

E.CA Economics

Cartel presumptions, quantification and pass-on - a claimant's view

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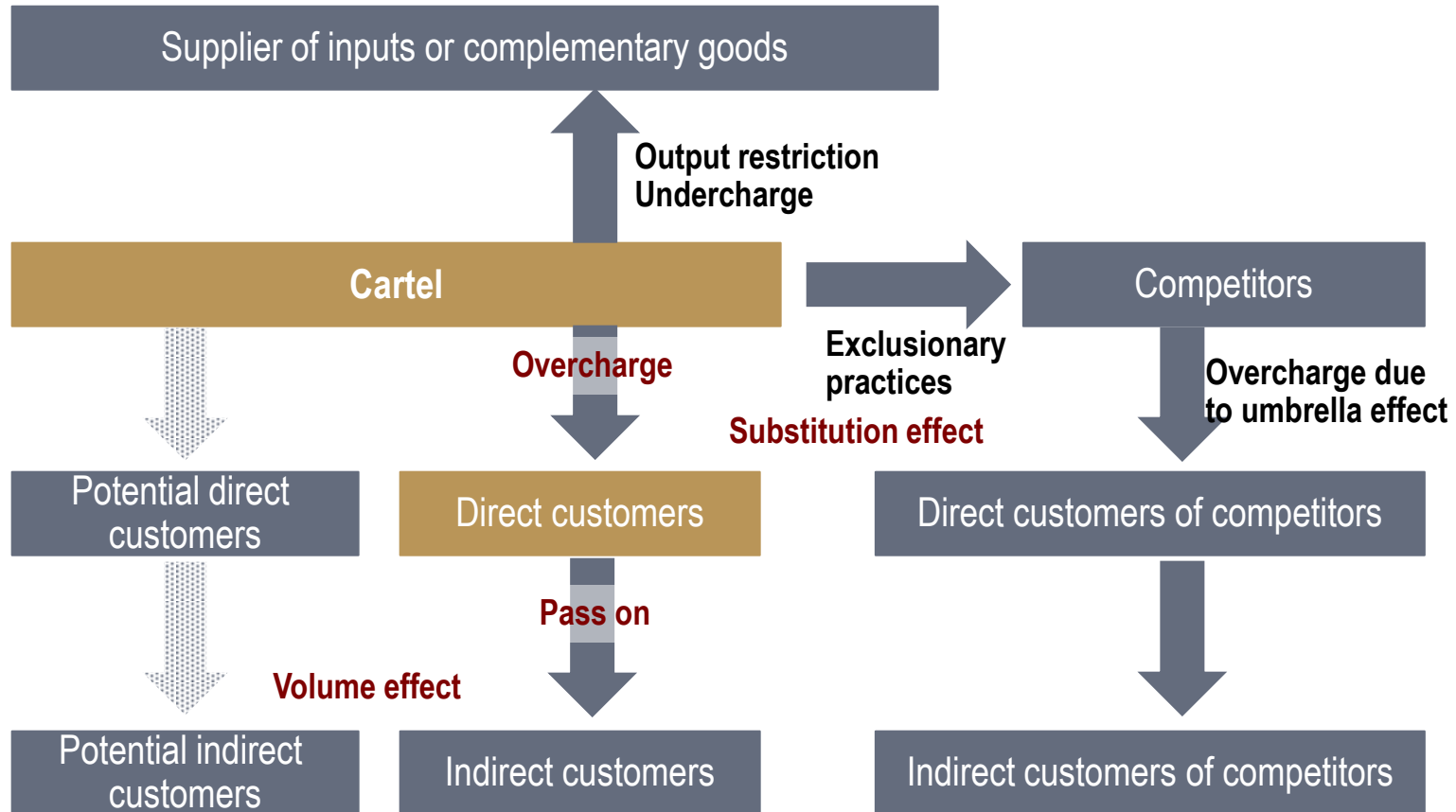
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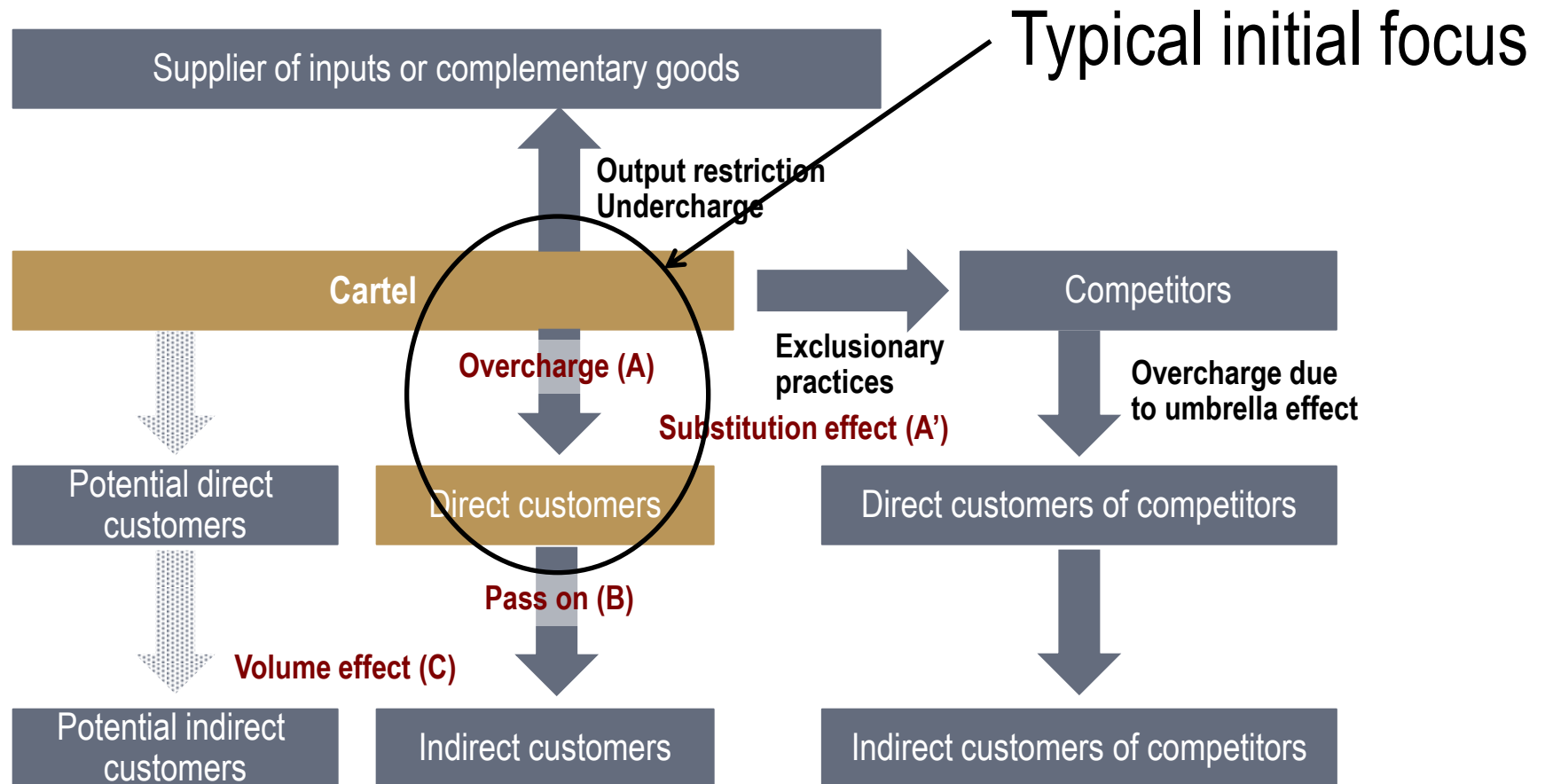
Agenda

- **Cartel effects** - just to set the scene
- **Presumptions** - can plaintiffs base their claims on rebuttable presumptions?
- **Choice of methods** – why often the time based comparison?
- **Pass-on** – is the defense often effective?

There are several potential claimants



But let us focus on the most common situation: the direct customer's view



Claimant's total economic damage = Overcharge (A) + Substitution effect (A') – Pass on (B) + Volume effect (C)

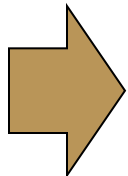
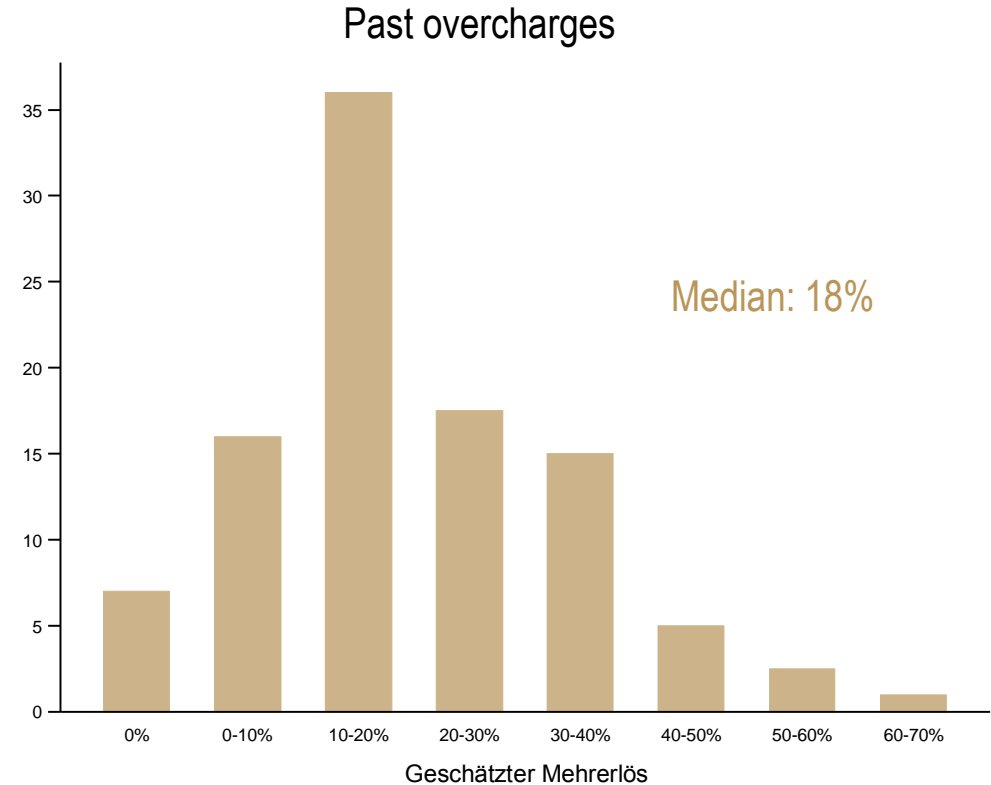
Can claimants rely on a presumed overcharge level?

There is a presumption of damages...

- If there is a decision by the authorities
- In most (all?) jurisdictions

...but should there also be a rebuttable presumption on the percentage overcharge?

- Discussed in the UK
- Dismissed



Large variance and few observations do not allow for a “rebuttable presumption”

Oxera study: Distribution of estimated overcharges for past cartels, based on 114 observations on 60 cartel cases from 1960

Can characteristics help determining a presumed overcharge level?

There are quite a few challenges for presumptions based on past cases

- **Allocation of characteristics to a specific cartel:** national/international, share of suppliers outside the cartel, elastic demand etc?
- **Combination of characteristics:** changes overcharges substantially and even the direction of the impact can change. (E.g. for national cartels in the Oxera dataset bid-rigging characteristic increases overcharges while the opposite is true for the whole dataset).
- **Lower number of observations for combinations:** When cartel characteristics are combined, the number of observations for specific combinations regularly decreases drastically
- **Essential cartel characteristics may not be covered** in the currently available meta-studies. E.g. evidence of cheating, consortia in the absence of a cartel etc.

Claims without quantitative underpinning usually have little substance

Can we form any conjectures based on market and cartel characteristics?

If there are too few observations to get to quantified rebuttable presumptions can we say nothing?

Sometimes the characteristics of the cartel mechanism are telling...

- Precision of discussions and mechanisms employed
- Share of market covered by cartel

...and there may be direct evidence on effectiveness

- Quotas met?
- Prices implemented?

Knowing characteristics is important for the implementation of empirical methods for overcharge estimation and it can be used to confirm the plausibility of estimation results

- But usually not more

A full expert opinion – what are the standards?

Standards for scientific economic expert opinions are intuitive (e.g. European Commission or FCO)

- Transparent and comprehensible
- Rationale for the choice of methods
- Robustness checks
- (Statistical) estimation is accepted

Legal framework for economic expert opinions matters for quantification (and may differ by jurisdiction)

- Infringement established? (Period? Affected contracts?)
- Access to information? (e.g. access to file)
- Burden of proof? (e.g. in case of contract clauses assuming an overcharge)
- Method to calculate interest?
- Statute of limitation/contributory negligence?
- Acceptance of pass-on defence and umbrella effect?

Typical steps in overcharge/damage estimations

1. Design and data gathering – data availability influences choice of methods

- Understanding of the economics of the industry, alleged conduct and available data/ information
- Choice of methodology (or several in parallel)
- Data/ information request (+ data from other sources)

2. Implementation – data cleaning often a lot of effort

- Data cleaning & implementation of the methodologies
- Choice of a preferred (i.e. the most robust and economically convincing) model
- Typical issues: overcharge, pass-on, run-off period / post-cartel period, volume loss, umbrella effect, interest

3. Robustness and documentation – less intensive when working with rough estimates

- Robustness checks and sensitivity analysis around the preferred model
- Careful presentation of results and reasoning

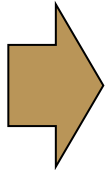
4. Negotiation – asymmetric distribution of information large part of the “game”

- When to release what type of information?
- How to interact with the other side?

Methodological choices

Compare cartel affected prices with

- **Time:** prices after the cartel (or before)
- **Region:** prices in other (non affected) regions
- **Products:** prices of similar (non affected) products



Time based comparison used most often:

- Good data availability and direct analysis of affected product
- Often, remaining differences can be well accounted for (changes in cost and demand)
- But: regional and product based comparison can be useful complements and – in some instances – also be superior
- Can be combined with time based comparison (difference in difference)

Other methods are rarely used (for good reasons):

- Add competitive margin to observed costs during cartel period
- Simulation models
- Overcharges from past cases with similar characteristics

Overcharge established but cartelists argue it was passed-on...

Be careful as this most likely implies a volume effect

- Pass-on reduces the damage on the goods sold
- But implies additional damage because of less goods sold (volume effect)

Exact determination of pass-on effects is complex

- Cost share, elasticity/curvature of demand, role of non-affected substitutes and quality differences

To date not as prominent as one could have expected

- Often low cost share – implies that effects are difficult to measure directly (but other methods exist)
- Legal standards still in the making
- Complexity of estimations

Selected take away points

Presumptions don't get us very far

- But experience continuous to be built up...
- And presumption of damage as such is valuable for claimants

Time based comparison often method of choice

- But not always!

Pass-on is tricky business

- To date critical only in a few cases

Cartel clauses in contracts matter for statistical significance

- Protect yourself...

Thank you!

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