



Slovenian Competition Day, Slovenian Competition Protection Agency, Ljubljana  
22 September 2016

# Quantification of harm in damages actions

Issues related to the Damages Directive and the EC's guidance work

Szabolcs LORINCZ  
Chief Economist Team  
DG Competition  
European Commission

Disclaimer: The views expressed are those of the author and cannot be regarded as stating an official position of the European Commission.  
Please do not quote or disseminate this presentation.

# Outline

Damages Directive and related EC guidance

Quantification of overcharges

Passing-on of overcharges

Some procedural issues



# Damages Directive (2014, European Parliament, European Council)

**Principle of full compensation** of harm from infringement of competition law  
Compensation for **actual loss, loss of profit**, plus **interest**

**No over- or under-compensation**

- Claim by direct customers                      possibility of pass-on defence
- Claim by indirect customers                      if direct customer passed-on overcharge

**Quantification of harm:** EU MS to ensure quantification is not effective barrier

**National Courts** must be empowered to estimate harm

How the market would have evolved had there been no infringement

**Adoption** date: 25 December 2014

**Implementation** by Member States: by 25 December 2016

## Collective actions

DD does not require MSs to implement mechanism

European Commission (2014): non-binding recommendation to introduce CA tool

Some MSs have some systems (UK, FR, BE, NL, PL, PT)



# EC's related guidance work

[Damages Directive](#) (EC, 2014)

[Practical Guide on Quantifying harm in Actions for Damages](#) (EC, 2013)

[Quantifying Antitrust Damages](#) (Oxera, 2009)

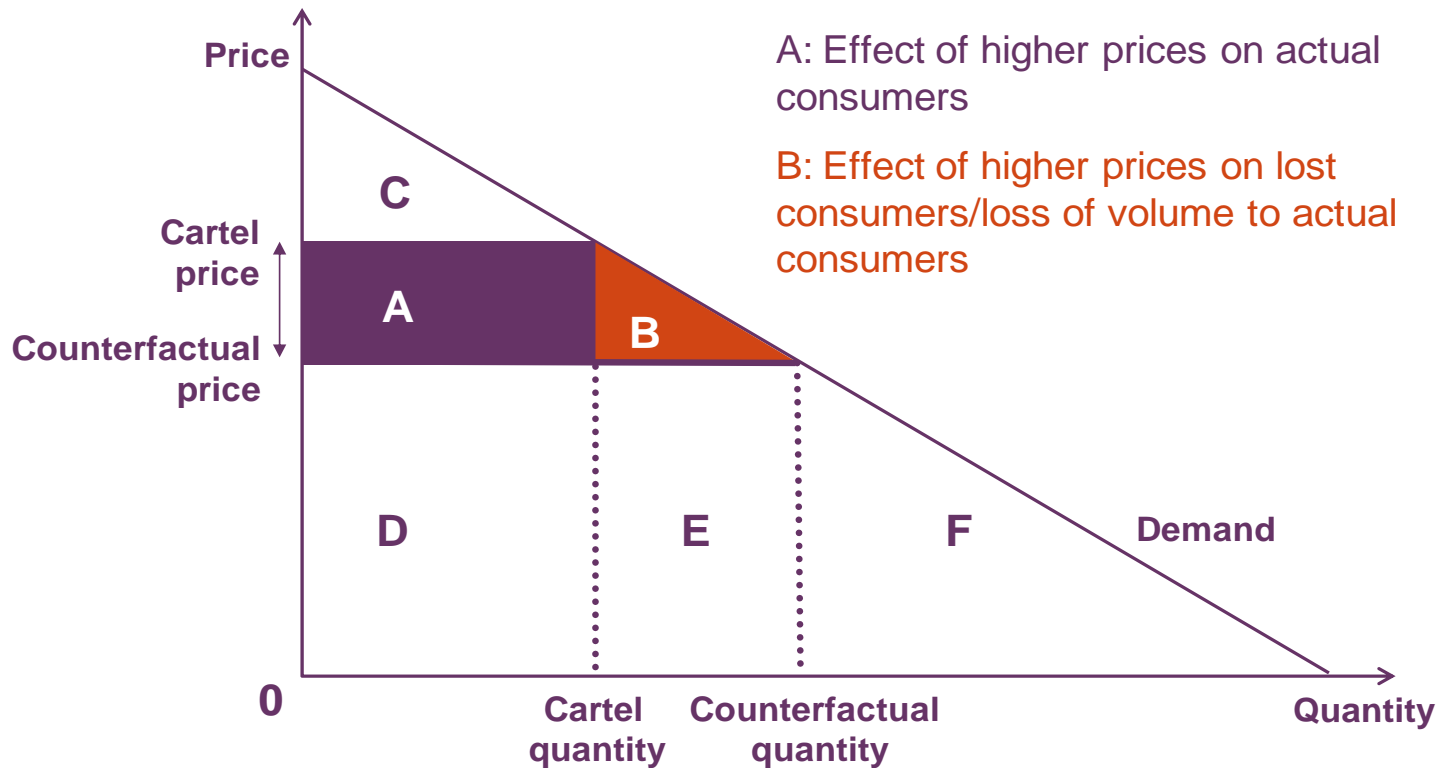
Guide on Quantifying Passing-on of Overcharges (EC, 2016-7, forthcoming)

[Study on Quantifying Passing-on](#) (RBB/Cuatrecasas , 2016)

[Best Practices on the Submission of Economic Evidence](#) (EC DG Competition, 2010)

[Best Practices on the Disclosure of Information in Data rooms](#) (EC DG Competition, 2015)

# Harm through overcharges



# Quantification of the overcharge

## The counterfactual

What would have happened had the illegal behaviour not taken place?

"Counterfactual", "but-for scenario", "alternative reality"

Hypothetical market price: would have been absent the cartel/conduct

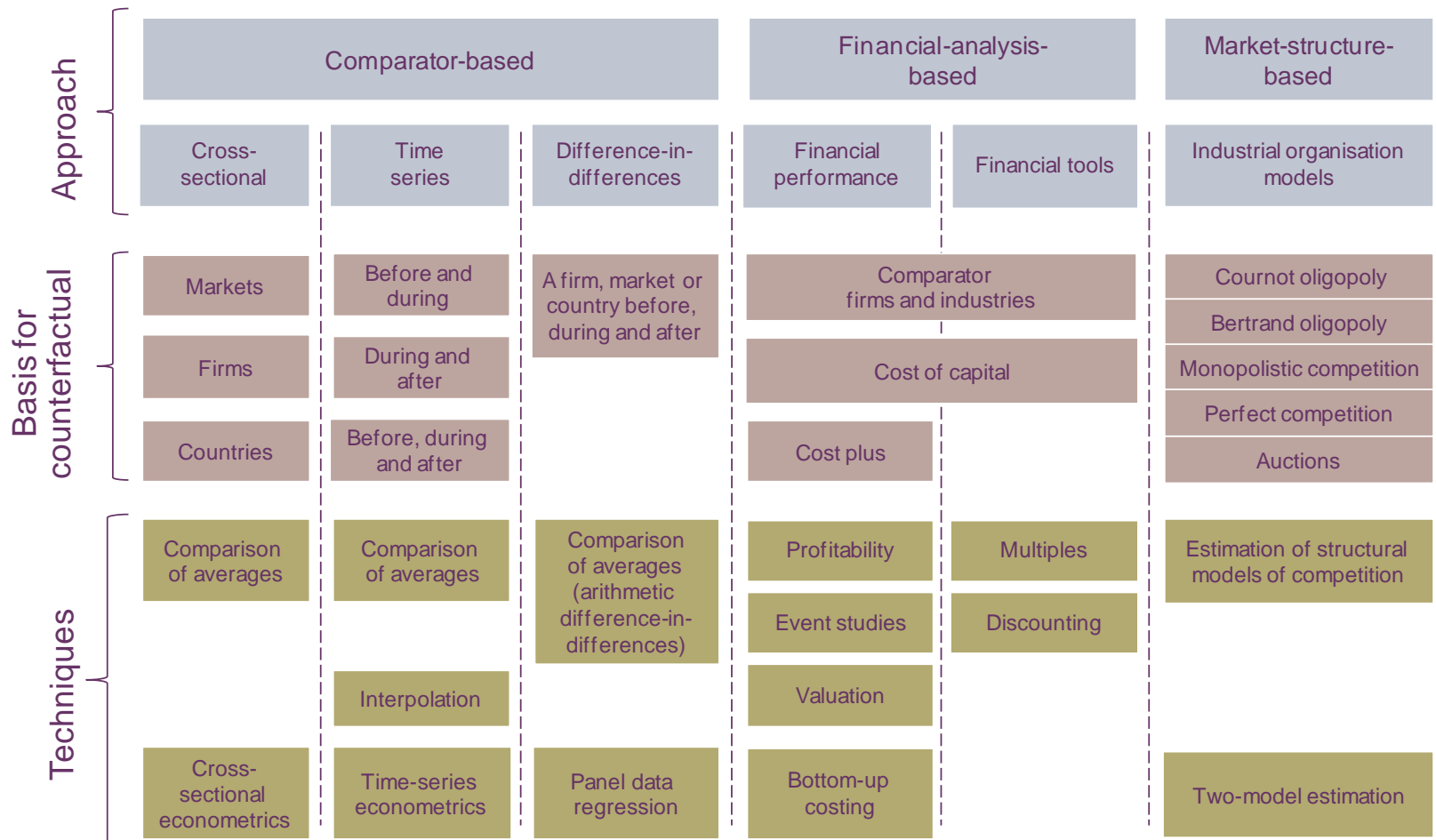
To be estimated by

- Comparator-based methods
- Cost- or finance-based methods
- Simulation methods

Controlling for

- Raw material prices, exchange rate movements
- Different cost structures
- Changes in supply and demand conditions

# Methods of quantification of damages



# Comparator-based methods

**Time series** method: same market, different periods

Before/during infringement

During/after infringement

Before/during/after infringement

**Cross-sectional:** different market, same period

“Similar” product market

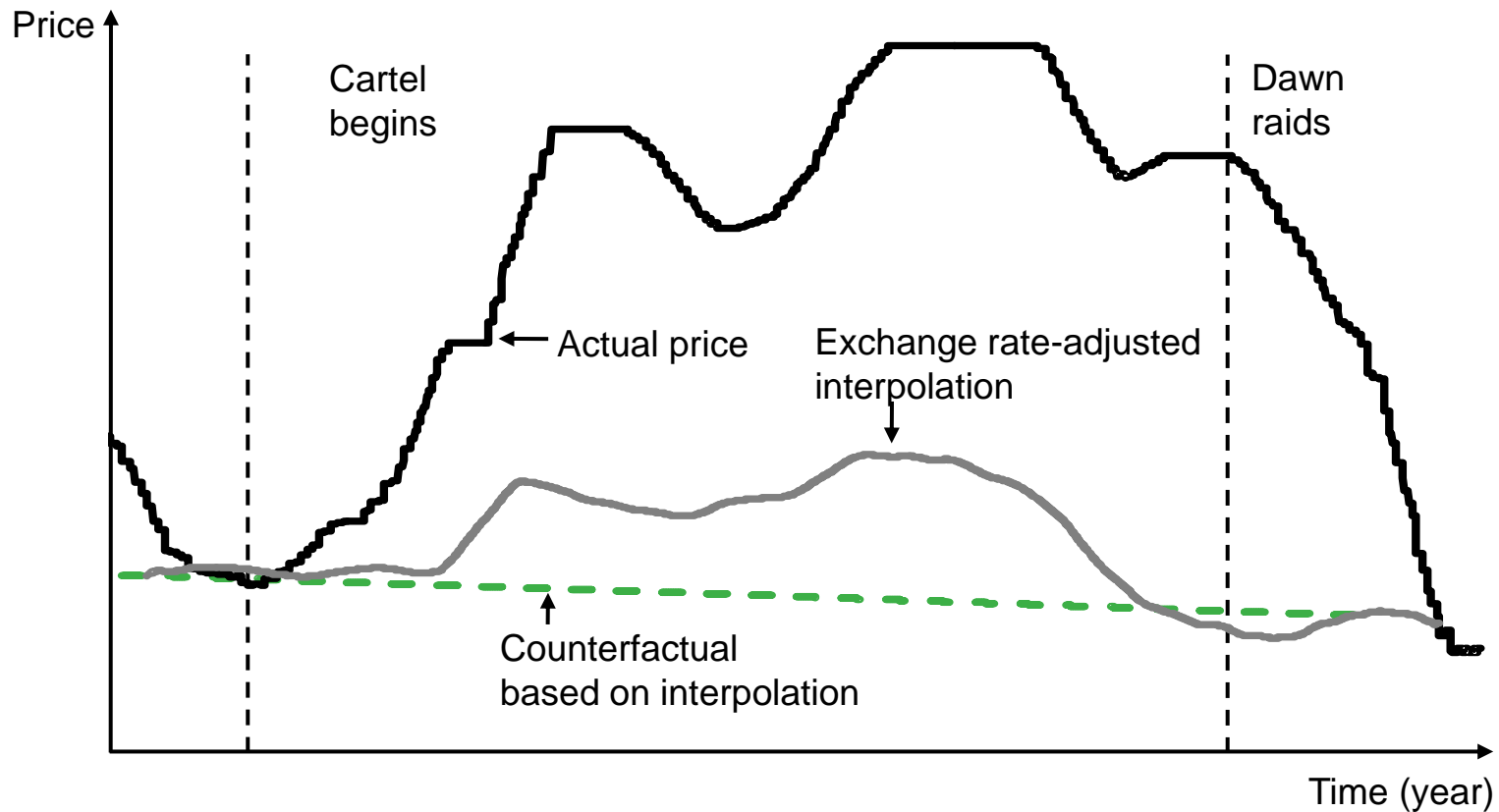
“Similar” geographic market of same product

**Difference-in-differences:** combination of TS and CS

Compares differences between infringement/non-infringement periods across different geographic (or product) markets



## Before-during-after analysis: an example



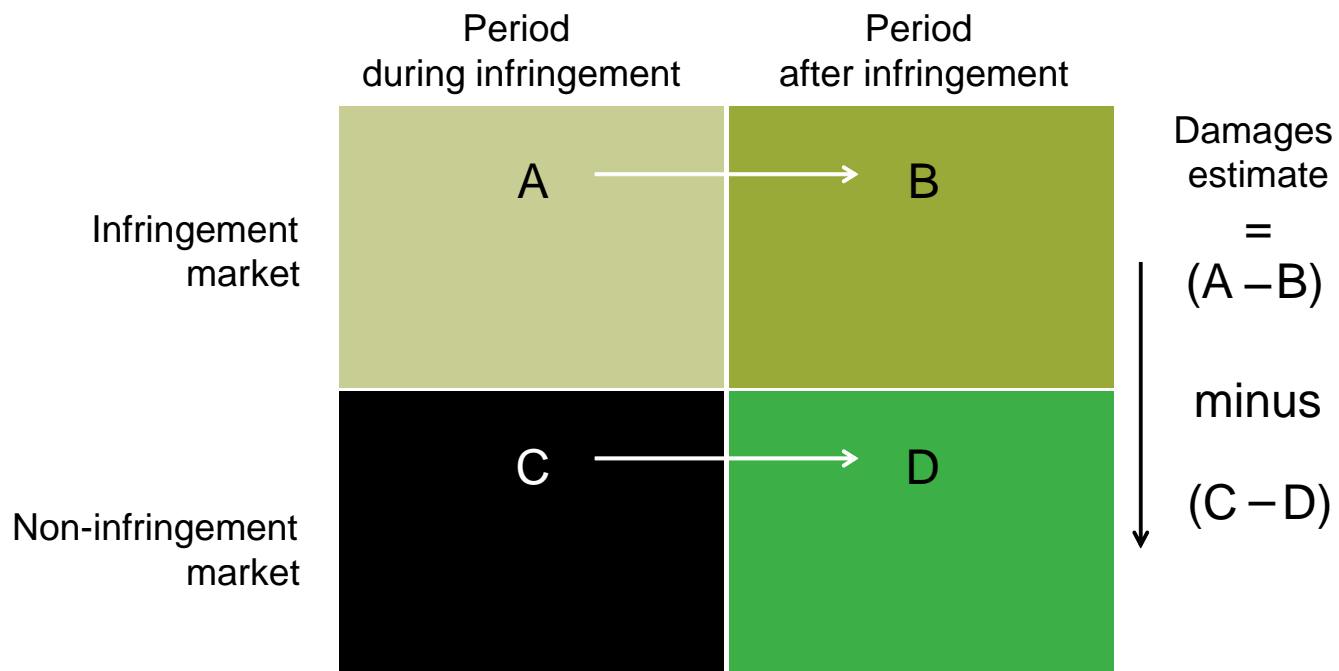
Source: Niels, G., Jenkins, H. and Kavanagh, J. (2011), *Economics for Competition Lawyers*, Oxford: Oxford University Press, March.

# Difference-in-differences

Combines time-series and cross-sectional approaches

Comparison of two markets

- Infringement vs. non-infringement *markets*
- During vs. before (and/or after) the infringement *periods*



# Other methods

## Cost-based method

Counterfactual: observed unit cost + “reasonable” mark-up

## Finance-based method

Profitability of undertaking under two scenarios

## Simulation models

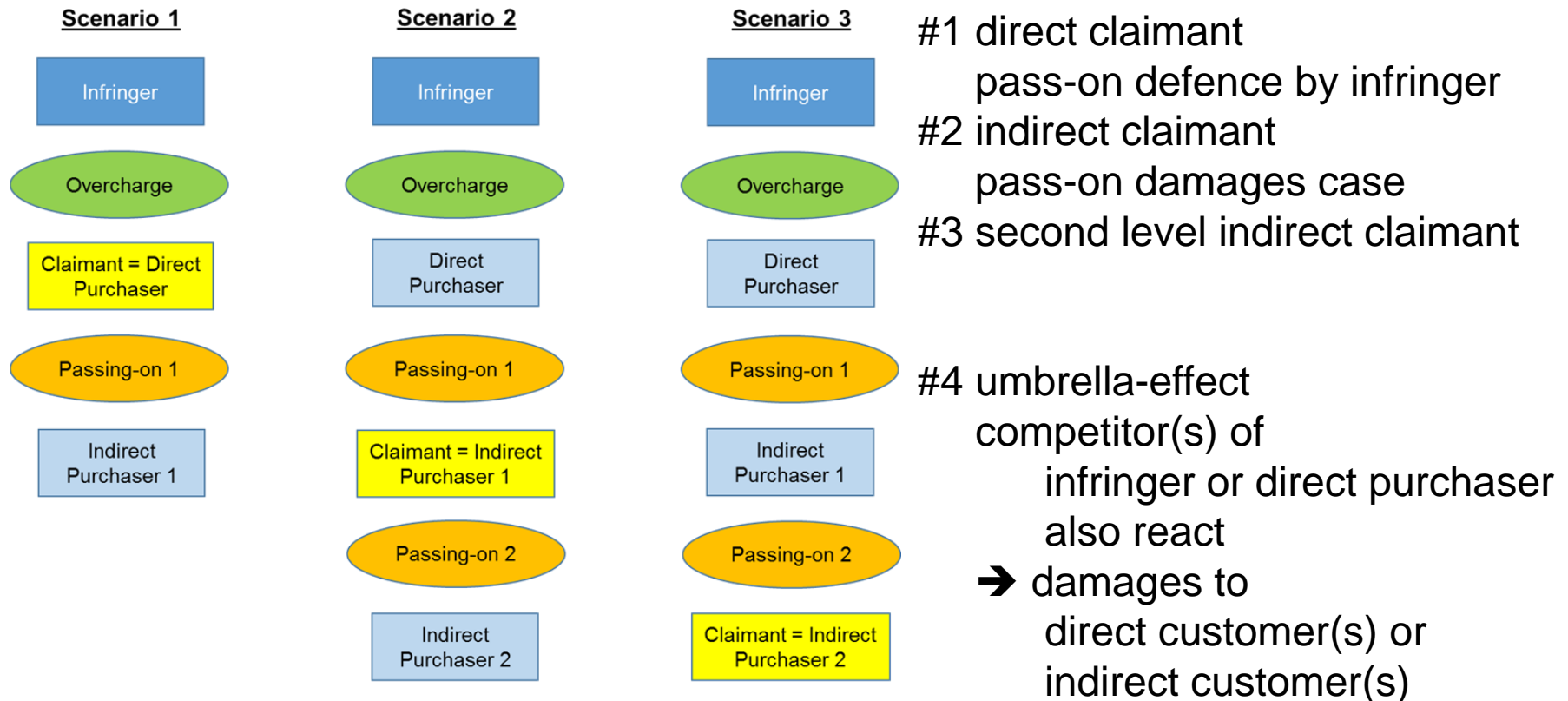
Structural economic model to simulate counterfactual

Often face the same problem as in comparator methods (counterfactual)

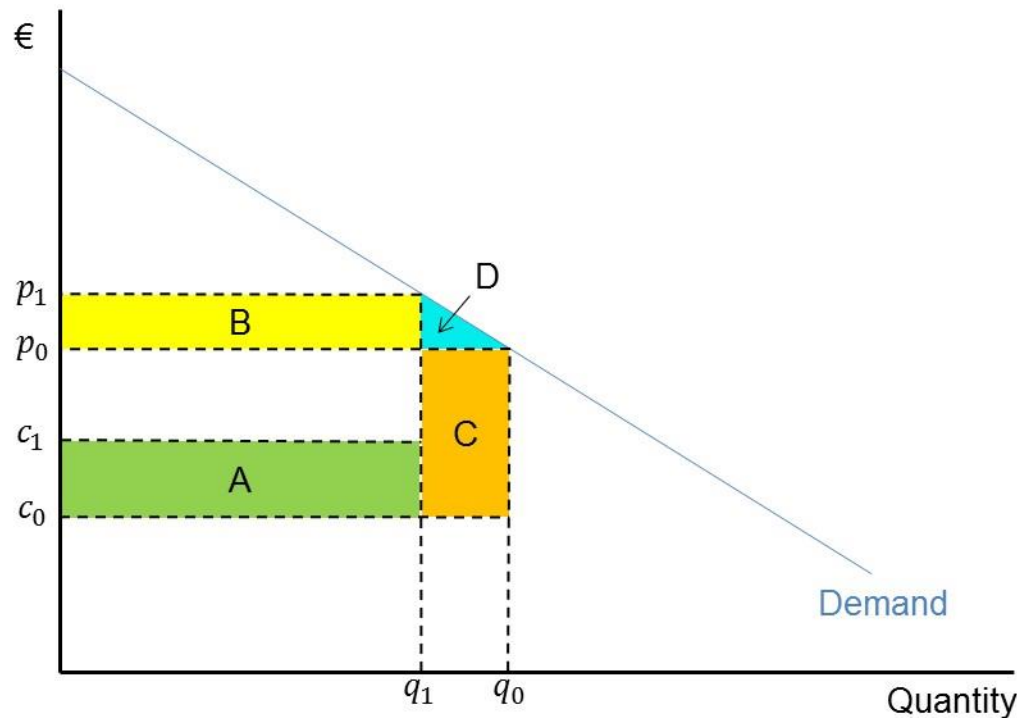
May even lead to explicitly use a comparator method

Simulation models: counterfactual simulated using an assumed form of economic competition

# Passing-on scenarios



# Overcharge, pass-on and volume effect



- A overcharge effect
- B pass-on effect
- C lost business (volume) effect
- D deadweight loss

Damage to direct customer:  $A-B+C$   
 Damage to indirect customer: B

# Basic economic insights on pass-on

	<b>Strong competition</b>	<b>Weaker competition</b>
<b>Firm-specific cost increase</b>	Weak p/o effect	Increased p/o effect
<b>Market-wide cost increase</b>	Very strong p/o effect	Weaker p/o effect than in case of strong competition

## Further issues

Relevant cost for pricing: variable/marginal cost (not fixed costs)

Buyer power: might not be automatic countervailing effect

Demand curvature: sensitivity of demand elasticity, affects extent of p/o

# Quantifying pass-on cases: Mix-and-match of all methods

## Sequential approach

1. Quantify pass-on
  - i. Direct approach: comparator method on prices
  - ii. Pass-on rate estimation  
 $\text{cost overcharge} \times \text{estimated pass-on rate} = \text{pass-on effect}$
2. Quantify lost profit
  - i. Direct approach  
Comparator method on volume and margin
  - ii. Elasticity approach

## "Holistic" approaches

1. Simulation models
2. Discount approach

# Data requirements

	Approach	Data requirements
Sequential approach	Pass-on effect: direct approach	Claimant's price, volume and on the benchmark price.
	Pass-on effect: pass-on rate approach	Input price or claimant's cost, price, volume. (Or info on pass-on rate.)
	Volume effect: direct approach	Claimant's volume, corresponding benchmark volume and.
	Volume effect: elasticity approach	Either data to estimate elasticity econometrically (price, volume, product characteristics), or elasticity estimate. Data on benchmark margin and on realised price and volume sold. Price increase can be used from the passing-on effect.
"Holistic" approaches	Simulation approach	Calibration: market shares and margins (or available elasticities). Estimation: price, volume, product characteristics.
	Discount approach	Data on pass-on rate. Various market informations.



## Some issues

Infringement–Causation–Quantification

Disclosure of information

Information from

Infringer, customer, third party, competition authority

Limitations

leniency, settlements, reasonableness, proportionality  
and confidentiality/data-room

Evaluation of expert economic evidence

Cross-examination

Hot-tubbing

Economics tutorials and independent experts

# Thank you!