1. Introduction


The underlying principles for the development of this Guidance are the following:

- Primary EU law guarantees that everyone who has suffered harm because of an infringement of Article 101 or 102 has the right to be compensated for that harm.
- It is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of this right to compensation guaranteed by EU law; and
- By EU law, these rules must not:
  - render excessively difficult or practically impossible the exercise of rights conferred on individuals (principle of effectiveness); and
  - be less favourable than those governing damages actions for breaches of similar rights conferred by domestic law (principle of equivalence).
The Draft Guidance Paper thus seeks to

*offer assistance to courts and parties involved in actions for damages by making more widely available information relevant for quantifying the harm caused by infringements of antitrust rules.*

To do so, it describes the conceptual framework to analyse the harm caused by the infringement of these rules to the different categories of potential claimants and presents the main methods and techniques available to quantify them.

Compass Lexecon’s European Competition Policy group welcomes the Commission’s initiative and the opportunity to comment on its proposals. We believe that this is a timely paper and that it will be of practical use to the courts, and we are in broad agreement with its approach.

We have two main overarching comments.

First, as we discuss below, our main concern with the current Draft is that it does not provide practical guidance on how to weigh damage estimates which are arrived at using different methodologies. In particular, the Draft may leave the reader with the impression that (i) simple methods to measure damages comply with the principle of effectiveness and that (ii) more sophisticated methods do not. In our experience, the context of the case and data availability should determine which method is more appropriate. In practice, it is perfectly feasible to apply “sophisticated” methods when the context of the case requires so. In fact, “sophisticated” methods, when correctly applied, are more likely to estimate damages precisely than simpler methods.

We would therefore propose that the Draft makes clear that, under the assumption that these are properly applied, some methodologies are more capable of providing precise estimates than others. In this regard, the Draft could propose a “hierarchy of evidence” for instance along such lines as:

(i) internal documents may in some cases offer a first insight about the possible extent of damages in a particular case. Generally, however, they are not developed according to methodological principles suitable for the purpose of damage estimation;

(ii) simple before-and-after or yardstick methods on the basis of observed price data may provide a more adequate measure of the overcharge in a specific case, yet would fail to account for other factors likely to affect prices; and

(iv) more sophisticated before-and-after or yardstick methods, typically implemented using econometrics, are capable of isolating the effect of the infringement from factors other than the infringement and thus are capable of providing a more precise measure of the effect of the infringement.

Second, while the document is a very useful review of the methods available for the quantification of damages, we believe that courts would benefit from being offered more

---

4 Draft Guidance Paper, paragraph 2
practical and actionable guidance in the form of checklists or scorecards that they could refer to when having to assess damage estimations.

In devising these checklists or scorecards, we believe that the Commission should strike the right balance between providing practical, actionable, guidance and maintaining the necessary level of flexibility.

This note is structured as follows. Section 2 presents our overall assessment of the paper. Section 3 discusses some areas in which we think there is room for further improvement and offer some suggestions on extensions to the current draft. Section 4 contains some detailed comments.

2. Overall assessment

In our experience as practitioners, actions for damages following breaches of competition law are becoming more common, and the methods described in the Draft Guidance Paper are regularly employed in court proceedings. In this context, a practical guidance for the parties and judges on the relevant conceptual framework and on the techniques available is extremely valuable. We thus regard DG Comp’s Draft Guidance Paper as a timely initiative meant to enhance the evidentiary value of economic analysis and the standards of admissibility of economic evidence in these proceedings.

As noted above, we welcome this document and take the opportunity to express our broad agreement with its main propositions. We also find that the document generally employs an accessible language and that it will certainly be of practical use for the parties involved and for the judges.

We are, however, concerned that a strict interpretation of the Draft Guidance Paper may discourage the use of rigorous economic and econometric analyses before the courts, in favour of internal documents, looser economic arguments and anecdotal evidence.

In particular, in our view, there are some asymmetries between the standards that the document sets for econometric (regression) analyses, and the standards (or lack thereof) that apply to other types of evidence.

The Draft Guidance Paper takes the position that direct evidence available to the parties and to the courts (for instance, internal documents of the infringing undertakings on agreed price increases) may provide useful information for assessing the quantum of damages in a given case\(^6\) and advocates the usefulness of simple techniques (individual data observations, averages, interpolation, etc.).

We agree that these types of evidence may provide useful insights in certain contexts and sometimes may be the only option available for the quantification of the damage,

---

\(^6\) Draft Guidance Paper, paragraph 26. Similar statements can be found in paragraphs 7, 8, 106 and 126.
given data restrictions. However, the Draft Guidance Paper does not establish clearly the
limitations of internal documents and the very strong but unstated assumptions under
which the use of the “simple” methods described in the paper would correctly identify the
impact of the infringement on the outcome of interest.

For example, internal documents may help establish that an infringement of competition
law has taken place. It is seldom the case, however, that they also help determine the
counterfactual price that would have been observed in the absence of the infringement,
for which real market data is, in our experience, necessary. Similarly, very strict
restrictions have to be satisfied for simple comparisons over time, across countries
and/or products to produce credible estimates of the damage. These limitations are
indicated in paragraphs 32, 35, and 44, but the Draft Guidance Paper seems to suggest
that whether those conditions hold or not depends on the applicable legal framework:

The comparator based methods rely on the premise that the comparator
scenario can be considered representative of the likely non-infringement
scenario and that the difference between the infringement data and the data
chosen as a comparator is due to the infringement. Whether the level of
similarity between infringement and comparator markets or time periods is
considered sufficient in order to perform a comparison depends on national
legal systems. Where significant differences exist, between the time periods
or markets considered, various techniques are available to account for such
differences.7

We understand the limitations imposed by the various national legal frameworks on the
applicability of the different methods. But, in our view, the Guidance should also make an
effort to explain that in most circumstances the simple comparisons that suffice under
certain legal systems may lead to inaccurate estimates and therefore taint the purpose of
compensatory damages claims.

The Guidance Paper could helpfully indicate that, when performing comparisons across
markets, cost differences or differences in the level or nature of customer demand may
lead to differences in competitive prices. Therefore, they should be taken into
consideration when coming to a view on the pertinence of any given ‘but for’ comparator.
Econometrics provides a method for controlling for such factors, but when simpler
methods are used, it will often be appropriate for a decision maker to apply proper
judgement to adjust the raw results of simple calculations in light of the evidence on cost
or demand differences.

Along the same lines, the Draft Guidance Paper discusses several requirements for
applying regression analysis (see paragraphs 74-79), but omits that most of those
requirements are also applicable to other methods.

7 Draft Guidance Paper, paragraph 32. See also 81 and 106.
For example, the Draft emphasizes that carrying out a regression analysis requires having a good understanding of the industry and formulating the right hypotheses (paragraph 74) and that it is “good practice to consider the assumptions underlying a regression equation, because some assumptions may be more appropriate than others in a given situation and may lead to significantly different results” (paragraph 77).

These considerations are equally applicable to the interpretation and the validity of “simple” comparisons for damage estimation and we suggest that this is made explicit in the next version of the Paper.

We are concerned that this – we believe unintended – apparent bias towards simple but imprecise methods, to the detriment of more sophisticated but more precise methods, could result in less accurate estimates being presented to courts.

Also, we are concerned that the Draft may not help courts to distinguish between different estimates, when these are based on different methodologies and thus are not directly comparable.

We would therefore propose that the Draft makes clear that – assuming that the methodologies have been properly applied – some methodologies are capable of providing more precise estimates than others. For instance, the Draft could propose a “hierarchy of evidence” along the following lines:

(i) estimates on damages based on internal documents may offer a starting point in the assessment of damages in a particular case, acknowledging that these documents would generally not have been developed according to a method suitable to damage estimation;

(ii) simple before-and-after or yardstick methods, calculating the effects on prices of the infringement would typically provide a more precise measure of the overcharge in the specific case, yet they would fail to properly account for external factors that may affect prices; and

(iii) more sophisticated methods, such as before-and-after or yardstick methods implemented using econometric analysis, can control for the effect on price of factors independent of the infringement, and are therefore capable of providing an even more precise measure of the effect of the infringement.

3. Comments and suggestions

We believe that the document could be further improved in the following ways:

---

8 Depending on industry characteristics and the nature of the practices, cost accounting data may sometimes be useful for the assessment of the possible extent of damages but may necessitate reworking to fit with the relevant economic notions of cost.
it should provide additional guidance to the courts on how to weigh evidence based on different methodologies;

it should explain in more detail how the courts should deal with the submission of sound and rigorous empirical analyses producing seemingly contradictory results;

it should adopt a cautious approach with respect to the use of insights from the literature when assessing the overcharge;

we suggest that the Commission discusses further the harm caused by the volume effect; and, finally,

we suggest that the section of the harm from exclusionary practices is developed further to account for the specific features of those infringements.

We discuss these concerns and suggestions in the remainder of this section.

A proposal on the choice of methods

In our view, the Draft Guidance Paper would also benefit with some additional insights on how to weigh evidence based on the different methods (paragraphs 104-107).

The Draft Guidance Paper claims that in principle, each method can provide useful insights in relation to all infringements, and that “there is no method that could be singled out as the one that would in all cases be more appropriate than others”, as each has its particular strengths and weaknesses.9

We agree with this general statement, but we also believe that it is possible to provide guidance on the set of methods that are likely to lead to more accurate estimates of the damage given the particular facts of a case, the data available, the industry at stake, etc. In a litigation context, our impression is that further practical guidance would be extremely helpful for the parties and for the courts. This guidance could help identify both the methods that are most appropriate and those methods which are not, given the specifics of the case.

In particular, the most suitable methods to quantify damages depend on (i) the nature of the competition law infringement, (ii) the possible victims, (iii) the nature of the affected products and (iv) the market.

These determine the counterfactual scenarios that can be built to assess the damages, the appropriate economic framework and the methods that can be applied, their degree of accuracy, and whether they can establish a causal relationship between the damage caused and the illicit gain. Another relevant factor is data availability: the different methods are likely to differ in the data necessary to implement them, and the data available may constrain the applicability of a method in a specific case.

Our suggestion is that the Draft either provides a set of examples on how to choose the appropriate techniques in a case, or, alternatively, that it is complemented by a tool

9 Draft Guidance Paper, paragraphs 104 and 105.
which delivers a checklist or a scorecard that assists courts in identifying the most appropriate methods to quantify the damage in each case.

An example

The tool we propose would consist of two modules, an “input” and an “output” module. The input module would be built upon a set of questions which, in a very practical way, cover all the issues necessary to correctly estimate the damage caused by an infringement.

- **STEP 1**: Characterization of the competition law infringement (which we assume has already been identified), including the type of the infringement, the main market outcome directly affected by the infringement, its duration, etc. The responses to these questions help define the counterfactual scenarios that will be built to assess the damages.

- **STEP 2**: Identification of possible victims (customers, competitors, suppliers) in the case under consideration. This information is required to determine the most appropriate economic framework and to determine the allocation of damages and to take into account pass-on issues.

- **STEP 3**: Characterization of the affected products. The scope of the affected products is delimited by gaining an understanding the areas of activity of the defendant.

- **STEP 4**: Characterization of the market, including the affected products, the market structure, the features of demand and the cost structure.

The output module would identify the most appropriate methodologies in each particular case. In particular, the tool would identify all of the methods applicable to the case and each method would be accompanied by two cards, a “score card” and a “requirement card”:

- The “score card” would provide an indication on the degree of accuracy of the method; a brief description of previous cases in which the method has been used (if any); and, most importantly, an indication of the extent to which the method is able to establish a causal relationship between the damage caused and the illicit gain.

- The “requirement card” would list the data necessary and provide an estimate of the time needed to carry out the quantification.

The output should be delivered in non-specialist and non-technical language and contain all the information the court needs to decide, in view of the specificities of each case, the best approach to quantify the damages.

Figure 1 presents a summary flow diagram of the steps that this tool would comprise.
We consider an illustration of the application of the tool based on a bid rigging case involving the selling of frozen seafood to the Defense Personnel Support Center (DPSC) in Philadelphia, described in Froeb and Shor (2002). In this case, conspirators agreed on the designated winner and agreed on the price for the upcoming auctions through phone conversations, so that the remaining ring members submitted bids above the prearranged winning prices. The conspiracy was detected in late 1988.

Figure 2 provides a brief summary of the tool applied to this stylized example. In this case, the responses to steps 1-4 above are as follows:

- The economic variable directly affected by the infringement was the price of frozen perch paid by the DPSC.
- The DPSC was the direct customer of the conspirators, and did not reduce its purchases of frozen perch due to the overcharge, although it was forced to pay prices higher than in the absence of the conspiracy.
- This was an oligopoly market in which the main input is fresh perch.
This, and other considerations, would lead one to propose a regression framework based on a before and after comparison of prices controlling for demand and cost factors (and, in particular, for the evolution of the price of fresh perch) as the preferred method to estimate the overcharge. Other alternatives would include a cost-based method or the estimation of a structural econometric model. The data requirements and the advantages and limitations of each of these methods would be described in the output module.

This is only an example: practical guidance may also be provided on the basis of checklist of factors (or questions) that would allow courts to determine the appropriateness of the methodology used, its robustness and accuracy.
Figure 2: A stylized example of the application of the tool to the frozen seafood cartel

Assessing the merits of seemingly contradictory evidence

In our experience, one of the main practical difficulties that courts face is the assessment of the merits of seemingly contradictory evidence. The Draft Guidance Paper discusses this briefly in paragraph 107, where it argues that it is not appropriate to “either simply
take the average of the two results nor would it be appropriate to consider that the contradictory results cancel each other out in the sense that both methods should be disregarded”. Instead, the Draft argues, the appropriate approach is to “examine the reasons for the diverging results”.

We agree with this approach: in some cases, apparently sound, but contradictory, analyses are developed and submitted.\(^\text{10}\) However, those apparent contradictions may result from differences in the data, in the approach to economic modeling, in the empirical techniques and methodologies, or indeed be the result of unintentional mistakes.\(^\text{11}\)

When alternative studies produce contradictory conclusions, their relative merits should be carefully investigated. The right approach cannot be to discard them all as if they were equally incorrect or unscientific, because some of those analyses may contain valuable information and may help to improve the decisions of the courts. In fact, it may well be the case that all those studies prove valuable in spite of their apparent contradictions.

However, this assessment may be fraught with practical difficulties in the litigation context, as it may require a set of technical skills that may exceed the courts’ knowledge. Our suggestion is that the Draft paper:

(i) acknowledges these difficulties;

(ii) provides courts with a checklist of factors to check to identify the main source of the disagreement and to determine which estimate may be more accurate and robust; and

(iii) recognises that at times this determination may exceed the court’s technical abilities and propose different mechanisms that courts may employ when faced with such situations (i.e. court appointed experts, requests of joint statements by the experts, cross examination, etc.).

The use of previous empirical evidence

The Draft Guidance Paper presents the results of a study based on existing empirical evidence that indicate that 93% of the cartel cases considered in these studies led to an

\(^\text{10}\) This often leads to scepticism about the usefulness of economic and econometric analysis. This scepticism is often unjustified. It is based on the understandable, but incorrect, belief that the application of scientific methods to the facts of a competition policy case should always produce unambiguous and consistent results. Charles F. Manski, Identification Problems in the Social Sciences, Harvard University Press, 1995.

\(^\text{11}\) This is acknowledged in DG Competition’s draft Best Practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases, paragraph 14.
overcharge. The Draft Guidance Paper states that these results should lead the courts to the presumption that all cartels have an impact on prices.

We believe that this approach is not without problems. First, the results from many of the existing empirical studies have been challenged and they may suffer from a publication bias (as acknowledged in footnote 125 of the Draft Guidance Paper). Second, despite this publication bias, in a significant proportion of cases the cartel overcharge could not be demonstrated. Third, the wide dispersion in the effects observed in these studies indicates that the existence and magnitude of overcharge effects are highly dependent on the facts of the case.

We are concerned that paragraphs 122 and 123 may provide national court with an average figure to use as a reference by default instead of assessing the litigants’ (and their experts’) damages estimates: “The average overcharge observed in these cartels is around 20%.” Our view is that damages should be awarded on the basis of case specific evidence.

If no evidence on damages specific to the case is available, then any damages awarded are highly speculative and may skew the incentives of plaintiffs to develop sound evidence in weak cases. We thus recommend removing paragraphs 122 and 123 from the final Guidance Paper, as well as last sentence of paragraph 124, given that average overcharges are meaningless indicators when variance is so important.

However, should the Commission consider that it is useful to provide courts with a presumption of overcharge in cartel cases, we recommend that the Commission makes clear that this presumption should be easily rebutted by estimates based on the specific facts of the case.

Effects of infringements leading to a rise in prices: the volume effect

As a matter of economics, the quantification of the volume effect is perfectly justified and we welcome the fact that the Draft Guidance Paper addresses it explicitly. We note, however, that the Draft Guidance Paper’s approach to quantifying the effect from the loss in output as a result of the infringement departs from the current practice in other

---

12 Draft Guidance Paper, paragraphs 121-125.
13 See e.g. Boyer, M. and R. Kotchoni (2011), “The Econometrics of Cartel Overcharges”, CIRANO Working Paper 2011. They show that the Connor-Lande (2006) study suffers from three main types of issues that bias the assessment of average cartel overcharges: identification issues and measurement errors, selection bias and heterogeneity. This is so because their sample comprises figures that are not proven to be overcharges and are simply estimates, thus present biases (positive or negative) vis-à-vis actual overcharges. Second, overcharge estimates stem from public sources and are more likely than not to be associated with cartels featuring amongst the highest overcharges, because scholars and governments would naturally tend to scrutinize the most successful cartels in priority. Third and most importantly, the sample feature a very high variance, with extreme outliers that skew average overcharges.
14 The need for case specific analysis is widely emphasized in David Sevy, Raphael De Coninck, Gunnar Niels, Robin Noble, Theon Van Dijk and Frank Verboven, “Competition damage evaluation: a short stateof-play”, Concurrences, 2010-3.
jurisdictions: courts in the U.S. do not usually award damages on the basis of the volume effect, which involves harm from purchases that did not take place.\(^\text{15}\)

In practice, we observe two main difficulties with quantifying this type of harm: (i) finding a measure of the additional volumes that each buyer would have bought absent the overcharge; and (ii) identifying buyers who would have bought absent the overcharge.

More importantly, while it is possible to estimate the volumes that would have been sold in the aggregate absent the cartel, it may prove more difficult to determine who would have purchased those additional volumes, and – if so – at what “but for” prices.

For example, an analysis attempting to estimate purchaser-specific “but for” quantities on the basis of purchase patterns before (or after) the infringement would necessarily assume that the competitive dynamics to which these businesses are subject remained fairly stable over time, an assumption which may not be adequate and which may thus call for more sophisticated analyses.

A further complication is that the reduced sales volumes for the cartelized product may result in increased sales volumes of non-cartelized substitutes. In the example in the Draft Guidance Paper, the lost profits for supermarkets deriving from the lower sales of bread produced with the cartelized flour could be mitigated by the increased sales of bread substitutes (e.g., crackers) potentially not affected by the cartel. This effect, which may significantly reduce the harm to direct and indirect purchasers, would in a complete analysis need to be accounted for.

Finally, the Draft should provide more guidance on the estimation of unpurchased volumes for the purpose of estimating lost profit. It is clear from the figure at paragraph 109 that one would significantly over-estimate the harm from the volume effect if the “lost volume” is multiplied by the overcharge to estimate the initial lost profits (i.e., before pass-on) from the volume effect.\(^\text{16}\)

Because of all these issues, the estimates of purchaser-specific “but for quantities” require some additional detailed guidance in the final paper. Such guidance should address the potential techniques to address the quantification of claims based on purchases that did not take place, so that national courts can be fully aware of the (sometimes) speculative nature of such claims and the potential methodologies available to ameliorate the concerns.


\(^\text{16}\) In the case of linear demand, as in the figure at paragraph 109 of the Draft Guidance Paper, multiplying the lost volumes by the overcharge would double-count the harm represented by the triangle B. If demand is curved (and convex), as it is often the case, this overstatement would be even more significant.
Quantifying the harm from exclusionary practices

Causality
A fundamental element in actions for damages is the extent to which claimants can rely on the competition authorities’ decisions to establish the causal link between the antitrust infringement and its effects to then focus on the quantification of the damage.

This is particularly relevant in Article 102 cases, where competition authorities may find an infringement because the conduct is capable of causing anticompetitive effects, even if such effects are not identified. In this case, there should be no grounds to presume damage and causality should be established in the litigation context. In our view, this issue should be discussed in the final Guidance paper.

Lost profit
We agree with the Commission’s view that damages can be approached through the broad concept of lost profits, comprising the actual loss (damnum emergens), the profit lost (lucrum cessans) and interests, as described in paragraph 163 of the Draft Guidance Paper. We believe that a benefit of this approach is to avoid a mechanical calculation of these three components, which in some circumstances may lead to some inappropriate redundancies in the damage claim.17

The Draft Guidance Paper mentions pragmatic approaches to assessing lost profits, such as multiplying the number of units that have not been sold due to the infringement with an average profit margin per unit of the product traded in the non-infringement scenario (paragraph 171). It also mentions (in footnote 156) that the profit margins could have been reduced during the infringement period, as compared to the pre-infringement period, for reasons unrelated to the infringement.

Along these lines, it would be worth acknowledging that the determination of both the number of unsold units and of the relevant profit margin raise challenges. For instance, it is generally presumed that the infringement corresponds to distorted and possibly weakened competition that may result in prices and margins higher than those that would have prevailed absent the infringement. If so, unit profit margins achieved by the plaintiff in the absence of the infringement may be lower than those actually earned under the infringement, contrary to what is depicted in footnote 156. In those circumstances, observed unit margins would overestimate the “but for” margins. Similarly, the assessment of the impact of the infringement on the number of units sold often amounts to assessing the plaintiff’s market share in the counterfactual situation, and requires

17 For example, where the actual loss and the profit loss components naturally overlap, as both relate to a same and single deficit in market share that would have resulted from the same exclusionary practices. See Jugement du 30.03.2011 du Tribunal de Commerce de Paris, NC Numéricable vs. France Télécom/Orange
understanding how the plaintiff would have performed against other companies affected by the infringement.

Therefore, we believe that the Draft Guidance Paper should seek to offer a more comprehensive description of the factors that may play a role in the assessment of the damage. In this regard, we are concerned with the end of paragraph 173, which notes that in the face of the complexity inherent to damage assessment, legal systems may allow discretion to courts as to the figures and statistical method to be chosen, and the way in which they are to be used to evaluate the damage. In our view, this statement should not be interpreted as the acceptance of less rigorous methods in the calculation of damages from exclusionary infringements than from cartels, especially given the complexities discussed above, which command a careful determination of the counterfactual.

As explained above, which method to employ depends on a number of case-specific elements, such as the sector characteristics, the competitive process and the data available to perform the damage estimation. Paragraph 179 says nothing different when stating that a comparative analysis shall take into account “possible differences between the undertakings or the markets concerned.” We also think that the assumption that “costs and revenues per unit would not have significantly changed in the non-infringement scenario” (paragraph 177) cannot be expected to hold in most cases and should not form the basis of a damage estimation without further examination.

We also suggest adding some caveats to the simpler approach described in paragraph 183, whereby plaintiffs would seek damages “in relation to the costs borne in order to enter the market rather than to the whole of the profits foregone”. This is because the costs related to initial investments in plant, machinery, advertising etc. will in many cases not bear any relation with the actual harm suffered by the plaintiff. For example, the claimant may argue that it has developed to a lesser extent than what it expected. If so, compensating for the costs only would overlook the revenues earned by the plaintiff as a result of its investments and overcompensate. The Guidance Paper should discuss the circumstances in which this short-cut may be adequate, i.e., mainly when the plaintiff could not enter the market at all and when the assets it invested could not be redeployed towards other markets and activities.

Finally, as regards compensation for future loss, in our experience claims are sometimes built around (i) a detailed approach to determine the counterfactual situation in the years close to the infringement and (ii) a more general assessment of lost profits in more distant years, for instance based on company valuation techniques like industry multiples. These methods are dependent on a number of key inputs, and especially the set of comparables. As lost profits assessed in this way may represent the bulk of the claim, a critical view and recommendations on the underlying hypotheses and the details of the application of these methods would be particularly welcome.

---

4. Detailed comments

Static and dynamic effects

Paragraphs 108-116 of the Draft Guidance Paper describe two main effects of infringements leading to a rise in price: an increase in price (“the overcharge effect”) and a reduction in output (“the volume effect”). The Draft Guidance Paper does not consider, however, the dynamic effects of the infringement. In particular, cartels and other price-increasing infringements weaken competitive discipline in the market and allow inefficient firms to enter and survive.

This implies that in markets that have been subject to long-running cartels, costs will be higher and product quality will be lower than in the absence of the infringement. This is a serious effect and we recommend that the final Guidance Paper discusses the possibility of dynamic efficiency effects in the context of long-running infringements leading to an increase in prices. The Guidance Paper should also acknowledge that dynamic effects may be particularly difficult to estimate and thus recommend that national courts are careful not to accept speculative estimates of these effects.19

The initial overcharge

Paragraph 126 of the Draft Guidance Paper states that

As the initial overcharge is a transfer of money from the direct customer to the infringing undertaking(s), any information that may exist on the illicit profits made by infringers can also serve to quantify this overcharge.“

We note that while it may be true theoretically that the “initial overcharge” is a transfer of money from the direct customers to the infringing undertakings, the illicit additional profits resulting from the infringement tend to be lower than the overcharge. This is because whenever the supply curve is upward sloping (i.e. average unit cost in the market increases with output), the volume effect will bring about a loss in profit which tends to lower the illicit profits below the level of the overcharge. We thus recommend including a note indicating that the illicit profits from the infringement tend to understate the level of the overcharge.

19 Depending on the methodology used to estimate the overcharge and the volume effect, dynamic efficiency effects may be implicitly included in the quantum of damages. For instance, if the harm is estimated by reference to the difference between the price in market A and that in market B – and assuming that in market B competition has resulted in efficient cost and market structure – then the estimated harm may include the effect of the difference in dynamic efficiency between the two markets.
Pass-on

We have several comments on the discussion about pass-on (paragraphs 142-151).

First, while the Draft Guidance Paper notes that “[t]he price increase through pass-on and the reduction in sales are thus intrinsically connected” (paragraph 144), the discussion should make it clear that claims of no pass-on and of substantial volume effect are inconsistent. If a direct purchaser claims that it did not pass-on any of the overcharge, it should be unable to claim a volume effect, because - having direct purchasers absorbed the overcharge completely - indirect purchasers should not have experienced any price increase, and thus there would be no scope for a volume effect. Conversely, a direct purchaser who claims a substantial volume effect would have to accept – by implication – a substantial pass-on of the overcharge.\textsuperscript{20} Thus, we suggest that the final Guidance Paper makes this tension explicit and warns national courts against accepting purchasers’ arguments simultaneously claiming no pass-on and substantial volume effects.

Second, paragraph 144 states that “both pass-on and volume effects are determined by the same factors, in particular, the elasticity of demand from downstream customers.” We note that pass-on is determined by other factors as well. This is recognized in paragraphs 150-151 of the Draft Guidance Paper. We thus suggest that paragraph 144 is clarified.

Third, in order to provide guidance to the national courts, the final Guidance Paper should indicate that between the two methods identified in paragraphs 147, method B (i.e. direct estimation of harm to indirect purchasers) is simpler and thus preferable to method A (i.e. estimating successive levels of pass-on throughout the supply chain).\textsuperscript{21}

Fourth, paragraph 149 suggests that if the overcharge has not been applied uniformly to all purchasers, the purchasers suffering the overcharge would have been unable to pass it on. This is not correct as a matter of economics: with imperfect competition, those purchasers would be able to pass-on a certain portion of the overcharge, even if some of their competitors had not suffered the overcharge.

\textsuperscript{20} Or be able to demonstrate a very high elasticity of demand to price.

\textsuperscript{21} Indeed, the complications of method A may be insurmountable and have led the U.S. Supreme Court to rule out the practicality of such enquiry in \textit{Hannover Shoe}. 