

**Tender specifications
COMP/2015/011**

Study on the passing-on of overcharges

1. Purpose and context of the contract

Directive 2014/104/EU on antitrust damages actions (the "**Damages Directive**")¹ entered into force on 25 December 2014. Member States need to implement it in their legal systems by 27 December 2016. In the framework of rules on the passing-on of overcharges, Article 16 of the Damages Directive invites the Commission to issue guidelines for national courts on how to estimate the share of the overcharge passed on to indirect purchasers (the "**Passing-on Guidelines**").

The purpose of this contract is to obtain a study on the passing-on of overcharges (the "**Passing-on Study**"), which should assist the Commission in drafting the Passing-on Guidelines.

The context of the contract is described below.

The goal of the Damages Directive is to help citizens and companies claim damages if they are victims of infringements of the EU antitrust rules, such as cartels and abuses of dominant market positions. To achieve this goal, it removes a number of legal and practical obstacles that stand in the way of effective compensation, and harmonizes important aspects of national rules governing antitrust damages actions. At the same time, the Damages Directive fine-tunes the interplay between private damages claims and public enforcement.

The Damages Directive is based on the **principle of full compensation**. It specifies that full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. Full compensation shall therefore cover the right to compensation for **actual loss** and for **loss of profit**, plus the payment of **interest**.²

As regards **quantification of harm**, the Damages Directive recalls that quantifying harm in competition law cases can be a very fact-intensive process and may require the application of complex economic models. In view of the costs involved and the difficulties in obtaining the data necessary to substantiate damages claims, quantification of harm can constitute a substantial barrier to effective compensation.³ The Damages Directive therefore obliges Member States to ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult.⁴

¹ Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, p. 1–19;
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.349.01.0001.01.ENG

² See Article 3(1) of the Damages Directive.

³ See Recital 45 of the Damages Directive.

⁴ See Article 17(1) of the Damages Directive.

The Damages Directive specifies that national **courts** must be **empowered to estimate the amount of harm** if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.⁵ As the Damages Directive recalls in this context, quantifying harm in antitrust damages actions means assessing how the market in question would have evolved had there been no infringement. This assessment implies a comparison with a situation which is by definition hypothetical and can thus never be made with complete accuracy.⁶

To assist national courts with the task of quantifying harm, the Commission adopted already in 2013 a Communication on quantifying antitrust harm in damages actions (the "**Quantification Communication**")⁷, which is accompanied by a more comprehensive and detailed Practical Guide drawn up by the Commission staff (the "**Quantification Guide**")⁸. These documents benefited from contributions by economic experts in the framework of workshops organised by the Commission in 2010 and 2011, as well as from external studies, including the 2009 Study on quantifying antitrust damages (the "**Quantification Study**").⁹

The Damages Directive is based on the principle that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim damages.¹⁰ In line with this principle, Member States are obliged to ensure that **compensation for harm can be claimed by anyone** who has suffered it, irrespective of whether they are **direct or indirect purchasers** from an infringer.¹¹ As the Court of Justice established in its *Kone* judgment¹², "**umbrella purchasers**" can also claim damages.¹³

Indirect purchasers can suffer harm when, for example, a cartel overcharge is fully or partially passed on to them by a direct purchaser of the cartelised goods or services. In line with the compensatory principle, the Damages Directive's rules on **passing-on of overcharges**¹⁴ are

⁵ See Article 17(1) of the Damages Directive.

⁶ See Recital 46 of the Damages Directive.

⁷ Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU, OJ C 167, 13.6.2013, p. 19-21;
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:167:0019:0021:EN:PDF>

⁸ Commission Staff Working Document: Practical Guide – Quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU, SWD(2013) 205, 11.6.2013;
http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf

⁹ External Studies and expert contributions on quantification are available at:
http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_en.html

¹⁰ See Article 3(1) of the Damages Directive.

¹¹ See Article 12(1) of the Damages Directive.

¹² *Kone and Others*, C-557/12, EU:C:2014:1317

¹³ For example, if it is established that a cartel is, in the circumstances of the case and in view of the characteristics of the relevant market, liable to result in prices being raised by competitors not being a party to the cartel, the customers of those competitors ("umbrella customers") must be able to claim compensation from the members of the cartel for harm resulting from such umbrella prices.

¹⁴ See Chapter IV (Articles 12 to 16) of the Damages Directive.

designed to ensure that compensation for the overcharge harm is awarded to those who ultimately suffered it. Depending on the pass-on rate and the structure of the supply chain, it can happen that the total overcharge harm is spread among the direct purchaser and a number of indirect purchasers at different levels in the supply chain, including final consumers.

The Damages Directive gives a **defendant** the right to invoke a "**passing-on defence**" against a claim concerning compensation for **overcharge harm**, based on the argument that the claimant has been able to (fully or partially) pass the overcharge on to his own customers.¹⁵ The defendant carries the burden of proof, i.e. it is for him to show that a pass-on occurred (and to what extent).¹⁶ The right to claim compensation for **loss of profit** is not affected.¹⁷ In fact, a successful use of the passing-on defence is likely to trigger a claim for compensation for loss of profit due to the lost business effect which is frequently associated with overcharge pass-on.

When an **indirect purchaser** brings a damages claim, it is for him to prove that the overcharge was passed on to him. However, under certain conditions he can rely on a **rebuttable presumption that a pass-on occurred**.¹⁸

To avoid that actions by claimants from different levels in the supply chain lead to a multiple liability or to an absence of liability of the infringers, national courts should be able to take due account of any related actions or judgments, or make use of appropriate procedural means, such as a joinder of claims.¹⁹

In the same way as with regard to quantification of harm in general, the Damages Directive obliges Member States to ensure that national courts have the **power to estimate the share of any overcharge that was passed on**.²⁰ As explained above, the Commission is invited in this context to assist national courts by issuing **Passing-on Guidelines**. The **Passing-on Study**, which is the subject of this contract, should assist the Commission in drafting the Passing-on Guidelines.

2. Subject of the contract and task description

The Passing-on Study will provide the Commission with an up-to-date overview of the state-of-the-art economic theories, econometric methods and empirical insights which can be useful for national courts when assessing the phenomenon of passing-on and when estimating the pass-on

¹⁵ As Article 12(4) of the Directive clarifies, the passing-on rules apply accordingly where the antitrust infringement relates to a supply to the infringer. Thus, for example, while a supplier could claim compensation for harm resulting from an "undercharge" caused by a cartel between buyers of the products concerned, the defendant could invoke a passing-on defence based on the argument that the supplier was able to pass such undercharge on to his own suppliers, etc.

¹⁶ See Article 13 of the Damages Directive.

¹⁷ See Article 12(3) of the Damages Directive.

¹⁸ See Article 14 of the Damages Directive.

¹⁹ See Article 12(1) and (2), and Article 15 of the Damages Directive.

²⁰ See Article 12(5) of the Damages Directive.

rate and the loss of profit resulting from any lost business effect in the context of an antitrust damages action.

It should be noted that issues concerning the estimation of the pass-on rate and related effects are part of a broader topic of quantifying harm in antitrust damages actions. That topic has been addressed already in the Quantification Communication and in the Quantification Guide, as well as in the various studies, including the Quantification Study, and other sources which were taken into account by the Commission when drafting them.

The Passing-on Guidelines will therefore serve as a **complement to the Quantification Guide** and will deal specifically with issues that are directly relevant to passing-on. The Passing-on Study should thus address passing-on issues only and should avoid any unnecessary overlaps with information contained in the sources referred to above. Where appropriate, the Passing-on Study may refer to those sources. To the extent that the existing materials briefly touched upon the topic of passing-on²¹, the contractor should take the relevant passages into account, but is expected to elaborate on the outlined insights in a significantly greater detail and go beyond them. It goes without saying that the Passing-on Study should reflect the latest developments in economic theory and the growing number of academic literature on the topic of passing-on.

To obtain a picture of the actual legal practice, the Passing-on Study will also provide an **overview and analysis of the relevant case law** in all Member States, as well as of cases resolved through mechanisms of alternative dispute resolution (**ADR**) or through out-of-court settlements.

Tenderers should keep in mind that the **primary addressees of the Passing-on Guidelines are judges**, who are typically not economic experts. What they need is a **practically oriented framework** that provides them with a solid but not overly complex overview of the principal approaches to estimating pass-on, the economic methods available and an understanding of why certain approaches and/or methods are likely to be more appropriate than others in the given factual circumstances (including the extent of data availability), market and competition conditions or types of infringements prevailing in the case they are dealing with. **The more practical** (model cases, empirical case studies, checklists, comparative tables, lists of pros and cons), **the better**.

Tenderers should note that the Passing-on Guidelines are intended to be used in a European Union context for damages actions based on infringements of EU competition rules. However, they may consider sources, studies or methodologies available in other jurisdictions.

Tenderers will be required to set out the methodology they intend to use in order to address the issues described below.

The final study report shall include in particular the following:

2.1. Economics part

2.1.1. Theory

²¹ For example, the Quantification Guide contains a chapter titled "The pass-on of overcharges" (p. 49 – 51) and the Quantification Study includes a chapter titled "Who has been harmed? Insight into pass-on of overcharges" (p. 116 – 122).

- Relationship between price overcharge, pass-on effect and lost business effect. Explanations on the type of harm which can be suffered in a pass-on scenario by (i) direct purchaser, (ii) indirect purchaser, (iii) end-consumer.
- **Model situation 1: Direct or indirect purchaser claims damages from infringer, the latter raises passing-on defence.**
 - What insights can economic theory provide on the likelihood of a pass-on and on the likely magnitude thereof? Describe the relevant assumptions and explain how relevant effects can be measured. Refer to relevant sources (economic literature, research papers, case studies, etc.).
 - Explain the factors that can usefully be taken into account, such as (the following list is merely for illustration – the contractor needs to cover all relevant factors):
 - the way the undertakings concerned compete (price, quantity, etc.);
 - the type of goods/services they sell (degree of differentiation);
 - the number of firms involved;
 - the elasticity of demand (at any level of the chain);
 - the strength of buyer power (at any level of the chain);
 - the type and duration of the infringement; or
 - the intensity of competition in the downstream market.
 - Provide detailed theoretical models to describe the passing-on effect subsequent to a price overcharge, especially combining different specifications of the market involved and of the concrete case (e.g. shorter/longer supply chain, different elasticity of demand, different kind of competition in each layer). Under what circumstances is a pass-on likely? Describe various scenarios, including situations where the pass-on rate can be higher than 100%.
 - Explain the difference between industry-wide pass-on and firm-specific pass-on. Explain the significance or whether the claimant's competitors in the downstream market are subject to the same or a similar overcharge, or not.
 - What are the consequences, from the economic point of view, of a (fully or partially) successful passing-on defence? Explain the link between overcharge pass-on and the lost business effect (and the loss of profit resulting therefrom). Explain how the magnitude of the lost business effect can be assessed/estimated.
 - For each of the cases you will develop, what are the effects of multiple damages claims from different levels of the supply chain? Demonstrate the relationships based on model cases, including (i) simple scenario: Direct purchaser – Indirect Purchaser – End-consumer; and (ii) scenario with more levels involved.
- **Model situation 2: Indirect purchaser claims damages from infringer.**
 - In addition to issues covered under model situation 1 above, explain the basic approaches to estimate the harm suffered by an indirect purchaser to whom an

overcharge has allegedly been passed on, and describe their advantages and disadvantages. In particular, explain the differences between:

- an approach based on quantifying the initial overcharge to the direct purchaser and subsequently determining the pass-on rate to the indirect purchaser; and
 - an approach based on directly quantifying the overcharge suffered by the indirect purchaser.
- What if the passing-on defence is raised against the indirect purchaser (not applicable to end-consumer)?
 - As above, what are the effects of multiple damage claims from different levels of the supply chain (including end-consumers)? Illustrate by way of model cases.

2.1.2. Estimation

- An overview of available methods (including but not limited to comparator-based methods, market simulation models, cost-based methods, finance-based methods, econometric analysis) on how to:
 - estimate the pass-on rate / the overcharge suffered by an indirect purchaser;
 - estimate the loss of profit resulting from the lost business effect associated with a pass-on.
- Explain the extent of data intensity, type of data required (e.g. actual prices and costs at the relevant layers of the supply chain, macro/micro panel data), the level of complexity and the costs of these methods. Illustrate the pros and cons of the methods, explain the trade-offs (e.g. reliability versus data intensity, efficiency versus robustness). Categorize the methods from the simplest to the most complex ones, taking the trade-offs into account. Explain also how widespread is their use in practice and academic research, and review studies or meta-studies comparing their performance.
- Provide an overview of possible presumptions, proxies, and grounds for estimating the relevant economic quantities (pass-on rate, loss of profit, overcharge etc.) and explain how they are identified, in a statistical/econometric sense, in these methods. Discuss the data and estimation requirements of such identification. Refer to relevant academic literature.
- Explain how to collect data and list reliable sources in empirical cases. Explain the possible difficulties that can arise during data collection and give guidance on how to deal with them (identification of data sources, draft data requests, preliminary discussions with data sources etc.).
- Explain how to deal with possible estimation issues, such as identification of firm-specific effects or endogeneity, measurement error, specification of prices/costs time-varying processes, failures of econometric assumptions, robustness of results, estimation of standard errors and confidence intervals, etc. Review the relevant academic literature.

- Explain how, besides econometric estimation, one may further specify/quantify/calibrate the demand model and compute the objects of interest as a function of observables or a limited set of parameters (e.g. simulate pass-on rates with the use of an explicit formula derived from an appropriate demand model). Identify predictable situations (refer to the Theory section when appropriate).

2.1.3. Empirical studies

- Empirical studies on the estimation of pass-on rates, loss of profit resulting from the lost business effect and other relevant passing-on issues covered by the Passing-on Study. The minimum requirement here is to provide a review of the most relevant existing empirical studies. Preferably, however, this review should be complemented by new studies made by the Contractor based on its own data collection and analysis.
 - Preference should be given to studies based on recent European antitrust damages cases.
 - Could be supplemented by studies on antitrust damages cases in other jurisdictions.
 - Could be also complemented by studies from other fields (e.g. tax incidence, exchange rate movements, transmission of prices of intermediate goods) to the extent that they provide results relevant for the passing-on assessment in antitrust damages cases.
 - If data (real, anonymized or simulated) is used, provide it as an example, together with explanations so that it becomes clear how an empirical analysis works.

2.1.4. To-do-lists for judges

- Guidance on how to make the best use of economic experts (appointed by the parties or by the court) with regard to passing-on issues.
 - Best practices on how to instruct economic experts in order to obtain expert reports that are focused and relevant for the concrete case.
 - How to phrase relevant questions?
 - Best practices on how to evaluate submitted economic expertise and what to do in case of conflicting expert reports.
 - Give guidance on how to ensure replicability of the results by independent experts. Discuss the merits and costs of sharing, possibly via a data room procedure, the data and computer codes with the different economic experts. Explain how to deal with potentially conflicting expert reports with and without such sharing.
 - How to determine the relevance and significance of an economic analysis for a particular case? How to combine quantitative and qualitative evidence for the assessment of a particular case, and how to resolve the potential divergence between these different types of evidence?

- What are the standards the judge should be looking at (description of data sources, robustness of data, proper motivation of the choice of methodology, etc.)?
- Produce checklists/comparative tables of key aspects of various approaches and methods. Identify the main determinants, information requirements and useful sources of information, to facilitate the judge's ability to effectively and efficiently manage the case as far as passing-on issues are concerned, step by step.

2.1.5. Evidence

- The study must include quantitative and/or qualitative evidence supporting the conclusions that the Contractor will submit to the Commission.

2.2. Legal part

- An overview and analysis of recent (last 10 years) case-law concerning passing-on issues in all EU Member States' jurisdictions. It could be supplemented by case-law from non-European jurisdictions, but limited to highly relevant cases only.
- An overview and analysis of national legislation (if any) in all EU Member States concerning passing-on issues.
- Particular focus: in multijurisdictional litigations and/or litigations involving multiple claims brought by claimants from different levels,
 - what legal framework applies in each Member State; and
 - what measures, if any, do courts apply to ensure overall consistency, in particular to ensure that the total damages awarded do not exceed the total overcharge, and to avoid that the infringer avoids liability for the overcharge harm. Include analysis on whether the sequence of claims (i.e. who – direct or indirect purchaser – claims first, or which case is decided first) influences the outcome.

3. Reporting and Deliverables

3.1. General requirements

All reports must be drafted in English and submitted according to the timetable in section 5. The final report must also be delivered in Adobe® Acrobat pdf format (in addition to the Word version) and in 5 hard copies.

3.2. Interim report

The interim report must be produced after the field research has been completed, and should, as far as possible, include preliminary conclusions. The report must, as a minimum, provide:

- an overview of the status of the study;

- a description of problems encountered and solutions found;
- an initial version of theoretical analysis, overview of estimation methodologies, legal/policy recommendations and results of the data gathering;
- an initial version of a framework to be provided to national courts for evaluating the extent of passing-on-related effects and making the best use of economic experts;
- a conclusion on whether any changes are required to the work plan, or whether any other solutions should be sought to ensure that the study's required results are achieved (if any such issues are identified, they must be discussed in a meeting with the Commission); and
- a proposal for the structure of the final report, and a structure for the executive summary.

By initial version, the Commission refers to a product that covers all the subjects agreed upon in the contract, even though not with the level of detail that should be presented in the final report.

3.3. Draft final report

The draft final report will deliver the results of all tasks covered by these tender specifications. The report must be divided into the following broad parts:

- **Main report:** The main report must set out, in full, the results of all analysis carried out and the conclusions and recommendations arising from the study. It must also contain, at least, a description of the methodologies evaluated, context for the study (including a review of relevant literature), the methodologies used (including an analysis of their strengths and weaknesses), and data description (including sources and selection process), along with robustness analysis, when needed.
- **Annexes:** These must collate the technical details of the study, tables or graphics, statistics, references and sources.

If needed, the Contractor may be requested during the implementation of the contract to provide access to, or copies of, documents, data, tables, figures and computer codes underlying the conclusions of the draft final report.

Given that the study may use data that is covered by rules on professional secrecy, the contractor must also produce a publishable version of the main final report and of the annexes containing non-confidential information.

All confidential information must be contained in confidential annexes, which must be provided to the Commission but will not be published.

3.4. Final report

The final report follows the same format as the draft final report. It must be edited by a native English speaker to ensure publishable quality (the editing work may be subcontracted.)

It must be accompanied by an executive summary, which will summarise the study's main conclusions, the main evidence (analytical and empirical) supporting these and recommendations arising from them.

In addition, an abstract, which will act as a reference tool, helping the reader to quickly ascertain the subject of the study, must be provided. Please refer to section 4 below for the technical requirements of the executive summary and the abstract.

The final report must take into account the Commission's feedback on the draft final report, while respecting the contractor's autonomy regarding the conclusions they have reached and the recommendations made.

As in the case of draft final report, the contractor must draft also a publishable version of the main final report and of the annexes containing non-confidential information. All confidential information must be concentrated in confidential annexes that must be provided to the Commission but will not be published.

The Commission will publish the official final report (containing non-confidential information only), the executive summary, the abstract and the non-confidential annexes on the internet.

3.5. Data handling and ethics

Any reproduction of figures, quotation from texts, or other use of published work must be appropriately acknowledged. If the work of others is to be included in the reports, the contractor must obtain all necessary copyright permissions. The contractor is responsible for appropriately acknowledging sources, ensuring references are correct, and avoiding plagiarism. Please refer to Article II.10 of the draft service contract in Annex II for further information.

4. Technical requirements of the final deliverable

All studies produced for the European Commission and Executive Agencies shall conform to the corporate visual identity of the European Commission by applying the graphic rules set out in the European Commission's Visual Identity Manual, including its logo²².

The Commission is committed to making online information as accessible as possible to the largest possible number of users including those with visual, auditory, cognitive or physical disabilities, and those not having the latest technologies. The Commission supports the [Web Content Accessibility Guidelines 2.0](#) of the W3C.

For full details on Commission policy on accessibility for information providers, see: http://ec.europa.eu/ipg/standards/accessibility/index_en.htm

²² The Visual Identity Manual of the European Commission is available upon request. Requests should be made to the following e-mail address: comm-visual-identity@ec.europa.eu

Pdf versions of studies destined for online publication should respect W3C guidelines for accessible pdf documents. See: <http://www.w3.org/WAI/GL/WCAG20-TECHS/pdf.html>

4.1. Content

4.1.1. Final study report

The final study report shall include:

- an abstract of no more than 200 words and an executive summary of maximum 6 pages, both in English and French;
- the following standard disclaimer:
“The information and views set out in this study are those of the author(s) and do not necessarily reflect the official opinion of the Commission. The Commission does not guarantee the accuracy of the data included in this study. Neither the Commission nor any person acting on the Commission’s behalf may be held responsible for the use which may be made of the information contained therein.”
- specific identifiers, which shall be incorporated on the cover page, provided by the Commission.

4.1.2. Publishable executive summary

The publishable executive summary shall be provided in both English and French and shall include:

- the following standard disclaimer:
“The information and views set out in this study are those of the author(s) and do not necessarily reflect the official opinion of the Commission. The Commission does not guarantee the accuracy of the data included in this study. Neither the Commission nor any person acting on the Commission’s behalf may be held responsible for the use which may be made of the information contained therein.”
- specific identifiers which shall be incorporated on the cover page provided by the Commission.

4.2. Graphic requirements

For graphic requirements please refer to the template available in (annex IV to the invitation to tender). The cover page shall be filled in by the contractor in accordance with the instructions provided in the template. For further details you may also contact comm-visual-identity@ec.europa.eu.

5. Timetable

The indicative starting date is **September 2015**. The implementation of the contract will start when both parties have signed the contract (T0). The total duration of the contract shall not exceed **8 months**.

The following work plan and indicative timetable are envisaged:

Deadline (from starting date)	Task
<i>Kick-off meeting</i> [T0 + 1 week]	
<i>Interim report</i> [T0 + 4 months]	Desk and field research are completed. The contractor provides the Commission with the interim report . An <i>ad hoc</i> meeting is organised in Brussels within two weeks of delivery of the report.
<i>Draft final report</i> [T0 + 7 months]	The contractor provides the Commission with the draft final report . An <i>ad hoc</i> meeting is organised in Brussels within two weeks of delivery of the report.
<i>Final report</i> [T0 + 8 months]	Taking account of the Commission's feedback, the contractor sends the final report and executive summary to the Commission.

6. Place of performance

The place of performance of the tasks shall be the Contractor's premises or any other place indicated in the tender, with the exception of the Commission's premises. Meetings will take place in the Commission's premises in Brussels. Apart from the kick-off meeting and the two ad hoc meetings mentioned in the timetable above, further meetings might be organised if the need arises (maximum 2 additional meetings). Ad hoc telephone/video conferences might also be organised.

7. Volume

The contract will be awarded to the tender offering the best value for money. See the award criteria in chapter 9.4 below.

The Commission reserves the right not to award any contract.

8. Terms of payment

Payments shall be made in accordance with Articles I.4 and II.15 of the draft service contract (annex II to the invitation to tender). One interim payment of 30% of the contract amount shall be made upon delivery of the Interim report.

9. Evaluation of tenders and award

9.1. Evaluation steps

The evaluation is based on the information provided in the submitted tender. It takes place in three steps:

1. Verification of non-exclusion of tenderers on the basis of the exclusion criteria
2. Selection of tenderers on the basis of selection criteria
3. Evaluation of tenders on the basis of the award criteria

Only tenders meeting the requirements of one step will pass on to the next step.

9.2. Exclusion criteria

All tenderers shall provide a declaration on their honour (see Annex III to the invitation to tender), duly signed and dated by an authorised representative, stating that they are not in one of the situations of exclusion listed in the annex III.

The declaration on honour is also required for identified subcontractors whose intended share of the contract is above 20%.

The successful tenderer shall provide the documents mentioned as supporting evidence in the Annex III before signature of the contract and within a deadline given by the contracting authority. This requirement applies to all members of the consortium in case of joint tender and to identified subcontractors whose intended share of the contract is above 20%.

9.3. Selection criteria

Tenderers must provide evidence of economic, financial, technical and professional capacity to carry out the work subject to this call for tender. Tenderers who do not provide the documentation specified, or who are judged, on the basis of the documentation provided, not to have fulfilled the criteria specified below, will be excluded.

The evidence requested should be provided by each member of the group in case of joint tender and by any identified subcontractors whose intended share of the contract is above 20%. A consolidated assessment will be made to verify compliance with the minimum capacity levels.

The tenderer may rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. It must in that case prove to the Commission that it will have at its disposal the resources necessary for performance of the contract, for example by producing an undertaking on the part of those entities to place those relevant resources at its disposal.

9.3.1. Economic and financial capacity

To be eligible, the tenderer must have the economic and financial capacity to perform the tasks required in this call for tender. Tenderers (i.e. in case of joint tender, the combined capacity of all members of the consortium and identified subcontractors) must provide evidence that they have the economic and financial capacity to perform the tasks continuously and satisfactorily throughout the envisaged lifetime of the contract.

The following evidence should be provided:

- copy of the profit & loss account and balance sheet for the last two years for which accounts have been closed,
- failing that, appropriate statements from banks,
- if applicable, evidence of professional risk indemnity insurance.

If, for some exceptional reason which the Commission considers justified, a tenderer is unable to provide one or other of the above documents, he or she may prove his or her economic and financial capacity by any other document which the Commission considers appropriate. The Commission must be notified of this exceptional reason and its explanation in the tender. The Commission reserves the right to request any other document that it considers will enable it to verify the tenderer's economic and financial capacity.

9.3.2. Technical and professional capacity

A. Criteria relating to the tenderer:

The tenderer (in case of a joint tender the combined capacity of all tenderers and identified subcontractors) must comply with the following criteria:

1. Previous experience of at least five years in each of the following fields:
 - (a) Competition law
 - (b) Litigation in the competition field
 - (c) Theoretical and applied economic research
 - (d) Collecting and analysing database/statistics
 - (e) Drafting reports
2. Ability to carry out projects that cover different Member States, taking into account the different languages spoken.

B. Criteria relating to the team delivering the services:

Tenderers must be able to provide a balanced and credible team and they must ensure that experts are adequately supported and equipped. In particular, sufficient administrative,

secretarial and interpreting resources, and other staff, must be available to enable experts to concentrate on their core tasks.

The contractor will not be allowed to substitute a team member while carrying out the contract unless the Commission gives its written permission (by email), based on the CV for the proposed substitute.

The tenderer is required to include senior and junior staff in the project team with the following competences, professional experience and educational background, or have access to essential supplementary expertise via sub-contracting.

Essential expertise that must be included in the team:

- ✓ Project Manager: At least 5 years of experience in project management, including overseeing project delivery, quality control of delivered service, and conflict resolution experience in project of a similar type and coverage, with experience in management of team of at least 12 people.
- ✓ At least one of the team members must be a practising lawyer with at least 5 years of proven experience in tort actions in complex economic matters, in Europe.
- ✓ At least one member of the team must be a practising lawyer or an economic expert with at least 5 years of proven experience in antitrust litigation in Europe (either in public or private enforcement).
- ✓ At least one member of the team must be a top level economic expert (with postgraduate degree) in the field of theoretical/applied competition policy.
- ✓ At least one member of the team must be a top level economic expert (with postgraduate degree) in the field of econometric/statistical methods.

The Commission refers to a "top level economic expert" as someone who has demonstrable experience, including in real cases, of at least 5 years in the above fields and publishes in peer reviewed journals.

- ✓ Team for data collection: collectively the team must have proven experience of at least 5 years in data collection techniques.

C. The following evidence must be provided to prove the above criteria have been met:

- ✓ a list and short description of the main services - relevant for the subject matter of the study - provided in the past three years,
- ✓ a detailed description of the resources available to carry out the contract (personnel, infrastructure, etc.),
- ✓ detailed CVs of the people who will provide the services in this contract, including management staff. CVs must indicate dates, places of work, employers/recipients of the work, and experience relating to the subject matter of the contract, as well as a list of publications in peer reviewed economic journals, if applicable,
- ✓ any other information showing that selection criteria are fulfilled.

By submitting a tender, each expert involved therein accepts the possibility of a check being carried out by the Commission on his technical capacities.

9.4. Award criteria

The contract will be awarded based on the best value for money procedure and the selected tenders will be evaluated according to the following criteria and points will be scored against each quality criterion. The total number of points is one hundred.

No.	Quality criteria	Quality points
1.	<i>Quality and relevance of proposed: - theoretical analysis - estimation methods -legal overview, with respect to the specification of the assignment (see section 2)</i>	25
2.	<i>Scope of the proposed: - theoretical analysis - estimation methods -legal overview, with respect to the specification of the assignment (see section 2)</i>	15
3.	<i>Quality, relevance and scope of the proposed methodology (including the type of materials/sources) for the setting up of a framework to be provided to national courts for evaluating the extent of passing-on-related effects and making the best use of economic experts</i>	20
4.	<i>Data-collection methods (quality of source, sample selection process, data description)</i>	15
5.	<i>Quality control measures, particularly with respect to the significance of contingent empirical results and to innovative theoretical insights, as well as language quality check and continuity of services in case of absence of a team member.</i>	15
6.	<i>Composition of the team and organisation of the work proposed by the tenderer (division of tasks, work schedule, coordination)</i>	10
Total number of points:		100

For your reference:

- Criteria 1. and 2. directly refer to Sections 2.1.1 ("theoretical analysis"), 2.1.2 ("estimation methods") and 2.2 ("legal overview").
- Criterion 3. directly refers to Section 2.1.4.
- Criteria 4., 5. and 6. are of a more general nature and will be used to assess the quality of the proposed content and work organization as a whole (e.g., appropriate use of

empirical cases, with respect to Section 2.1.3; intention to test results and with which methods; etc.).

Moreover, the scope and quality/relevance of all analyses and estimation methods proposed will be evaluated separately (criteria 1. and 2.) because the study should be as broad as possible in scope, in addition to providing high-quality and applicable results.

Tenders which score less than 50% in total for the quality criteria will be rejected and will not be ranked. In addition, only those tenders with a mark of at least 40% of the maximum number of points for each of the criteria will be considered for the award of the contract (i.e., at least 10 for criterion 1, at least 8 for 3, at least 6 for 2, 4 and 5, and at least 4 for 6).

The tender offering the best value for money will be determined on the basis of the price and quality of the tender, by calculating the final score according to the following formula, in which the quality of the tender has a weighting of 70 %, and 30 % weighting is given for price:

$$\text{Score for tender x} = \frac{\text{cheapest price}}{\text{price of tender x}} \times 30\% + \frac{\text{Total quality score (out of 100) for all award criteria of tender x}}{100} \times 70\%$$

If two or more tenders achieve the same total score (i.e. they would be ranked the same) then the one with the best quality score will be awarded the contract.

9.5. Technical offer

The technical offer must cover all aspects and tasks required in the technical specification and provide all the information needed to apply the award criteria. Offers deviating from the requirements or not covering all requirements may be excluded on the basis of non-conformity with the tender specifications and will not be evaluated.

9.6. Financial offer

The price for the tender must be quoted in euro. Tenderers from countries outside the euro zone have to quote their prices in euro. The price quoted may not be revised in line with exchange rate movements. It is for the tenderer to assume the risks or the benefits deriving from any variation.

Prices must be quoted free of all duties, taxes and other charges, i.e. also VAT, as the European Union is exempt from such charges under Articles 3 and 4 of the Protocol on the privileges and immunities of the European Union.

The quoted price must be a fixed amount which includes all charges (including travel and subsistence).

In order to facilitate the assessment of the price, the tenderer should specify for each category of staff to be involved in the project:

- the total labour costs;
- the daily rates;

- total number of days (man-days) each member of staff will contribute to the project.

For other categories of costs, indicating the nature of the cost, the total amount, the unit price and the quantity.

Costs incurred in preparing and submitting tenders are borne by the tenderers and cannot be reimbursed.

The budget of the contract must include all costs and incidental expenses for its total duration.

10. Information on tendering

10.1. Participation

Participation in this tender procedure is open on equal terms to all natural and legal persons from one of the EU Member States and to all natural and legal persons in a third country which has a special agreement with the Union in the field of public procurement on the conditions laid down in that agreement. Where the Multilateral Agreement on Government Procurement²³ concluded within the WTO applies, the participation to the call for tender is also open to nationals of the countries that have ratified this Agreement, on the conditions it lays down.

10.2. Contractual conditions

The tenderer should bear in mind the provisions of the draft contract which specifies the rights and obligations of the contractor, particularly those on payments, performance of the contract, confidentiality, and checks and audits. By submitting an offer the tenderer accepts the conditions of this contract.

10.3. Joint tenders

A joint tender is a situation where a tender is submitted by a group of economic operators (consortium). Joint tenders may include subcontractors in addition to the joint tenderers.

In case of joint tender, all economic operators in a joint tender assume joint and several liabilities towards the Commission for the performance of the contract as a whole. Nevertheless, tenderers must designate a single point of contact for the Commission.

After the award, the Commission will sign the contract either with all members of the group, or with the member duly authorised by the other members via a power of attorney.

10.4. Subcontracting

²³ See http://www.wto.org/english/tratop_E/gproc_e/gp_gpa_e.htm

Subcontracting is permitted in the tender but the contractor will retain full liability towards the Commission for carrying out the contract.

Tenderers must indicate the proportion of the contract that they intend to subcontract.

Tenderers are required to identify all subcontractors.

During contract execution, the change of any subcontractor identified in the tender will be subject to prior written approval of the Commission.

10.5. Content of the tender

The tenders must be presented as follows:

- Part A: Identification of the tenderer (see section 10.6).
- Part B: Evidence for exclusion criteria (see section 9.2)
- Part C: Evidence for selection criteria (see section 9.3)
- Part D: Technical offer (see section 9.5)
- Part E: Financial offer (see section 9.6)

10.6. Identification of the tenderer: legal capacity and status

The tender must include a cover letter signed by an authorised representative of the tenderer presenting:

- the name of the tenderer (including all entities in case of joint offer),
- identified subcontractors if applicable, and
- the name of the single contact person in relation to this tender.

If applicable, the cover letter must indicate the proportion of the contract to be subcontracted.

In case of joint tender, the cover letter must be signed by a duly authorised representative for each tenderer, or by a single tenderer duly authorised by other tenderers (with power of attorney).

Subcontractors must provide a letter of intent stating their willingness to provide the service foreseen in the offer and in line with the present tender specification.

In order to prove their legal capacity and their status, all tenderers must provide a signed Legal Entity Form with its supporting evidence. The form is available on:

http://ec.europa.eu/budget/contracts_grants/info_contracts/legal_entities/legal_entities_en.cfm

The tenderer (or the single point of contact in case of joint tender) must provide a Financial Identification Form and supporting documents. Only one form per offer should be submitted

(no form is needed for subcontractors and other joint tenderers). The form is available on: http://ec.europa.eu/budget/contracts_grants/info_contracts/index_en.cfm

Tenderers must provide the following information if it has not been included with the Legal Entity Form:

- For legal persons, a legible copy of the notice of appointment of the persons authorised to represent the tenderer in dealings with third parties and in legal proceedings, or a copy of the publication of such appointment if the legislation which applies to the legal entity concerned requires such publication. Any delegation of this authorisation to another representative not indicated in the official appointment must be evidenced.
- For natural persons, where applicable, a proof of registration on a professional or trade register or any other official document showing the registration number.