

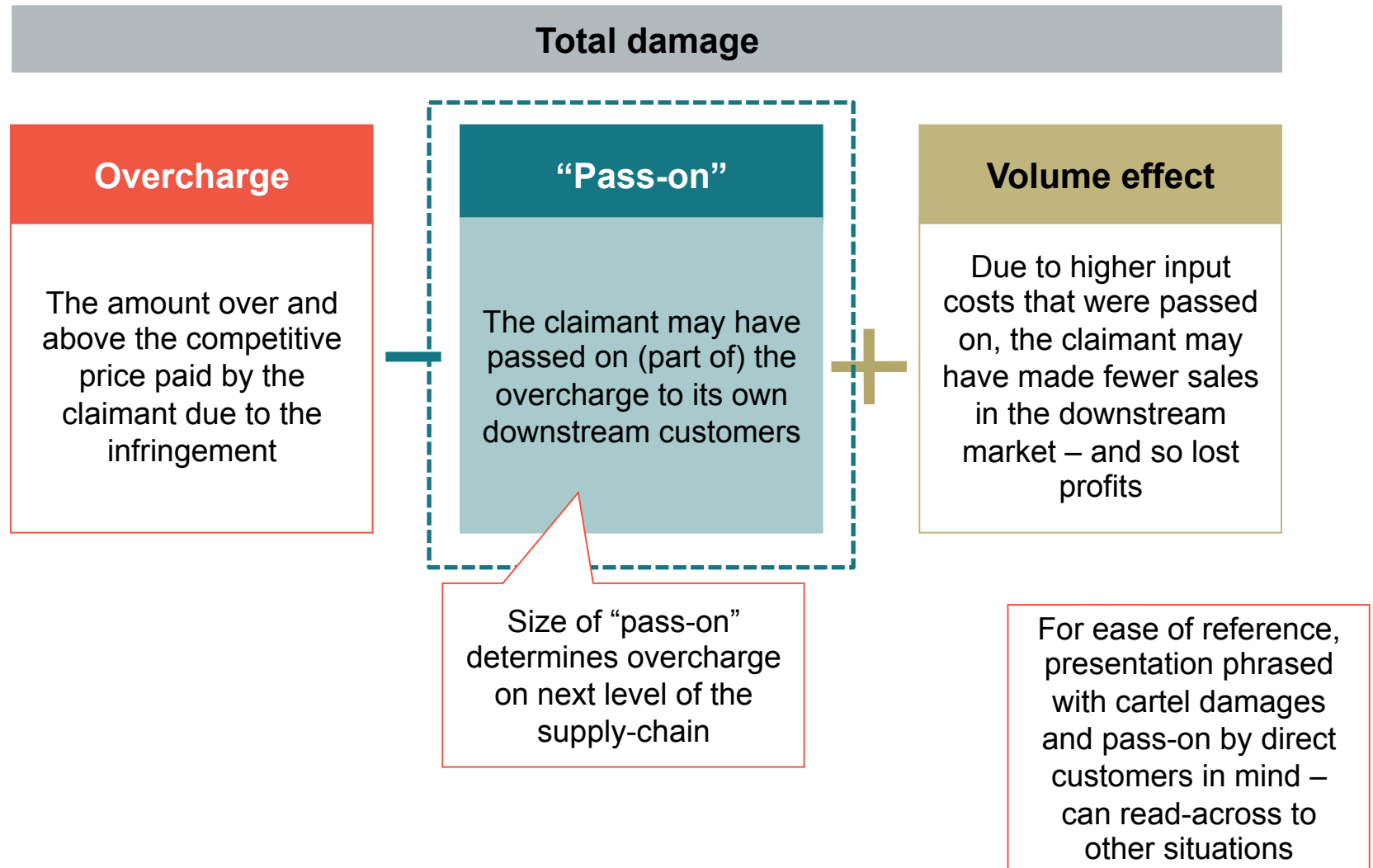


# Passing on of overcharge – an economic perspective

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# Potential total damage consists of three parts



# Predictions of the size of pass-on can be made based on features of the downstream market

Did downstream players differ in their ability to source inputs from non-cartelised sources – e.g. imports?

Did downstream players differ in the extent to which they relied on the cartelised product – e.g. different inputs?

## Key considerations:

Were the claimant's main competitors equally affected by the overcharge?

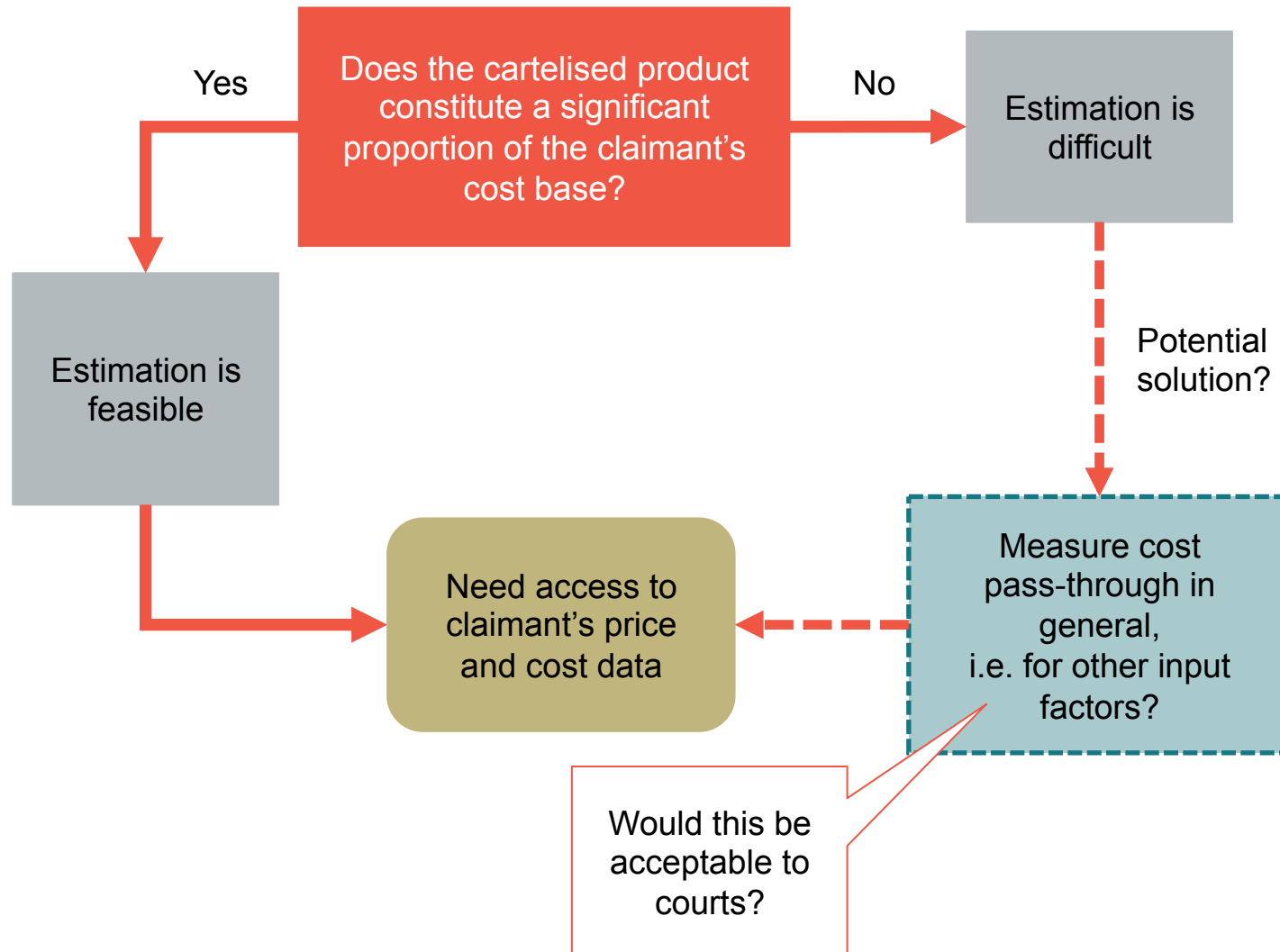
(Is the cartelised product a variable or a fixed input cost?)

Might long-term supply contracts have shielded some downstream players from the effects of the cartel?

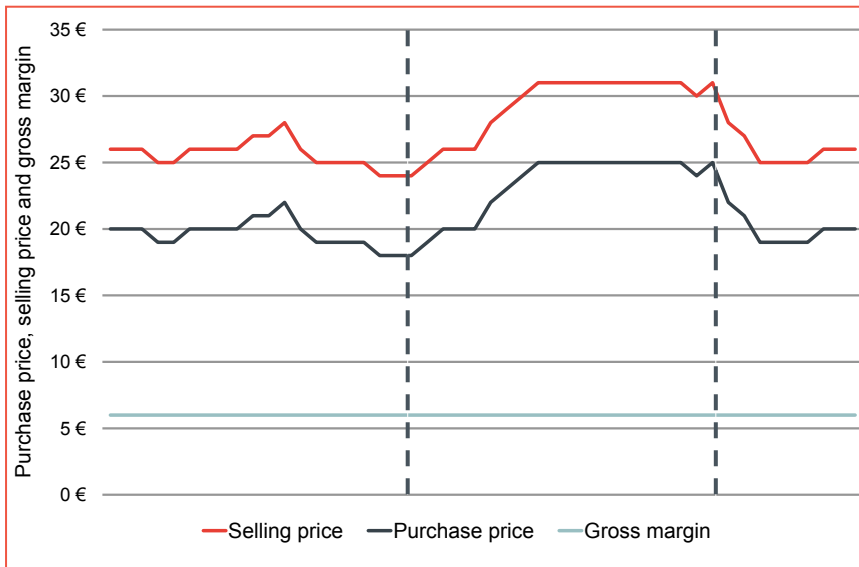
Were certain downstream players vertically integrated into the manufacture of the cartelised input?

... first step in any case!

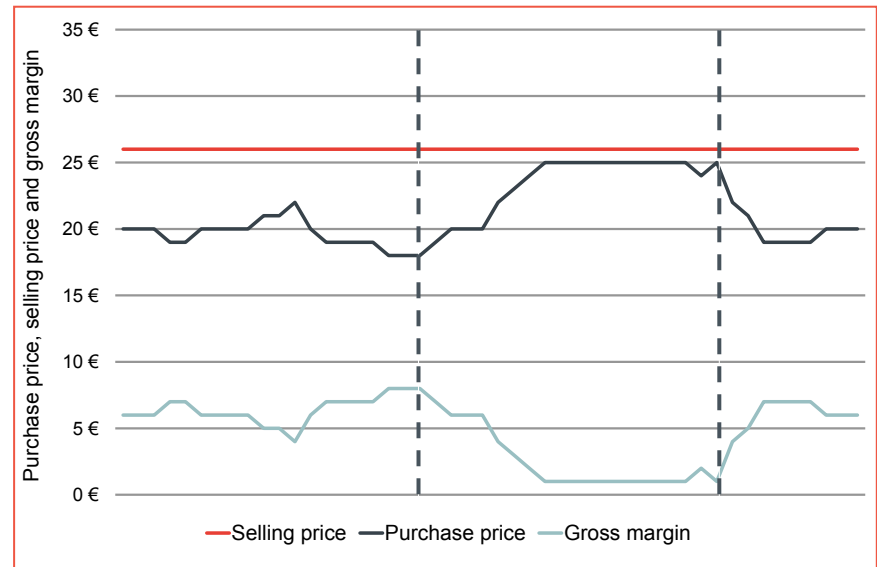
# Sometimes measuring pass-on is feasible



# Empirically estimating the degree of pass-on – an illustration



100% pass-on: Selling price moves in line with cartelised input cost, margin remains constant



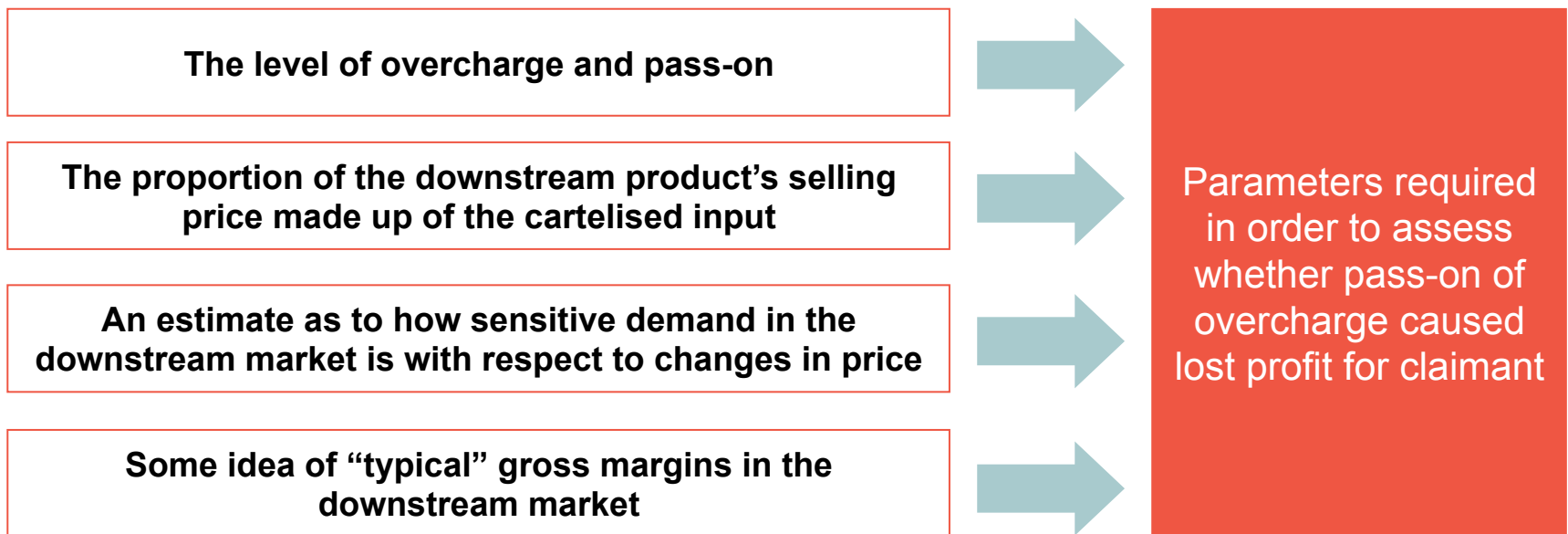
0% pass-on: Selling price independent of cartelised input cost, margin drops during the cartel period

In many cases  
all you have

... in any event: need “body of evidence”!

# Pass-on intrinsically linked to the volume effect

- Again, estimation requires:
  - Access to claimant's sales and cost data to assess how downstream sales volumes moved in line with input cost changes
  - Cartelised product constitutes a significant proportion of the claimant's cost base (or approximation)
- Otherwise, predictions can be made based on the following:



# Comments on the Directive in relation to pass-on

## EU Damages Directive

- Burden of proving pass-on lies with the defendants (“passing-on defence”)
- Indirect purchasers are able to claim – burden of proving pass-on of overcharge to them lies with the claimants
  - But: wording of the Directive suggests that the standard of proof may be low (prima facie evidence) (“rebuttable presumption”)
- Court to ensure no overcompensation if both direct and indirect purchasers bring claims

## Comments

- Relevant information lies with the claimants – Art. 13: defendants able to request disclosure
- Pass-on presumption cannot be deducted from economic theory
- Approach driven by other considerations: shifting the burden of proof to the defendants and thus making it easier for customers to bring claims and to be heard in court
- But: proper estimation of the cartel damage to an indirect customer should not be affected!
- Problem: relevant information may be in hands of direct customers
- Also: how to ensure no overcompensation in practice, in particular:
  - if different claimants bring different claims to different courts at different points in time?
  - what if part of the claimants settle (private information, often not with agreed levels of overcharge and pass-on)?



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