

Dear Sirs

We (Simmons & Simmons LLP) have found the draft Guidelines to be well written and believe that they will be of general assistance to national courts, as well as parties to follow-on damages claims and their legal representatives. We consider that the illustrative examples (both fictional and those taken from cases) will be of particular use in assisting non-economists to understand the tools which are available to calculate overcharge pass-on, which can be highly complex.

We make the following observations in relation to potential areas for improvement:

- The Guidelines are necessarily detailed. Summaries of the information they contain would be useful to make the Guidelines more user-friendly. Some suggestions include:
  - The addition of an executive summary at the start of the Guidelines;
  - A one page overview / checklist of the various methods of pass-on calculation included in the Guidelines, with a high-level description, for use as a quick reference point; and
  - Incorporating Annex 1 into the main body of the guidelines (possibly section 3) in order to avoid duplication of content.
- The Commission could consider, if it has not already, including the Guidelines within the existing Practical Guide on Quantifying Harm (for example, adding an extra chapter on calculating pass-on of overcharges or weaving points into other sections). Having all of the relevant information in a single document will make it more readily accessible.
- We note that, although the Guidelines refer to the existence of damages caused by non-price effects, they do not cover pass-on in this context. There is a risk that, in leaving any discussion of these effects out of the Guidelines, this will implicitly deny the validity of quantum calculations that account for non-price effects – particularly as they are not categorised separately in the Damages Directive. This could be mitigated by either: (i) including some detail about the assessment of non-price effects in the Guidelines (even at a high level); or (ii) if the Commission considers that this is not appropriate, explaining why pass-on in the context of non-price effects has not been covered.
- It would be useful to understand which of the various methods of calculating overcharge pass-on are acceptable to the different national courts. There may be some methods which are, for example, preferred in certain jurisdictions and others which some national courts will refuse to accept at all. These differences may be borne out in comments from various jurisdictions, and where it emerges that some methods are incompatible with particular national legal systems, this would be usefully commented upon in the final Guidelines.
- The Guidelines include various methods of calculation which, by their nature, have significant weaknesses but may in some scenarios be the most credible method (or combination of methods) available to a court. The Guidelines could stress more heavily the potential risks of using these methods. A comparative table, summarising the strengths and weaknesses of each method may be helpful.
- Paragraph 4 refers to direct and indirect approaches when estimating pass-on related price effects. It would be helpful to include a flowchart which succinctly outlines the sub groups of these approaches.
- The Guidelines refer to “variable input cost” and “marginal costs” interchangeably at times (see, for example, Box 8 and paragraph 157 on

page 37). As explained at paragraph 156 and in the glossary, these are two separate economic concepts. The fact that they appear to, at times, be referred to as alternatives may lead to confusion.

- The Damages Directive suggests that the risk that actions for damages by claimants from different levels in the supply chain lead to a multiple liability or to an absence of liability can be avoided through national courts taking due account of other actions and judgments relating to the same underlying infringement (Article 15). The Guidelines do not expand materially upon this concept (considered at paragraphs 24 and 25 of the draft Guidelines). It would be beneficial to provide a more detailed explanation as to how this can be expected to work in practice. There are potential difficulties in the approach, particularly in light of a minimum five year limitation period for bringing a claim. The use of joinder, stays and third-party interventions in the context of claims commenced potentially years apart (relating to different levels of the supply chain) could give rise to delay in the resolution of private actions. And appeal processes may be undermined if appellate judges are expected to take account, in considering quantum, of first instance decisions which may not themselves have been appealed.

**Simmons & Simmons LLP**