



# Private enforcement of EU competition law

## Economic analyses

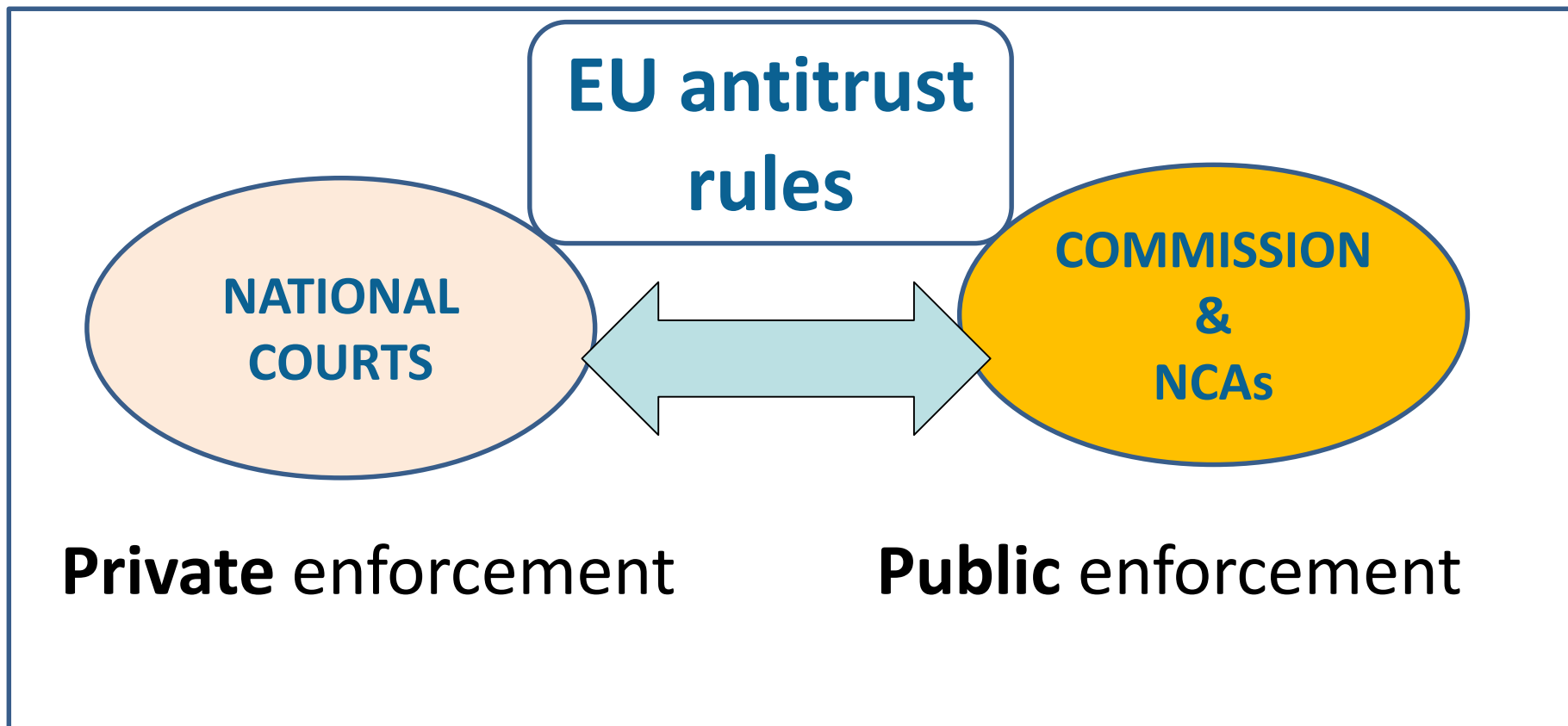
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**Hans-Petter H. Hanson**

Policy Officer  
ECN & Private Enforcement  
DG Competition

Bratislava, 11 October 2018

# Overall effective enforcement





# EU antitrust rules

- Article 101 TFEU: *The following shall be prohibited [...]: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as **their object or effect** the prevention, restriction or distortion of competition*
- Article 102 TFEU: *Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States*

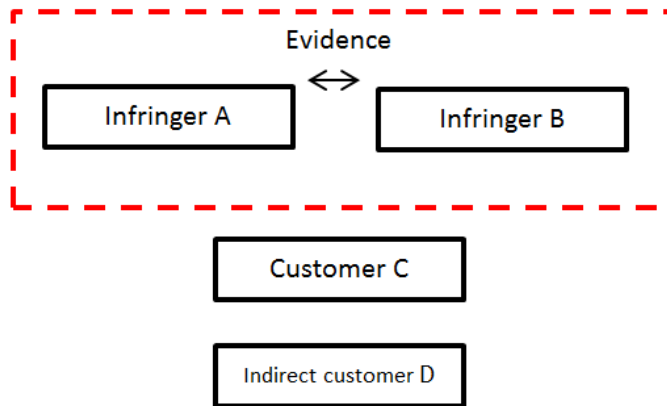


## The Damages Directive has 2 complementary goals:

- to **help victims** of antitrust infringements **get compensation**; and
- to **optimise the interplay between public and private** enforcement.

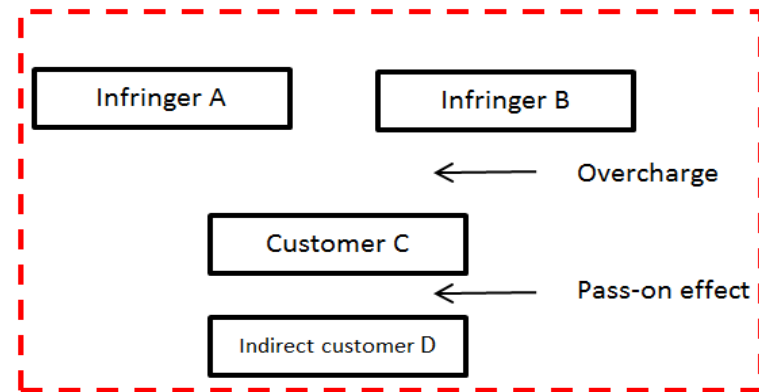
# Private vs. public enforcement

- Infringements of EU Competition law (Public enforcement)



- ✓ Potential effects

- Compensation for harm (Private enforcement)



- ✓ Actual effects

# Public enforcement – potential effects (1)

- *"The assessment under Article [101 TFEU] consists of two parts. The first step is to assess whether an **agreement between undertakings**, which is capable of affecting trade between Member States, has an **anti-competitive** object or actual or **potential effects**.*

*Commission Guidelines on the application of Article 81 (3), para 11.*

- *"Article [101(1) TFEU] does not restrict such an assessment to actual effects alone; it **must also take account of the agreement's potential effects on competition** within the common market (see, to this effect, Case 31/85 ETA v DK Investment [ECLI:EU:C:1985:494, para.] 12, and BAT and Reynolds, ECLI:EU:C:1987:490, para.] 54) [...]. Consequently, the Court of First Instance was **unable to establish the existence of an actual anti-competitive effect had no bearing** on the outcome of the case."*

*Case C-7/95 P, John Deere, ECLI:EU:C:1998:256, paras. 77 and 78.*

## Public enforcement – potential effects (2)

- " [I]n order to establish that a practice such as **margin squeeze is abusive**, that practice must have **an anti-competitive effect on the market**, although the effect does not necessarily have to be concrete, **it being sufficient to demonstrate that there is a potential anti-competitive effect** which may exclude competitors who are at least as efficient as the dominant undertaking "

Case C-295/12 P, *Telefónica and Telefónica de España v Commission*, ECLI:EU:C:2014:2062, para. 124

- " in order to establish whether [...] a practice is abusive, that practice must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete, and **it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude** competitors who are at least as efficient as the dominant undertaking "

Case C-52/09, *Konkurrensverket v TeliaSonera Sverige AB*, ECLI:EU:C:2011:83, para. 64.

## Public enforcement – potential effects (3)

- *"Restrictive effects on competition [...] are likely to occur where it can be expected, [...] that due to the agreement the parties would be able to **profitably raise prices or reduce [...] innovation**. This will depend on **several factors** such as the **nature and the content of the agreement**, the extent to which **the parties** individually or jointly have or obtain **some degree of market power**, and the extent to which **the agreement contributes to the creation, maintenance or strengthening** of that **market power**.*

*Commission Guidelines on horizontal cooperation agreements, para. 28.*



# Private enforcement – actual effects

- Legal framework, The Damages Directive Article 3:
  - *"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."*
- In economic terms:
  - Compare the market where the infringement took place with ***a market where the infringement did not take place***

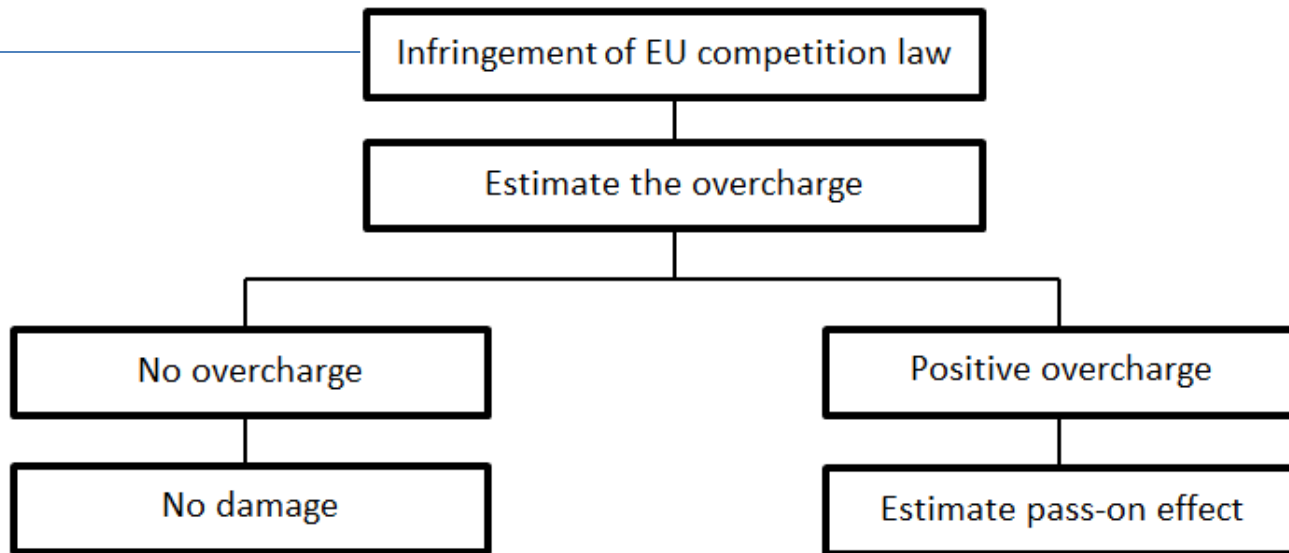


## ***THE COUNTERFACTUAL***

- The purpose of the counterfactual is to isolate the effect of the infringement from other factors affecting prices
- The counterfactual is hypothetical and cannot be directly observed
  - Different methods and techniques available

# Private enforcement – actual effects

## The sequence of damage estimation



- » *An infringement of competition law found by a final decision of a competition authority is deemed to be irrefutably established for the purposes of an action for damages (Damages Directive Article 9)*
- » *It shall be presumed that cartel infringements cause harm (Damages Directive Article 17)*

# Quantification step 1: The overcharge



Strasbourg, 11.6.2013  
SWD(2013) 205

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

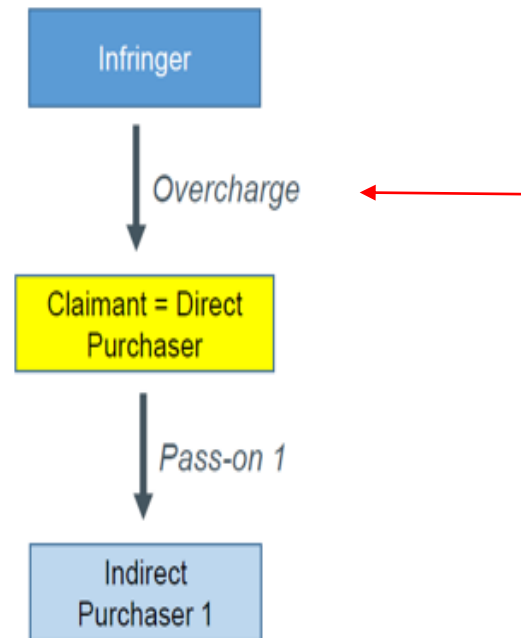
*Accompanying the*

COMMUNICATION FROM THE COMMISSION

on quantifying harm in actions for damages based on breaches of Article 101 or 102 of  
the Treaty on the Functioning of the European Union

{C(2013) 3440}

## Scenario 1



## COMPARATOR BASED APPROACH

# Quantification step 2: The pass-on effect

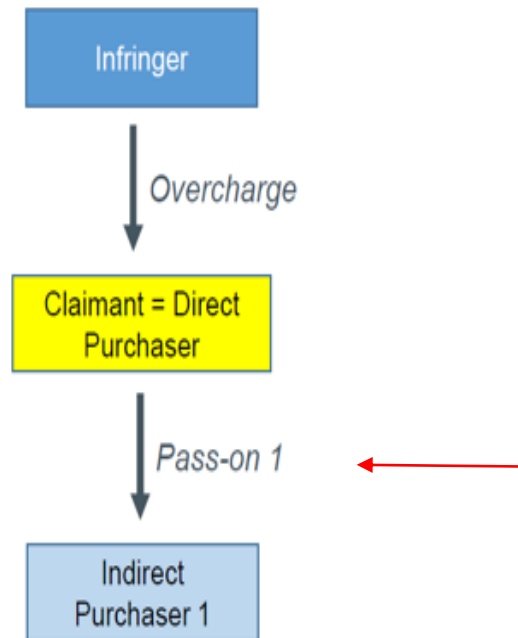


Brussels, XXXX  
[...] (2018) XXXX draft

## COMMUNICATION FROM THE COMMISSION

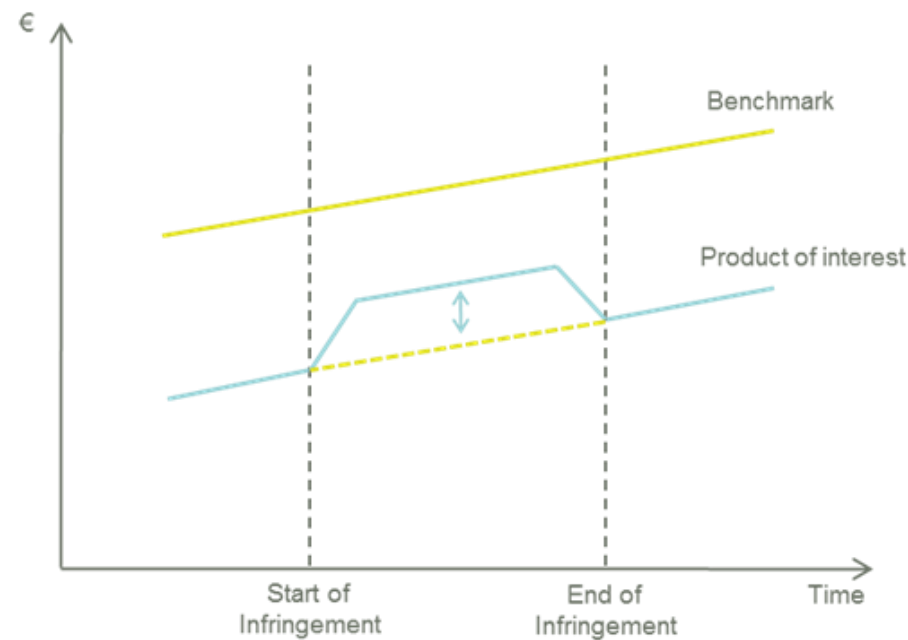
Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser

### Scenario 1



# Quantification – actual effects

## The main comparator-based method of "direct" counterfactual estimation



### Double comparison:

- across time
- across "markets" (comparators)

### Comparators (benchmarks):

- proxy for counterfactual
- have to be
  - "similar" to product of interest
  - but **unaffected** by infringement

### Difference 1: main product

- infr. vs. non-infr. Period

### Difference 2: comparator

- infr. vs. non-infr. Period

### Difference-in-differences (=impact):

- Difference 1 – Difference 2

See **Quantification Guide** for more on comparator based methods

# Quantification – actual effects

- **The court's power to estimate**
  - The Damages Directive Article 17:
    - The MS shall ensure that the courts are empowered to **estimate the amount of harm** if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis on the evidence available
  - Guidelines on passing-on of overcharges:
    - The national courts must base their assessment of harm on
      - Firstly, the information reasonably available
      - Secondly, strive for an approximation which is plausible

# Quantification step 2 – data and information needed

The collection of data/information should focus on the construction of the counterfactual

## Data collection in three steps

1. Prevailing market characteristics may provide indications of the plausibility of passing-on in the first place
  - Existing court decisions
  - Parallel civil proceedings
  - Market studies
  - Decisions from competition authorities describing the market dynamics

# Quantification step 2 – data and information needed

The collection of data/information should focus on the construction of the counterfactual

## Data collection in three steps

2. Other documents of qualitative nature
  - Internal documents on
    - Pricing
    - Strategy
    - Contracts
    - Financial reporting



# Quantification step 2 – data and information needed

The collection of data/information should focus on the construction of the counterfactual

## Data collection in three steps

3. Quantitative data
  - Actual prices
  - External factors influencing prices
    - GDP growth (demand)
    - Inflation
  - Costs of other inputs

# Quantification – actual effects

- **The use of economic experts**
  - The rules on expert evidence vary significantly between different Member States

Courts deal directly with experts appointed by the courts	Courts seek advice from court appointed experts
France	Belgium
UK	Germany
The Netherlands	Hungary
	Denmark
	Italy

# Quantification – actual effects

- The use of economic experts

## Box 3: Example of a case involving evidence provided by economic experts<sup>1</sup>

In a case pending before a UK court, economic experts representing each side (the infringer and the claimant) had proposed their own distinct method for estimating pass-on. The judge expressed concerns about the potential complexity of the expert evidence, and requested the parties' experts' to reach an agreement on the proposed approach to economic evidence on pass-on before any disclosure was ordered. If the experts failed to reach an agreement on the approach, the judge would hear submissions on the respective approaches, including an explanation of what each expert proposed, the information required and the cost of the exercise, and then decide which method should be applied.

High Court of England and Wales, *Emerald Supplies v. British Airways Plc*, HC-2008-000002

# What is the role of economic theory in damages cases?

Economic theory may...

- provide a framework for assessing evidence  
E.g. explain the incentives of a firm to adjust prices in response to an overcharge
- assist judges when deciding on disclosure requests  
E.g. question why certain pieces of information are relevant
- form a basis for discerning the credibility and reliability of different economic explanations  
E.g. may eliminate implausible explanations of passing-on effects

# Thank you!

For follow-up questions: [hans-petter.havas-hanson@ec.europa.eu](mailto:hans-petter.havas-hanson@ec.europa.eu)