

**COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTIONS OF ANTITRUST  
LAW AND INTERNATIONAL LAW ON THE EUROPEAN COMMISSION’S  
PROPOSAL FOR GUIDELINES FOR NATIONAL COURTS ON HOW TO ESTIMATE  
THE SHARE OF OVERCHARGE WHICH WAS PASSED ON TO THE INDIRECT  
PURCHASER<sup>1</sup>**

October 2, 2018

*The views stated in this submission are presented on behalf of the Sections of Antitrust Law and International Law (“Sections”) of the American Bar Association (“ABA”) only. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors and therefore do not state the views or policy of the American Bar Association.*

The Sections welcome the opportunity to provide feedback 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 (“Draft Passing-on Guidelines” or “Guidelines”). The Sections commend the Commission for issuing the Draft Passing-on Guidelines to bring more transparency and certainty to the application of Council Directive 2014/104<sup>2</sup> by EU Member State courts.

These comments are submitted in response to the request of the European Commission (“Commission”) for public comment. The following comments reflect the experience and expertise of the Sections with competition and consumer protection law in the United States and other jurisdictions, including the European Union (“EU”). The Sections are available to provide additional comments or to participate in any further consultations with the Commission as appropriate.

**Executive Summary**

In sum, the Sections commend the Commission for drafting a thoughtful set of guidelines on what in the Sections’ experience under U.S. law is a very complex issue. Based on the Sections’ considerable experience in this field, we recommend the following:

- The Commission should clarify that the pass-on of damages should not be presumed, but rather should be determined through careful factual and economic analysis in each case. This is especially true in markets with complex distribution channels. Where a presumption of pass-on is adopted, procedures should be developed to allow parties the ability to take discovery and have a meaningful opportunity to rebut that presumption.
- The Commission should note that, in some cases (e.g., where manufacturers use dual distribution networks), purchasers may be both direct and indirect for different purchases.

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<sup>1</sup> “Draft Passing-on Guidelines,” as used herein and by the Commission in its request via its Consultations website, [http://ec.europa.eu/competition/consultations/2018\\_cartel\\_overcharges/index\\_en.html](http://ec.europa.eu/competition/consultations/2018_cartel_overcharges/index_en.html), means the draft “Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser,” available at [http://ec.europa.eu/competition/consultations/2018\\_cartel\\_overcharges/20181807\\_en.pdf](http://ec.europa.eu/competition/consultations/2018_cartel_overcharges/20181807_en.pdf).

<sup>2</sup> 2014 O.J. (L349) 1 (EU) (“Antitrust Damages Directive” or the “Directive”).

- The Commission should caution courts about assuming that purchasers lack the market power to resist price increases and that a specific factual analysis should be conducted in each case.
- To the extent that a national court were to appoint a neutral expert to examine the pass-on issue, the parties should be afforded a meaningful opportunity to challenge the expert's analysis.
- The Commission should caution national courts not to assume that private damages claims are based on the same theories, facts, and analysis that are reflected in the decision of a regulatory authority examining the defendants' conduct. Courts should consider how differences in relevant time periods, participants, and affected products may distinguish the private action from the authority's decision.
- In assisting national courts in developing economic models for their pass-on analysis, the Commission should provide guidance for presumptions based on simple rules that may be rebutted by the parties.
- The Commission should advise national courts that there is no single economic model that best analyzes the pass-on issue in every case. National courts should be advised to be flexible in considering alternative approaches proposed by the parties.

The Sections discuss these and other observations below.

The Antitrust Damages Directive provides that any person who has suffered harm caused by a competition law infringement, including indirect purchasers, may claim full compensation for that harm. Guiding decisions, including *Manfredi v. Lloyd Adriatico Assicurazioni SpA*<sup>3</sup> and *Courage v. Crehan*<sup>4</sup> establish the dual principles of equivalence and effectiveness, which are to govern implementation of the Directive.<sup>5</sup> A primary step in compensating victims of competition law infringements is thus to establish procedures to prove pass-on damages to indirect purchasers without imposing huge pre-trial discovery burdens and recognizing that pre-trial discovery will often be limited.

In the United States, this issue is to some extent addressed by the Supreme Court's decision in *Illinois Brick Co. v. Illinois*,<sup>6</sup> which, except in very limited circumstances, precludes indirect

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<sup>3</sup> Joined Cases C-295 to C-298-04, 2006 E.C.R. I-6641.

<sup>4</sup> Case C-453/99, 2001 E.C.R. I-6323.

<sup>5</sup> As stated in *Manfredi*, this means: "[I]n the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to prescribe the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favorable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)."

<sup>6</sup> 431 U.S. 720 (1977),

purchasers from suing for damages under federal law.<sup>7</sup> In addition, in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Supreme Court held that a defendant cannot defeat a plaintiff's federal antitrust claim by arguing that the direct purchaser "passed on" any overcharge to another purchaser in the distribution chain. The Draft Passing-on Guidelines are different from U.S. federal antitrust laws in both regards, because the Draft Passing-on Guidelines recognize pass-on as being both a way to calculate damages for all of those potentially affected by an anticompetitive act, and a defense against direct purchasers and other similarly situated firms seeking damages. As such, the Draft Passing-on Guidelines recognize pass-on as both a "shield" (§ 17) and a "sword" (§ 18). These comments do not address the pros and cons of the U.S. case law, but rather attempt to offer useful observations on the Draft Passing-On Guidelines in the context of EU law.

Attempting to estimate pass-on precisely at each level of distribution can be difficult, due to both economic complexities (arising from, *inter alia*, product integration issues and different levels of competitiveness on multiple levels of distribution) and limited availability of key data – reasons why the United States largely precludes damages claims by indirect purchasers under federal law. While a number of competition experts believe that the *Illinois Brick* approach, now over forty years old, should be reevaluated in light of substantial improvements in computational techniques and econometric analysis, the issue is hotly contested among scholars and practitioners in the United States.<sup>8</sup>

Some scholars have argued that a simple formula should be used to address the complexity of estimating pass-on. For example, in 2009, Professor Andrew Gavil proposed a presumption that for cases involving two distinct levels of distribution, the direct/indirect split of the overcharge is 50/50%; for three levels, 50/25/25%; and for greater than three levels, 50% to direct purchasers, 25% for final customers, and the remaining 25% split evenly among the intermediate levels—with no pass-on defense.<sup>9</sup>

In general, the Draft Passing-on Guidelines highlight the tension between utilizing detailed economic analyses based on reliable data, on the one hand, and the cost of such analyses, on the other, particularly when reliable data may not be available, and in the context of potentially modest damages. These comments provide the Sections' observations and suggestions that balance the interests of claimants in bringing meritorious claims without excessive investigation and court costs against the interests of defendants in being able to defend themselves using relevant information and robust analysis to the extent possible.

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<sup>7</sup> However, many states have enacted so-called *Illinois Brick* "repealer" statutes to permit such claims under state law.

<sup>8</sup> See, e.g., Antitrust Modernization Commission, Report and Recommendations, Chapter III, Section 3, 270-278 (2007), available at [https://govinfo.library.unt.edu/amc/report\\_recommendation/toc.htm](https://govinfo.library.unt.edu/amc/report_recommendation/toc.htm).

<sup>9</sup> Andrew I. Gavil, "Thinking Outside the *Illinois Brick* Box: A Proposal for Reform," 76 Antitrust Law Journal 167, 195 (2009).

## I. Pass-On Presumptions and Complications

Although the Draft Passing-on Guidelines properly recognize that there are instances when pass-on does not occur,<sup>10</sup> several parts of the Draft Passing-on Guidelines suggest that pass-on almost always occurs and the only question is to estimate its magnitude. However, increasing the price of subsequently produced goods is not the only way a purchaser can react to a component's cost increase, and passing on may be inconsistent with the profit-maximizing price. A cost increase may result in a loss of profit margin or the substitution to other lower cost components or technologies. Accordingly, an indirect purchaser alleging an infringement may not be able to prove in every (or almost every) situation that its pass-on analysis is sufficient without some reasonable basis or inference. In addition, the absence of indirect purchaser claims may indicate that pass-on did not occur, or that the claims are not sufficiently large to be worth pursuing individually. It is important that the Guidelines properly weigh and balance the competing goals of providing a mechanism for compensation while avoiding any overcompensation that may result from an irrebuttable presumption of pass-on.<sup>11</sup> The Sections respectfully suggest a clarification that pass-on is not certain at all times and in all circumstances.

In addition, although the Guidelines contemplate that pass-on will not always occur through a simple distribution chain from the direct purchaser immediately to the specific indirect purchaser at issue,<sup>12</sup> it may be helpful to provide additional explanation that these types of complexities may affect the methodologies for calculating pass-on at each level. Indeed, the Guidelines likely would benefit from more emphasis on the potential need to address cases involving complicated manufacturing and distribution channels and the potential impact of such complexities on measuring pass-on. In instances of highly complex distribution chains, presumptions of pass-on may be inappropriate.

For example, in the instance of electronics companies and allegedly price-fixed component parts, there are often multiple intermediaries at issue. Components often travel through complex systems of Electronic Manufacturing Services ("EMS") or Original Design Manufacturers ("ODMs"), Original Equipment Manufacturers ("OEMs"), distributors, and retailers before their final sales to end purchasers. This level of complexity is not fully

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<sup>10</sup> See, e.g., Draft Passing-on Guidelines, **Example 1** at 14-15.

<sup>11</sup> See, e.g., Draft Passing-on Guidelines at ¶ 1.1.(1) ("These guidelines intend to provide national courts, judges and other stakeholders in damages actions for infringements . . . with *practical guidance on how to estimate the passing-on of overcharges*." (italics added); *id.* at ¶ 2.1.(14) ("However, the direct or indirect purchaser may be able to pass on the overcharge further down the supply chain and thus either reduce (partial pass-on) or eliminate (full pass-on) its actual loss.") (containing no mention of the possibility of no pass-on); *id.* at ¶ 2.4.(38) ("As regards the power to estimate, this means that national courts cannot reject submissions on passing-on because a party is unable to precisely quantify the passing on effects."); *id.* at ¶ 3.1.(42) ("The passing-on of overcharges and the associated price and volume effects arise because of a firm's incentives to respond to increases in its costs by raising prices."). See also *id.* at ¶ 3.1.(50) ("[O]ther elements *may, under certain circumstances*, play a crucial role in the direct purchaser's price formation mechanism, and, hence, for passing-on of the overcharge by the direct purchaser.") (italics added).

<sup>12</sup> See, e.g., *id.*, ¶¶ 1.2.(8), 2.1.(12), 2.1.(14); ¶ 1.2.(8) n.8 ("According to Article 2 (24) Damages Directive 'indirect purchaser' means a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser *or a subsequent purchaser*, products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom.") (emphasis added).

contemplated or identified in the Guidelines, even though these very complicated distribution chains of commerce are common in certain industries.

The Guidelines would also benefit from recognizing that certain purchasers may be both direct and indirect purchasers within the same case, which will require the parties and court to accurately identify the relevant distribution chains and the data appropriate to assess indirect purchase claims in light of this complexity.

For example, an automobile manufacturer may have purchased components directly from the component manufacturer in certain instances but may have purchased the components through distributors at other times. Accordingly, some of the automobile manufacturer's purchase data may not be relevant to the indirect purchase claims and questions of pass-on. Further analysis of the data, and the use of an expert economist, may be needed in order to identify the precise purchase and sales data that is relevant to the pass-on measurement.

The Guidelines would also benefit from further clarification recognizing that different purchasers at the same level in a supply chain may have different competitive positions, such that overcharge and pass-on impact would be different for each. While the Guidelines discuss competition and positioning at the direct level, they do not do so at the indirect level.<sup>13</sup> Specifically, the apple juice examples in the Guidelines contemplate different amounts of competition only at the direct level.<sup>14</sup> They do not address the various abilities of different *indirect* customers to avoid pass-on. There is not only a possible pressure from direct purchasers to resist an overcharge from the infringer, but also a possible pressure from indirect purchasers throughout the distribution chain to resist price increases.

For example, if a corn producer involved in a cartel raises prices to a popcorn manufacturer (the direct purchaser), a large retailer selling popcorn (indirect purchaser A) may be able to resist price increases that a local grocery store could not (indirect purchaser B). Even though at the same level of the distribution chain, *i.e.*, the retail level, these two indirect purchasers have different market shares and competitive positions, that may mean one is forced to accept the price increase (indirect purchaser B) and another is not (indirect purchaser A). Some of this differentiation, especially amongst larger purchasers, may be mitigated by most favored nations pricing obligations, which typically provide that if another large purchaser gets a better price from the manufacturer, then the first contracting purchaser will get the same price.

## **II. Evidence Used by the Courts**

We recognize that the rules of proportionality may limit pre-trial discovery and/or economic analysis in certain cases. However, given potential industry, market and other competitive complexities even in lower value cases, the Guidelines should recognize and identify potential categories of evidence – and the potential sources for such evidence – that may allow parties to litigation to rebut a presumption of pass-on. For example, the following may be used to suggest smaller or no pass-on for at least some larger customers: evidence of monopsony power; focal-point pricing; or frequent use of heavy discounts from list prices. In addition, the Guidelines should identify vertical integration covering a substantial part of a market as a possible limiting

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<sup>13</sup> See *id.*, ¶ 3.1.(48).

<sup>14</sup> See *id.*, ¶¶ 3.2.(55)-(58).

factor for proving pass-on. Evidentiary sources for this type of information may include third party publications, competitor information, industry reports, party pricing policies, financial reports, and other types of documents that have a relatively low cost of collection and production.

While we recognize the potential practical benefits that seem to underlie the Guidelines' attempt to limit the use of regression analysis in low-value cases,<sup>15</sup> it is not clear where the line will or should be drawn. There is a possible concern that litigants may be completely foreclosed from utilizing regression analyses, even in cases where market circumstances strongly suggest that pass-on may be unlikely, simply because they are “low value.”

With respect to the issues of disclosure, the Guidelines do not clearly contemplate the fact that third-party data may not always be made available or their meaning transparent at the national level. ¶¶ 2.3.(27) *et al.* Accordingly, the Guidelines may need to discuss more explicitly the possibility that rulings on disclosure may not be clear-cut. Indeed, as is often the case in the United States, an active dialogue between parties (including their counsel and retained economic experts) about data disclosures may be necessary, and the court may need to examine whether parties have sufficiently explained the relevant data in a given case (*e.g.*, column headers, cross references between datasets, etc.). Data disclosure will be useful only to the extent the parties are able to obtain it on a timely basis, interpret and rely on it. We respectfully suggest adding this concept in ¶ 2.3.(30).

In addition, the proposition that a court could simply determine that it has enough evidence, without any supplementation or discovery of data that could rebut the presumption of pass-on, may be problematic for litigants who do indeed have (or believe they can get) information that may rebut a presumption of pass-on.<sup>16</sup> Although many Member States do not provide discovery particularly in the case of non-parties, the Sections submit that, for the Guidelines to function properly, parties should have an opportunity to obtain at least limited discovery from third parties who are in the relevant distribution chain to either support or attempt to refute pass-on, to the extent possible.<sup>17</sup>

Indeed, what a firm does or does not believe about price changes and their causes could be different than the reality. Consideration should be given to the use of qualitative evidence to supplement quantitative evidence – but not as a substitute for quantitative analysis.<sup>18</sup> References

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<sup>15</sup> See, *e.g.*, *id.*, ¶ 4.3.1.2.(111) (“As mentioned above, techniques based on econometric analyses may in certain cases entail considerable costs that may be disproportionate to the value of the damages claimed. In such cases, the court may find it sufficient to estimate the pass-on by simultaneously assessing quantitative data without the use of regression analysis and by taking into consideration qualitative evidence.”).

<sup>16</sup> See, *e.g.*, *id.*, ¶ 2.2.(29) (“For example, this means that judges may come to the conclusion that the evidence presented by the parties already allows them to estimate the share of the overcharge that was passed on instead of gathering further data.”).

<sup>17</sup> However, given the Directive that compensation should be available to victims of infringement, the absence of discovery in a Member State should not be a bar to recovery.

<sup>18</sup> See, *e.g.*, *id.*, ¶ 4.1.(70) (“For instance, internal documents or other documents of a qualitative nature produced by the direct or indirect purchaser regarding the relationship between the overcharge and changes in its own prices. If this type of evidence is available, the court may find it sufficient to estimate the pass-on effects (price and volume effects) by taking into consideration qualitative evidence or making adjustments to the quantitative data without the use of a regression analysis.”).

pertaining to qualitative evidence should be directed towards the industry/market at issue, and not mere recitations of the proposition that economic theory always leads to pass-on.<sup>19</sup>

Further, the Guidelines might be seen as endorsing the idea that an academic study of pass-on in a market or industry can be directly applied to the case without proper testing for the specific facts of the case at hand. Taking existing studies into account can be useful, but how much they can teach us about a specific industry depends on how close the object of the study is to the industry and time of the infringement. We suggest that the Guidelines might make that point more clearly. Similarly, using examples from other geographic markets as benchmarks, could be directionally helpful, but is typically not sufficient to accurately demonstrate or quantify pass-on in another market absent adequately controlling for other market forces.<sup>20</sup>

Finally, the Guidelines discuss the potential importance of the relevant time period for estimating an overcharge and pass-on.<sup>21</sup> It could be helpful if the Guidelines discussed in more detail some principles for how to determine the relevant period for measuring damages at the beginning and after the end of a conspiracy period. For example, the Guidelines discuss contract length, and it is true that the longer the contracts, the longer the effects of an anticompetitive act are likely to be felt, even after the behavior has ceased. However, buying patterns for customers in some industries may continue for some time if customers generally require an extended period to evaluate alternative choices. It would also be helpful for the Guidelines to discuss how to distinguish between conspiracy and oligopolistic pricing at different levels in the supply chain, since that could affect the amount of any pass-on substantially.

### III. Independent and Neutral Expert / Reliance on National Competition Authorities

The Guidelines mention the use of experts to help analyze and resolve these complicated issues. A neutral economist may be advantageous in these types of proceedings, to the extent it would be practical for parties to agree to such an expert.<sup>22</sup> If a judge is to appoint an economic expert, consideration should be given to whether there will be an opportunity for the parties to challenge the economic expert or whether this issue will be left to the Member States.

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<sup>19</sup> See, e.g., *id.*, ¶ 2.2.(32) (“[T]he parties may generally base their analysis on economic theory and quantitative economics.”); ¶¶ 4.3.1.2 (Box 6) for the following example (“In this judgement, the Court found that a producer of pesticide had passed on 50% of the initial overcharge to the indirect customers. This finding was based on economic theory predicting that 50% of an overcharge will be passed on if the direct customer is a monopolist facing linear demand. In this case the court could rely on publicly available market studies characterizing the market on which the direct customer was active as a monopoly market.”).

<sup>20</sup> See, e.g., *id.*, ¶ 4.3.2.2.(134) (“Examples of such other sources may include pass-on rates found in other cases concerning the same industry or in other industries, academic studies relevant for the industry in the case at hand or evidence provided in witness statements.”).

<sup>21</sup> *Id.*, ¶¶ 4.3.1.3.(119)-(123).

<sup>22</sup> See, e.g., *id.*, ¶ 2.2.(29) (“Depending on the instruments available under national law, they may also appoint [their] own economic experts or narrow down the questions to be addressed by party-appointed experts.”); ¶ 4.2.(85) (“In some jurisdictions national courts may appoint economic experts who assist the judge when estimating pass-on and they have traditionally taken this approach to estimate the initial overcharge. As explained below, the court may employ a similar approach when estimating pass-on, e.g. by using the so-called comparator-based methods.”).

Consideration also should be given to cost allocation, as the use of a court appointed expert to analyze these issues is likely to be significant. .

The Guidelines also mention that Member States may consider obtaining advice and/or guidance from national competition authorities. ¶ 4.2.(89). A national competition authority may have useful information regarding a particular market or industry, especially if such national competition authority has already investigated in the particular sector. However, because the scope of any investigation may differ from the scope of a private claim, care should be taken in ensuring that advice and guidance from competition authorities considers any significant differences with respect to relevant time period, relevant participants, and/or the affected products.

#### IV. Quantitative Analysis of Pass-On

In general, the Guidelines identify the best type of economic modeling for what the Commission calls the “direct” approach (Section 4.3.1). The Guidelines appropriately recognize that needed data may not be available, and jurisdictions may thus need to rely on “indirect” approaches (Section 4.3.2). These approaches, however, will not likely completely address various economic issues that can affect the amount of pass-on, such as the shape of the demand curve discussed in the Guidelines’ Box 9 (¶ 5.3.(170)). As the Guidelines correctly point out, a sufficiently “convex” demand curve can result in a pass-on rate of over 100% (¶ 5.3.(170)). There are several oligopoly models that also result in pass-on exceeding 100%. A greater than 100% pass-on does not occur for a “linear” or “concave” demand curve, or in other oligopoly models. These considerations can make a large difference in the amount of pass-on and the amount of damages the members of each level should be reimbursed. The Guidelines recognize the challenges that these complexities create, but could consider articulating specific presumptions that might be built into the analysis, recognizing that pass-on estimations may not be capable of the same precision as original overcharge calculations. For example, the Guidelines might consider suggesting a rebuttable presumption that demand curves are not convex.<sup>23</sup>

The “comparator” approach<sup>24</sup> relies on identifying another product or geographical market that is not affected by the alleged collusion but that is similar to the market such that it can be used as a comparison. In the context of a geographical comparator approach, in particular, how much pricing patterns in one country can teach us about the impact of an infringement on a specific industry in another country does require taking into consideration differences among countries. In effect, geographical comparisons are similar to “difference-in-differences” analyses often used by economists, and similar to what was done in the first attempted *Staples/Office Depot* merger that the FTC successfully blocked in 1995.<sup>25</sup> Controlling for other influences is also clearly important when doing a before and after analysis.

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<sup>23</sup> Without the convex demand curve discussed in Box 9 (¶ 5.3.(170)), there is less likelihood that a price increase would be passed on by more than 100%. Those trying to show pass-on exceeding 100% would bear the burden of showing the demand curve was convex, rather than linear or concave.

<sup>24</sup> See Guidelines, ¶¶ 4.3.1.1(96)-(103).

<sup>25</sup> 970 F. Supp. 1066 (D.D.C. 1997).

## V. Volume/Lost Profit Estimates

Damages in the United States are typically calculated by multiplying the quantity of sales by estimates of the overcharge, which is the “price effect” discussed in the Guidelines.<sup>26</sup> The Guidelines include both this “price effect” and also lost profits from the “volume effect.”<sup>27</sup>

The Guidelines provide a good description of the impact of lost volume on the profits of firms that pass on price increases, but there are some cautions regarding implementing the calculations of such losses.<sup>28</sup> The same cautions regarding the direct and indirect approach for the price effect above pertain to the estimation of lost profits. However, the price effect can often be estimated directly by the impact of upstream prices on downstream prices through econometric and other methods, but the volume effect also requires estimation of the impact of any price change upstream on the quantity sold at each level. In particular, measuring both a price effect and profit effect is particularly complex. This is because, instead of determining the effect of cost on price (*i.e.*, our usual pass-on rate regression), the analysis must simultaneously estimate the change in quantity from the alleged conduct and the associated level of profit margin (revenue less cost), which also depends on the quantity. Practically speaking, these additional complications make estimating the volume effect difficult to quantify at all levels. To the extent the Commission wants to encourage the estimation of lost profits due to lower volume, it may want to provide some guidance for presumptions based on simple rules that can be rebutted with an analysis of the available information.

Plaintiffs can be expected to make both a theoretical argument and to provide an estimate of the lost profits due to the reduction in output. Lost profits due to the reduction in output might begin with an estimate of a defendant’s incremental margin on sales, recognizing that the Guidelines warn this is not the correct margin. The output reduction might be estimated by multiplying the pass-on rate times the overcharge to determine the increase in price to the consumer, and multiplying that percentage increase in the price of the product times the elasticity of demand for that product. The lost profits would then equal the reduction in output times the plaintiff’s incremental margin (*i.e.*, the volume loss multiplied by the margins that the purchaser would have earned on those products but for the infringement). This string of estimates presents complexities that will require information, time, and expense to calculate damages, and perhaps some presumption based on a simple approach and assumptions may be helpful.

## VI. Other Specific Comments

- ¶ 2.2.(24) – The Sections support the Guidelines’ suggestion that national courts should try to view all claims holistically so that an alleged infringer is not required to overpay. However, this may be difficult to implement practically given (1) statute of limitations

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<sup>26</sup> *Id.*, ¶ 1.2.(7).

<sup>27</sup> *Id.*, ¶ 2.1.(14).

<sup>28</sup> *See id.*, ¶¶ 4.4 (136)-(153).

issues and (2) differing claims by different claimants at different times. Moreover, the passing reference to a “holistic approach” in ¶ 4.1.(74) when “accounting simultaneously for pass-on and the volume effects” may be difficult to estimate.

- ¶ 3.1.(44) – The Sections agree with the statement in the Guidelines that non-price effects are too complicated to try to calculate.
- ¶ 3.1.(45) – The relationship between the input product and the downstream product is a key factor in measuring pass-on. Although this is mentioned later in the Guidelines, it may be important to note at this juncture that an overcharge on a tiny component of a finished product may be less likely to be passed on (or to establish that it has been passed on) through the distribution chain.
- ¶¶ 3.1.(46)-(47) – It would be helpful to note that case-by-case analysis needs to be undertaken to determine if the assumptions stated here are in fact true in a particular case.
- ¶ 3.1.(50) – This paragraph includes an important, but passing, reference to the fact that pass-on timing may be delayed based on a number of circumstances. It may be useful to emphasize this point in the Guidelines. The number of competitors in a particular market should be mentioned as a relevant factor in this paragraph as well.
- ¶ 4.3.1.1.(101) – This paragraph recognizes that there are assumptions embedded in the method discussed, but it would be helpful to clarify these assumptions and the consequences if these assumptions are not justified in a particular case.
- Annex 1 (¶ 5.3.(164)) – The example of a firm’s own price elasticity being “-0.5” in this annex should probably be changed. A firm will not price on the inelastic portion of its demand curve, since it should be able to raise price to increase its profits. The Sections believe it is better to assume an elasticity of -1 or -2 in the example.
- The statement in ¶ 5.5.1.(175) requires the additional assumption of a perfectly flat marginal cost curve.
- Box 3 (¶ 4.1.(84)) – It would be useful if the outcome of the case were also provided.
- Box 4 (¶ 4.1.(85)) – The example is somewhat unclear in that it says the expert proposed a methodology (implying only a single methodology was proposed), but then the court decided on “which approach to take” (implying there was a choice of methodologies).

## VII. Conclusion

The Sections appreciate the opportunity to provide comments on the Commission’s Draft Guidelines. The Sections would be pleased to respond to any questions the Commission may have regarding these comments, or to provide any additional comments or information that may be of assistance to the Commission.