

**EU PASS-ON STUDY**

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Introduction

On 25 October 2016, the European Commission published the "*Study on the passing-on of overcharges*" co-authored by RBB Economics and Cuatrecasas, Gonçalves Pereira (the "Study").<sup>1</sup> The Study, commissioned by the Commission in 2015, is intended to assist the European regulator in preparing guidelines for national courts on how to estimate the share of an overcharge which has been passed on to indirect purchasers,<sup>2</sup> as required by Article 16 of Directive 2014/104/EU (the "Damages Directive").<sup>3</sup> It is expected that those guidelines will be published during the course of 2017 or 2018. Prior to their publication, the Commission is planning to carry out a series of workshops with judges, economists and legal practitioners and can be expected then to publish draft guidelines for consultation.

The Study includes an extensive analysis of current thinking on the topic of pass-on, a full review of national and EU case-law (as well as experience from the US), and an in-depth analysis of economic theory. The Study also sets out and evaluates alternative approaches to quantifying the impact of pass-on on damages claims. It concludes with "*39 Steps*": a checklist providing practical recommendations for national courts, including on how to navigate and manage expert evidence and quantification methods, how to utilize new disclosure mechanisms introduced by the Damages Directive and how to avoid inconsistent decisions. It is thought that the Study will provide a key and useful touchstone for the forthcoming discussion on the Commission's guidelines, as well as providing practical guidance that will be of particular help to judges as they develop the practice and doctrine in this nascent area.

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<sup>1</sup> [http://ec.europa.eu/competition/publications/reports\\_en.html](http://ec.europa.eu/competition/publications/reports_en.html).

<sup>2</sup> Indirect purchasers are defined in the Damages Directive as any person "*who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom*" (art. 2(24)).

<sup>3</sup> <http://eur-lex.europa.eu/eli/dir/2014/104/oj>.

## Relevance of pass-on

It is a basic principle of EU law on civil damages for breach of competition law that any person who has suffered harm caused by a competition infringement may claim for that harm.<sup>4</sup> This places the question of entitlement to sue and quantification of harm firmly in the sphere of the law of causation.<sup>5</sup> Within this sphere, pass-on plays a crucial role.

Pass-on may be invoked by an indirect purchaser in order to claim harm, which has allegedly been suffered as a result of overcharges on the purchases of products or services made by it from direct customers of the infringer or from companies which have incorporated goods affected by the infringement to their own products or services: pass-on as a “sword”. Alternatively, pass-on may be raised as a defence to claims for damages on the ground that the claimant has incorporated overcharges, or part of them, in its downstream prices of products or services, thus reducing its actual harm: pass-on as a “shield”.

Accordingly, the elements of the calculation of a damages claims in the EU where pass-on has occurred are three:

- A. First, there is an overcharge in products purchased by the claimant which have been affected by an infringement, such overcharge being either directly suffered by a direct purchaser or indirectly suffered by an indirect purchaser to whom the overcharge, or part of it, has been passed on.
- B. Second, the impact of the overcharge may have been reduced by the claimant passing on part or all of that overcharge in the prices it charges downstream.
- C. Third, the passing-on of the overcharge may have reduced sales by the claimant and therefore caused it a loss of profit.

These three elements are represented graphically below:<sup>6</sup>

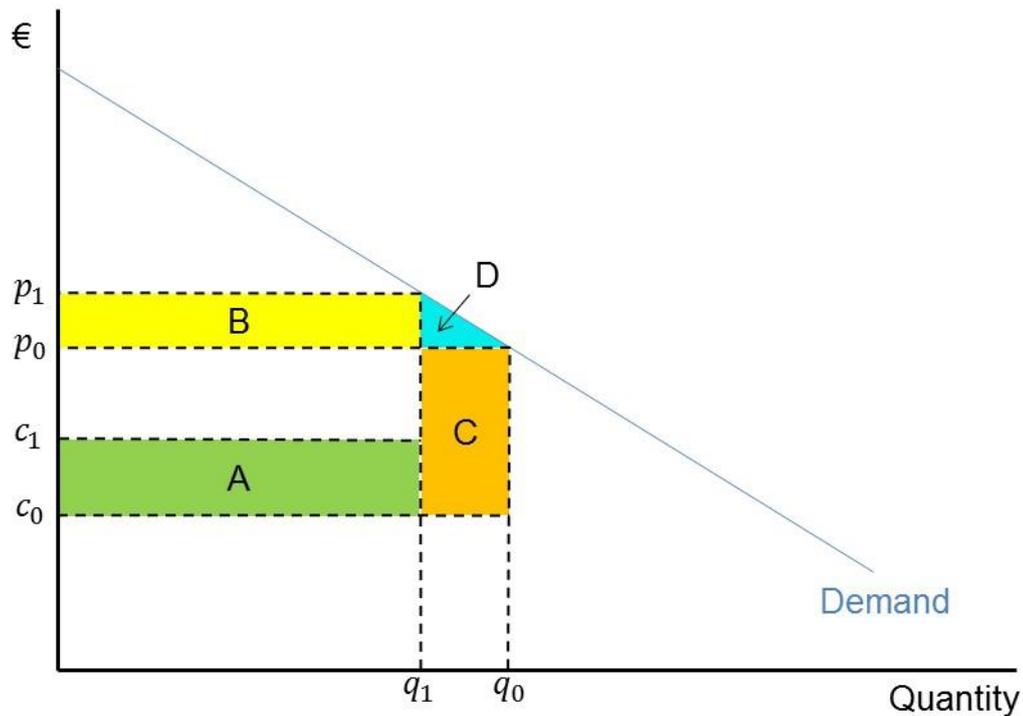
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<sup>4</sup> See to this effect judgments of the Court of Justice of the European Union in *Courage and Crehan*, C-453/99, EU:C:2001:465 and judgment in *Manfredi*, C-295/04, EU:C:2006:461. See also Article 3(1) of the Directive

<sup>5</sup> It is national Member State law in the EU which, subject to principles of effectiveness of EU law, determines the rules of causation (and, indeed, standard of proof).

<sup>6</sup> Reproduced with the kind permission of RBB Economics. Area D represents the deadweight loss, which refers to the reduction in consumption brought about by the passing-on of the overcharge causing an additional welfare loss for end customers.

**Impact of an overcharge with two layers of downstream purchasers**



It is worth noting that it was the difficulty of determining the effects of pass-on in terms of increased prices (Area B) and loss of sales (Area C) which led the US Federal Court to reject the defence in its seminal judgment in *Hanover Shoe Inc v United Shoe Machinery Corporation*.<sup>7</sup>

Practice of EU national courts

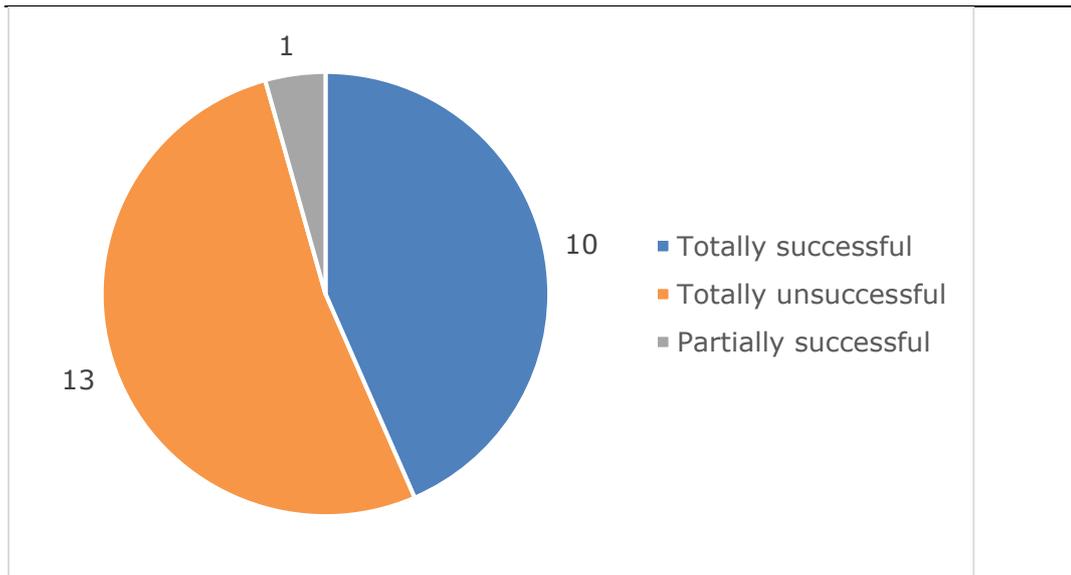
Pass-on is frequently raised in antitrust damages claims in the EU and can potentially be key to the quantification of damages (or even to a party's standing to claim). Nevertheless, it has not to date been determinative of many case outcomes and has seldom been subject to any detailed expert quantification.

In the majority of cases where the issue has been determinative of the outcome of the case, it has been raised as a defence. In more than half of those, the court rejected the pass-on defence entirely whereas in about 40% of the cases the court

<sup>7</sup> 392 U.S. 481 (1968).

determined that the claimant had passed on the overcharge entirely.<sup>8</sup> In one, 50% pass-on was held to have occurred (reducing the overcharge harm by half) and loss of profits was also quantified and awarded.<sup>9</sup> We provide an overview of decided cases below:

**Statistics on the success level of pass-on arguments**



In the recent judgment of the Competition Appeal Tribunal in London in the Sainsbury’s claim against MasterCard in relation to interchange fees, pass-on was a key element of the defence raised by the card platform.<sup>10</sup> The defence was, however, rejected by the court because MasterCard had, to its mind, been unable adequately to demonstrate the causal relationship between interchange fees and an increase in Sainsbury’s product pricing (such that indirect purchaser actions further down the chain would be entitled to claim that harm):

*485. It follows that MasterCard’s pass-on defence must fail. No identifiable increase in retail price has been established, still less one that is causally connected with the UK MIF. Nor can MasterCard identify any purchaser or class of purchasers of Sainsbury’s to whom the overcharge has been passed who would be in a position to claim damages.<sup>11</sup>*

<sup>8</sup> Note that, of the 10 cases in which pass-on was totally successful, 3 were cases of the French courts in which pass-on was raised as a defence and where the burden of proof was on the claimant to show that they had not passed on the overcharge (i.e. there was a reversal of the burden proposed by the Directive).

<sup>9</sup> Danish Maritime and Commercial Court, Case no. U-4-07, *Cheminova A/S v. Akzo Nobel Functional Chemicals BV and Akzo Nobel Base Chemicals AB*, judgment of 15 January 2015.

<sup>10</sup> [http://www.catribunal.org.uk/files/1241T\\_Judgment\\_140716.pdf](http://www.catribunal.org.uk/files/1241T_Judgment_140716.pdf).

<sup>11</sup> MasterCard is seeking permission to appeal this judgment.

Interestingly, a huge collective consumer action has been launched before the same court which alleges, conversely, that card transaction overcharges have, in fact, ultimately been passed on to them in retail prices by retailers (such as Sainsbury's) to UK consumers.<sup>12</sup> This is, accordingly, a clear case where pass-on will be critical to whether or not indirect purchaser actions will succeed and, if so, to what extent.

Pass-on has been raised in a number of further important cartel damages claims around the EU in recent years. These include the Spanish *Sugar Cartel* case which reached the Spanish Supreme Court in 2013. There, the highest Spanish court, adopting the approach of the Court of Justice of the European Union in its case-law on the reimbursement of unlawful taxes,<sup>13</sup> rejected the defence *inter alia* because the defendants had been unable to show that the claimants would not have suffered some kind of harm (in particular, in the form of lost profits) even if pass-on had occurred.<sup>14</sup> The German Supreme Court followed a similar approach in the *Carbonless Paper Cartel* case in Germany in 2011.<sup>15</sup> France has tended to adopt a more favourable position to the pass-on defence by requiring plaintiffs to demonstrate that they did not pass-on the overcharge in order to make good their claim.<sup>16</sup>

Pass-on is also an important defence raised by the defendants in the *Gas Insulated Switchgear Cartel* claims currently being heard in the Netherlands, initially rejected at first instance,<sup>17</sup> and since the subject of a number of rulings all the way up to the Dutch Supreme Court about the correct legal approach to pass-on under Dutch law.<sup>18</sup> Finally, in the ongoing *Air Cargo Cartel* litigation in the UK the approach to disclosure in the context of pass-on has met with some skepticism from the court. Specifically, Justice Rose has aired considerable concern about the potential cost and time that could be involved in carrying out the quantitative

<sup>12</sup> <http://www.catribunal.org.uk/237-9391/1266-7-7-16--Walter-Hugh-Merricks-CBE-.html>.

<sup>13</sup> See *inter alia* judgment in *Ireks-Arkady v. Council and Commission*, C-238/78, EU:C:1979:226; judgment in *Just*, C-68/79, EU:C:1980:57; judgment in *Amministrazione delle finanze dello Stato v. San Giorgio*, C-199/82, EU:C:1983:318; judgment in *Bianco and Girard v. Directeur général des douanes and droits indirects*, C-331/85, EU:C:1988:97; judgment in *Comateb and Others v. Directeur général des douanes and droits indirects*, C-192/95, EU:C:1997:12; judgment in *Dilexport*, C-343/96, EU:C:1999:59; judgment in *Michailidis*, C-441/98, EU:C:2000:479; judgment in *Lady & Kid and Others*, C-398/09, EU:C:2011:540.

<sup>14</sup> Spanish Supreme Court, Case No. 5819/2013, *Nestlé and ors v. Ebro Puleva*, judgment of 7 November 2013.

<sup>15</sup> Federal Court of Justice, KZR 75/10, *German Carbonless Paper*, judgment of 28 June 2011.

<sup>16</sup> Judgment of 16 February 2011 of the Appeals Court of Paris, Case No. 08/08727, *Le Gouessant v. Ajinomoto & CEVA*.

<sup>17</sup> District Court of Gelderland, *TenneT v. Alstom*, judgment of 10 June 2015 (ECLI:NL:RBGEL:2015:3713).

<sup>18</sup> Dutch Supreme Court, *TenneT v. ABB*, judgment of 8 July 2016 (ECLI:NL:HR:2016:1483).

analysis of pass-on contemplated by the experts, as opposed to relying on other “factual” or “qualitative” evidence (such as testimony from price setters).<sup>19</sup>

The Study’s in-depth description of legal practice, economic theory and economic quantification methods will no doubt be of use to practitioners and courts in future cases. At the same time, the Study sheds light on some important procedural issues and concepts related to managing and assessing economic and other types of evidence in the determination of pass-on and addressing the key question of causation under national law. These types of recommendations and guidance for judges are likely to become of increasing importance over the coming year as Member States implement the new Damages Directive and, *inter alia*, new *inter partes* disclosure rules.

#### Conclusion

The potential complexity of the determination of pass-on and the need for sensible and qualified scientific and legal analysis are almost certainly some of the key drivers behind the Commission’s wish to seek professional advice through the Study as well as to open up the forthcoming consultation process. It will be fascinating to see how the ensuing debate and court practice develops over the coming years in light, *inter alia*, of this work.

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<sup>19</sup> High Court of England & Wales, *Emerald Supplies v. British Airways Plc*, HC-2008-000002. Case Management Conference, hearing of 13 October 2015.