

European Commission: Directorate-General for Competition
Consultation on draft guidelines for national courts on how to
estimate the share of cartel overcharges passed on to indirect
purchasers and final consumers

Response of Bryan Cave Leighton Paisner LLP



A. INTRODUCTION

Bryan Cave Leighton Paisner LLP advise both claimant and defendant clients in cartel private damages actions both in the UK and the US, for example representing claimants in relation to the Gas Insulated Switchgears, Power Cables and Trucks cartels, and defendants in relation to the automotive parts cartels. We also advise complainants and parties under investigation for potential cartel infringements before the European Commission and other competition authorities inside and outside the EU. We therefore approach the issue of passing-on from a balanced perspective, and offer our comments below.

We have reviewed the *draft guidelines for national courts on how to estimate the share of cartel overcharges passed on to indirect purchasers and final consumers* (the "Draft Guidelines") with interest and we welcome the opportunity to comment on them. We welcome the publication of the guidelines.

We consider that the guidelines will serve as a useful means of seeking consistent application of pass-on analysis across the EU. This is particularly important given that pass-on findings made by a court of one Member State may be taken into account, under Article 15 of Directive 2014/104/EU (the "Damages Directive"), in an action brought by a claimant at a different level of the supply chain in another Member State. A proper assessment of pass-on is necessary to avoid over or under compensation of claimants.

As an overarching observation, the Draft Guidelines appear to be predominantly focused on the economic aspects of pass-on, with comparatively less guidance provided on the relevant legal or policy aspects (and which may have a direct impact on the quantum estimation exercise by the national courts). A fuller review in the Draft Guidelines of the relevant case law from the national courts of the Member States would potentially assist other national courts in determining a best practice framework for asserting pass-on and assessing cases before them in light of that framework.

B. EVIDENCE

Section 2.3 of the Draft Guidelines provides a helpful explanation of the rules of evidence applicable to competition damages actions. We consider this section would benefit from further explanation of the appropriate **scope of evidence** (in particular documentary evidence) to be introduced in respect of cases concerning pass-on. For example at Paragraph 30 it is noted that requests for evidence by parties in proceedings "*must concern specific items or categories of evidence*". However, limited explanation is provided of how broad or limited in scope any request for a "category" of information should be.

We consider it would be useful to provide further guidelines and/or examples of the nature and scope of a request for evidence that may be proportionate in a given circumstance.

C. QUANTIFYING PASS ON

Section 2.4 provides a summary of a national court's power to estimate the share of any overcharge passed-on, noting that the "*exercise of estimation is subject to national law*". In this context, the guidance appears to endorse what is stated to be the approach of the "United Kingdom national courts to quantifying harm *by the exercise of a sound imagination and the practice of a broad axe*", referencing the UK Competition Appeal Tribunal judgment in *Gibson v Pride Mobility Products Ltd* [2017] CAT 9 (a judgment in respect of an application for a Collective Proceedings Order and not a full trial).

Gibson v Pride provides a useful statement of the broad principles which apply when quantifying an overcharge suffered by an indirect purchaser claimant. However, the recent Court of Appeal decision in *Sainsbury's Supermarkets Ltd v MasterCard Inc.* [2018] EWCA Civ 153 (which is the leading UK case on pass on, and which was issued on the day before the start of the current Consultation) indicates that, as a matter of English law, there are nuances in the way that the "*broad axe*" principle applies to the assessment of pass on.

In simplified terms, Sainsbury's was (albeit technically an indirect purchaser) in the position of a direct purchaser claimant against Mastercard, and Mastercard raised the defence that the restitutionary damages claimed by Sainsbury's as a result of alleged anti-competitively inflated interchange fees charged by Mastercard were not recoverable by Sainsbury's as they would have been passed-on by Sainsbury's to its own customers.

In particular, at paragraph 331 of the *Sainsbury's* judgment, the Court of Appeal states that "*the broad axe principle is applicable where the claimant has suffered loss as a result of the defendant's culpable conduct but there is a lack of evidence as to the amount of such loss. There is no scope for the application of any such principle where the burden lies on the defendant to establish a pass-on of the unlawful overcharge in order to reduce the amount recoverable by the claimant.*"

It therefore appears that the English courts may be willing to apply a "*broad axe*" approach when quantifying harm suffered by an indirect purchaser claimant, but may take a different approach in establishing the fact, and quantifying the amount, of pass on where it is invoked by a direct purchaser as a defence. In those latter circumstances, "**a combination of empirical fact and economic opinion evidence**" may need to be produced to evidence a "sufficiently close causal connection" between an overcharge and increase in the direct purchaser's prices (paragraph 332 of the *Sainsbury's* judgment).

We recognise that there may be policy reasons for a difference in approach by the courts in relation to the thresholds for establishing and quantifying pass on, as between: (i) a claim brought by an indirect purchaser claimant; and (ii) a defence raised by a carteliser that a claimed loss associated with a cartel overcharge has been absorbed at a level of the supply chain above that of the indirect claimant. The deemed pass-on of cartel overcharge to an indirect claimant in the circumstances set out in Article 14(2) of the Damages Directive appears consistent with the possibility of differences in quantification approach depending on which party to the litigation is putting forward the pass-on arguments. We would welcome further engagement by the Commission in the Draft Guidelines as to the possible impact of the Article 14 burdens and presumptions (as they apply to the opposing sides of the litigation) on the estimation exercise to be undertaken by the national courts.

D. NON-PRICE EFFECTS

The Draft Guidelines describe well the innate connection between price and volume effects in the economic assessment of pass-on.

The exclusion of "non-price effects" from the scope of the Draft Guidelines (at recital 44) necessarily does not appear to extend to the exclusion of a consideration of volume effects (a concomitant effect of a cartel overcharge from an economic perspective). Rather, in the recitals at least, "non-price

effects" appear to be limited to (potentially more remote) qualitative effects. In this regard, it is interesting to note precedents in the UK claims for damages for lost profit and loss of a chance (as have been argued in the UK in a series of claims relating to Article 102 and its national equivalent),¹ and further guidance in this regard may be useful in due course.

Judges in national courts may not take a holistic approach to price and volume aspects of pass-on effects as readily as some economists and the Draft Guidelines suggest - certainly unless those volume aspects are expressly pleaded by the litigating parties (see for example, paragraph 340 of the Court of Appeal's *Sainsbury's* judgment quoting the lower judgment of the Competition Appeal Tribunal, which states that "the pass-on defence is only concerned with identifiable increases in prices"). As such the Draft Guidelines may benefit from more clarity in the definition of "volume effects" as being distinct from other "non-price effects", described in recital 44.

E. CONCLUSION

We would be happy to engage further in relation to any aspect of our response or the Draft Guidelines.

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¹ 2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Limited [2012] CAT 19; Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd [2011] EWCA Civ 2; Albion Water Limited v Dŵr Cymru Cyfyngedig [2013] CAT 6