

CLIENT ALERT

European Commission Continues Promotion of Cartel Damages Claims in Pass-On Guidelines

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On July 1, the EC issued Guidelines on a key issue in EU antitrust litigation: the passing-on defense. Aimed primarily at national courts, the Guidelines are likely to have a significant impact. In setting a high bar for defendants wishing to rely on a passing-on defense, they support a claimant-friendly regime, particularly for direct purchasers.

The Guidelines were mandated by the EU Damages Directive, which required the EC to issue “clear, simple and comprehensive” guidance to national courts (a challenge with which the EC has struggled over 52 dense and technical pages).

Pass-on occurs if the victim of a cartel in turn increases its prices to its customers, thereby reducing its losses. The Guidelines emphasize “at the outset” the presumption established by the Damages Directive that cartels cause harm. As a result, in claims brought by direct purchasers from the cartel, the burden of proving pass-on lies on the defendant cartelists (the “passing-on defense”). The Guidelines give further assistance to direct purchasers by emphasizing that, even when pass-on occurs, the claimant will have lost sales as a result of the increase in its own prices (the “volume effect”). The passing-on defense is therefore unlikely to be absolute.

Elsewhere, the Guidelines note the complex and fact-specific nature of the pass-on analysis and advocate both (i) the use of economic techniques for assessing pass-on and (ii) early engagement by courts with economic experts. In terms of economic analysis, the Guidelines set a high technical bar. The approach recommended as most accurate is “difference-in-difference” analysis. This combines a before-during-after approach (comparison of prices on the cartelized market before, during, and after the cartel) with a cross-sectional approach (comparison of the cartelized market with an unaffected geographic market). In practice, applying such approaches is likely to be data intensive and difficult. And even then, pass-on effects may be hard to detect.

The importance of data is underlined and the Guidelines make reference to courts’ powers under the Damages Directive to order the disclosure of evidence where necessary. At the same time, the Guidelines remind courts of the need to adopt a proportionate approach. Courts should have regard to the size of the claim and the availability of evidence when ordering disclosure and choosing the appropriate economic method.

The Guidelines also recommend initial consideration of the plausibility of pass-on given “general insights from economic theory” and the parties’ internal documents. The existence and extent of pass-on will depend, among others, on the purchaser’s use of the cartelized products, their significance in its overall costs, and the nature of competition in the downstream markets. Pass-on will be unlikely or low where cartelized products represent a fixed cost for the purchaser, where they are a small percentage of total variable cost and downstream prices are difficult to adjust, or where claimants face competition from undertakings unaffected by the cartel.

Overall, in highlighting that the passing-on defense is not a silver bullet, setting a high standard for establishing pass-on, and reiterating that the burden of proof will typically lie on defendant cartelists, the Guidelines appear to support a claimant-friendly

approach. However, the Guidelines underline the need for claimants and defendants to engage with complex and difficult issues as well as potentially large quantities of data. Parties to such cases will therefore be well advised to seek out experienced and sophisticated counsel and economist advisors to assist them.

[The full text of the guidelines is available here.](#)

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