



Contribution

to the public consultation by the

European Commission

Directorate-General for Competition, Unit A.4

on

Draft guidelines for national courts on how to estimate the share of cartel overcharges passed on to indirect purchasers and final consumers

– suggestion: clarifying the reasonableness test –

CDC Cartel Damage Claims

Consulting SCRL

Avenue Louise 475

B-1050 Brussels, Belgium

Phone +32 (0) 2 213 49 20

mail@carteldamageclaims.com

www.carteldamageclaims.com

CDC Cartel Damage Claims (**CDC**) welcomes the opportunity to comment on the draft guidelines by the European Commission for national courts on how to estimate the share of cartel overcharges passed on to indirect purchasers and final consumers (the '[Guidelines](#)'). The Guidelines shall be issued under Article 16 of Directive 2014/104/EU on antitrust damages actions (the '[Damages Directive](#)').

CDC is the leading European company specialising in claims for damages resulting from the infringement of EU or national competition law. For more than one and a half decades, CDC has been exclusively active in the economic analysis, management and enforcement of damage claims relating to national and Europe-wide competition law infringements.

In the following, CDC would like to draw attention to one specific aspect which the Guidelines do not address adequately: the legal reservation to the so-called 'passing-on defence' of infringers of competition law by what may be called the 'reasonableness test'. This test is prescribed by both primary EU law and the Damages Directive. It has been applied by several national courts in antitrust damages cases already.¹

Executive Summary:

In Chapter 2 of the Guidelines on the legal framework applicable to passing-on, it should be explicitly added that the infringer cannot invoke as a defence against a claim for damages the fact that the claimant passed on the overcharge resulting from the infringement of competition law, if such a defence led, unreasonably, to an absence, or a significant reduction, of liability of the infringer.

This is highly relevant in situations as indicated in the Guidelines where a direct purchaser from the infringer has passed on small and dispersed damages to a multitude of final consumers who typically have no interest in pursuing expensive legal actions for claiming those damages themselves.

The Guidelines ought to suggest that for the passing-on defence to succeed the infringer shall show, under the relevant national standard of proof, that there exists, to a meaningful extent, further plaintiffs claiming for damages, downstream of the claimant, to whom the overcharge has been passed on. That assessment takes place on a case-by-case basis. Especially, in keeping with the current developments of collective redress in Europe, this allows to concretely take into account collective redress mechanisms available to, and actually used by, plaintiffs downstream of the claimant.

Such considerations are not only in line with the existing case law on private antitrust enforcement in several Member States (such as Germany, the Netherlands, and the United Kingdom), but even required by the Damages Directive. Due to the plain wording of its Articles 12 and 15, any passing-on defence **must not** lead to an '**absence of liability of the infringer**', regardless of any economic assessment and evidence under the Guidelines.

¹ See, already, the [Study on the Passing-on of Overcharges](#) for the European Commission, paras. 90 to 93.

1. The Guidelines repeatedly point to that fact (*e.g.*, at para. 12) that a direct purchaser from an infringer can pass on all or part of an unlawful overcharge to its own customers (the ‘indirect purchasers’) and thus, directly or indirectly, even down to the final consumer. The direct purchaser, as well as all the indirect purchasers further down the distribution chain, including the final consumers, may therefore claim damages. For this, an indirect purchaser uses the passing-on as a ‘sword’, by basing its claim for damages on the argument that the direct purchaser (and any other purchaser upstream of the claimant) has passed on the overcharge to it and that it has thus suffered harm. In turn, the infringer can invoke the passing-on of the overcharge as a defence (‘shield’) against a claim for damages, by arguing that the claimant had reduced its actual loss by passing it on to its own customers. The Guidelines refer to both scenarios, each of them acknowledged under the Damages Directive.
2. The Damage Directive especially stipulates that the infringer can invoke the passing-on defence, while bearing the burden of proof for its conditions (Article 13). Otherwise, it might amount to unjust enrichment from ‘over-compensation’ of a claimant who passed on the overcharge by the infringer. This shall be avoided (Article 12). Besides, denying use of the passing-on defence could imply that the infringer would risk having to compensate the overcharge more than once. This would be the case if both the direct purchaser, who suffered from the initial price increase, and the indirect purchaser, to whom the overcharge was passed on, claim damages for the same illegal price increase. Such a ‘multiple liability’ of the infringer shall be avoided too (Article 15).
3. However, the Guidelines do not mention the case, not even in the context of final consumers, where the passing-on defence shall be used against the claimant (provided the infringer can prove the pass-on), while **no or very few purchasers** downstream of the claimant bring a damages case, *e.g.* because the damage is too small and/or too difficult to prove. This especially concerns, but is not limited to, final consumers. Having small and scattered damage only, and a long causation line to the infringement, it is typically not reasonable for them to sue the infringer for such damages themselves.
4. This scenario is highly relevant for any assessment of passing-on in antitrust damages cases, because, pursuant to Articles 12(1) and 15(1) of the Damages Directives, an

‘absence of liability of the infringer’

must be avoided as well.
5. In such a case, there is obviously no need to protect the infringer against multiple compensation. As regards the argument related to the ‘unjust enrichment’ of the claimant, this is outweighed by the fact that those who violate competition law would retain the fruits of their illegality, if the claimant was barred from compensation by the passing-on defence and, as a matter of fact, none or just a fraction of the harmed purchasers downstream brought suit against them instead. Such an absence of effective liability contradicts the principle of full compensation and impedes any deterrent effect of private actions for antitrust damages. The effectiveness of the competition rules under Articles 101 and 102 TFEU would be substantially and hence unduly reduced.

6. Several courts of the Member States, especially in those jurisdictions with most private enforcement activities, have already applied such a reasonableness test and excluded the passing-on defence correspondingly:
- a) The [Study on the Passing-on of Overcharges](#) for the European Commission refers to a judgment of the District Court of Gelderland of 10 June 2015 (ECLI:NL:RBGEL:2015:3713, available in Dutch [here](#)) on the *Gas Insulated Switchgear Cartel* in the Netherlands (at para. 92). There, the Court held that allowing the passing-on defence would unjustly enrich Alstom, the cartelist sued, because it would reduce damages of TenneT, the claimant, without it being possible for indirect purchasers downstream of TenneT to bring damages actions due to ‘diabolical’ evidentiary problems, issues regarding limitation, and other procedural complications, compared with their relatively small and dispersed losses. Later, on appeal, the Dutch Supreme Court has clarified the legal test to be used to assess the passing-on defence. Accordingly, when assessing the passing-on defence, lower courts have to take into account the benefit that is conferred onto the claimant in connection with the infringement. However, they also must assess that it is reasonable (*‘redelijk’*) to do so indeed (Hoge Raad, judgment of 8 July 2016, ECLI:NL:HR:2016:1483 *TenneT v ABB*, para. 4.4.3; full text in Dutch [here](#)). The Supreme Court then referred the case back to the District Court.
 - b) Another example is the German *Rail Track Cartel* case. Numerous railway operators and public transport companies brought follow-on damages actions against members of that price-fixing cartel before different courts in Germany. The defendants invoked the passing-on defence, arguing that the claimants had passed on any illegal overcharge to the rail customers. That argument has been rejected by the courts, however, not least because of grounds of reasonableness. The courts point out that, if there was a pass-on in fact, the multitude of rail customers (*i.e.* the final consumers using the transport service) did suffer from small and dispersed (*‘atomised’*) damages only. Any cartel-related price increase would have been passed on to such a small extent or so fragmentarily that there is practically no possibility of proving that the increase has been passed on. Even if that proof was possible, none of those rail customers would, by themselves, bring an action (*‘for a few Cent at best’*) against the infringer. The infringers therefore did not have to fear any compensation claim. Under such circumstances, regardless of the general acceptance of the passing-on defence, its application here would lead to an ‘undue relief’ of the infringers.²
 - c) The Regional Court of Dortmund (Germany) comes to the same conclusion in the *Trucks Cartel* litigation (judgment of 27 June 2018, 8 O 13/17 [Kart], available in German [here](#)). In that case, the cartelised trucks manufacturers tried to defend themselves against a follow-on action by stating that the transport company suing them would have passed on the illegal overcharge to

² See, e.g., Higher Regional Court [*Oberlandesgericht*] of Munich, judgment of 08/03/2018, U 3497/16 Kart (in German [here](#), at para. 81); Regional Court [*Landgericht*] of Frankfurt, judgment of 30/03/2016, 2-06 O 464/14 ([here](#), at C I 1 b dd (2)); Regional Court of Hamburg, judgment of 01/09/2017, 315 O 356/14 ([here](#), at the end of para. 54). Also, see [Biennial Report XXII](#) of Germany’s Monopolies Commission of 03/07/2018, at para. 893.

its own customers asking for forwarding services of the claimant. The Court, however, having assessed both jurisprudence and literature from Germany, the Netherlands, the United Kingdom and Austria, as well as the Damages Directive, holds that, among other reasons in that case,

[169] [...] the passing-on defence is excluded for general grounds of valuation [“*Wertungsgesichtspunkte*”] in the context of the set-off of benefits [“*Vorteilsausgleichung*”] (see Bundesgerichtshof [German Supreme Court], judgements in Cases KZR 75/10 *ORWI*, para. 58 [full text in German [here](#)], X ZR 126/13, para. 14 [here](#)], and VII ZR 81/06 para. 18 [here](#)]; J Topel, in: G Wiedemann (ed.), *Handbuch des Kartellrechts* (2016)³, §50 para. 101; applying aspects of valuation [in such a case] is acknowledged in other European countries as well, so for the Netherlands Hoge Raad [Dutch Supreme Court], judgment of 8 July 2016 *TenneT v ABB*, para. 4.4.3 [*loc. cit.*], and for the United Kingdom CAT [Competition Appeal Tribunal], judgment of 14 July 2016, CAT 11, case no. 1241/5/7/15 *Sainsbury’s v Mastercard*, para. 484(5) [full text [here](#)]).

[170] Within an individual distribution chain at the very same market, damages of final consumers at the latest, but depending on the length of the supply chain damages on upstream market levels as well, will regularly be too small to be claimed for, provided that there has been a passing-on of the overcharge at all. The cartel members thereby would be factually released from their liability for damages (for that, see F Bien in *Festschrift W Möschel* (2011) 131, 132; S Hirner & T Mayr-Riedel, *wirtschaftsblätter* 7 (2016) 366, 367; G Klumpe & T Thiede, *Betriebs-Berater* 50 (2016), 3011, 3012; R Podszun & S Kreifels, *Gesellschafts- und Wirtschaftsrecht* 4 (2017) 67, 68).

[171] Under such circumstances, already, the passing-on defence must not be allowed [for that, see e.g. S Polster & A-Z Steiner, *Österreichische Zeitschrift für Kartellrecht* 2 (2014) 48; A Petrasincu, *Wirtschaft und Wettbewerb* 7-8 (2016) 330, 332; M Seegers, *Wirtschaft und Wettbewerb* 5 (2017) 236, 238 [here](#)]; similarly C Kersting & R Podszun, 9. *GWB-Novelle* (2017) ch. 7, para. 82; R Hoffer & I Innerhofer, *Österreichische Blätter für gewerblichen Rechtsschutz und Urheberrecht* 6 (2013) 257, 261; already doubting [on that defence] the Court in Cases 8 O 90/14 (Kart) [here](#)], and 8 O 25/16 (Kart) para. [116] [here](#)]; disagreeing, among others, A Fritzsche, *Neue Zeitschrift für Kartellrecht* 12 (2017) 630, 635). To avoid an absence of liability of the cartellists, as stipulated by the [Damages Directive](#), as well as by the Bundesgerichtshof in *ORWI* (judgment in Case KZR 75/10, para. 75 [here](#)), there is no other solution, given the lack of collective redress mechanisms (for that, see M Faure & F Weber, *Journal of European Tort Law* 6(2) (2015) 163; G Klumpe & T Thiede, *loc. cit.*). The possibility of the Federal Cartel Office, or associations, to skim off [illegal] benefits under Sections 34, 34a of the [German] Act Against Restraints of Competition does not provide an alternative (A Petrasincu, *loc. cit.*).

[172] This is valid all the more in a case such as the one at hand, in which not even the same distribution chain is concerned. Here, if the passing-on defence was unconditionally allowed, a passing-on over a vast amount of markets would be possible, as far as there just might be any kind of commercial use. Although each purchaser benefits from a presumption of harm under the new law regime, a harm would not be forensically identifiable anymore. That would result in an absence of liability of the infringer.

[173] Insofar, the risk of conflicting goals of, on the one hand, the full release of the infringer and, on the other hand, the prohibition of unjust enrichment of the injured person under the principles of tort law has to be solved in favour of the injured person.'

(Dortmund Court, *loc. cit.*; translation, and explanations in the square brackets, by CDC)

- d) Similarly, in a lawsuit brought against MasterCard in the United Kingdom, following on from the European Commission decision finding MasterCard's interchange fee arrangements to be anti-competitive, the Competition Appeal Tribunal found in *Sainsbury's Supermarkets Ltd v MasterCard Inc* [2016] CAT 23 ([here](#)) at para. 484(4)/(5) (underlined in the original text):

'[...] There is danger in presuming pass-on of costs to indirect purchasers (*pace* Article 14 of the Damages Directive), because of the risk that any potential claim becomes either so fragmented or else so impossible to prove that the end-result is that the defendant retains the overcharge in default of a successful claimant or group of claimants. This risk of under-compensation, we consider, to be as great as the risk of overcompensation, and it informs the legal (as opposed to the economic) approach. It would also run counter to the EU principle of effectiveness in cases with an EU law element, as it would render recovery of compensation "impossible or excessively difficult" (Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297, [2002] 1 QB 507 at [29]).

(5) Given these factors, we consider that the pass-on "defence" ought only to succeed where, on the balance of probabilities, the defendant has shown that there exists another class of claimant, downstream of the claimant(s) in the action, to whom the overcharge has been passed on. Unless the defendant (and we stress that the burden is on the defendant) demonstrates the existence of such a class, we consider that a claimant's recovery of the overcharge incurred by it should not be reduced or defeated on this ground.'

7. Such a reasoning is already discernible in Chapter 2 of the Guidelines on the legal framework applicable to passing-on. Especially, the avoidance of both over-compensation and under-compensation is mentioned there. Para. 24 of the Guidelines states that,

'[a]s a result of the compensatory principle, the practice of passing-on of overcharges and the abovementioned presumptions, it is possible that there are parallel claims from purchasers at different levels in the supply chain. In such situations, national courts should seek to avoid both over-compensation and under-compensation (see Articles 12(1), 12(2) and 15 Damages Directive). This can be achieved *inter alia* by taking due account of any actions for damages that are related to the same infringement of EU competition law, judgements resulting from such damages actions and relevant information in the public domain resulting from the public enforcement of EU competition law in the case at hand (see Article 15(1) Damages Directive). For instance, where related actions are pending in the courts of different Member States ("MS"), national courts may apply Article 30 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council ([...]) to which the Damages Directive makes reference ([...]). This article stipulates that national courts other than that first seized may stay proceedings or, under certain circumstances, may decline jurisdiction.'

(Underlining by CDC)

8. However, while the Guidelines at para. 24 address the aspect of avoiding over-compensation and multiple liability in some detail (pointing to the risk of parallel actions), the mere reference to the avoidance of under-compensation in that paragraph of the Guidelines does not sufficiently clarify the limits and hence conditions of the passing-on defence. The term ‘under-compensation’, not expressly mentioned in Articles 12(1) or 15(1) Damages Directive, is too narrow by focussing on the injured party only. Moreover, as stated above, while there are several examples in the Guidelines concerning the passing-on of overcharges to final consumers, none of them indicates that it must be carefully assessed whether the passing-on defence is legally available at all. Overall, the current draft of the Guidelines does not make clear that the Damages Directive does not only seek to avoid over-compensation of a claimant, but also – and even more – that any absence of liability of the infringer must be avoided. As the passing-on defence is a restriction on the subjective right to compensation directly derived from the EU legal order, it must be interpreted restrictively.³

Against this background,

CDC suggests clarifying in the Guidelines (for example by an addition to its para. 24) that:

- **Firstly**, the passing-on defence cannot be invoked against a claimant to the extent that otherwise any claims downstream of that claimant are either so fragmented or else so impossible to prove that, if successful plaintiffs or group of plaintiffs on that level do not exist, the end-result would be an ‘absence of liability of the infringer’ (Articles 12(1), 15(1) Damages Directive) or a similar, significant, reduction of its liability. This would be contrary to the EU legal principles of both full compensation and effectiveness of EU competition law;
- **Secondly**, for the passing-on defence against a claimant to succeed the infringer shall address the risk of an absence or significant reduction of liability, by demonstrating the existence of (sufficiently enough) other plaintiffs, or groups of plaintiffs, asking for damages on the downstream level, in order to ensure the principle of full compensation for the harm caused by the infringement of competition law on the different levels of the supply chain. This shall take place in line with the relevant national standard of proof, taking into account the infringer’s burden of proof (Article 13 Damages Directive), the particular relation of this burden of proof to the question of whether actions for damages related to the same infringement are brought by claimants from other levels in the supply chain (Article 15(1)(a) Damages Directive), and the fact that the infringer is best placed to know whether or not anybody else has sued him for damages;⁴

³ See, regarding recovery of taxes, the ECJ in Case C-147/01 *Weber’s Wine World* [2003] ECR I-11365, para 95.

⁴ This is also in line with general principles of EU law. As it has been pointed out in the Commission Staff working paper on the Green Paper ‘Damages actions for breach of the EC antitrust rules’ (SEC(2005) 1732) at para. 175 already, passing on operates as a defence. The burden of prove is thus on the defendant. Otherwise, it would be virtually impossible or excessively difficult for injured parties to exercise their right to compensation.

- **Thirdly**, it may be assessed, on a case-by-case basis, whether there is an effective collective redress mechanism which as a matter of fact is used by plaintiffs downstream of the claimant.⁵ In case of doubt, given that the Damages Directive itself does exactly not require Member States to introduce collective redress mechanisms for the enforcement of EU competition law (Recital 13), while explicitly forbidding an absence of liability of the infringer (Articles 12(1) and 15(1)), any conflict between the Directive's objectives of avoiding over-compensation on the one hand, and under-compensation or even an absence of liability on the other hand, must be solved to the disadvantage of the infringer of EU competition law.

Brussels, in October 2018

⁵ According to some national courts (see above), as well as the European Commission itself (*Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules*, [SEC\(2008\) 404](#), at paras. 211 to 212, with further references), the existence of effective means of collective redress was the only alternative to the exclusion of the passing-on defence for ensuring liability of the infringer. Under the regime of Articles 12(1), 13 and 15(1) of the Damages Directive this can be assessed on a case-by-case basis.