COMMENTS FROM THE *ASOCIACIÓN ESPAÑOLA PARA LA DEFENSA DE LA COMPETENCIA* ("AEDC") TO THE DRAFT GUIDELINES FOR NATIONAL COURTS ON HOW TO ESTIMATE THE SHARE OF OVERCHARGE WHICH WAS PASSED ON TO THE INDIRECT PURCHASER

3 October 2018

1. AEDC welcomes the opportunity to comment on the European Commission´s "Draft Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser" (the "Guidelines").

2. AEDC's observations have been provided by lawyers, economists and academics, all specialists in the competition law field. These observations do not necessarily represent the views of all the members of the Association[*].

3. The Guidelines intend to provide national courts and other stakeholders in damages actions for infringements of Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU") with practical guidance on how to estimate the passing-on of overcharges.

4. While the Guidelines are in general terms welcome, certain aspects deserve clarification.

5. AEDC's observations follow the order of the Guidelines: (1) Introduction; (2) Legal Framework; (3) Economic theory of passing on; and (4) Quantification of passing-on related price and volume effect. The observations also include a reference to the specific section and/or paragraph for which suggestions are made.

[*] AEDC would like to thank the following individuals for their collaboration in drafting these observations: Rais Amils; Enrique Cañizares; Andrea Diez de Uré; Iñigo Igartua; Belén Irisarry; Patricia Liñán; Luis Loras; Xavier Mas; Soledad Pereiras; Valerio Sodano; Candela Sotés; Claudia Valdés; Ainhoa Veiga; and Elena Zoido.

1. Introduction

Section 1.1: Purpose and scope

Paragraph (1), (3) and FN 5

Par. (1) says that the Guidelines are intended to provide practical guidance regarding infringements of both Article 101 and Article 102 TFEU. Later, in par. (3) in fine, the accompanying FN 5 states that the actual focus of the Guidelines is on passing-on of overcharges in the context of infringements of Article 101 while they may eventually be "*a reference source for good practices* (…) *for infringements of Article 102* (…)". If the guidelines are actually intended to be used only for cases under Article 101 we would recommend that this is clearly stated from Par. (1).

In addition, there is no indication of whether the Commission understands that the Communication can also serve as guidance when the damage has been generated by vertical agreements (for example, an agreement setting resale prices, exclusivity agreements, etc.). If deemed appropriate, we suggest indicating that the Communication can also serve as a source of inspiration for these cases too. In case the Commission understands that this is not the case, then we would suggest indicating it and providing an explanation of the reasons that have led the Commission to this conclusion.

Paragraph (5)

The Guidelines suggest that the assessment and the estimation of the pass-on should be proportionate to "the size of the claim". We suggest that, in addition, the Guidelines acknowledge the relevance of (i) the potential aggregate size of all individual claims associated to the pass-on of a given overcharge, since such a pass-on may have negatively affected a large number of individual consumers; (ii) parallel claims (as discussed e.g. in par. 24); and (iii) the likelihood of the decision on a certain case serving as a precedent for future similar cases.

Section 1.2: What is passing-on of overcharges?

Paragraph (7):

Its wording can generate confusion.

On the one hand, we would recommend first defining what the volume effect (in case of passing on of overcharges) is.

On the other hand, our understanding is that the paragraph intends to explain the volume effect that a direct purchaser may suffer in passing all or part of the excess cost on to the indirect purchaser. Nonetheless, towards the end of the paragraph, it would appear that the volume effect that the direct purchaser can suffer entails (the English version uses the term "consequently") a waterfall volume effect in relation to the rest of indirect purchasers "at later stages of the supply chain". As our understanding is that such waterfall volume effect might not appear in all cases, and in order to avoid any confusion, we suggest its wording to be qualified in the sense that this waterfall volume effect "may" arise in some cases (i.e., to replace the term "consequently" by "may").

2. Legal Framework

Section 2.1. Passing-on of overcharges and the right to full compensation

Paragraph (13) and FN 16:

The footnote states that suppliers can also be adversely affected in the situation of a sellers' cartel, "namely if they supply less to the infringers because of the volume effect". The foregoing invites to consider that a seller's cartel would give a cause of action also to suppliers as long as they prove a volume effect. Without prejudice to objections derived from national rules on causality (e.g., rules of foreseeability and remoteness), we would recommend deleting this sentence in Footnote 16 as the Directive is not meant to apply to allegedly affected suppliers by a seller's cartel. Footnote 16 would be assuming causality upstream not warranted in the Directive.

Paragraphs (14) and (15)

The Guidelines underline the "inherent link" between price and volume effects. However, the Guidelines could better explain the relationship between the price effect and the volume effects. Particularly, the Guidelines could emphasize the fact that the circumstance of bearing an increased purchase price alone does not warrant a volume effect and that, in fact, there are reasons to defend that they are inversely related: a company suffers a volume effect to the extent that such company has increased its sale price because of the overcharge (i.e. it has passed on the overcharge and suffers no price effect in relation to such passing on)".

Section 2.2. Scenarios in which a court deals with passing-on issues

Paragraph (19)

Our understanding is that the purpose of this paragraph is to clarify what the defendant's and the claimant's burden of proof is when the defendant alleges passing-on in its defence. However, said paragraph states that, in those cases in which the direct purchaser claims the overcharge and the defendant (cartelist) invokes the defence based on passing-on of this overcharge, and this is accepted in full or in part, then the direct purchaser (claimant) "may still claim compensation for loss of profit resulting from the pass-on". That is, this wording seems to give the impression that the claimant would in that case have the "option" of "reformulating" its claim and claiming the damages derived from the passing-on (volume effect). It would be advisable to modify this wording in order to make it clear that the possibility of redirecting the claim towards the volume effect (not previously invoked in the main claim) is only possible if the national legislation of each Member State allows it, as there are jurisdictions (such as the case of Spain, for example) that are quite rigid and do not allow changes in claims and reformulations of this kind once the proceedings have been initiated.

In addition, to be consistent with the Damages Directive (Article 13), we would recommend removing the word "generally" included in the second line of paragraph (19).

Paragraph (23)

To be consistent with the Directive and, in particular, with the - not-so-clear - wording of Article 14, we would recommend replacing the last sentence of this paragraph by the following: "If the infringer meets this standard, the presumption in paragraph (2) of Article

14 would not apply".

Paragraph (24)

It would be useful to have more detailed guidelines on the matter of parallel claims, mainly when both the direct and indirect purchaser seeks damages from the infringer. It is indicated that there should not be a lack of compensation or overcompensation, but there are no clear guidelines on how to reconcile the -opposing- interests of the direct purchaser, on the one hand, and the indirect one, on the other. To be precise, it could be useful to address more specifically what a direct purchaser can do when the indirect purchaser, in parallel proceedings, invokes the presumption of passing-on against the defendant.

Reference to the application of Article 30 of the Regulation (EU) No 1215/2012 is incorrect as it does not relate to the subject matter of the Guidelines. It should be indicated instead that national courts must make use of all the procedural means available under national legislation by applying effectiveness and compensatory principles.

In particular, to provide greater clarity to courts, we believe that it would be important to differentiate between procedural measures that national courts can implement to ensure consistency between judgments in case of parallel and subsequent proceedings. As Annex G of RBB/Cuatrecasas' *Study on the Passing-on of Overcharges* ("the Study") sets out, mechanisms which can be useful to ensure consistency in parallel proceedings may be: joinder of parties/proceedings (and, in particular, collective actions consolidating related direct and indirect purchaser actions), third-party notices / intervention and stays (e.g. so that test cases may be tried and then their judgments can be subsequently relied on by other courts). In this sense, in line with recital 44 and article 15 of the Damages Directive, subject to national laws, upon the filing of a claim but before its admission/processing, *ex officio* or at any party's request, courts should take "*due account*" of parallel claims which may be pending before the court, or others, and potential procedural measures which could be implemented to avoid potential inconsistencies. In assessing whether it would be desirable to implement any procedural mechanisms, courts should consider (with the party's assistance – e.g. by way of briefs) whether the parallel actions could actually be characterized as such, and in particular, whether the separate processing of the proceedings may lead to contradictory judgments which could lead to over/under compensation.

Regarding subsequent proceedings, and in line with the Study, we consider that it is

important to highlight that the Directive's wording "*due account*" is clear and intentional. That is, courts may take *due account* to judgments issued in parallel proceedings but cannot be bound by them. To hold otherwise could compromise the fundamental right to an effective remedy, or the right of defense (for instance, if a court were to automatically apply a previous ruling finding the full existence of pass-on, or the lack thereof, to a claimant or a defendant, respectively - see in this sense Recital 44 of the Damages Directive: "*This possibility to take due account of judgments should be without prejudice to the fundamental right of the defence and the rights to an effective remedy…*"). Indeed, courts should assess on a case-by-case basis (with the party's assistance – e.g. by way of briefs) if precedents in parallel proceedings can actually be considered so (i.e. if not following a precedent would, strictly speaking, lead to over/under compensation), the level in the judiciary of the court which issued the judgment, the judgment's date and context, and whether the court is also persuaded by its findings, taking into account all the available evidence in the proceedings before it.

Section 2.3: The role of evidence and economic analysis

As the Guidelines correctly point out, passing-on may be invoked by the infringer/defendant in its defence against a claim, alleging that the claimant passed on the overcharge downstream ("shield") or when the claimant (an indirect purchaser) alleges that the direct purchaser passed on the overcharge onto him ("sword"). However, it is of practical importance to underline that, also in "sword" situations, the defendant might be required to deal with passing on issues. This is because, in a "sword" situation, the claimant is entitled to satisfy its burden to prove that the overcharge was passed on him by having recourse to the presumption of Article 14.2 of the Directive, without any need to provide any evidence or reasoning (apart from meeting the conditions of the presumption) about the actual passing on. It is likely that plaintiffs will invoke this presumption and that the burden will shift to the defendant as per the last paragraph of Article 14.2 of the Directive. This means that, in practice, it would be the defendant who may have to care about passing on issues also in a "sword" situation and who would have to prove that passing on did not take place onto the indirect purchaser.

It is important to recognize this reality when the time comes to judge on the proportionality of disclosure requests. As a consequence of the above, it will be more often the defendant than the plaintiff who will make use of disclosure requests in relation to passing on. It is also often the case that defendants are large national or multinational companies with a level of

sophistication and economic resources higher than plaintiffs (who can include often small companies, professionals or consumers). In these circumstances, it cannot be ruled out that national courts may take into consideration, when deciding on the proportionality of a request made by a defendant regarding disclosure of evidence by the plaintiff, the relative bigger size and resources of the defendant compared to the plaintiff to reject such disclosure request (as an "abusive" request of a large company over a small claimant), even if this is not as such a criterion of Article 5.3 of the Directive.

It may be therefore useful to bear the following factors in mind, and that the Guidelines somehow clarify these points:

It is more often the defendant who will request disclosure of evidence from the plaintiff as regards passing on issues, than the other way round.

The proportionality of such requests must not be judged in the light of the relative size or resources of the parties, but on the merits of the request itself: no matter how large a defendant company is, the evidence of passing on (either in "shield" and "sword" situations) is largely in the hands of third parties (including namely the plaintiff).

Evidence regarding passing on (particularly direct evidence) to be requested by the defendant from the plaintiff will not be difficult or costly for the plaintiff to produce. Evidence such as contracts or accounting reports can be easily produced by plaintiffs in all situations.

Paragraphs (29) (and also (69) and (85)

The Guidelines consider the possibility of the courts appointing their own economic experts, if such an instrument is available under national law. We believe the Guidelines should encourage this possibility where possible, in particular in complex cases where technical knowledge is required for a thorough analysis of the case (for example, where complex quantitative evidence is presented). Other useful methods for evaluating expert economic evidence that in our experience could be of great assistance to the courts and should be encouraged include cross-examination and "hot-tubbing".

Besides, and given that this is a complex economic matter, it would be advisable to create a list of recognized economic experts in this field, in order to avoid the problems that we have seen in some jurisdictions, where courts appointed someone who was not sufficiently

experienced or was even totally new to this subject. In addition, it may be useful to develop best practices for the submission of economic evidence that set out basic standards for submissions. These guidelines exist in the US and the UK, for instance, and are of great help in ensuring that submissions are reliable and verifiable.

Paragraph (30)

The Guidelines stress that, under the control of the national court, evidence may be requested from the other party, including certain pieces of confidential information that are necessary for the calculation of the pass-on:

It would be extremely useful for the Guidelines to provide examples on the relevant documentation that may be legitimately requested from the other Party (for example, what is the adequate level of detail of the pricing/margin data that may be requested from the other party?).

Reference could be made (in a footnote) to Directive (EU) 2016/943 on the protection of trade secrets, and the legislation transposing said Directive into national laws, which also contains mechanisms to protect the confidentiality of information constituting trade secrets and whose confidentiality must be preserved.

Paragraph (31)

It would be advisable to expressly state that, in those exceptional cases where the disclosure of elements of evidence by the competition authority is requested, the Court will have to adopt the appropriate measures to preserve the confidentiality of the information supplied in the case file, as well as the rights of third parties who are not involved in the judicial proceedings (but who are parties to the administrative procedure). Moreover, the text could address the question of how a judge may be affected by the fact that the corresponding National Competition Authority has declared such information confidential, in particular, when its decision has been appealed before the courts and has become final, and whether the judge can, should or should not perform a new assessment of the matter.

Paragraphs (32), (70) and (112)

Qualitative evidence is admissible proof before the national court, and according to the

Guidelines could be used to estimate pass-on (i.e. documents on pricing policy and performance objectives). In this regard, the Guidelines should stress the fact that evidence should be treated with caution in the context of estimating pass-on and clarify the conditions under which this qualitative evidence would suffice.

For example, the Guidelines suggest that documents relating a firm's "performance objectives" in terms of margins could be used to estimate pass-on. Specifically, paragraph (112) states the following:

> *"In other cases the firm may seek to achieve certain performance objectives. For instance, the direct purchaser may apply a specific margin to the pricing of the products it supplies. In principle, such a policy suggests that they would pass on cost changes."*

However, it is important to highlight that there can be a considerable difference between commercial policy objectives and the commercial policies that are implemented in practice. For example, market circumstances may change, such that the direct buyer's intention of passing on 100% of the overcharge to its customers to preserve unitary margins is not profitable in practice (for example, because new competitors enter the market and the direct buyer may only end up passing on a proportion of the overcharge). In general, the Guidelines should warn about the limitations of extracting conclusions about the pass-on rate from qualitative documents, especially where such conclusions have not been substantiated by quantitative evidence. It should also be emphasized that the context in which those documents have been written or prepared must be taken into account.

On another note, the first paragraph of paragraph 32 may be confusing to judges. While in the USA parties do generally rely on economic theory and quantitative economics to prove pass-on (See section II.B of the Study) in the EU, at least to date, parties have sought to prove pass-on, mostly, with qualitative evidence and/or economic theory. Consequently, we would propose to delete the second and third sentences of this paragraph.

In addition, while the purpose of quantitative evidence is set out in the Guidelines ("*data for the use of econometric techniques*") the purpose of qualitative evidence is not. We believe that, in line with the Study (See section V.B.2), and to provide greater clarity of what is referred to as qualitative evidence, the first dash of this paragraph could be drafted as follows: "*Qualitative evidence to understand a company's approach to pricing and the*

reasons why prices may have varied over time comprising e.g.:….."

To clarify in greater detail what is the use and purpose of qualitative evidence and how can parties seek to rely on it to prove the (in) existence of pass-on, we also consider that the examples provided in Boxes 6 and 7 may not be the best ones as they mostly showcase how some national courts have dealt with pass-on, mainly, on the basis of economic theory. In this sense, we believe that cases Unimare (1999) and EKKO (2002) referred to in paragraph 89 and paragraph 245 and Box 20 of the Study may provide greater clarity in this respect. Cheminova (2015) and Doux Aliments (2014) could nevertheless be relocated to a different section, for instance Annex 1, to showcase how some national courts have dealt with pass-on on the basis of economic theory, but perhaps indicating that, whether or not economic theory, by itself, would be sufficient to prove pass-on in a particular case is a matter for national courts to decide on a case-by-case basis subject to the principle of effectiveness provided under EU law.

Section 2.4. Quantifying passing-on: The court's power to estimate

Paragraph (35)

Whenever the Guidelines reproduce the Directive, there should be quotes. Thus, the following sentence belonging to Article 12 (5) of the Directive should be quoted: "ensure that the national courts have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on".

Paragraph (37):

When mentioning the Kone case, we would recommend including a footnote referring to FN (12) and to the relevant paragraph in the judgement. Further, this whole paragraph lacks clarity; in particular, how the Kone case relates to the passing on of overcharges beyond the "effectiveness of Article 101".

Paragraph (39):

The reference to Article 17 (3) of the Damages Directive should be replaced by Article 17 (1).

3. Economic theory of passing on

Sections 3.1. (Overview) and 3.2. (Examples)

Paragraph (45)

The reader may benefit from a more explicit reference in the opening of paragraph 45 that to assess the pass-on of (price-effect) damages, it is important to start with a general consideration of the competitive interaction and the main drivers of price in the relevant markets for the direct and indirect purchasers. This is key when assessing the impact that the overcharge may have on the prices set and volumes sold by direct and indirect purchasers, both in the factual and counterfactual scenarios. Once this exercise is clear, one can continue with the list of the main drivers as presented in (i) to (iv).

Paragraph (46)

The Guidelines state that, in general, increases in fixed costs will not affect pricing decisions, whilst pass-on is likely in the case of increases in marginal costs. We suggest that the Guidelines shift the focus away from whether costs are fixed or marginal to whether costs are or not avoidable, what in turn depends on the period of time considered (e.g. in the short run, an airplane belonging to an airline might be an unavoidable cost, but when the airplane has worn out and the airline has to decide whether to buy another aircraft, this cost becomes avoidable). In this regard, an overcharge on an avoidable cost of the direct buyer may affect its pricing decisions.

Paragraph (47)

This paragraph of the Guidelines seeks to explain that the level of pass-on will be affected by the curvature of the demand curve. This issue is quite technical, and should be illustrated with examples so that the explanation becomes more intuitive and can be more easily grasped. In this regard, it would be useful to place the examples in the Annex in paragraphs (168) and (169) in the main body of the Guidelines.

More generally, in our experience, economic theory plays a critical role (i) in the actual analysis and in the assessment of the results of the qualitative and quantitative analyses; and (ii) in guiding disclosure (by helping identify the data and documents that may provide useful

for the estimation of the pass on). This may be a reason for including in the main body of the guidelines a non-technical summary of the issues discussed in the annex, together with some additional practical examples and empirical evidence which, on the other hand, could be included in an annex.

4. Quantification of passing-on related price and volume effects.

Sections 4.1. (Introduction) 4.2. (Data and information needed when quantifying the passing-on effects) and 4.3. (Quantification and estimation of passing-on related price effects)

Paragraph (69)

We propose simplifying this paragraph. It sets out which costs could be considered for the purposes of assessing whether proceedings costs render practically impossible or excessively difficult the right to full compensation perhaps unnecessarily. Indeed, it is arguable whether some of the costs referred therein are, as a matter of law, relevant for these purposes (i.e. costs to the judicial system) as they are not, strictly speaking, costs that are borne by claimants and hence that will deter or impede them to pursue legal action under Articles 101 and 102 TFEU.

Paragraph (70)

Referring to "staged disclosure" might be helpful in this context. On the basis of economic theory courts may order disclosure of qualitative evidence on a first stage and, subsequently, if qualitative evidence indicates that certain degree of pass-on exists, courts may then, at a party's request, order the disclosure of quantitative evidence to conduct econometrics (provided that qualitative evidence is insufficient to evidence, by itself, a certain pass-on rate). See in this sense section V.C.3 of the Study.

Paragraphs (72), (91), (92), (124)

In our view, the direct and indirect methods and their relative merits should be more clearly described. In particular, these are typically understood as follows: the direct method consists of directly estimating the increase in the prices paid by the indirect purchaser, whereas the indirect method involves the estimation of the pass on rate (which requires data on the

prices charged in the upstream and downstream markets). This is not clearly set out in the Guidelines.

Also, the differences between these methods in terms of their data requirements are not clearly described and, in some cases, explanations may be confusing.

For example, the Guidelines suggest in paragraph (124) that the direct method, which consists in estimating directly the increase in prices that has resulted from the infringement, is preferable over the indirect method, which consists in estimating the pass-on rate before or after the infringement period. In particular, the guidelines suggest that the indirect method should be used when data on actual prices set by the direct or indirect purchaser during the infringement period are not available. We note that the indirect method also requires data on the costs and prices of the indirect purchaser and that access to these data for the defendants may be just as difficult for the infringement and non-infringement periods. Therefore, data availability may not be the main reason to why one method is preferable to the other.

Moreover, contrary to what paragraph (126) suggests, the indirect approach may also be applied to data for the infringement period.

Finally, the Guidelines should explain that, if properly applied, one would expect that the results of the direct and indirect methods lead to similar conclusions. This could actually be a useful robustness check, when feasible.

Paragraph (84)

The Guidelines propose that, "early in the proceedings", the Court may facilitate a discussion between the parties' experts. It should be indicated that this can be done provided that national legislation allows for it.

Paragraphs (94-96)

The Guidelines should stress that simple comparisons over time or across markets are often misleading, in particular, because factors that affect prices may also change over time or may be different in different markets.

We note that, for example, paragraphs (63) and (106) of the Guidelines highlight the importance of controlling for factors that are not related to the infringement when building the counterfactual scenario. In our view, this should also be stressed when the comparator methods are initially described.

In this regard, it would also be useful if the Guidelines could provide an overview of the main factors that may have affected prices and volumes, such as (i) changes in the prices of other inputs, (ii) changes in demand, (iii) regulatory changes, etc.

Paragraph (94)

In relation to the comparator-based methods identified in the Guidelines, we suggest that the Guidelines present the before-and-after comparator method prior to presenting the benchmarking comparator method. This is because the before-and-after could generally be seen as easier to implement, given the complexity of identifying and selecting comparable markets or products as a benchmark. In fact, in our experience, time comparisons are much more widely used in practice.

Paragraphs (97) to (101)

The guidelines describe the "differences-in-differences" methodology as the "method that should be used ideally", because it "can filter out changes unrelated to the passing-on related price effect that occurred during the same period as the passing-on". We agree that it is important to filter out the factors unrelated to the infringement that may have affected the prices paid by indirect customers.

However, the statement that differences-in-differences should be the method of choice is in our view not fully accurate. The guidelines should acknowledge that (i) the reliability of the differences-in-differences methodology depends on whether certain assumptions hold (for instance, that prices in the affected and non-affected markets would have moved in parallel absent the infringement, other things being equal) and that (ii) it is possible to filter out those factors on the basis of an econometric model using before-during-and-after comparisons (as described in paragraphs (108) and (109), for instance).

Paragraph (111)

We suggest clarifying the reasons why regression analysis may be preferable, despite its higher costs. In particular, the Practical Guide explains that "Econometric techniques can increase the degree of accuracy of a damages estimate and may thus help in meeting a higher standard of proof" (para. 92). It may be advisable to state this explicitly in these guidelines as well.

Paragraph (115)

According to the Guidelines, when using comparator methods instead of econometric analysis, a "safety discount" can be applied, by deducting "from the observed data values an amount sufficient to take account of uncertainties in the estimate". This discount is supposed to "exclude the effects on the variable of other effects". It would be relevant to explain exactly what this 'safety discount' consists of, and how it is supposed to be calculated. Additionally, the Guidelines should stress that the application of such safety discounts needs to be justified well, guided by economic theory and the facts of the market, and applied carefully so that the quantitative estimate does not become superfluous.

* * * * *