass-on in the context of damages estimation. As such, it is intended to become a reference document for judges and other practitioners.

Benoît Durand is partner in Brussels and Paris, Iestyn Williams is partner in London. They are both co-authors of the Study, together with lawyers from Cuatrecasas, Gonçalves Pereira.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe [here](#).

Kluwer Competition Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers are coping with increased volume & complexity of information. Kluwer Competition Law enables you to make more informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

79% of the lawyers experience significant impact on their work as they are coping with increased volume & complexity of information.

Discover how Kluwer Competition Law can help you.
Speed, Accuracy & Superior advice all in one.



2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Tuesday, November 8th, 2016 at 3:14 pm and is filed under [Source: UNCTAD](#) > Damages, European Commission
You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.