Comments on the European Commission's draft guidelines on pass-on of overcharges

Response to consultation on draft guidelines for national courts

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1 Introduction

1.1 On 5 July 2018 the European Commission published draft guidelines to help national courts estimate the share of overcharges 'passed on' to indirect purchasers and final consumers.[1] The guidelines also cover estimation of volume effects, which are the natural counterpart to pass-on. This document provides Oxera's response to the draft guidelines.[2]

1.2 Oxera is extensively involved in antitrust damages cases across Europe, some for defendants, some for claimants, and some as court-appointed experts. We produced the 2009 study on quantifying damages for the European Commission, which helped inform the 2013 practical guide to courts on the quantification of damages.[3] Oxera provides Commission-sponsored training modules for national judges on quantifying damages. Many of the leading

[1] European Commission (2018), 'Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser', Communication from the Commission, draft, undated, published for the consultation 05.07.2018 to 04.10.2018. See: http://ec.europa.eu/competition/consultations/2018_cartel_overcharges/index_en.html [accessed 3 October 2018].

[2] We are happy for the Commission to publish this document.

[3] Oxera and a multi-jurisdictional team of lawyers led by Dr Assimakis Komninos (2009), 'Quantifying antitrust damages: towards non-binding guidance for courts', study prepared for the European Commission Directorate General for Competition, December. European Commission (2013), 'Practical guide on quantifying harm for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union', Staff working document, 11 June.

cases in which we have been involved include analyses of pass-on across a wide range of industries, such as gas insulated switchgear, air cargo, polyurethane foam, interchange fees and car glass.

1.3 Overall we consider the European Commission's draft pass-on guidelines to be based on sound economic principles. They recognise that economic theory provides the relevant framework for thinking about pass-on and volume effects, and when considering what evidence ought to be produced for a national court. As with a number of other tools in competition policy, such as the SSNIP test for market definition, it is appropriate to start from a conceptual economics framework for the pass-on of overcharges.[4] This is in part because pass-on is not an entirely intuitive topic; courts cannot rely only on 'common sense' and factual evidence when assessing pass-on. The draft guidelines recognise this.

1.4 This response offers comments on two topics covered in the draft guidelines:

1.5 **Evidence of pass-on**. To what extent can/will judges rely on economics theory and complex quantifications? We submit that the guidelines should give more prominence to what the Commission terms 'qualitative' evidence—i.e. an informed review of factual evidence from the businesses and markets in question, including disclosure of internal documents and witness statements. A related question is how to scale the evidential burden of pass-on to the value of the case in hand. How far can courts go with applying a 'broad axe' to complex questions where legal costs are going beyond a scale appropriate to the realistic scale of damages to be recovered?[5]

1.6 **Evidence of volume effects**. The draft guidelines indicate that volume loss harm is expected to be considered in a damages case where downstream pass-on is a significant factor. This is in line with economic theory. Of all the major elements involved in a damages claim—overcharge, pass-on, lost profits via volume effect, interest—arguably the volume effect is the element that has received the least discussion in the literature and been the least tested in the national courts.

[4] SSNIP is an acronym for small but significant non-transitory increase in price.
[5] In many jurisdictions courts can at some stage determine the degree of pass-on, having seen the available evidence. The term 'broad axe' comes from UK case law and refers to a quantification based on informed approximation as opposed to (falsely) precise calculation. *Watson Laidlaw & Co Ltd v Pott Cassels & Williamson* [1914] SC(HL) 18 *per* Lord Shaw at paragraphs 29–30; *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch) *per* Lewison J. at paragraphs 27–29; and [2008] EWCA Civ 1086 *per* Arden L.J. at paragraph 110 and Longmore L.J. at paragraph 159.

2 Evidence for pass-on: theoretical arguments

2.1 Pass-on is recognised as a complex subject, in relation to which precise answers are not usually obtainable. The draft guidelines note that national courts are required to 'strive for an approximation of the amount or share of passing-on which is plausible […] In practice, national courts will have to rely on assumptions.'[6] Reference is made to the idea of using a 'best fit' approach in Dutch cases, and the concept of the 'broad axe' in English case law.[7] According to the draft guidelines, national courts 'cannot reject submissions on passing-on because a party is unable to precisely quantify the passing on effects' (paragraph 39).

2.2 As documented in the 2009 Oxera study, the economics literature provides helpful insight into the main drivers of pass-on, and this forms the starting point for the conceptual framework for pass-on analysis.[8] The most important insight is that pass-on is closely related to the nature of competition in the downstream market. In perfect competition, pass-on equals 100% if the cost increase is uniform among all competitors. This gives rise to a useful (if perhaps counterintuitive) rule of thumb that pass-on tends be high in competitive markets. This theoretical finding has been corroborated in empirical studies. Another theoretical insight is that a textbook monopolist (facing linear demand) passes on 50% of any increase in marginal costs, and in some oligopoly models the rate of pass-on increases with the number of competitors in the market (closer to 50% with few competitors; closer to 100% with many competitors).

2.3 Could a court rely on assumptions alone? Beyond rules of thumb, the answer is probably 'no'. As is well-documented, a pass-on rate can depend on many assumptions: market structure, product differentiation, price-setting behaviour, menu costs, whether an overcharge applies to a variable or a fixed cost, whether it applies industry-wide or affects only a sub-set, and so on.

2.4 In other words, it is not difficult to paint a picture of pass-on estimation as idiosyncratic, complex to determine and highly sensitive to assumptions. This

[6] European Commission (2018), ibid., paragraph 39.
[7] References are given at footnote 40 to the draft guidelines, European Commission (2018), ibid., p. 11. The footnote states: 'E.g. in the United Kingdom national courts quantify harm "by the exercise of a sound imagination and the practice of the broad axe" (*Gibson v Pride Mobility Products Ltd* [2017] CAT 9), in the Netherlands the national court awarding damages quantifies the amount of the harm to the extent that this is possible (see Article 612 Wetboek van Burgerlijke Rechtsvordering) and estimates it in the manner that is the best fit for the characteristics of the harm (see Article 6:97 Burgerlijk Wetboek).'
[8] Oxera et al. (2009), op. cit.

might be termed the 'scrambled egg' defence: that pass-on is an intractable mix of factors that cannot be unpicked.[9]

2.5 Yet it is plain from the guidelines that claiming that pass-on is 'too difficult' is not an option—this would be inimical to the right to full compensation for the victims of a competition law infringement. Those victims may have large claims or small, and all the same pass-on analysis is required in a justiciable yet proportionate manner. The guidelines seek a simple and tractable pass-on analysis where possible. This is not to say that pass-on is easy, but rather, to use an old English phrase, that 'the cloth must be cut to suit the purse' if private damages enforcement is to work in practice for smaller cases as well as the large ones.

2.6 Box 1 describes two German cases where courts have recognised that pass-on depends on market characteristics such as demand and supply responsiveness, and have considered pass-on in this light without finding that the multiplicity of factors causes too much complexity.

Box 1 Examples of pass-on in court judgments, the German ORWI and car glass cases

In 2001, the European Commission fined the producers of carbon paper for infringing EU competition law (COMP/E-1/36.212). A purchaser, who bought carbon paper indirectly via a wholesaler, claimed compensation following the Commission's Decision. The claim went all the way to Germany's Federal Supreme Court.

The Supreme Court, in its judgment in 2011 (KZR 75/10, known as '*ORWI*'), allowed the indirect purchaser's claim in principle. In doing so, the Court clarified the ranking of conflicting policy and legal considerations around effectiveness and compensation. It highlighted the prerequisite of any claim by an indirect purchaser to show that: (i) the competition law infringement resulted in a price increase for direct purchasers; and (ii) direct purchasers passed on these price increases to indirect purchasers.

When assessing the degree of pass-on, the court highlighted a range of relevant considerations. These included principles-based considerations such as the

[9] Pass-on analysis can also be expanded into more difficult applications. Examples would be claims for losses suffered by products that are complements to the product that is subject to passing-on, challenges about internal transfer pricing limiting within-firm pass-on, or calculating how every firm in an industry will, in its own particular way, react to an input cost change as the claimant's optimal response depends not only on its own-price elasticity but also the cross-price elasticities with similar products.

responsiveness of demand and supply and duration of the infringement, as well as facts-based considerations around the actual price-setting behaviour of direct purchasers vis-à-vis indirect purchasers.

The Federal Supreme Court's pass-on criteria came to play in 2015 in a follow-on antitrust damages claim concerning car glass before the Regional Court of Düsseldorf (14d O 4/14). Here, an insurance company claimed compensation from members of a car glass cartel for having overpaid for replacement car glass installed in vehicles that it insured. The insurer was an indirect purchaser, in the sense that the glass was sold via automobile manufacturers, who were the direct purchasers.

Although the Court accepted that the competition law infringement by the car glass manufacturers resulted in higher glass prices to automobile manufacturers, it rejected the insurer's claim that automobile manufacturers passed on these price increases down the value chain.

Referring to the judgment regarding carbon paper, the regional court concluded that the largely principles-based pass-on arguments presented by the insurance company were not of sufficient evidential value. In particular, the court argued that the fact that automobile manufacturers were able to sell replacement glass at a 7- to 10-time multiple of the purchase price suggested that these manufacturers based their sales prices not on costs, but on other commercial considerations. On this basis, the court rejected the insurer's claim for compensation.

[ORWI]: BGH (2011), 'Urteil vom 28. Juni 2011 – KZR 75/10 – OLG Karlsruhe, LG Mannheim', 28 June 2011

[Car glass]: Landgericht Düsseldorf (2015), 'Urteil vom 19. November 2015 – AZ 14d O 4/14', 19 November 2015

3 Quantitative evidence for pass-on

3.1 The guidelines recognise that economics theory alone may be insufficient to quantify pass-on. Thus, quantitative evidence will frequently be required:[10]

[10] The guidelines explain that 'parties may generally base their analysis on economic theory and quantitative economics' (paragraph 32), but that supporting evidence 'will depend to a great extent on the economic method used' (same paragraph). The 'guiding principle' (paragraph 79) is to be the comparison of the actual scenario with what would have occurred absent the infringement, i.e. the counterfactual. To be able to construct a counterfactual 'in most cases the parties need quantitative evidence' (paragraph 79).

> in order to be able to construct a counterfactual and control for different factors affecting passing-on, in most cases the parties need quantitative evidence (paragraph 79).

3.2 This quantitative evidence refers to data on actual prices, costs and margins, and adjustments to observed data to account for explanations of changes in price that might otherwise lead to false inferences on the relationship between the cartel overcharge and the downstream product price. In some cases these 'adjustments' might be 'simple' (paragraph 107). However, where they are not, econometrics analysis is probably required, even though such analysis can 'entail considerable costs' (paragraph 111). Assuming that econometrics is necessary, it would be a simpler task to test the general price–cost relationship, but the guidelines discourage this as requiring the 'strong assumption' of symmetry in pass-on for all input costs. As such, evidence on the general price–cost relationship should 'normally only be considered if [this] assumption is plausible based on the facts of the case' (footnote 64, p. 22).

3.3 Making the symmetry assumption is termed the 'indirect approach' by the European Commission. This appears to rule out the more simple analyses, and causes a potentially high evidential burden in cases where the cartelised input is a trivial part of the total costs (for example, less than 1%). The cost–price relationship of interest—that between the cartelised input and price—may be undetectable in such cases. There is not usually an econometrics equivalent of a telescope to apply when the parameters of interest are very small. Where the effects can be made more visible through obtaining more granular data and applying more sophisticated econometric techniques, the costs of such an exercise may be prohibitive in the context of a small claim. The class certification case before the UK Competition Appeal Tribunal (CAT) in *Merricks* confirms that, for a major damages claim, one would not want to compromise on pass-on analysis: 'Given the massive size of the claim [£14 billion], a difference of even 10% in the average pass-through rate makes a very substantial difference in financial terms'.[11] What is less clear is the acceptable standard of proof for pass-on in a case that is very much smaller.

3.4 Thus, in summary, the draft guidelines have identified the technically preferred technique, namely, multiple regression analysis without the strong assumption of uniform pass-through of every cost. However, this technique relies on the availability of reliable data. It is not uncommon in a follow-on damages case to

[11] Competition Appeal Tribunal (2017), *Walter Hugh Merricks CBE v MasterCard Incorporated and Others*, Judgment (Application for a Collective Proceedings Order), [2017] CAT 16, 21 July, paragraph 77.

be claiming for a harm that occurred many years ago. Accordingly, data is normally incomplete, with the quality of data decaying over time, and with its veracity or relevance possibly subject to factual dispute between the parties. Before undertaking quantitative work, it is therefore sensible to ask first whether the right data is available, and what assumptions are required where data is missing (for follow-on cases missing data is a frequent issue due to the passage of time).[12] Data issues aside, it is not clear from the guidelines when courts can consider such analysis to be disproportionate to the value of a claim. Stepping from econometrics to simple assumptions changes the standard of proof, and it may therefore be up to national courts and national legal practice to determine when, or even if, to compromise on pass-on analysis for the sake of smaller claims. The UK Court of Appeal leaves this in the hands of the individual judge:

> in each case it is a matter for the judge to decide whether, on the evidence before her or him, the defendant can show that there is a sufficiently close causal connection between an overcharge and an increase in the direct purchaser's price. We see no reason why that increase should not be established by a combination of empirical fact and economic opinion evidence. It is not appropriate for us on these appeals to be more specific as to the nature and type of evidence capable of satisfying a trial judge that there is a sufficiently close causal connection.[13]

3.5 In light of this, it may be helpful to draw a parallel with the Commission's case practice in mergers (and indeed that of other leading competition authorities). In a large Phase 2 merger investigation, it is not uncommon to see parties, and the Commission, engage in 'merger simulation'. This is an economics exercise not unlike analysing pass-on, using data on prices, margins and elasticities to estimate hypothetical price effects of a merger. However, the simulation technique is not normally employed for small-scale mergers and those that are reviewed only at Phase 1, mainly because it is costly and time-intensive; nor would the Commission normally rely on a merger simulation alone to come to its overall assessment of a merger.[14] Rather, the quantitative results will be integrated with the qualitative evidence on the likely effects of the merger (e.g. from the review of internal documents) and be read in conjunction with this

[12] For example, in the US courts, the question of available data for regression analysis may be addressed at the class certification stage: 'Dr Netz has successfully explained how to assign numerical values to all factors relevant to her regression analysis and has identified obtainable data to be used with her four approaches later.' United States District Court, Northern District of California, San Francisco Division (2013), *In re: Cathode Ray Tube (CRT) Antitrust Litigation*, Report and Recommendation regarding Indirect Purchaser Plaintiff's Motion for Class Certification, p. 36, footnote 23.

[13] Court of Appeal (2018), *Sainsburys v MasterCard; AAM v MasterCard; Sainsbury's v Visa*, [2018] EWCA 1536 (Civ), 4 July, paragraph 332.

[14] Buettner, T., Federico, G. and Lorincz, S. (2016), 'The Use of Quantitative Economic Techniques in EU Merger Control', MPRA Paper No. 76384, posted 25 January 2017, p. 3.

evidence. It might be helpful for the pass-on guidelines if the Commission could give a similar logic as to when the more complex assessments of pass-on are required, given that similar trade-offs between detailed analysis and costs/time have a rather developed history in merger practice. Box 2 looks at how the UK *MasterCard* case invoked a 'broad axe' approach with respect to the pass-on rate used by the CAT in calculating the interest component of damages.

Box 2 Pass-on in the UK MasterCard appeal

What qualifies as a 'broad axe' for pass-on is yet to be seen, but has been hinted at in the interchange fee cases.[15] For the interest on damages in *Sainbury's/MasterCard*, the CAT had drawn a distinction between 'economic' pass-on and the legal 'defence' of pass-on, awarding compound interest where the interest component only was calculated on the basis that 50% of the UK MIF would have been passed on:

'We consider that, although we have had to make assumptions, and have applied a broad axe, these losses have been sufficiently established by the evidence, and that Sainsbury's is entitled to interest at a compounded rate on 50% of the overcharge.'[16]

Whether the CAT was right to limit compound interest by applying this 50% rate of pass-on was not an issue in the appeal, and therefore the Court of Appeal did not say directly whether it agreed with this approach. It provides a limited example of the broad axe principle, and only within the frame of what the Court of Appeal termed an economist's view of pass-on. This 'economist's view' did not rely upon econometrics, but reflected a fairly broad-brush (or broad axe) approach:

'We consider that a substantial amount of the UK MIF—50% - would have been passed-on (albeit not in a manner which would have amounted to a 'defence' of pass-on…).'[17]

The distinction drawn between the legal pass-on defence and the 'economist's view' is that the former is concerned only with identifiable increases in prices paid by the claimant's customers, whereas the latter could include other forms of mitigation by the claimant, such as reduced advertising expenditure or efficiency savings. Taking this point a little further, consider the 'Toblerone' form of pass-

[15] Court of Appeal (2018), ibid., paragraph 340.
[16] Competition Appeal Tribunal (2016), Sainbury's Supermarkets Limited v MasterCard Incorporate & Ors, [2016] CAT 11, Judgment, 14 July, paragraph 526.
[17] Competition Appeal Tribunal (2016), ibid., paragraph 525.

on. In the UK the makers of Toblerone reduced 400g bars to 360g and 170g bars to 150g in order to maintain constant retail prices in the face of rising ingredient costs, caused by a fall in the value of the pound against the euro and the dollar.[18] The change attracted media attention. If a chocolate maker would react to a cartel overcharge by keeping chocolate bar prices constant, yet reducing the amount of chocolate in each bar, would that be legal or economic pass-on? The price per gram of chocolate has changed but the price per bar has not.

4 Qualitative evidence on pass-on

4.1 Theory and quantitative evidence should be supplemented by what the Commission terms 'qualitative evidence', which many courts may term 'factual evidence'; that is, evidence from business witnesses, and from the review of disclosure, including management accounts and internal reports on pricing (board minutes, strategy papers, etc.). The idea here is not necessarily to find a 'smoking gun' statement of the form 'Dear CEO, we have noticed a 10% increase in the price of input x, and we will pass this cost increase on to our customers in full at the next price review, due in 3 months' time.' It is also to find out where the relevant business fits in the economic framework for passing-on. Are prices spot or fixed by long-term contract? Is there a form of cost-plus pricing? Was the relevant input a variable cost or a fixed cost? Does the firm compete with others that did not use the cartelised input and yet competed in the same downstream market?

4.2 In this sense the qualitative evidence is arguably a vital complement to 'quantitative' evidence, and indeed will provide information to enhance quantitative evidence by providing knowledge where otherwise assumptions would be necessary.

4.3 It is useful to retain the nomenclature of the draft guidelines, referring to 'quantitative' and 'qualitative', rather than 'economic' and 'factual' evidence, because there is a subtle but important difference between a commercial opinion and an economics interpretation of the facts. Consider by analogy cases involving market definition, where 'there is no reason to expect that the

[18] The Guardian (2016), 'Toblerone gets more gappy, but its fans are not happy', 8 November, https://www.theguardian.com/business/2016/nov/08/toblerone-gets-more-gappy-but-its-fans-are-not-happy [accessed 3 October 2018]. See also Oxera (2017), 'Shrinkflation! A bite missing?', *Agenda*, April, available at: https://www.oxera.com/agenda/shrinkflation-a-bite-missing/ [accessed 3 October 2018].

concept of market employed by business executives […] would be the same as the concept of an 'antitrust market' or 'relevant market' defined for the purpose of antitrust analysis.'[19] As market definition is about consumer responses to a hypothetical price increase for a (typically) hypothetical bundle of products, it turns out that the legal and economic definition of a relevant market does not correspond to what might be termed a 'market' by those intimately involved in the industry.[20]

4.4 Similarly, as noted above, if disclosure or witnesses on pass-on speak about a market that is so competitive that input cost increases are impossible to pass on in price, it seems at first glance that the qualitative evidence has confirmed zero pass-on. However, this requires a more subtle interpretation for the legal and economic definition of pass-on, where an industry-wide increase in input costs will be largely or fully passed on where markets are perfectively competitive. A similar distinction can be drawn in relation to buyer power. Evidence suggesting that buyer power prohibited any cost pass-through must be considered in light of the expected competitive dynamics where buyer power is strong (and therefore seller power is weak).

4.5 Perhaps a more intuitive example is that pass-on may be low where cartelists are vertically integrated into the downstream market. Claimants paid a supra-normal price for the relevant input, but did the cartelists set their internal transfer price at the same level? The latter had an option to win downstream market share by a form of margin squeeze. Whether they exercised that option may be a contested topic. Here qualitative evidence about price-setting might need disclosure from the defendants, even though the topic of interest is whether the claimants adjusted their own pricing.

5 Evidence of lost profits from volume effects

5.1 Turning to the analysis of volume effects, there is a similar theme to the difference between 'quantitative' and 'qualitative' evidence, although here the application of qualitative evidence is less direct (as the volume loss question is what the business would have done in a *counterfactual scenario*, whereas pass-on is concerned with what happened in the factual scenario).[21]

[19] Reference is to Baker, J. (2007), 'Market Definition: An Analytical Overview', 74 *Antitrust Law Journal* 129 at 138–9.
[20] A similar point can be made about the relevance of disclosure on intentions in A102 predatory pricing cases. See Niels, G., Jenkins, H., and Kavanagh, J. (2016), *Economics for Competition Lawyers*, second edition, Oxford University Press, paragraphs 4.71 to 4.72.
[21] It follows that 'factual' evidence by itself cannot deal with the question of lost profits via volume loss.

5.2 Volume losses are said to arise where the passing-on of any overcharge in the form of an increase in the downstream price itself gives rise to a loss of profit due to a reduced volume of downstream sales. This is based on the assumption that there is an inverse relationship between price and demand in any claimant's end market, where end market can refer to either the final consumer or a further layer of the supply chain. Any volume effects will depend on conditions in these markets, in particular the elasticity of demand with respect to price.

5.3 It might be hoped that a firm would be intimately familiar with its own-price elasticities, the cross-price elasticities with respect to competing products, and how these factors evolve over time. But as competition lawyers and economists know well from merger cases, this is rarely true. If obtaining accurate product-level price elasticities were simply a matter of disclosure, merger decisions might be considerably more straightforward. Merger simulations might be commonplace. But in the real world, the data is simply not available 'off the shelf': 'some of the data used for [merger simulation models], such as pre-merger prices and market shares, is often readily available, but parameters such as the elasticity of demand will usually *need to be estimated*.' [Emphasis added][22] Recall also that in a cartel damages case the relevant data is not current business data, but rather *historical data*, and therefore often incomplete, inconsistent and generally far from perfect.

5.4 Elasticities are not constant across industries, but they are also not constant across firms within an industry, or even across products within the same firm. Elasticities also are not constant across time, as markets and demand evolve. Moreover, volume loss damages are calculated as: (volume loss x counterfactual margin). Margins, like elasticities, may differ across firms and products even within the same market. Cost allocation and scalability of costs are also important in understanding potential losses resulting from lost volumes. The relevant margin is not even that observable in disclosure, rather it is the counterfactual (higher) margin that would have been earned on lost sales.

5.5 Despite these concerns, as with pass-on, saying that volume effects are 'too difficult' would not satisfy the principles of the Commission's guidelines; nor

[22] Niels, G., Jenkins, H., and Kavanagh, J. (2016), ibid., paragraph 7.78. Note the similarity: 'While potentially generating more robust results than the approaches discussed above, full merger simulation is not very common because of its complexity and data requirements.'

should the problem be seen as intractable. On this basis it may be advisable to reconsider some points in the guidelines that hint at complex volume effects analysis, effectively taking volume loss assessment to the same level as merger simulation. For example at paragraph 148:

> The magnitude of the loss in volume will require an assessment of how the passing-on has affected prices of all competitors in the market, as well as the sensitivity of demand to those price changes.

5.6 As discussed above for pass-on, volume loss quantification could not be at this level of sophistication for smaller cases, or if it were, the costs for legal and economic expertise might surpass what is considered reasonable.

6 Conclusion

6.1 The draft guidelines are based on sound economic principles. They recognise the main economic factors influencing pass-on, and the interaction between pass-on and volume effects. Yet there are places where the guidelines are perhaps too optimistic about the extent to which quantitative analysis can be carried out without significantly raising the costs of bringing and defending a damages action. They also place insufficient weight on the importance of factual evidence to complement and inform the economic analysis.

6.2 The development of best practice in quantifying pass-on and (even more so) volume effects is at an early stage relative to quantifying overcharges. As the draft guidelines recognise, there is a tension between the principles of effectiveness and unjust enrichment. In order to achieve the former, pass-on and volume effect analysis will need to remain tractable, and therefore relatively crude, or ‘broad axe’, at least for smaller claims.

6.3 This is not an impossible balance to strike, as can be seen from the area of merger control, where advanced and data-intensive economic techniques are usually employed only for the largest cases, and even then the results of such techniques are normally interpreted in conjunction with less technical evidence.