A Legal Approach to Assessing Evidence of Pass-on

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Introduction

The subject of pass-on is one of the most pertinent and potentially difficult questions in contemporary competition law damages litigation. It is intimately linked to the question of causation of harm and the possibility, in many market situations, that persons at different levels of the supply chain may have been negatively affected by an anti-competitive infringement. The topic has been brought more sharply into focus by the (now largely completed[1]) implementation of EU Directive 2014/104, the so-called "Damages Directive", which contains provisions specifically addressing passing-on; namely:

1) Confirmation of the right of both direct and indirect purchasers to claim full compensation for harm suffered and a requirement that national procedural rules account for the possibility of claims at different levels of the supply chain due to pass-on (art.12(1)).
2) Confirmation of the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge (art.12 (3)).
3) Express recognition of the availability of the pass-on defence, with the burden on the defendant to show that all or part of the overcharge resulting from the infringement was passed on by the claimant down the supply chain through price increases (art.13).
4) A rebuttable presumption, in certain circumstances, that the overcharge has, at least in part, been passed on to an indirect purchaser (art.14(2)).
5) Recognition of the importance of coordinating parallel claims from affected parties at different levels of the supply chain to avoid multiple liability or an absence of liability of the infringer (art.15).

The Damages Directive, and its national implementing legislation, will be the main legal basis for adjudication of pass-on issues by national courts going forward, subject to precisely when the different substantive and procedural rules it contains come into force).[2]

In parallel with the implementation process, in October 2016, the European Commission published the "Study on the Passing-on of Overcharges" (the "Pass-on Study").[3] The Pass-on Study was co-authored by law firm Cuatrecasas and economics consultancy RBB Economics. It carries out a comprehensive review of current theory and practice related to pass-on in the EU, from both a legal and economics perspective, as well as drawing on experience from the US. The Pass-on Study concludes with the so-called "39 Steps"—a check-list of questions and answers for national courts to draw on when faced with pass-on issues.

Similarly to the Oxera Study,[4] precursor to the Commission's Practical Guide: Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of The Treaty on the Functioning of the European Union (the "Practical Guide on Quantification of Harm"),[5] the Pass-on Study is intended to form the basis for new guidelines for national courts on how to estimate the share of the overcharge passed on to the indirect purchaser (the "Pass-on Guidelines").[6] Indeed, the Commission is now working on a draft of the Pass-on Guidelines, and private workshops have already taken place with groups of judges and economists to assist the Commission further in that work, taking the Pass-on Study as its starting-point. The draft guidelines will be put out to public consultation in due course and then the final Pass-on Guidelines will be prepared and adopted, foreseeably during the course of 2018.

Drawing heavily on the Pass-on Study, and taking into account further important recent developments in cases such as *Sainsbury's*[7] in the UK or *TenneT*[8] in the Netherlands, this article aims to provide an overview of judicial practice in this area and, after a brief focus on the key legal question of causation, to offer a possible practical framework for national courts and practitioners in the assessment of evidence of pass-on. Before addressing these issues, it is important to understand a little more what passing-on means in the context of competition law damages litigation and why the issue may be important.

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[1] For details see: *http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html* [Accessed 18 July 2017].
[2] The temporal application of the Damages Directive is regulated in art.22 which distinguishes substantive and procedural provisions.
[3] *http://ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf* [Accessed 18 July 2017].
[4] See Oxera, *Quantifying antitrust damages: Towards non-binding guidance for courts* (Publications Office of the European Union, 2009).
[5] *http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf* [Accessed 18 July 2017].
[6] These guidelines are expressly required by art.16 of the Damages Directive.
[7] *Sainsbury's Supermarkets Ltd v MasterCard Inc* [2016] CAT 11; [2016] Comp. A.R. 33. This judgment is pending permission to appeal.
[8] District Court of Gelderland, *Tennet v ABB*, judgment of 29 March 2017 (ECLI:NL:RBGEL:2017:1724).

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Quantifying damages: three components of loss

Where it occurs, pass-on contributes to the existence of three distinct (but interdependent) elements of the recoverable harm potentially suffered by a claimant in a competition law damages claim. The "passing-on effect" occurs when the adverse impact of an overcharge on the claimant is reduced by the affected undertaking incorporating some or all of that overcharge into the prices it charges to its own customers.[9] Whilst such "downstream" pass-on reduces the actual harm suffered by a claimant, it will do so at the expense of causing harm further down the supply chain. Indeed, the pass-on effect at one level of the chain implies an overcharge of the same magnitude at the next level downstream; they are two sides of the same coin. In this way, in damages litigation, pass-on can serve as both a "sword" and a "shield": a sword where an indirect purchaser alleges that an overcharge has caused it harm because of upstream pass-on; and a shield where a defendant alleges that downstream pass-on by a claimant has reduced (or eradicated) the actual harm the latter has suffered.

At the same time, the pass-on of overcharges will normally have a further knock-on impact on the claimant: that is, its sales may decrease and it may lose profits as a consequence of selling at higher prices, since (subject to a situation of inelastic demand) demand for the affected products will decrease when prices increase. This is the so-called "volume effect". Indeed, the very prospect of this effect on sales may influence the level at which companies are prepared to pass on costs.

Consequently, the components of harm are as follows (see also Figure 1 below):

1) The "overcharge" (Area A in Figure 1). The increase in the claimant's costs that may be brought about by the infringement; in legal terms, actual harm or direct loss (*damnum emergens*). Such harm may arise directly or because of "upstream" pass-on by a direct or indirect purchaser that supplies the claimant.
2) The "pass-on effect" (Area B). The reduction in actual loss caused by the overcharge by virtue of the claimant incorporating some or all of that overcharge to its downstream prices.
3) The "volume effect" (Area C). To the extent that a claimant suffers a fall in the number of sales as a consequence of its passing on of the overcharge, it will lose the profit margins associated with those sales. The volume effect constitutes recoverable loss of profit (*lucrum cessans*) in legal terms and forms part of the overall damage calculation.

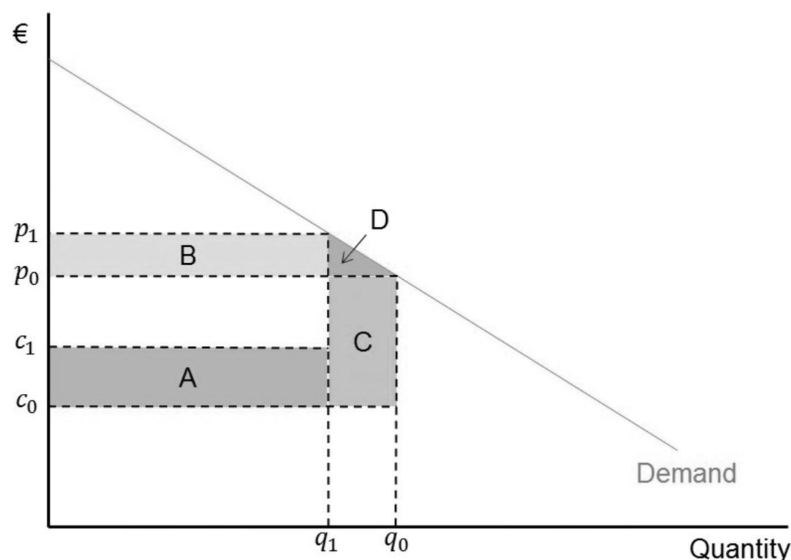

Figure 1: Impact of an overcharge with two layers of downstream purchasers

To the result of these three components of loss, interest from the moment harm was suffered should be added in order to ensure what the Directive defines as "full compensation". In the words of art.3.2:

> "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. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest."

As noted in arts 3 and, in particular, 12.1 of the Damages Directive, full compensation should not involve overcompensation to the claimant, nor allow the infringer

[9] Whether pass-on could extend to cover other knock-on effects of the overcharge (such as reduced expenditure on service levels) is unresolved. This proposition was rejected as a matter of law in *Sainsbury's* [2016] CAT 11; [2016] Comp. A.R. 33.

to escape liability. The adequate and coherent assessment of the existence and extent of pass-on between direct and indirect purchasers at different levels of the supply chain is central to achieving these goals.[10]

The situations where pass-on may arise can raise some real evidentiary challenges for courts as a quick look at some real life examples shows[11]:

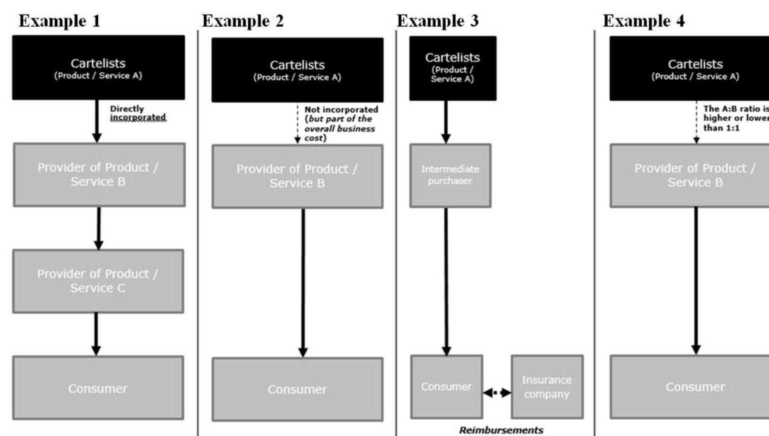

Figure 2: Evidentiary challenges—practical examples[12]

The potential difficulty of determining the effects of pass-on, and so measure the harm caused by an overcharge on the different levels of the supply chain, led the US Federal Court to reject the pass-on defence in its seminal judgment in *Hanover Shoe Inc*.[13] Nevertheless, as a matter of EU law, the basic principle that any person who has suffered harm caused by a competition law infringement may claim for that harm[14] places causation, and accordingly pass-on, at the heart of our assessment of damages claims. It must therefore be addressed.

Judicial treatment of pass-on to date

At an EU level, the Court of Justice (CJEU) has had the opportunity to consider pass-on in a series of cases relating to the reimbursement of taxes or charges unlawfully levied in breach of EU law.[15] In this case-law, the CJEU recognises that pass-on is a relevant consideration for courts in determining the level of harm suffered at different levels of the distribution chain. The principle was first evinced by the court in *Ireks-Arkady*[16] and has since been consolidated by reference to the underlying rationale that the claimant should not receive more than its real harm and thereby be "unjustly enriched".

Given that it constitutes a restriction on a right derived from the legal order of the European Union when it is used as a defence (that is, it is an exception to the EU law right to receive compensation for harm suffered as a result of a breach of EU law), this particular case-law has interpreted it in a restrictive manner.[17] So, for instance, the CJEU has established that, even if pass-on of costs may be considered normal commercial practice, no presumption of pass-on can be applied.[18] Equally, the burden cannot be placed on the claimant to prove that pass-on has not taken place.[19] Rather, the CJEU has held in these cases that pass-on is a question of fact to be determined by the national court on the basis of a free

[10] As to which see arts 12.1 and 15 of the Damages Directive.
[11] See further s. I.A.2 of the Pass-on Study. The potential situations are of course almost infinite.
[12] Example 1: e.g., a consumer of mobile telephony services where the mobile handset provided by the service provider (C) incorporates a cartelised element and the service provider has purchased the phone from a manufacturer of handsets (B) who has in turn purchased that cartelised element from a cartelist (A). Vodafone's pending claims against the members of the Smart Card Chip cartel in the High Court in London are an example of a claim by an indirect purchaser at level A, while Nokia's claims against the members of LCD cartel also before the High Court in London are an example of a level B claimant. Example 2: e.g., a consumer who purchases electricity from an energy company who purchases network components; such as occurs in the GIS cartel claims in the UK and Netherlands (discussed below). Example 3: e.g., a motor insurance company who reimburses the consumer, who has purchased car glass from intermediate purchasers (e.g. car glass repair shops) which are in turn direct (or indirect) purchasers of car glass from the cartel. This is the case of claims brought by insurer HUK Coburg and others before the Regional Court of Dusseldorf (see below re *German Car Glass* judgment). Example 4: e.g., a purchaser of a flash camera which incorporates hundreds of cartelised capacitors.
[13] *Hanover Shoe Inc v United Shoe Machinery Corp* 392 U.S. 481 (1968).
[14] See to this effect judgments of the Court of Justice of the European Union in *Courage Ltd v Crehan* (C-453/99) EU:C:2001:465; [2002] Q.B. 507; [2001] 5 C.M.L.R. 28 and judgment in *Manfredi v Lloyd Adriatico Assicurazioni SpA* (Joined Cases C-295/04 to C-298/04) EU:C:2006:461; [2007] Bus. L.R. 188; [2007] R.T.R. 7. See also art.3(1) of the Directive.
[15] See, inter alia, *Ireks-Arkady v Council of Ministers and Commission of the European Communities* (C-238/78) EU:C:1979:226; [1979] E.C.R. 2955; *Hans Just I/S v Danish Ministry for Fiscal Affairs* (68/79) EU:C:1980:57; [1980] E.C.R. 501; [1981] 2 C.M.L.R. 714; *Amministrazione delle Finanze dello Stato v San Giorgio SpA* (199/82), EU:C:1983:318; [1983] E.C.R. 3595; [1985] 2 C.M.L.R. 658; *Les Fils de Jules Bianco SA v Directeur Général des Douanes et Droits Indirects* (331/85), EU:C:1988:97; [1988] E.C.R. 1099; [1989] 3 C.M.L.R. 36; *Societe Comateb and v Directeur Général des Douanes and Droits Indirects*, (C192/95) EU:C:1997:12; [1997] S.T.C. 1006; [1997] 2 C.M.L.R. 649; *Dilexport Srl v Amministrazione delle Finanze* (C343/96) EU:C:1999:59; [2000] 3 C.M.L.R. 791; [2000] All E.R. (EC) 600; judgment in *Kapniki Michailidis AE v Idrima Kininikon Asphaliseon (IKA)* (C-441/98) EU:C:2000:479; [2000] E.C.R. I-7145; [2001] 1 C.M.L.R. 13; *Lady & Kid A/S v Skatteministeriet* (C-398/09) EU:C:2011:540; [2012] S.T.C. 854; [2012] 1 C.M.L.R. 14.
[16] See *Ireks-Arkady* (C-238/78) EU:C:1979:226; [1979] E.C.R. 2955 at [14].
[17] *Weber's Wine World Handels GmbH v Abgabenberufungskommission Wien* (C147/01) EU:C:2003:533; [2004] 1 C.M.L.R. 7; [2005] All E.R. (EC) 224 at [95]; *Lady & Kid* EU:C:2011:540; [2012] S.T.C. 854; [2012] 1 C.M.L.R. 14 at [20].
[18] *Comateb* (C192/95) EU:C:1997:12; [1997] S.T.C. 1006; [1997] 2 C.M.L.R. 649 at [25]; *Weber's Wine World* (C147/01) EU:C:2003:533; [2004] 1 C.M.L.R. 7; [2005] All E.R. (EC) 224 at [96]–[97].
[19] *Amministrazione delle Finanze* (199/82) EU:C:1983:318; [1985] 2 C.M.L.R. 658 at [14]; *Michailidis* (C-441/98) EU:C:2000:479; [2001] 1 C.M.L.R. 13 at [36]; *Weber's Wine World* (C147/01) EU:C:2003:533; [2004] 1 C.M.L.R. 7; [2005] All E.R. (EC) 224 at [111].

assessment of the evidence adduced before it following an economic analysis in which all the relevant circumstances are taken into account.[20]

The potential difficulties of this exercise, in the context of reimbursement claims against the State, were alluded to by the seminal opinion of AG Geelhoed in *Italy v Commission* in 2003:

> "73. It will first be necessary to examine whether a charge which increases prices is actually passed on in the price of a product. The fact that the price of the product is increased does not automatically mean that the price increase is directly connected with the charge imposed. In the light of the dynamic of market conditions and prices it is by no means certain as to what effect a charge will have on the level of a price. Prices of products are not static. In general producers regularly adjust their prices depending on the circumstances of the market. With the exception of the cost price, a trader will base his pricing policy inter alia on factors such as expectations concerning the development of the market and the position of a particular product on the market. A charge increasing the cost price is only one of the factors in determining the price. …
>
> 78. These considerations lead me to the conclusion that it will be virtually impossible to demonstrate the degree to which the economic burden resulting from the charge has been passed on. In order to do so it is necessary to conduct a thorough analysis of the market, taking into account a large number of variables such as the structure of the market concerned (more or fewer providers) and the availability of possible substitutes for the product affected by the charge. Account must also be taken of the fact that market conditions are dynamic in nature and that prices fluctuate according to changes in supply and demand. This makes it particularly difficult to establish what effect a charge has on the level of the retail price. In order to establish that effect it would ultimately be necessary to establish how the prices and the sales would have developed if no charge had been imposed."

In terms of national case-law, the number of judgments dealing expressly with pass-on is still relatively low. Nevertheless, the situation is fast changing as pass-on becomes an increasingly central aspect of damages claims.[21]

The majority of judgments to date have dealt with pass-on as a defence and, marginally, there have been more judgments rejecting the defence than accepting it.[22] There is also a growing trend of indirect purchaser actions. In these cases, the assertion of upstream pass-on (as a "sword"), ranges from relatively undisputed assertions (such as in the multilateral interchange fee litigation)[23] to claims where pass-on has been a hotly-contested issue (including, it seems, in the recent consumer action in France arising out of the detergent cartel fined by the French Competition Authority in 2011).[24]

With increasing exceptions, the case-law that has entered into the merits of pass-on has not done so with the assistance of economic experts, or if it has, quantitative analysis has not generally been carried out. The assessment of pass-on has been restricted rather to what one might classify as threshold questions around the likelihood of pass-on having occurred. Where experts have intervened, they have generally relied on insights from economic theory to argue for or against the existence and extent of pass-on and have sought to support their contentions with publicly available documentation such as market study reports and the particular characteristics of the market in question.

The German Federal Supreme Court expressly rejected a presumptive approach to pass-on, however, in the 2011 case of *German Carbonless Paper*[25] and held that a defendant in Germany would have to prove each of the following three elements to plead successfully the passing-on defence:

1) the increase of price by the claimant to its clients was due to the passing-on of the damage and not to any other circumstance;
2) the pass-on was economically plausible in light of the particular market dynamics in question (including elasticity of demand, price evolution and product characteristics); and
3) the claimant had not suffered any other economic disadvantage, as, for example, the reduction of its sales due to the increase of the price.

Factual evidence relating to how prices are set and costs considered is important in assessing pass-on and, to date, has been granted significant weight by courts. Such

[20] *Weber's Wine World* (C147/01) EU:C:2003:533; [2004] 1 C.M.L.R. 7; [2005] All E.R. (EC) 224 at [96] and [100]; in *Alakor Gabonatermelö és Forgalmazö* (C-191/12) EU:C:2013:315 at [30].

[21] See, for the situation as of June 2016, the survey carried out by Cuatrecasas included in Annex B of the Pass-on Study.

[22] Albeit some jurisdictions, notably France, have sought to impose the burden of proof on claimants rather than on defendants as required by the Damages Directive. See, for example, Appeals Court of Paris, Case No.10/18285, *DOUX v Ajinomoto & CEVA*, judgment of 27 February 2014 and judgment of 16 February 2011 of the Appeals Court of Paris, Case No.08/08727, *Le Gouessant v Ajinomoto & CEVA*.

[23] See, for example, *Sainsbury's* [2016] CAT 11; [2016] Comp. A.R. 33.

[24] The claim was reportedly rejected by a French commercial court in June 2017.

[25] German Federal Court of Justice, KZR 75/10, *German Carbonless Paper*, judgment of 28 June 2011.

qualitative evidence may relate to contractual arrangements, to a company's price setting policies or to price regulation.[26] One example is the Italian case *Unimare*[27] where the Cagliari Court of Appeal found that any harm suffered by the claimant as a result of allegedly excessive airport tariffs had been passed on by virtue of the contract that the claimant had with its customer required the latter to reimburse any fees paid including any increase thereof.

Some court rulings and legal practice suggest that the larger the proportion of the input cost of a product affected by an overcharge in the end product price, the higher the likelihood that a court will be prepared to find that an overcharge has been passed on, and, what in practical terms has a huge relevance in these types of case, vice versa: i.e. the less material the cost, the lower the likelihood of passing-on being found.[28] This may however simply reflect the empirical difficulty of identifying the impact that an overcharge has had on prices, difficulty which, with the right methods, may be capable of being addressed.

In *Doux*, a French case relating to the Lysine Cartel, for example, the Court of Appeal, found that pass-on of the overcharge on lysine had not, in fact, occurred between poultry producers and supermarkets. In this case, the overcharged lysine only represented one per cent of the overall cost of the chickens sold by the claimants. Agreeing with the allegations made by the claimant and its expert, the court concluded that it was unlikely that a 30 per cent increase in an input cost representing only one per cent of the total could be used as a reason by them to modify their chicken prices, noting furthermore that the supermarkets had buyer power.[29] By contrast, the Spanish Appeals Court in the *Spanish Sugar Cartel II* case[30] considered the fact that industrial sugar represented approximately 75 per cent of the input cost for certain confectionery products manufactured by the claimants to be persuasive in determining that pass-on had occurred.[31]

Increasingly, empirical analysis is being contemplated in damages litigation and this tendency is expected to continue with the more generalised availability of disclosure. Nevertheless, obtaining relevant evidence to prove pass-on, when such evidence is in the hands of the counter-party, or even third parties, raises real challenges. Even where broad disclosure is already available, as in the UK, there may be limited relevant information available from the period directly affected by the infringement (which may have occurred sometime before litigation commences). Meaningful economic analysis and, in particular, regression analysis may require a level of detail in the information which is not always available (or proportionate).[32] The Danish case of *Akzo Nobel*[33] seems to have been a case in point—due to a lack of available specific data, the judicially-appointed expert resorted to insights from economic theory and reference to market studies to reach his conclusions on pass-on.

Some national courts have shown themselves to be concerned that cartelists not be permitted to use the pass-on defence to escape liability; in particular, where the court considers that customers downstream of the claimant do not have a realistic or viable claim. An example can be seen in the approach adopted by certain Dutch courts in the litigation arising from the European Commission's 2007 Decision in relation to the Gas Insulated Switchgear (GIS) cartel. In its 29 March 2017 judgment in *TenneT*,[34] the District Court of Gelderland held that to allow the pass-on defence would unjustly enrich the defendant GIS manufacturers and, accordingly, rejected the defence. The court came to this conclusion on the basis that an admission of the defence would reduce the claimant, TenneT's, damages with only a negligible chance that indirect purchasers downstream of TenneT would be able to bring damages actions, due to evidentiary problems, questions of limitation and the fact that the ultimate purchaser, the Dutch consumers, would have small and disparate claims that would not justify the legal costs of bringing actions against ABB.[35] As TenneT is a public company owned 100 per cent by the Dutch state, the court found that it would not be unreasonable to "overcompensate" TenneT because, albeit indirectly, consumers may be able to benefit from its ruling via lower electricity tariffs.[36]

Somewhat similar considerations were employed by the Competition Appeal Tribunal (CAT) in its July 2016 judgment in *Sainsbury's* in relation to claims against MasterCard for alleged harm suffered as a result of excessively high multilateral interchange fees (see further below). There, the CAT held that, in light of legal causation considerations and the risk of undercompensation to victims of cartels (running counter to the principle of effectiveness), the pass-on defence

[26] We return to this subject in more detail below.

[27] See Cagliari Court of Appeal, *Unione Agenti Marittimi—Unimare Srl v Gestione Aeroporti Sardegna—Geasar SpA.*, judgment of 23 June 1999. Note, however, that in CJEU jurisprudence, even the requirement to include VAT in downstream invoices may not be sufficient to accredit pass-on (see *Weber's Wine World* (C147/01) EU:C:2003:533; [2004] 1 C.M.L.R. 7; [2005] All E.R. (EC) 224 at [114].

[28] This issue arises and can be a relevant issue in US competition litigation. See *In re Optical Disk Drive (ODD) Litigation*, Case No. 3:10-md-02143, Dkt. 1444 (N.D. Cal. Oct. 3, 2014).

[29] Appeals Court of Paris, Case No.10/18285, *DOUX v Ajinomoto & CEVA*, judgment of 27 February 2014.

[30] Appeals Court of Madrid, Case No. 370/2011, *Nestlé v Ebro Puleva*, judgment of 3 October 2011.

[31] This position was subsequently rejected by the Supreme Court, inter alia, on the ground that the overcharge only affected Spanish manufacturers and not their foreign competitors—see Supreme Court, Case No. 819/2013, *Nestlé v Ebro Puleva*, judgment of 7 November 2013.

[32] We return to the subject of disclosure below.

[33] Maritime and Commercial Court, Case No.U-4-07, *Cheminova A/S v Akzo Nobel Functional Chemicals BV and Akzo Nobel Base Chemicals AB*, judgment of 15 January 2015.

[34] District Court of Gelderland, *TenneT v ABB*, judgment of 29 March 2017, (ECLI:NL:RBGEL:2017:1724). The case was referred to the District Court of Gelderland for assessment of quantum following the decision of the Dutch Supreme Court that confirmed the availability of the passing-on defence under Dutch law, see *TenneT v ABB*, judgment of 8 July 2016 (ECLI:NL:PHR:2016:70). (ECLI:NL:RBGEL:2015:3713).

[35] See above at [4.19].

[36] See above at [4.20].

required the defendant additionally to prove the existence of a class of claimant downstream of Sainsbury's to whom the overcharge had been passed on:

> "There is a danger in *presuming* pass-on of costs to indirect purchasers … because of the risk that any potential claim becomes either so fragmented or else so impossible to prove that the end-result is that the defendant retains the overcharge in default of a successful claimant or group of claimants. … Given these factors, we consider that the pass-on 'defence' ought only to succeed where, on the balance of probabilities, the defendant has shown that there exists another class of claimant, downstream of the claimant(s) in the action, to whom the overcharge has been passed on. Unless the defendant (and we stress that the burden is on the defendant) demonstrates the existence of such a class, we consider that a claimant's recovery of the overcharge incurred by it should not be reduced or defeated on this ground".[37]

Causation

We come now to what is perhaps the key underlying issue in this terrain and one which has received relatively little attention to date: causation. One of the reasons for this paucity of focus is that, subject to the EU principle of effectiveness,[38] the detailed rules governing causation are a matter of national law.

In the context of pass-on, causation relates in particular to the question of whether a party can satisfy the court to the requisite standard that an increase of prices by a particular firm downstream of the cartel was caused (or not caused, as the case may be) by an overcharge being passed down the supply chain, as opposed to being caused by other circumstances. This key and obvious legal point has been directly referred to by the German and Spanish highest courts. In the *German Carbonless Paper* case,[39] for example, the Federal Court of Justice stated:

> "[I]t is a prerequisite of the 'adjustment of profits' that the price increase, which the victim can pass through to its own customers, has an adequate causality relationship with the price increase resulting from the cartel …"(our translation).

Causation in law refers both to:

- the factual link between the infringement and the damage (factual or material causation); and
- the delimitation of what constitutes recoverable loss and damage (legal causation).

Legal causation covers, for example, issues such as how far an infringer's liability extends as a matter of law, as well as what constitutes an adequate or sufficiently direct cause to generate (or reduce) liability.

The requirements in law as to proving loss and factual causation will normally entail verifying whether such evidence adequately demonstrates the reality of pass-on. Uncertainty as to whether a sufficient causal link exists may arise because of the factual complexity of concurrent causes of price variation, particularly where the interactions between various levels of the supply chain are in issue. In addition, it may, on the facts of any particular case, be found, when put to judicial scrutiny, that the loss being claimed is too remote, or that the infringement is not a sufficient or adequate cause of the harm, for the loss to be recoverable as a matter of law. We should add that the best that the law and courts can do in cases of pure economic loss (such as is normally the case in competition damages claims) is to estimate the amount of loss. Accordingly, to the extent permitted, the interpretation of economic analysis of the existence and extent of pass-on may entail a certain probabilistic approach to proof, in preference to the application of hard-edge rules.[40] In the Damages Directive, this is reflected in the requirement that courts be able to "estimate" pass-on.[41]

Economic evidence may be central in courts addressing causation issues in the context of pass-on, since, in the right circumstances, it may be able to take into account many explanatory factors and to isolate the effects of a competition infringement, as well as predicting the way in which markets, firms and consumers behave. In particular, the Commission in its Practical Guide on Quantification of Harm has noted that regression analysis "may in some instances be suggestive of a causal inference of one variable to another".[42] Even then, this statement is, as one can see, somewhat tempered, indicating that economic evidence of causation may not per se meet the standard for proving causation as a matter of law. Indeed, economic models are, by their nature, stylised representations of reality, always based partly on theoretical assumptions.[43] As such the requirement that the analysis be "consistent with a coherent economic framework and with other pieces of qualitative and

[37] [484(4)] and [484(5)].
[38] For an example of the impact of the principle of effectiveness on national rules on causation, see the judgment of the CJEU in *Kone AG v OBB-Infrastruktur AG* (C-557/12) EU:C:2014:1317; [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539, in connection with so-called "umbrella" damages.
[39] German Federal Court of Justice, KZR 75/10, *Carbonless Paper*, judgment of 28 June 2011.
[40] Lord Hoffmann's famous dictum in *Secretary of State for the Home Department v Rehman* [2001] UKHL 47; [2003] 1 A.C. 153; [2002] A.C.D. 6, is frequently cited in this context, at [55]: "some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian".
[41] Directive art.12(5). Note also, in this context, the 2013 Communication at [9].
[42] Commission Staff Working Document, Practical Guide: Quantifying Harm in Actions for Damages based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union SWD (2013) 205, para.70.
[43] See Oxera, *Quantifying antitrust damages: Towards non-binding guidance for courts* (2009), pp.37–38, 41–42.

quantitative evidence" is especially important.[44] They are also dependent on the availability of sufficient and accurate data.

The recent English case of *Sainsbury's* has specifically addressed the question of causation in the context of a pass-on defence and provides an interesting first view of this question from the perspective of English law.[45] The case relates to a claim by the UK supermarket chain, Sainsbury's, against MasterCard for damages purportedly suffered as the result of MasterCard's multilateral interchange fees (MIFs) which are alleged to be in breach of EU competition law. MasterCard argued that Sainsbury's had passed on any overcharge paid on its merchant service charges (MSCs) as a result of inflated MIFs in the form of higher prices (or costs savings or reduced expenditure). Importantly, the CAT made a number of key observations with regard to the applicable legal test, in particular as regards causation, marking a distinction between the legal approach to the question and the one adopted by economic experts.

An element of MasterCard's defence was that Sainsbury's was not entitled to damages because either it had directly passed on the cost of any overcharge in relation to the MIF to its customers through its pricing, or it had mitigated any overcharge by cutting costs or by reducing expenditure elsewhere in its business.[46] It was not seriously disputed that the passing-on of costs by rational acting entities is a recognised concept of economic theory and that Sainsbury's, as a profit-seeking business,

> "would have passed on to consumers what it could, made whatever costs-savings it could and…adjusted its spending (e.g. by cutting back on or expanding capital projects) so as to return the expected profit".[47]

Indeed, the CAT accepted that it was

> "blindingly obvious that this must be the case. If Sainsbury's did not seek to recover the inevitable costs of its business from its customers, it would rapidly lose more than it made, and become an ex-business".[48]

However, this, in the CAT's view, was insufficient to establish a causal relationship between the cost associated with the MIF and Sainsbury's' pricing; i.e. to make out the pass-on defence

> "if MasterCard, by its submissions, was seeking to assert that it was possible to link a given cost incurred by Sainsbury's to a specific price charged by Sainsbury's for a product sold by it or to specific saving, then that is a submission that we would have to reject as unarguable. It is obvious from manner in which Sainsbury's carried on its business that such a nexus does not exist.[49]

The CAT went on to draw the economics and law distinction we referred to earlier:

> "[W]hilst the notion of passing-on a cost is a very familiar one to an economist, an economist is concerned with how an enterprise recovers its costs whereas a lawyer is concerned with whether or not a specific claim is well-founded. We consider that the legal definition of a passed-on cost differs from that of an economist in two respects:
>
> (i) First, whereas an economist might well define pass-on more widely (i.e. to include cost savings and reduced expenditure), the pass-on defence is only concerned with identifiable increases in prices by a firm to its customers.
>
> (ii) Secondly, the increase in price must be causally connected with the overcharge, and demonstrably so."[50]

These considerations, together with the more policy type considerations referred to above, led the CAT to reject MasterCard's pass-on defence:

> "It follows that MasterCard's pass-on defence must fail. No identifiable increase in retail prices had been established, still less one that is causally connected with the UK MIF. Nor can MasterCard identify any purchaser or class of purchasers of Sainsbury's to whom the overcharge has been passed who would be in a position to claim damages."[51]

Notwithstanding the foregoing, the CAT found on a separate issue (interest) that the amount to be paid to Sainsbury's should be reduced on account of pass-on. Specifically, the interest[52] to be paid to the claimant should be reduced by 50 per cent.[53] On the basis of the evidence on the supermarket chain's budget process and on how it monitored costs and adjusted prices, the CAT considered that, prima facie, Sainsbury's would have sought to pass on the cost of the MIF to its customers but would not have been unconstrained in doing so—hence, the 50 per cent estimation. As explained above, that same evidence had not satisfied the CAT as regards the different test which it expressly applied to the pass-on defence.

[44] Oxera, *Quantifying antitrust damages: Towards non-binding guidance for courts* (2009), p.25, fn.69.
[45] Note that this ruling is pending leave for appeal to the Court of Appeal.
[46] *Sainsbury's* [2016] CAT 11; [2016] Comp. A.R. 33 at [436].
[47] *Sainsbury's* [2016] CAT 11; [2016] Comp. A.R. 33 at [464]. See also [433].
[48] *Sainsbury's* [2016] CAT 11; [2016] Comp. A.R. 33 at [464] to [468].
[49] *Sainsbury's* [2016] CAT 11; [2016] Comp. A.R. 33 at [469].
[50] *Sainsbury's* [2016] CAT 11; [2016] Comp. A.R. 33 at [484(4)].
[51] *Sainsbury's* [2016] CAT 11; [2016] Comp. A.R. 33 at [485].
[52] A question of fact under English law as the claimant was claiming an amount on interest actually paid as opposed to simple legal interest.
[53] *Sainsbury's* [2016] CAT 11; [2016] Comp. A.R. 33 at [525] and [546].

Causality was also a key factor in the court's thinking in the German case of *HUK Coburg*,[54] a follow-on action brought by a group of motor insurance companies against members of the Car Glass Cartel. The claimant alleged that the overcharge on replacement glass had been passed on to the repair shops upstream by their suppliers and then to the insurance companies, given that the insured had the cost covered by insurance. The claimants' expert carried out an analysis of the price developments in both the replacement and the OEM markets before, during and after the cartel period to try to establish a correlation. No multivariable regression or correlation analyses were run. Rather, the claimants sought to establish a link between the cartelised product prices and the replacement glass prices through the observation of pricing patterns on the two markets. The Regional Court of Düsseldorf dismissed the claim. While recognising that—for the case at hand—it might be assumed that the cartel inflated sales prices vis-à-vis the direct OEM purchasers, the court concluded that the claimants had failed to demonstrate sufficiently that there was any causal link between the cartel behaviour in the OEM market and the pricing of replacement glass by car manufacturers. This was particularly the case considering the substantial price mark-ups charged by the car manufacturers for replacement glass (as compared with the prices charges in the OEM market for the same glass), which the claimants had not adequately explained.

As already noted, this exercise of weighing up evidence of pass-on by national courts is carried out within a specific national legal framework of rules on causation, as well as standards of proof and national civil procedural rules (albeit subject to the EU law principles of effectiveness and equivalence). Economic and other expert evidence is assessed alongside other types of evidence in accordance with normal evidentiary practice in national courts. In this context, it is especially important that experts are properly advised by their instructing parties and lawyers as to the relevant legal framework within which they are to work, and the legal principles that apply, in order to ensure that their evidence is pertinent and can be afforded adequate weight.[55] In time, as noted by some commentators,[56] the national law on damages may be increasingly influenced by competition economics and other specific expertise brought to bear on the topic of pass-on. However, the real challenge that the interface between law and economics presents in this area will be overlooked by litigants only at their peril.

A framework for assessing evidence of pass-on

Courts regularly admit and assess evidence of both a qualitative and a quantitative nature in their analysis of the existence and extent of pass-on. Best practices relating to the submission of economic evidence as well as EU jurisprudence highlight this need for a comprehensive approach to evidence.[57] In particular, this means fitting empirical evidence by economists (and other experts) of the impact of costs on prices (or other economic variables) with factual evidence related to the case (as well, potentially, as applicable economic principles on firm behaviour).

Judges in Member States of course have significant experience handling factual and expert evidence. However, their experience of combining factual evidence with economic theory and empirical models in the potentially quite complex factual situations raised by pass-on may be more limited. This raises some real challenges for courts in their task of evaluating and quantifying pass-on in accordance with national legal rules of evidence, causation and standard of proof. It is for this reason that the Commission will be looking to provide some sensible framework and guidance for judges to refer to in the forthcoming Pass-on Guidelines. Subject to the possibilities offered by national procedures, we suggest in the Pass-on Study that courts may find it useful to divide the types of evidence that come before them into the following three categories and that this may serve as a conceptual framework:

[54] Regional Court Düsseldorf, 14d O 4/14, *German Car Glass*, judgment of 19 November 2015. Note that this ruling is pending appeal before the Higher Regional Court of Düsseldorf.

[55] See, on this issue *Sainsbury's* [2016] CAT 11; [2016] Comp. A.R. 33 at [36]–[41].

[56] See on this point Lianos, Davis and Nebbia, *Damages Claims for the Infringement of EU Competition Law* (Oxford: OUP, 2015), at p74: "Causation is certainly the area of tort law raising the most difficult and interesting questions as to the integration of the methods of economics, in view of the combination of empirical but also theoretical knowledge and assumptions, some of which are characterized by some relative uncertainty over the relevant actors' behaviour (firms, individuals) and more generally the operation of market processes, but which also rely on aggregate data and statistics to make inferences, rather than information on the effects of the specific transactions, which is often unavailable". At the same time, the authors note that competition economics may influence the way in which consideration of the evidence of causation in tort law may develop: "In view of the reliance of EU competition law on the doctrinal toolkit of general tort law, when envisaging damages for competition law infringements and the frequent use of economic evidence in competition litigation, competition law cases may exercise an important influence on the development of general tort law and the increasing consideration of scientific evidence on causation."

[57] The need to verify economic analysis against other types of evidence is recognised by DG Competition in its *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*, para.4, noting that "one must assess the congruence and consistency of the economic analysis with other pieces of quantitative and qualitative evidence (such as customer responses, or documentary evidence)".

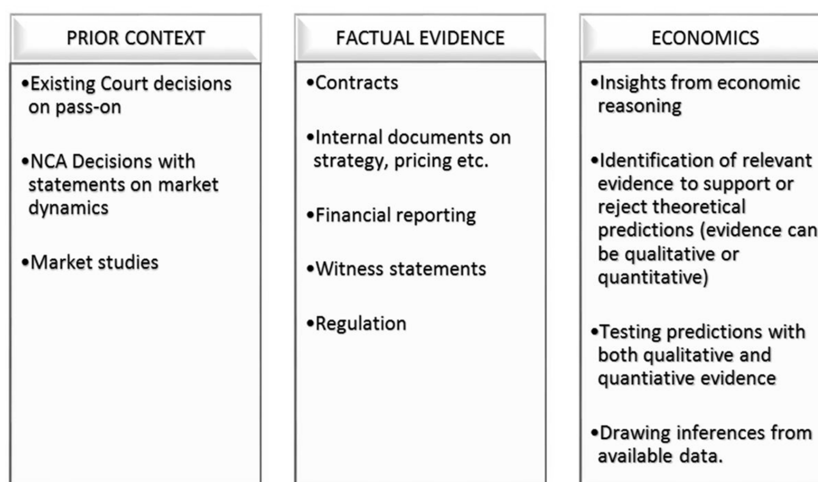

Figure 3: A conceptual framework for evidence

These categories are not necessarily collected or analysed in chronological order and the introduction of different evidentiary components to proceedings will depend on how and when evidence is to be proffered pursuant to national procedural rules. We nevertheless address each in turn below:

Prior context

Contextual materials may indicate the plausibility of pass-on in a particular case and thereby assist the court's approach to the evidentiary assessment of the issue (for example, whether the defence should be entertained and what level of disclosure is appropriate). These may include rulings of parallel civil proceedings at the same or different levels of the supply chain, decisions of national competition authorities or the European Commission, and market studies.

Application of economic reasoning will also likely form part of this threshold consideration of pass-on. In particular, economic analysis can provide a helpful framework for establishing the coherence and plausibility of claims in respect of passing-on, as well as identifying the likely sensitivities of passing-on effects to the characteristics of the relevant market environment. Issues that may be relevant include, the nature of the cost affected by an overcharge (marginal or fixed cost), the extent that competitors are affected by the overcharge (firm-specific versus industry-wide overcharges), the intensity of competition, the elasticity of demand, supply constraints, menu costs to changing prices and buyer power.[58]

Nevertheless, it is important to underline the need for economic analysis to be consistent with the factual and other evidence pertaining to an individual case. The economics must "fit" with the relevant market context, including the characteristics of the parties involved. In particular, predictions from economic theory (which will, to a greater or lesser extent, depend on specific assumptions) should be tested against evidence on how the relevant firm in fact sets prices and the extent to which it has responded to relevant changes in circumstances. For instance, while mainstream economic theory typically contemplates the pricing behaviour of firms that act rationally, and can be expected to adjust prices where this will increase profits, this may not always be the case. For example, in order to act on this incentive to adjust prices (i.e. to increase profits), a firm will need to have recognised that a relevant change in circumstances has occurred, and identified that a change in pricing would be desirable, and what a sensible price change would be. This may not be a trivial requirement when (for example, the costs changes at issue are very small, and/or changes in demand conditions are substantial) and, hence, pricing may not be as responsive in practice as simple theory alone would predict.[59] Factual evidence relating to how companies in fact set prices may therefore be important.

Factual evidence

The analysis of the pass-on defence frequently starts with the relevant business collating and analysing available factual evidence to see if there is any record or evidence of a link between the downstream pricing and the upstream overcharge that results from the infringement. Such evidence may include contracts, financial documentation (including accounting data and testimony from accounting experts) and internal documents relating to costs and pricing (e.g. pricing strategy documents, including pricing models/algorithms or methodology papers). This will be supplemented by interviews with relevant business people who can provide witness evidence concerning how prices are negotiated, set, formulated and/or modified, as well as relating to specific events which may have caused price changes over the relevant period of time. This may be complemented or tested with testimony of industry experts, in relation to the dynamics and operation of the particular market in

[58] See, more generally, s.3 and Annex D of the Pass-on Study.
[59] See para.114 of the Pass-on Study.

question. Finally, in certain industries, regulation may also have a role to play in price setting such that it is necessary to collect and adduce as evidence relevant regulations and other related, publically available documentation relating to price setting.

In *National Grid*,[60] a follow-on damages claim by English power supplier National Grid against manufacturers of GIS, the analysis of pass-on centred on economic modelling designed to reflect the regulatory environment in which National Grid operated, drawing on a number of sources of factual information about how price regulation worked in practice. In *Deutsche Bahn*,[61] follow-on litigation brought by a number of European rail companies before the CAT in connection with the Electrical Carbon Products cartel, some attention at the evidentiary stage was focused on wholesale supply contracts and intra-group pricing policies and the extent to which this evidence proved that pricing to the claimants was cost-plus based (such that any overcharge would have been passed on to them).

Factual evidence may involve in-depth fact finding and examination at trial of a sort which judges are quite used to handling.

Economics

Economists (as well potentially as other types of expert) can provide qualitative insight into, and assessment of, pass-on based inter alia on theory, market conditions and factual evidence. They can also assist in the collection of (and request for) relevant data and information to evaluate the extent of passing-on, including testing theoretical predictions. Where appropriate, this will involve carrying out quantitative or empirical analysis to quantify the pass-on and volume effects. Indeed, sound economic analysis will, where possible, be supported by a robust empirical analysis.

There are a number of different quantitative approaches that can be deployed when seeking to analyse the impact of pass-on. This can, depending on circumstances and data availability, include both correlation analysis and more sophisticated multi-variable regression analysis. As already noted, it is important that any empirical analysis be consistent with the factual evidence relating to the case at hand, such as the relevant behaviour of firms and observed market outcomes. Detailed predictions regarding pass-on in a particular situation will typically be sensitive to the specific circumstances of the case.

There are two principal ways to quantify the pass-on effect, which are described in the Pass-on Study:

- First, the "direct approach" which estimates the pass-on effect at a particular level (B) that has resulted from the impact of the initial infringement at a higher level (A) by analysing prices (or margins) of the company in question at level (B) by reference to a counterfactual absent the infringement (thus using comparator-based methods and taking into account relevant confounding factors which influence prices or margins). This method has the advantage that the key data (downstream prices) is more likely to be available to the parties to litigation (in particular, this may be of use to the claimant who is an indirect purchaser and wishes to show that the prices it paid included a passed-on overcharge). However, where the overcharge may have been passed-on through multiple stages in the supply chain or is relatively small, quantification may be difficult or at least very costly/data intensive.
- Second, the "pass-on rate approach" which focuses on estimating the effect of a change in the relevant unit cost affected by the overcharge on downstream prices. This pass-on rate can then be applied to the relevant overcharge to obtain an estimate of the increase in price. Put simply, if the pass-on rate is estimated to be 50 per cent, i.e., if half of the absolute amount of the overcharge is passed-on, then if the overcharge is €10, the purchaser subject to the overcharge increases its price downstream by €5. This approach has the advantage of observing more directly how the overcharge on affected costs impacts on prices within the same organisation. However, it will require access to information in the hands of another party (who may not in fact be party to the litigation).

The Pass-on Study also describes several methods that can be used to estimate the volume effect (namely, the direct, elasticity and counterfactual volume methods) as well as further methods (discount and simulation) which can be used to estimate the combined impact of the pass-on and volume effects, the two of which, as noted earlier, are normally linked. An increasing familiarity with such approaches by practitioners, experts and courts will be vital for this aspect of the damages calculation to addressed by judges.

Disclosure and the use of experts

As illustrated by the foregoing, there is a wide range of evidence that is potentially relevant to the assessment of pass-on, large parts of which may be in the hands of opposing parties or third parties. The challenge for judges is to ensure that the evidentiary process in relation to allegations of pass-on is managed in a way that is both, on the one hand, effective in assessing facts (and

[60] High Court of England & Wales, *National Grid Electricity Transmission Plc v ABB Ltd* [2012] EWHC 869 (Ch). See [512] and Box 39 of the Pass-on Study.
[61] CAT, *Deutsche Bahn v Morgan Crucible* (Case 1173/5/7/10). The claims were withdrawn prior to judgment, so no decision is available (on the issue of pass-on or otherwise). See [242] of the Pass-on Study.

discovering the truth) and, on the other, reasonable and proportionate. There is a balance to be achieved between obtaining accurate results and ensuring that the process is not excessive or abusive.[62] This is a particularly pertinent issue given the introduction, through art.5 of the Damages Directive, of broader disclosure regimes in all EU Member States. The disclosure process may, depending on the approach to pass-on analysis proposed by the parties, be costly and time-consuming.

As such, judicial control over disclosure, and the related expert process, is critical. Without such control, there arises the risk of vexatious disclosure requests (e.g. intended to cause delay and increase costs), on the one hand, and inadequate or insufficient disclosure, on the other,[63] as well as ineffective use of experts. As a codicil to this article, we point therefore to how courts can try to manage this process in the context of the broader disclosure rules of the Damages Directive, drawing on recommendations in the Pass-on Study.

There are a number of ways in which courts can manage disclosure and seek to ensure compliance with the guiding principles we have identified. These include:

1) **Threshold tests:**

parties provide a reasoned justification containing reasonably available facts and evidence for the disclosure request (as required by the Damages Directive).

2) **Early (written) proposals:**

judges may require parties to explain, ideally in writing: (i) which components of damage their experts propose to address; (ii) which quantification methods they propose to use and why; (iii) what the approach entails in terms of information/data requirements, including where and how that evidence is stored; (iv) what assumptions are being made by the experts in their proposed models; and (v) what is the realistic estimate of costs and time involved in the proposed disclosure.

3) **Staged disclosure:**

this involves ordering disclosure in tranches (for example, a first stage covering documents on pricing policy and costs, followed, if appropriate and justified, by a second stage covering information on prices, and so on). Once the parties have received and analysed the documents and information in a first stage of disclosure, a decision can be made as to whether any further disclosure is, in fact, necessary and, if it is, enable the parties to further narrow subsequent disclosure requests.

4) **Sampling:**

it may be reasonable to consider estimating pass-on only for a sub-set of customers or products or periods or territories. For this approach to be valid, it must be the case that these sub-sets are sufficiently representative or that it be set up as only an initial exercise. Such exercises are normally the result of agreement between the parties and their experts, under the supervision of the judge.

5) **Disclosure hearings:**

it is advisable for judges to manage the disclosure process through the scheduling of hearings, both for the initial request and to address further requests, as well as to deal with any problems with encountered during the disclosure process. Such hearings can be supplemented by meetings attended, as necessary, by the "opposing" experts aimed at resolving and narrowing any remaining differences in approach.

As can be seen from the foregoing, the involvement of experts in this process (in one way or another) can be important. However, the possibility for courts to involve experts and actively manage the disclosure process will invariably depend on the case management powers accorded to judges by national procedural rules.

In Common Law jurisdictions, judges have the ability actively to case-manage expert evidence before it is produced. This includes not only case management conferences (hearings) to discuss proposals for disclosure but also the possibility for independent discussions to take place between the parties and/or their experts in order to try to narrow down the issues relevant to pass-on by identifying areas of agreement and disagreement (as well as related disclosure requirements). English Civil Procedure Rules allow the court to direct the taking place of discussions between experts in this way[64] and such discussions are frequently used in English proceedings as a way of attempting to advance the expert process without the need to take up court time through formal hearings.

These possibilities are more remote for many Civil Law processes, where expert evidence may need to be tendered fairly early on or, in all events, with little or no prior guidance or direction from judges and certainly not with the same procedural flexibility. Some Civil Law

[62] See H. W. Friederiszick and L.H. Röller, "Quantification of harm in damages actions for antitrust infringements: Insights from German cartel cases", (2010) 6 Journal of Competition Law and Economics, 595-618, where the authors refer to this balance as the "trade-off between accuracy and practicality" and argue that such trade-offs not only need to be well understood and made transparent but that "decisions on how to proceed in light of those trade-offs have to be taken upfront by the court".
[63] Indeed, the Damages Directive reflects this need for judicial control at art.5(7), which requires Member States to ensure that parties have an opportunity to be heard before the judge orders disclosure.
[64] For example, pursuant to the English Civil Procedure Rules Pt 35.12.

jurisdictions allow the use of court-appointed experts to review parties' expert evidence, and/or make their own findings, on pass-on, and this may allow greater flexibility and control of expert evidence, at least by the appointed expert. However, given the way court systems elect experts in some Member States, such experts may lack adequate expertise in this area, and court-appointed expert processes sometimes arguably do not involve the sort of judicial control necessary to ensure compliance with the Damages Directive's goals.[65] This situation may change post implementation, in particular with the introduction of broader disclosure to Civil Law proceedings. Indeed, broader disclosure is perhaps likely to bring about the need for further hearings and stages to the civil process. In turn, this may well provide an opportunity for greater involvement of parties and experts and the use of the types of mechanisms we have identified.

The *Air Cargo* litigation in London[66] offers an interesting case study into these issues and an illustration of the sorts of challenges that can be faced by courts, particularly in complex mass litigation in this area. At a case management conference in October 2015, Justice Rose expressed the following remarks of concern about the reasonableness and proportionality of the parties' proposed disclosure on pass-on:

> "It just seems to me that … there is a huge amount of data, it is all being handed over to the economists to crunch and nobody has thought about what the trial is going to be, how I am going to get to grips with these issues, which are factual issues of how negotiations were conducted, how did people construct the price of their flowers or computers, or whatever. There must be people in the companies who did these things. Why does it all have to be looking at figures and crunching figures the whole time? …
>
> If, for example, it turns out that what one expert proposes is a deluxe exercise that costs £20 million and will be 90% accurate, whereas what the other proposes will cost £3 million and be 70% accurate, I might decide that the cheaper method is the most appropriate."

As a result of these concerns, the judge requested that the parties' experts engage in discussions to reach an agreement on the proposed approach to economic evidence of pass-on before any disclosure be ordered, failing which she would hear submissions on the respective approaches and assess for herself which method should be applied.

Conclusion

The estimation of pass-on in the EU is not a standardised process. The way in which the assessment is structured depends on the facts of the case, the available evidence, national procedural rules and standards of proof, and, crucially, national legal rules of causation. Following the implementation of the Damages Directive (and the greater availability of disclosure) we may, however, begin to see emerging trends across the Member States as issues of pass-on in competition litigation claims come before their national courts. Further, given the expected increase in indirect claims (which we are beginning to see already in multijurisdictional cases like *MIF* and *Air Cargo*), it is likely that the question of causation will receive more and more attention and, with the new disclosure rules, be pursued in greater detail. The practical guidance offered in the Pass-on Study and referenced in this article, as well as the existing judicial practice of courts, may assist judges and practitioners in effectively assessing the evidence of pass-on in competition law damages claims as the EU enters this new landscape.

[65] Indeed, in certain jurisdictions, it is common for the management of the expert evidential process to be delegated to a court-appointed expert on behalf of the judge. In the absence of clear instructions (or "terms of reference") from, and adequate monitoring by, the court, there is a risk that a judge may lose control of the process.

[66] High Court of England & Wales, *Emerald Supplies v British Airways Plc* HC-2008-000002. This case, concerning follow-on claims for damages arising from the European Commission's investigation into an alleged price-fixing cartel in the market for the supply of air freight services, is one of the largest cartel damages actions to date in the EU. The case was stayed pending the re-adoption of the Commission's decision in 2016–17 and no further steps have to date been reported on the pass-on analysis. Parallel actions have been brought in the Netherlands and Germany.