

# PASSING ON OF OVERCHARGES

## Selected Issues

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# Passing on - Compensatory Principle

## Basic Principles:

- Compensatio lucri cum damno – if any benefit accrued to the damaged party *out of infringement*, such benefit is to be taken into consideration
- Duty to mitigate

## Issues:

- How to define what benefit derives out of infringement – causal link
- Does every benefit matter?
- If the overcharge was not passed on at all, did the damaged party breached its duty to mitigate?

# Pre-Directive Case: Wholesaler vs. Brewery

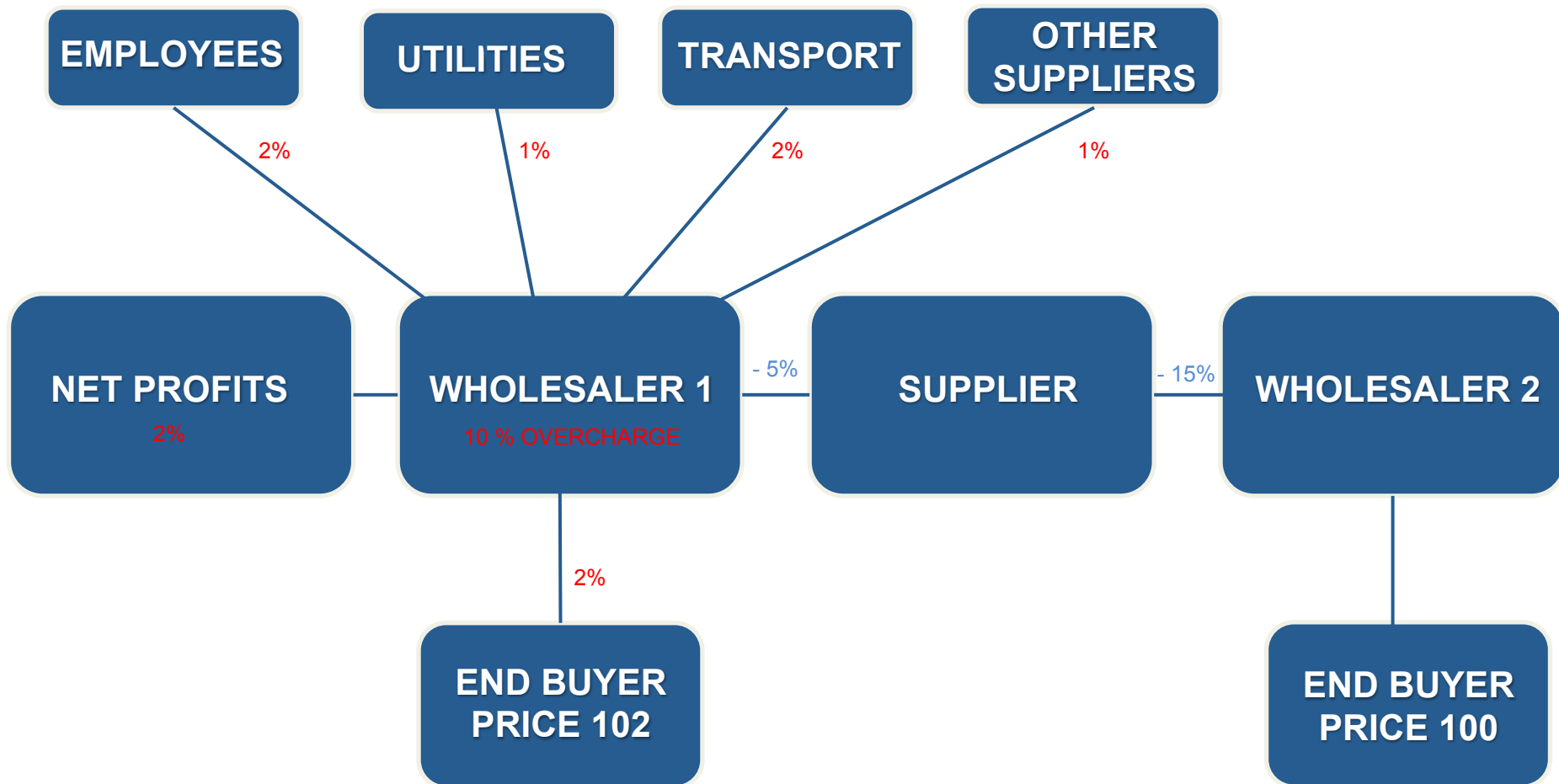
## Relevant Facts:

- Dominant brewery changed its rebate policy, offering larger retroactive rebates for larger purchased quantities of beer (alleged abuse of dominance)
- The wholesaler receiving lower rebates than the larger wholesalers claimed (i) actual loss in the amount of the overcharge (lower rebates) and (ii) lost profits caused by diminution of competitiveness

## Judgement (claim refused):

- Actual loss (*damnum emergens*) could only be proved if: (i) the overcharged party was the end user, or (ii) before the infringement the purchased goods were sold without margin (therefore at the same price) and the increase in the purchase price could not be passed-on (in which case the competitiveness would not be diminished)
- Lost profits (*lucrum cessans*): failure to satisfy the evidential burden

# Mitigation of Harm – Which part of harm has been passed on? Which part is recoverable?



# Transposition of Directive

- **Guidelines still missing**
- **Actual Loss = Overcharge, if not passed on?**
- **Duty to mitigate?**
- **Passing-on defence available only for the part passed on to the overcharged party's purchasers?**
- **Are the rules on passing-on defence limiting or enhancing defendant's possibilities under the general principles of national law?**



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