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The passing-on of price overcharges in European competition damages actions: a matter of causation and an issue of policy

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Claudio Lombardi*

Abstract

This paper analyses the functioning of the passing-on of price overcharges in damages actions for breaches of EU competition law and aims to give a critical appraisal of the present regulatory framework in Europe. In particular, this paper maintains that the European Directive 2014/104, in order to facilitate the claims of damages caused by the infringement of European competition rules and to provide full compensation for those damages, has adopted a complex set of rules placing the burden of proof on the party that has, assumedly, the best access to evidence on the relevant issue. Moreover, it is noted that these rules give a strict definition of the overcharge harm and of its diffusion through the market chain. In this connection, it is argued that the objectives of the Directive are partly compromised by the fact that this restrictive approach fails to take into consideration a number of other subjects who may potentially be damaged by the passing-on of the overcharge harm.

Secondly, this paper maintains that the set of rules laid down by the Directive 2014/104 creates a system of presumptions, which, contrary to its intended purpose, is likely to discourage damages actions. Finally, this paper argues that actions by indirect purchasers based on the passing-on of the overcharge will still need to heavily rely on domestic civil law rules in particular on local principles of causation and evidence.

Keywords

European competition law; damages actions; private enforcement; passing-on; indirect purchaser; passing-on defence; Directive 2014/104; causation; civil liability

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Introduction

An antitrust infringement often results in harm via price effects[1]. This means that the cartel, or the dominant undertaking, fixes a supra-competitive price that it charges to its customers. However, these buyers might not be the end consumers of those goods or services but rather a first juncture of a supply chain that can be more or less complex[2]. The direct purchaser therefore has a threefold choice. Firstly, she can internalise the overcharge and charge on her clients the same as before the infringement. Alternatively, she may pass on the full overcharge, raising prices by the same amount as the overcharge, burdening the indirect purchaser with the corresponding cost. Finally, the direct purchaser can pass on only part of the overcharge, internalising the remainder of it.

To present an example, vitamin producer 'β' cartelises with competitors in order to fix higher prices for bulk vitamins. β sells the vitamins at a supra-competitive price to the cosmetics producer 'Ω'. This latter firm has a distributor, 'α', to whom it sells the cosmetic products. Although the price of vitamins increased, due to the cartel, Ω might decide, perhaps for fear of losing an important client, to sell the cosmetics at the same price as before. In a different and, according to economic scholars[3], more likely scenario, Ω decides to pass on the full price increase

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[1] This is particularly true about cartels: a study from Boyer and Kotchoni, for instance, shows that 95% of the cartels analysed caused an overcharge harm; see Marcel Boyer, Rachidi Kotchoni, *The econometrics of cartel overcharges* (CIRANO 2011). They also quantify the mean overcharge in all cartel cases as 17.5% and the median 14%. In contrast, the EC 'Quantification Study' observed that the average overcharge amounts to 20%, while the study conducted by Connor and Lande quantified it as 23%; see 'Quantifying antitrust damages - Towards non-binding guidance for courts' ('the Quantification Study'), available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf., 91; and J.M. Connor and R.H. Lande 'Cartel Overcharges and Optimal Cartel Fines', in S.W. Waller (ed.), Issues in Competition Law and Policy, volume 3, ABA Section of Antitrust Law.

[2] Hence, for price overcharge, we mean the difference between the supra-competitive price fixed by the antitrust infringer and the market price of the same goods or services.

[3] Assimakis P Komninos and Oxera, 'Quantifying Antitrust Damages: Towards Non-Binding Guidance for Courts' *Oxera* X <available at: http://www.oxera.com/Latest-Thinking/Publications/Reports/2010/Quantifying-antitrust-damages-Towards-non-binding.aspx> accessed 20 March 2014; Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349 2014 Recital (41). For a different view, see Frank

for vitamins or at least part of it to the next level of the supply chain, that is the cosmetics distributor α. The question posed in this regard is, therefore, if α is entitled to claim damages against the cartelist β and if the latter can oppose the passing-on defence to a claim raised by the direct purchaser Ω. The direct purchaser who passes on the overprice is a median between the antitrust infringer and the subject harmed by the infringement. Under the causal laws of both common law and civil law jurisdictions, if the action of the direct purchaser has an independent causal effect, it becomes the only cause of the damage and, therefore, 'breaks the causal chain' between the infringement and the harm to the indirect purchaser.[4] As a consequence, the indirect purchaser would be barred from claiming damages against the antitrust infringer for lack of causation.

The scenario is even more complicated if we think that in the downstream market, after the distributor, there may be a long chain of subjects buying, implementing or re-selling the vitamins and the other derived products. In addition, we should think of the market chain as a network of relationships, which springs both vertically and horizontally; and so does the damage that is transmitted through the price adaptations that follow a price shock[5].

However, the passing-on is – at present – conceptualised as taking place only vertically, upstream or downstream in the supply chain. This is the approach adopted by the European Directive 2014/104, which allows both actions from indirect purchasers and the passing-on defence. In this view, the passing-on is due to trade relations that bind the production to the distribution process, so that what happens at a certain level of the supply chain tends to be passed on to the next level[6]. This raises questions of 'proximity' of the causal connection between the

P Maier-Rigaud, 'Toward a European Directive on Damages Actions' (2014) 10 Journal of Competition Law and Economics 341, 346.

[4] Cees Van Dam, *European Tort Law* (Oxford University Press 2013); Anthony M Honoré, 'Causation and Remoteness of Damage' in A. Tunc (ed), *International Encyclopedia of Comparative Law*, vol 6 (Mohr Siebeck 1983); HLA Hart and Tony Honoré, *Causation in the Law* (Oxford University Press 1985); Hanns A Abele, Georg E Kodek and Guido K Schaefer, 'Proving Causation in Private Antitrust Cases' (2011) 7 Journal of Competition Law and Economics 847; Ioannis Lianos, 'Causal Uncertainty and Damages Claims for Infringement of Competition Law in Europe' <Available at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2564329> accessed 26 July 2015.

[5] See, inter alia, Keith Cowling and Michael Waterson, 'Price-Cost Margins and Market Structure' [1976] Economica 267; Jochen Meyer and Stephan Cramon-Taubadel, 'Asymmetric Price Transmission: A Survey' (2004) 55 Journal of agricultural economics 581.

[6] For an introduction to the problem of passing-on of price overcharges in competition law see, Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *EU Competition Law and Economics* (Oxford University Press 2012); David Ashton and David Henry, *Competition Damages Actions in the EU: Law and Practice* (Edward Elgar Publishing 2013); Ivo Van Bael, *Due Process in EU Competition Proceedings* (Kluwer Law International 2011); Richard Craswell, 'Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships' [1991] Stanford Law Review 361; Frank Verboven and Theon Van Dijk, 'Cartel Damages Claims and the Passing-on Defense*' (2009) 57 The Journal of Industrial Economics 457; Robert G Harris and Lawrence

damage and the infringement, because at each step of the supply chain a new action will be implemented, resulting in an additional possibility to introduce an independent and sufficient cause of damage. In other words, it is not always clear when the overcharge passing through the supply chain dissipates and stops being a cause of damages and when, instead, it remains an adequate causal link of the damage. The same applies to upward connections in the supply chain, as, for instance, a buying cartel may yield similar effects.

This paper analyses the passing-on in light of causation laws. Once the general problem around the proof of causation in passing-on actions is described, it presents the choices made by national judges and legislators in the four countries selected for the comparative study[7]. Therefore, the third part describes the approach adopted by the recently released Directive on competition law damages actions[8]. With regard to the Directive, this paper argues that the legislator has been sufficiently precise in identifying the problems and fixing the aims, but has not been as efficient in proposing solutions. Part V analyses indeed the solutions laid down by the Directive in light of the aims posed by the same European legislator. In particular, this paper observes that the presumptions contained in the Directive may ease the burden of proof for the indirect purchaser claiming damages, but yield the opposite effect of discouraging damages actions. Consumers generally lack sufficient economic incentive to bring the lawsuit. In addition to that, they also lack efficient procedural rules that may facilitate such claims, especially through collective actions. Moreover, the take of this paper is that the structure of the supply chain relationships influences price transmission, as well as other factors. These include the bilateral relationships between buyer and seller. Therefore, the simplification of the vertical pass-through of the overcharge may lead to unequal treatment of market actors that were equally harmed by the competition law infringement.

1. Passing-on as a matter of causation

A Sullivan, 'Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis' [1979] University of Pennsylvania Law Review 269; Earl E Pollock, 'Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine' [1966] Antitrust Law Journal 5.

[7] These are France, Germany, Italy and the United Kingdom.

[8] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349 (n 3).

The private enforcement of European competition law is centred on the aim of compensating the victim of an antitrust infringement ('the compensatory principle')[9]. This is one of the main differences to the US system, that heavily relies on the deterrence effect of private antitrust provisions[10]. The compensatory principle dispenses a general rule that is aimed to enable the harmed party to recover damages in order to restore the same situation, at least from an economic point of view, as before the breach occurred[11]. For obtaining compensation of the damage, the claimant has to substantiate the infringement, the prejudice suffered and the causal connection between the two.

Antitrust infringements usually affect several subjects at the same time, because they have a horizontal impact on the direct buyers of those goods and a vertical impact on down- and upstream markets connected to them[12]. The supply chain that brings the good from the first supplier to the consumer can be more or less complex and is generally composed of different links, which correspond to an equal number of steps before the final consumer. Among other factors, the complexity of these chains therefore depends on how many levels the product undergoes before reaching the final consumer. A supply chain is defined as "*a network of autonomous or semi-autonomous business entities collectively responsible for procurement, manufacturing, and distribution activities associated with one or more families of related products*"[13]. Market chains, instead, comprise a broader spectrum of subjects than supply chains, encompassing all economic

[9] Although this is not the only aim of European private enforcement, as the discussion is still open, see Ioannis Lianos, 'Competition Law Remedies in Europe: Which Limits for Remedial Discretion?' [2013] CLES Research Paper No. 2/2013 <available at http://papers.ssrn.com/abstract=2235817> accessed 12 May 2014; Lianos (n 4); Renato Nazzini, 'The Objective of Private Remedies in EU Competition Law' [2011] Global Competition Litigation Review 131. The principle was stated in *Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (2006) ECR I-06619; *Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others ECR I-06297*., and subsequently adopted by the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349 (n 3). For an historical reconstruction of the right to damages in competition law see Veljko Milutinović, *The 'Right to Damages' Under EU Competition Law: From Courage V. Crehan to the White Paper and Beyond* (Kluwer Law International 2010).

[10] Wouter PJ Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics* (Kluwer Law International 2002).

[11] Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford University Press 2012); William Lloyd Prosser, *Prosser and Keeton on the Law of Torts* (West Pub Co 1984).

[12] William M Landes and Richard A Posner, 'Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick' [1979] The University of Chicago Law Review 602; Firat Cengiz, 'Passing-On Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: What Can the EC Learn from the US?' [2007] University of East Anglia Centre for Competition Policy, Working Paper 07, 39; Ashton and Henry (n 6) 42.

[13] Jayashankar M. Swaminathan, Stephen F. Smith, and Norman M. Sadeh, "Modeling Supply Chain Dynamics: A Multiagent Approach" *Decision Sciences* 29, no. 3 (1998): 607–32.

actors involved in producing and transacting a given product as it moves from primary producer to final consumer[14].

Economists observe that one of the main reasons for the propagation of the damage along the market chain rests on the passing-on phenomenon, since market players react to an increase of costs by selling at higher prices themselves[15]. For instance, when a downstream cartel sets higher prices for the goods sold, it is thought by economic literature[16] that in most cases the direct purchaser of those goods passes at least part of the overcharge[17] on to the following link of the chain[18]. This sequence might repeat itself until arriving at the final purchaser, who is not able to unload the overcharge[19]. However, the damage propagates at each step of the supply chain, thanks to the actions of market actors which are damaged parties and not antitrust infringers, thus raising the issue of the existence of an adequate causal link between the infringement of competition law and the harm suffered by the final purchaser.

1.1. Cause-in-fact and the passing-on

The position of the indirect purchaser in passing-on actions is generally analysed as a matter of standing rather than of causation[20]. However, as related to the passing-on of price overcharges in EU competition damages actions, the CJEU and the Directive 2014/104 have clearly stated that any natural or legal person who has suffered harm caused by an infringement of

[14] In this connection it is possible to observe that in simple market chains, there is a limited number of subjects involved, such as in short supply chains. Differently, complex market chains comprise a number of market actors acting both vertically and horizontally at every level of the chain.

[15] The Oxera and a multi-jurisdictional team of lawyers led by Dr Assimakis Komninos have developed a study for the European Commission where they cautiously state that "*Economic theory has identified certain relationships between cost changes (such as changes in input prices) and price changes. In essence, these relationships follow from the standard models of competition, oligopoly and monopoly in which there is a certain relationship between price and (marginal) cost. On this basis, the report describes several insights from economic theory regarding the likely pass-on rate in various market situations. A distinction must be made between firm-specific and industry-wide cost increases*" Komninos and Oxera (n 3) X.

[16] Komninos and Oxera (n 3); Verboven and Van Dijk (n 6).

[17] The price overcharge is defined as the "difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law", see Article 2 (20), Directive 2014/104.

[18] Maier-Rigaud labels this view as simplistic, as he argues that "*By changing relative prices, competition law infringements trigger responses throughout the economy and neither all competition law infringements nor all repercussions of competition law infringements occur within a vertical chain*" and that the overcharge should not be classified as damage; Maier-Rigaud (n 3) 346.

[19] Economists see these sequences as almost unavoidable in some cases because of the cost-price being embedded in the pricing dynamics (a higher input cost corresponding to a higher output price).

[20] Süleyman Parlak, 'Passing-on Defence and Indirect Purchaser Standing: Should the Passing-on Defence Be Rejected Now the Indirect Purchaser Has Standing after Manfredi and the White Paper of the European Commission?' (2010) 33 World Competition 31; Ashton and Henry (n 6) 36; Cengiz (n 12); Assimakis P Komninos, *Ec Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing Limited 2008).

competition law is able to claim full compensation for that harm[21] irrespective of whether they are direct or indirect purchasers[22]. Therefore, no room remained for speculations about the right to claim for damages by indirect purchasers[23]. The general question regarding causation in passing-on cases, instead, is whether and to what extent the competition law infringement harmed the different market actors, including direct and indirect purchasers[24]. Causation determines the factual link between the infringement and the damage (material or factual causation), and delimits the compensable damages (legal causation)[25]. The factual causal nexus links the antitrust infringement to the damage, thus the anticompetitive behaviour to the specific damage claimed, be it an actual loss or lost profit. Nonetheless, the different market actors transacting the good may interfere with the transmission of the damage, contributing to it or absorbing it[26].

In particular, regarding the actual loss caused by the overcharge, it has to be assessed if buyers and sellers transacting the good after the infringer contributed to the magnitude of the damage passed through, reduced it or interrupted the causal connection. The causal link is therefore a structural element of the infringement, which generally responds to an objective reconstruction of a syllogistic type, between an action abstractly considered (not yet classified as *damnum injuria datum*[27]) and the harmful event. In order to identify the primary relationship between conduct and event, the judge in the first instance determines the factual connection, therefore excluding any

[21] Article 2 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349 (n 3).

[22] Article 12, ibid.

[23] It remains certainly still vivid in terms of the policy-based discussion about the opposite choice made by the US Supreme Court and the most efficient system, confronting the aim it pursues.

[24] For an analysis of causation in competition damages actions, see Ioannis Lianos, 'Causal Uncertainty and Damages Claims for Infringement of Competition Law in Europe' (January 2015), available at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2564329.

[25] The doctrine on causation in the law is particularly rich. However, an important contribution was made by HLA Hart and Tony Honoré, *Causation in the Law* (Oxford University Press 1985); moreover see Richard W Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts' (1987) 73 Iowa L. Rev. 1001; Jane Stapleton, 'Unpacking Causation' in Peter Cane, Anthony M Honoré and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on His Eightieth Birthday* (Hart Publishing 2001); Richard Goldberg, *Perspectives on Causation* (Hart Publishing 2011); Anthony M Honoré, 'Causation and Remoteness of Damage' in A. Tunc (ed), *International Encyclopedia of Comparative Law*, vol 6 (Mohr Siebeck 1983); Michael S Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford University Press 2010).

[26] The causal contribution of market actors may be interpreted in the light of quantitative or scalar approaches to causation, which allow the evaluation of the multiple causes of the damage apportioning the damage on the basis of the causal contribution, although this is not subject of scrutiny of the present paper. See Jane Stapleton, 'Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims, The' (2008) 74 Brook. L. Rev. 1011; Moore (n 24).

[27] The damage unlawfully inflicted to the property of another.

assessment of foreseeability, both subjective and objective, that is an analytic element placed at the second stage of the reconstruction of the causal nexus.

The specific questions related to material causation are different and specifically related to the factual situation. On this basis, a general subdivision of causality questions can be framed as follows. The material causation demands that the claimant (indirect purchaser) gives sufficient proof that the cartel overcharge was passed on to her. So the question would then be whether or not the damage would have happened but for the antitrust infringement[28]. On the other hand, the defendant (the antitrust infringer) has to prove that the steps taken after the first purchase reduced or eliminated the damage. When instead the direct purchaser is to claim for damages, the evidential burden related to causation varies according to the specific characteristics of the domestic system. In competition law the but-for approach is often developed through counterfactuals[29].

When the overcharge is the result of an antitrust infringement that inflates the prices of goods or services, the legislator has to decide whether to allow indirect purchasers to claim compensation for the relative damages or not. At this point, the material causal link between the conduct and the event finds correspondents in each antecedent (near, intermediate and remote) that has generated, or even contributed to this objective relation to the fact, and therefore should be considered a cause of the event. The second stage requires instead the analysis of legal causation in order to ascertain that the damage claimed falls foul of competition regulation and therein is attributable to the antitrust infringer.

1.2. Legal causation

[28] Differently and, in a more sophisticated way, the judge can ask whether the overcharge passed-on was a necessary element of a set of conditions jointly sufficient for causing the damage claimed. For an analysis of the NESS theory and its application in tort law see supra, para 2.6; Wright, 'Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof' (n 24); Hart and Honoré (n 4); Richard W Wright, 'Causation in Tort Law' [1985] California Law Review 1735; Richard W Wright, 'The NESS Account of Natural Causation: A Response to Criticisms' <http://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?article=1715&context=fac_schol> accessed 13 January 2015.

[29] Damien Geradin and Ianis Girgenson, 'The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach' [2011] (December 11, 2011) <availble at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1970917> accessed 25 August 2014; Cento Veljanovski, 'Counterfactual Tests in Competition Law' [2010] Competition Law Journal. Although the first analysis of counterfactuals is attributable to John Stuart Mill, A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation (John W. Parker, 1843), it is only from the 1960s' that the theory had been thoroughly developed mainly thanks to the work of Ardon Lyon, "Causality" British Journal for the Philosophy of Science 18, no. 1 (1967): 1–20; J; L. Mackie and John Leslie Mackie, The Cement of the Universe: A Study of Causation (Clarendon Press, 1980); David Lewis, "Causation" The Journal of Philosophy, 1973, 556–67.

The illegal overcharge passed through the market chain may cause different types of damages to both direct and indirect purchasers. Firstly, there is the actual loss of the purchaser who did not pass on the overcharge, which amounts to the level of the overcharge multiplied by the number of items purchased[30]. As for intermediate buyers of the goods or services under infringement, when they succeed to pass on the overcharge paid, they can claim for lost profits caused by the decline in demand due to higher prices[31]. However, the pass on of the overcharge may cause other types of damages. For instance, the raise in prices by the cartel may generate umbrella effects[32], or may bring a counterfactual purchaser to renounce the purchase.

The evaluation of legal causation - both in terms of the dependence of the event on its factual antecedents and with regard to the scope of the rule infringed - is done according to criteria of scientific probability or relying on logic inferences[33] determined by domestic tort laws. Legal causation delimits the compensation, identifying which damages are ruled out from the compensation to the claimant materially injured by the infringement. Some of the principles developed by European jurisdictions to assess legal causation are remoteness, directness, scope of the rule, causal regularity, probability[34]. Hence, based on these or any other tests adopted by the domestic law of a Member State, the claimant has to substantiate that the supra-competitive price caused damages that are causally linked to the antitrust infringement and meet the legal requirements[35]. Based on these theories, are damages caused by pass-on always compensable? On the one hand, with the approval of the Directive 2014/104, damages caused to the indirect purchaser by the overcharge paid on the good should, in principle, once the factual causation is determined, not raise particular issues. On the other hand, the Directive 2014/104 does not clearly address other types of damages that may be caused through the passing-on to, for instance, counterfactual purchasers or other buyers in the form of loss of profits or lost chances. Neither

[30] This actually happens only in perfectly competitive markets where the pass-on rate is 100%, see Commission Staff Working Document – Practical Guide 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 SWD(2013) 205 2013 para 170.

[31] ibid para 175 ff.

[32] Roman Inderst, Frank P Maier-Rigaud and Ulrich Schwalbe, 'Umbrella Effects' (2014) 10 Journal of Competition Law and Economics 739.

[33] Hart and Honoré (n 4) 85 ff.

[34] For an analysis of some national European approaches to the legal causation, see here chapter III.

[35] Therefore, for instance, the claimant will have to prove, depending on the applicable law, that the damage is direct, falls within the scope of the rule, is a regular consequence, is probable, or is not remote.

does the Directive address the harm inflicted upon the direct and indirect purchasers of the supplier of a buyers' cartel[36], thereby raising doubts about their compensation[37].

The time is not yet ripe to base a response on national and European case law that - so far - have not dealt with such cases[38]. National and European courts have dealt with a limited number of cases regarding the application of passing-on in competition law cases. However, courts have long discussed the concept and dynamic of passing-on in other areas. The following paragraph offers an analysis of the case law of the European Courts dealing with passing-on in other areas of law but, to some extent, is applicable to competition law.

2. Passing-on in non-competition law cases and the CJEU

2.1. Tax levies

A consistent CJEU case law admits the passing-on defence in claims for restitution of taxes and burdens illicitly charged in conflict with EU regulation[39]. The national tax authority can oppose the passing-on to the claimant who is asking for the restitution of the amount paid. However, this case law burdens the defendant (the tax authority) to give evidence that the tax was passed on[40]. In the *San Giorgio* case the Court pointed out that "*in a market economy based on freedom of competition, the question whether, and if so to what extent, a fiscal charge imposed on an importer has factually been passed on in subsequent transactions involves a degree of uncertainty for which the person obliged to pay a charge contrary to Community Law cannot be systematically held responsible"*[41]. In other words, burdening the possible injured subject to substantiate that the overcharge was not passed onto the downstream market would make the exercise of its right to compensation almost impossible.

[36] This is the so called waterbed effect that may apply if we define the overprice applied to the buyers, as a pass-on of the disutility due to the price conditions imposed by the buying cartel. For a general overview of the waterbed effect, see Roman Inderst and Tommaso M Valletti, 'Buyer Power and the "Waterbed Effect"' (2011) 59 The Journal of Industrial Economics 1; Adrian N Majumdar, 'Waterbed Effects and Buyer Mergers' [2005] CCP Working Paper No. 05-7. <Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=911574> accessed 15 July 2015; Zhiqi Chen, 'Dominant Retailers and the Countervailing-Power Hypothesis' [2003] RAND journal of Economics 612.

[37] See infra at paragraph 4.

[38] See here para 2.1.

[39] See, among the many others, *Case C-398/09 Lady & Kid A/S and Others v Skatteministeriet ECR I-07375*; *Case C-94/10 Danfoss A/S and Sauer-Danfoss ApS v Skatteministeriet ECR I-09963*; *Case C-440/12 Metropol Spielstätten Unternehmergesellschaft (haftungsbeschränkt) v Finanzamt Hamburg-Bergedorf not yet published*.

[40] *Case 199/82 Amministrazione delle Finanze dello Stato v SpA San Giorgio ECR 1983 03595*.

[41] ibid para 15.

Moreover, the CJEU has more recently required the national tax authority to prove also the unjust enrichment of the claimant in case of compensation[42]. The CJEU deemed it necessary because, even in case of passing-on of the charge levied, the claimant may suffer a reduction of its sales due to the price increase, resulting in a loss of profits[43].

2.2. Non-contractual liability

In *Ireks-Arkady*[44] a *quellmehl* producer claimed for compensation of the damages caused by the European Community that rejected his application to receive the subsidies. The quellmehl is used in bread production and is derived from maize or wheat. The point made by the claimant was that the quellmehl is used as an alternative to starch, therefore the European institutions were supposed to recognise the subsidy under the parity of treatment clause. At the time of the claim the European Commission already stated that quellmehl producers had to be levelled with the starch producers. Ireks decided to claim for the prior damages felt. The Commission opposed that the claimant had passed the damage through the supply chain. In response, the claimant objected that he could not raise prices, given the competition of starch producers who were benefitting from subsidies in the same relevant period.

The CJEU admitted in general terms the possibility to invoke the passing-on defence. However, in the specific case, it rejected the objection of the defendant because there was no sufficient proof of the passing-on.

In the following Wührer case[45], the Court faced a double defence by the Commission and the Council based on passing-on exceptions. This case regards the same line of refunds to maize producers as in the *Ireks-Arkady* case. Differently from *Ireks*, the Italian brewery Wührer was not a maize producer. However, it purchased the maize directly from the producers and used it for the production of beer. The same producers assigned their right to the production refund to Wührer. On this point, the Commission and the Council raised two objections. With the first objection, they maintained that Wührer had passed on the damage through price overcharges on the final products

[42] *C-192/95 - Comateb and Others v Directeur général des douanes and droits indirects ECR I-00165* para 27.
[43] ibid para 29.
[44] *C-238/78 - Ireks-Arkady v Council and Commission ECR 01719*.
[45] *C-256/80 - Birra Wührer v Council and Commission ECR 00789*.

sold. Here the Court rejected the objection, because the defendants failed to substantiate their counter-claim, which was mainly speculative[46].

Secondly, the Commission and the Council objected that Wührer was an 'indirect assignee' of the right to production refund. Hence, the claimant had to substantiate the consideration paid for having that right. On this ground, the Court stated that the Commission erred to qualify the relationship between Wührer and the right to compensation. The claimant was indeed the assignee of those rights, which were legally transferred to him by the owner. By consequence, Wührer was not claiming for a refund passed on by the producers. The claimant was, indeed, the direct owner of the right to refund[47].

3. Passing-on in national courts: a comparative overview in competition law

National courts have long been dealing with the passing-on of price overcharges in competition damages actions, preceding in time the choices made with the Damages Directive. Generally, national courts have accepted passing-on considerations, granting indirect purchasers the right to claim damages and ensuring, at the same time, the defendants's right to exercise the passing-on defence. However, the degree and extent of these rights are slightly different in modulation.

3.1. Germany

The German Act against Restrictions of Competition (ARC) provides in Section 33, subsection 3, that "*whoever intentionally or negligently commits an infringement of competition law shall be liable for the damages arising therefrom*". According to the wording of this paragraph, the antitrust infringer is liable for damages to direct purchasers and to indirect purchasers, indifferently. In 2005, the German legislator amended the law and specified that "*if a product or a service has been purchased at an excessive price, the damage is not excluded because the good or service has been resold*"[48]. The fact that the direct purchaser passed on the price overcharge does not exclude his right to claim compensation for damages. But the provision fails to indicate

[46] ibid paragraph 85.
[47] ibid para 95.
[48] Section 33, subsection 3, sentence 2 ARC. This provision is applicable only to cartels taking place from 2005 on. However, the Supreme Court interpreted also the amended text in order to provide guidance for future cases.

what type of damages are subject to compensation. However, the German Supreme Court interpreted this sentence differently.

The ORWI case[49] indeed solved a longstanding issue in German case law about the admissibility of passing-on actions and defences. In an early case, the Court of Dortmund held that the defendant could not raise the passing-on defence[50]. Similarly, in the *Readymix* case the Higher Regional Court of Berlin[51] disallowed the cartelist to object the passing-on of the overcharge. When the defendant objected that this approach would lead to multiple compensations, the Court observed that the payment, either to a direct or indirect purchaser, extinguishes the infringer's obligation to pay damages caused by the same cartel[52]. By contrast, the Appellate Court of Berlin held that both the direct and indirect purchasers could claim the entire amount of damages, but only once the distribution of the compensation being an internal matter as between the claimants, as they are joint creditors of the damages payment obligation[53]. However, the Court disallowed the passing-on defence[54].

In a later case, related to the carbonless paper cartel (the 'ORWI' case), the Federal Court of Justice finally granted the indirect purchaser the right to stand and, at the same time, allowed the direct purchaser to raise the passing-on defence[55]. The proceeding involved three parties, a savings Bank (claimant), a printing firm (injured party) and the cartelist (defendant), a carbonless paper producer.

The damaged party, an insolvent printing firm, transferred its own right to compensation to the savings bank through an assignment of claims. The defendant, on the other hand, was part of a cartel fined by the European Commission[56]. The claimant purchased carbonless paper from a

[49] *Bundesgerichtshof [BGH] [Federal Court of Justice] KZR 75/10 (FRG)*.

[50] *Regional Court of Dortmund WuW/E DE-R 1352*.

[51] Higher Regional Court Berlin, judgment of 1 October 2009, 2 U 17/03 – Readymix concrete. The proceeding is a follow-on action of the cement cartel. The claim was first rejected by the Regional Court of Berlin in 2003, because the claimant was not a specific target of the cartel. The Appellate Court of Berlin reversed this decision and established that the claimant does not necessarily have to be targeted by the cartel. The Court also stated that the existence of a cartel constitutes a rebuttable presumption of a cartel overcharge.

[52] *Higher Regional Court Berlin 2 U 17/03*.

[53] KG, 2 U 10/03 Kart, 01.10.2009. The case was appealed before the Supreme Court, but quashed on procedural grounds/confirmed by the court, BGH, 08/06/2010 - KZR 45/09.

[54] KG, 2 U 10/03 Kart, 24.

[55] *Bundesgerichtshof [BGH] [Federal Court of Justice] KZR 75/10 (F.R.G.)* (n 46).

[56] *Commission decision Carbonless paper cartel* (2001) OJ L 115, 21.04.2004.

wholesaler of the defendant at inflated prices. By consequence, when it learned about the existence of the cartel, it claimed for compensation of the damages due to the price overcharge.

The Court of first instance (District Court of Mannheim) dismissed the claim, stating that only direct purchasers of cartel members had the right to claim compensation[57]. Moreover, the judge of the merit clung to the motivation observing that the claimant, by its turn, might have passed the overcharge on to their clients. The claimant appealed the judgment to the Court of Appeal of Karlsruhe, which, however, endorsed the position of the first grade judge with regard to the passing-on issue[58]. The Appellate Court, however, found that in the specific case the claimant was entitled to claim for damages. The claimant purchased the paper from a wholesaler, who was fully owned by the cartelist. On this basis the judge reasoned that, since the direct purchaser, it being a subsidiary, would have never recovered the damage against the parent company, the judge had to grant the indirect purchaser the right to claim compensation, in order to avoid unjust enrichment of the cartelist[59].

On the other hand, both courts agreed that the passing-on defence should not be likewise allowed. For, in that case, the cartel member would be exempted from any sort of compensatory liability. By consequence, the Appellate Court granted the defendant the damages, calculating only the sales from the wholly owned subsidiary of the cartel member and excluded the passing-on exception, by denying any possible reduction of damages based on eventual pass-on of the overcharge.

By contrast, and finally, the Supreme Court held that also indirect purchasers should be able to bring damages claims against the members of a cartel[60]. In addition, the Court determined the admissibility of the passing-on defence, so dismissing the argument of the Court of Appeal[61]. As a result, the Supreme Court stated that every damaged party is entitled to claim compensatory damages from any of the antitrust infringers[62]. By consequence, each cartelist is jointly and severally liable for the whole damage caused to a purchaser, be it direct or indirect. On the other hand, the defendant has the right to object the fact that the direct purchaser had passed the damage

[57] *Landgericht Mannheim (District Court of Mannheim)* (2005) 22 O 74/04 Kart EWiR 659.

[58] *Oberlandesgericht Karlsruhe (Higher Regional Court of Karlsruhe)* (2010) June 11, 2010, 6-U 118/05 (Kart) (F.R.G).

[59] Here the reasoning appears to be fallacious, since it recognises the right to compensation only as a counterbalance to avoid unjust enrichment of the cartelist.

[60] *Bundesgerichtshof [BGH] [Federal Court of Justice] KZR 75/10 (F.R.G.)* (n 46).

[61] ibid.

[62] ibid.

through the market chain. The Court moreover reasserts the power of the trial judge to estimate damages caused by a cartel[63]. The Court also bases its interpretation on Section 33(3), sentence 2 ARC (even though it was not applicable to the case at hand) making it more difficult to object the passing-on defence. The defendant can invoke the passing-on defence pleading an adjustment of profits. In order to do this, the defendant has to substantiate the simultaneous fulfilment of three conditions. Firstly, the defendant has to support with plausible proof or evidence that the passing-on was economically possible. Secondly, he has to show that there was a causal link between the infringement and the damage passed on. Finally, the defendant's burden of proof also compels him to give evidence for the fact that no other economic disadvantages injured the direct purchaser. In particular, the Court refers to the loss of profit resulting from the decrease in demand that is a normal market response to the increase in prices.

The *Bundesgerichtshof* (BGH) made clear that the burden of proof of the passing-on of the overcharge lies with the defendant. Therefore, when the direct purchaser claims compensation from the antitrust infringer, it is up to the cartelist to show evidence of the passing-on. On this point, commentators already noticed that the proof in many cases can become a '*probatio diabolica*', given that access to information needed to substantiate the passing-on can be particularly thorny[64]. Some scholars pointed out that the obstacle could be overcome by courts accepting the so-called 'secondary burden of allegation'[65]. This is a special procedural instrument used in some jurisdictions to oblige claimants to disclose the relevant information for providing rebuttal evidence[66]. Hence, the claimant has to demonstrate and to prove that his damage is based on the prohibited cartel. If the victim did not purchase directly from the cartel members, he must also prove that the overcharge was passed on to him as an indirect purchaser. Given the complexity of pricing, the BGH held that there is no presumption that an increase in prices during the period

[63] ibid. The estimation has to be conducted within the specific framework that the Supreme Court draws. Firstly, the judge has to base the estimation on the prices of goods actually paid by the claimant. Secondly, the prices can be adjusted by decreasing or increasing factors. Finally, there are lingering effects that the judge can use in taking the decision for adapting the rule to the specific case.

[64] Johannes Zöttl, 'Die Private Durchsetzung von Kartellrechtlichen Schadensersatzansprüchen — Status Quo in Deutschland' (2012).

[65] Kai Hüschelrath and Heike Schweitzer, *Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives* (Springer 2014) 274.

[66] Although, at the moment, the burden of proof of the claimant appears to be rather heavy, it seems to be that the possibility of actions from indirect purchasers are rare, given the difficulties related to substantiating the claim and that the German procedural law does not give the possibility of using class actions.

of cartelization results from such a cartel. In contrast to the EU Commission, the BGH demands evidence in every individual case.

3.2. France

Under French law, there is no specific statutory basis for actions proposed by indirect purchasers. Hence, all claims are based on the general rule set by Article 1382 French Civil Code, based on where "*Any act of a person which causes damage to another makes him by whose fault the damage occurred to make reparation for the damage*"[67]. Given the broadness of the rule, French judges facing indirect purchasing actions for the first time had enough room to interpret the law as they deemed it to be reasonable. This discretion created conflicting judgments that ended in the Court of Cassation decision of 2010[68].

This notable case takes place as a follow on action of the lysine cartel decision of the European Commission of 2004[69]. The claimant, *Doux aliments Bretagne* (Doux), a poultry farmer group, purchased lysine from *Ceva santé animale* (Ceva) which did not take part in the cartel. However, Ceva purchased lysine from cartel members, in particular *Ajinomoto Eurolyne* (Ajinomoto), at an inflated price and supplied Doux. Doux decided to bring an action for damages directly against Ajinomoto before the French courts, arguing that the overcharge of the cartel had been passed on to it.

The Court of first instance, the Commercial Court of Paris[70], rejected the claim of Doux because the claimant failed to prove that it was unable to pass the overcharge through the market chain. In other words, for the court, Doux failed to prove the causal link between the cartel and the damage claimed. Moreover, the judge observed that the claimant failed to calculate the amount of damages. However, Doux appealed the decision before the Court of Appeals of Paris that reversed the judgement on both points[71]. The appellate judge commented that Doux was entitled to damages since it suffered a loss of profits due to a diminution of competitiveness of its products for which

[67] In the original version "*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer*".
[68] *Cour de Cassation, Doux Aliments v Ajinomoto Eurolyne 09-15816*.
[69] *Commission Decision (Case COMP / E-2 / 37533 - Choline Chloride).*
[70] *Commercial Court of Paris, Laboratoires JUVA c/ Hoffmann La Roche*.
[71] *Paris Court of Appeal, SNC Doux Aliments Bretagne etc v SAS Ajinamoto Eurolysine, No 07/10478*.

it should be compensated up to 30 per cent of its claims and, by consequence, awarded damages amounting to €380,000[72].

Finally, the Court of Cassation defined the dispute and stated that the Court of Appeal failed to explain the underlying reasons for accepting Doux's claim. The judge, indeed, erred when considering the passing-on as insignificant in the assessment of the damage and its quantification[73]. Although the Cassation concluded that indirect purchasers are allowed to bring claims directly against cartelists, the decision has been criticised for taking a rather defensive approach with regard to the pass on of the cartel overcharge[74].

In a following case[75], the French Supreme Court also specified that, as a matter of usual market dynamics, there is a presumption that purchasers tend to pass on the price overcharge paid for the good or service. Hence, the claimant has the burden to prove that she internalized the damage and avoided to pass the overcharge on to the next level of the market chain.

In both cases, the Court ruled that the claimant has the burden to substantiate the claim and also to prove that they internalised the overcharge, avoiding the passing-on of it .

The Commercial Court of Nanterre, in 2006, adopted a similar approach[76] that, however, has brought the judge to draw different conclusions. In this case, the judge burdened the plaintiff to prove why she could not have passed on the price increase to consumers. The court based its decision on the Commission's decision on the vitamins' cartel, presuming that price increases were likely to be passed on to consumers[77]. Ultimately, the court held that the cartel was implemented worldwide and, consequently, every competitor of the plaintiff was subject to the same conditions. Therefore, the plaintiff had the possibility of passing on the increase and the choice not to do so

[72] This ruling clearly admits that indirect purchasers have standing under French law to bring a damages action against a competition law infringer. Not only is this ruling in line with the recommendations of the Commission in the White Paper, but it also complies with the ruling rendered on July 13, 2006 by the EUCJ in Manfredi,14 in which the Court stated that "[A]ny individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC."

[73] *Cour de cassation, civile, Chambre commerciale, 15 juin 2010, 09-15816, Inédit* [2010] Cour de cassation 09-15.816, Inédit. "*[A]warding damages without assessing whether Doux aliments had fully or partly passed on to its clients the overcharge resulting from AE's infringement could have resulted in an unjust enrichment*."

[74] Parmentier, Hugues and Descôte, Mathilde, 'The French Commercial Supreme Court Validates the Passing-on Defence in a Follow-on Action Based on the Lysine Cartel (Doux Aliments/Ajinomoto Eurolyne)' [2010] e-Competitions.

[75] *Cour de Cassation, Gouessant, arrêt no 540, pourvoi no 11-18495.*

[76] *Commercial Court of Nanterre (Arkopharma).*

[77] *Commission Decision (Case COMP / E-2 / 37.533 - Choline Chloride* (n 66).

was part of the plaintiff's pricing policy. In view of this, the court concluded that the plaintiff had not established the causal link between the fault and the damage.

However, by recognising the standing to indirect purchasers, the Court of Cassation's decision should bring about a new wave of antitrust damages actions and could have a deterrent effect on potential infringers. However, it must be underlined that, under French tort law, only damages amounting to the actual loss are awarded to the claimant, since no punitive damages are admitted. Therefore, given the costs of proceedings, only indirect purchasers left with a significant damage should, in practice, seek compensation in court.

3.3. Italy

Some of the earliest cases regarding the passing-on in antitrust damages actions have taken place in Italy with the proceedings *Indaba v. Juventus*[78] and *Unimare v. Geasar*[79].

In the former case, Indaba, a travel agency, agreed with Juventus Football Club to sell tickets for the 1997 Champions League final match in Munich, offering them along with extra services such as transportation, excursions and the like. The 'travel package' had no success among supporters and Indaba sued Juventus claiming that the football club abused its dominant position infringing Article 102 TFEU and imposing an unreasonable surcharge on the ticket prices. The Court of Appeal noted that, indeed, the parties entered an agreement that restricted competition and that Juventus imposed excessive prices. Moreover, the practice of tying the sales of the tickets to the sale of travel packages amounted to a second infringement of competition law, as it illegally restricted the relevant market, ultimately damaging consumers.

However, the Court observed that Indaba entered into the agreement with the intention to pass on the overcharge to its customers. The Turin Court reasoned about the effects of the passing-on in the specific case applying Article 1227 of the Italian Civil Code, according to which the causal contribution of the damaged party to the event reduces or even excludes it from compensation. For this reason the Court awarded no damages, noting that Indaba passed on the full amount of the costs with which it was illegally burdened. In this vein, the Court stated that

[78] *Court of Appeal of Turin, judgment of 6 July 2000, Indaba Incentive co v società Juventus FC S.pA*.
[79] *Court of Appeal of Cagliari, judgment of 23 January 1999, Unimare S.r.l v Geasar S.p.a*.

only the indirect customers "*would be the ones entitled to claim damages for the overcharges they did not want*"[80].

3.4. United Kingdom

English courts have for long been reluctant to deal with the problem of passing-on in competition damages actions. The admissibility of passing-on has been accepted with a few *obiter dicta*[81] but never became the object of judicial interpretation. In *Devenish Nutrition Ltd v Sanofi-Aventis SA*, for instance, Tuckey LJ considered that *"…Devenish is claiming the overcharge as if it were the defendants' net profit so as to avoid having to take into account the fact (if true) that it passed on the whole of the overcharge to its customers. I can see no way in which it could avoid taking this "pass on" into account in any compensatory claim for damages*"[82].

Moreover, in *Emerald Supplies v British Airways* Mummery LJ stated in this regard that "*The potential conflicts arising from the defences that could be raised by [British Airways] to different claimants, such as direct purchasers who have "passed on" the inflated price and would not want BA to run that passing on defence to their claims and those indirect purchasers to whom the inflated price has been passed on and who would want BA to raise the pass on defence to claims by direct purchasers, reinforce the fact that they do not have the same interest and that the proceedings are not equally beneficial to all those to be represented*"[83].

Following, in *Cooper Tire*, the parties settled the case and agreed that the availability of the passing-on defence should depend on normal English principles of causation and mitigation[84].

The ostensible reluctance to treat the problem of passing-on in-depth might be explained by the factual approach that English judges have with regard to the pass-on issue. As explained by Mr Justice Popplewell in *Fulton Shipping Inc v Globalia Business Travel SAU*: "*In order for a benefit to be taken into account in reducing the loss recoverable by the innocent party for a breach*

[80] Siragusa, Mario, 'Private Damages Claims: Questions Relating to the Passing-on Defence' [2011] Oxera <http://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/Private-damages-claims-%28Mario-Siragusa%29_1.pdf?ext=.pdf>.

[81] *Emerald Supplies Ltd & Anor v British Airways Plc [2010] EWCA Civ 1284* (EWCA (Civ)); *WH Newson Holding Ltd & Ors v IMI Plc & Ors [2013] EWCA Civ 1377* (EWCA (Civ)); *Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors (Rev 1)* (EWCA Civ 1086).

[82] *Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors (Rev 1)* (n 78).

[83] *Emerald Supplies Ltd & Anor v British Airways Plc [2010] EWCA Civ 1284* (n 78).

[84] *Court of Appeal (Civil Division) Cooper Tire & Rubber Co Europe Ltd v Shell Chemicals UK Ltd 23 July 2010 [2010] EWCA Civ 864; [2010] Bus LR 1697; [2011] CP Rep 1; [2010] 2 CLC 104; [2010] UKCLR 1277; (2010) 160 NLJ 1116; Official Transcript*.

of contract, it is generally speaking a necessary condition that the benefit is caused by the breach […] The test is whether the breach has caused the benefit; it is not sufficient if the breach has merely provided the occasion or context for the innocent party to obtain the benefit, or merely triggered his doing so […] Nor is it sufficient merely that the benefit would not have been obtained but for the breach."[85]. Hence, the court should adopt a case-by-case approach, verifying whether the cartel "*has caused the benefit*" or "*provided the occasion or context for the innocent party to obtain the benefit",* and it is part of the claimant's burden of proof to demonstrate how the cartel influenced prices.

However, as a matter of principle, the English system is in line with the other European jurisdictions that accept both claims from indirect purchasers and the defence of passing-on.

Meanwhile in the United States the Supreme Court, with the *Hanover Shoe*[86] and *Illinois Brick*[87] cases, rejected the defence of passing-on and barred indirect purchaser claims under federal antitrust law[88]. Defendants are not allowed to invoke the defence of passing-on against the claims of direct purchasers, and indirect purchasers cannot claim damages on the basis that an overcharge has been passed on to them[89].

These two opposite views show dogmatic, legal and economic differences that are worth analysing but their enforcement is mainly based on considerations connected to the specific legal, economic and geographical drawbacks. The US approach, however, is deeply complicated by the fact that State courts have generally disregarded this case law. In many states the indirect purchaser has the right to claim antitrust damages and the antitrust infringer can use the passing-on argument as a defence. It is reported that "*thirty-six states and the District of Columbia, representing over 70 percent of the nation's population, now provide for some sort of right of action on behalf of some or all indirect purchasers*"[90]. This situation has generated paradoxical litigation where

[85] *Fulton Shipping Inc of Panama v Globalia Business Travel SAU (formerly Travelplan SAU) of Spain* (2014) EWHC 1547 (Comm).

[86] *Hanover Shoe, Inc v United Shoe Machinery Corp 392 US 481 (1968)*.

[87] *Illinois Brick Co v Illinois, 431 US 720*.

[88] Phillip Areeda, Herbert Hovenkamp and John L Solow, *Antitrust Law* (Aspen Publishers 2001); Phillip Areeda and Herbert Hovenkamp, *Fundamentals of Antitrust Law* (Aspen Publishers Online 2011).

[89]See Timothy F Bresnahan, 'Antitrust Modernization Commission' (New York University 2006) <available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Roundtable_Participant_List.pdf> accessed 12 May 2014.

[90] Kevin J O'Connor, 'Is the Illinois Brick Wall Crumbling' (2000) 15 Antitrust 34, 34. See alsoAntitrust Modernization Commission Report and Recommendations VI 2007.

indirect purchasers are claiming for damages before state courts and direct purchasers sue the infringers before the federal courts.

4. The regulatory framework for passing-on in Europe

The choice of the EU Commission, expounded in the White Paper 2008 and clinched with the Directive 104/2014, has been to grant indirect purchasers the right to claim damages due to the passing-on of the overcharge and, simultaneously, to allow cartelists to oppose the passing-on defence. This choice is justified by the aim of ensuring the effective exercise of the victims' right to full compensation. However, the actual formulation of the Directive is the result of a process that counts at least ten years of different drafts. During the same period of time, the priorities of the European legislator changed and with them also the formulation of the relative rules on the passing-on, some of which were complicated by cryptic formulation[91]. In the following two paragraphs a critical description of this evolution is outlined.

4.1. The Green Paper and the White Paper

In the Green Paper[92], the Commission left open the question whether or not a defendant should be able to invoke the passing-on defence. The Green Paper proposed four different alternatives to the passing-on defence issue and indirect purchaser standing[93]. The Ashurst study, instead, took a highly sceptical position in this regard, noting that "*The existence of the passing on defence itself is an obstacle to the extent it complicates claims. Moreover, to the extent it reduces the money paid to the plaintiff it clearly also reduces the latter's incentive to bring a claim. Lack of clarity as concerns the possibility for the indirect purchaser to claim and the difficulties of proof (in particular as regards causation and damages) both constitute obstacles to the indirect purchaser's claim. The combination of the passing on defence (in particular where this is readily accepted) and the difficulties faced by indirect purchasers will seriously restrict private claims"*[94].

[91] See, for instance, art. 12.3 of the Directive Proposal.

[92] Green Paper - Damages actions for breach of the EC antitrust rules SEC (2005) 1732 COM/2005, 672 2005 at 2.4.

[93] ibid para 2.4.

[94] Study on the conditions of claims for damages in case of infringement of EC competition rules 2004 6.

This advice remained however largely unheard[95]. Basing their assumption on the evolution of the CJEU case law, the Commission argued in the White Paper[96] that it was time to introduce a common European rule about passing-on in private antitrust enforcement. With the *Courage* and *Manfredi* cases, the CJEU stated that anyone should be able to claim for damages caused by an illegal conduct, agreement or practice, where there is a causal link between the infringement and the harm, and that the compensation is limited to the *damnum emergens* and *lucrum cessans*, plus interests.

The aim of the White Paper was to ensure a consistent application of this principle, through a twofold action. Firstly, it intended to deny that the application of the right to compensation could lead to multiple compensation and artificial multiplication of lawsuits[97]. Secondly, the White Paper sought to avoid unjust enrichment of the claimant who actually passed on the overcharge[98].

Therefore, the Commission proposed to make available both a passing–on defence for the defendant and the right for the indirect purchaser to claim for damages connected to the cartel. Regarding the standard of proof, the White Paper also pointed out that for the defendant it should not be lower than the burden imposed on the claimant to prove the damage. Instead, for indirect purchasers the Commission suggested the integration of the normative text with a rebuttable presumption that the illegal overcharge was passed on to them[99].

4.2. The Directive Proposal and its amendments

In the wake of the mentioned CJEU case law and the White Paper, the Draft Directive[100] stated that injured parties are entitled to compensation for actual loss (overcharge harm) and loss of profit. The direct purchaser who passes on the overcharge, is entitled – therefore – to claim for the loss of profit due to the reduction of the volume sold consequent to the increase of price[101]. The Commission then pointed out the

[95] Part of the US scholars share a similar view commenting on the point that "*We, however, address a more fundamental question: assuming the procedural details could be worked out, would the objectives of the antitrust laws be advanced or retarded by allowing indirect purchasers to sue? This question, we believe, can be fruitfully addressed with the assistance of economic analysis. That analysis leads us to conclude that allowing indirect purchasers to sue would probably retard rather than advance antitrust enforcement. The basis for this conclusion lies in the detrimental impact that allowing a passing-on defense would have on enforcement by direct purchasers.*"Landes and Posner (n 11) 620.

[96] White paper on damages actions for breach of the EC antitrust rules 2008.

[97] ibid para 2.6.

[98] ibid para 2.6.

[99] ibid para 2.6.

[100] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. COM(2013) 404 2013.

[101] The total harm suffered by the direct purchaser will amount therefore to the price of the overcharge minus the passing-on of the overcharge plus the damage from lost sales that result from the pass-on.

situation - before neglected - that the pass-on can take place also in an upwards direction on the supply chain (for instance in cases of buying cartels)[102].

With Article 12 the Commission has then introduced the main innovation to the previous formulations. In particular Art. 12.2 states that "*Insofar as the overcharge has been passed on to persons at the next level of the supply chain for whom it is legally impossible to claim compensation for their harm, the defendant shall not be able to invoke the defence referred to in the preceding paragraph*".

This article has been fundamentally changed by the General Approach that stated more simply that the defendant in an action for damages can invoke the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement. Moreover, it provided that the burden of proving that the overcharge was passed on rests with the defendant.

The following Article 13 determined that the passing-on of the overcharge is presumed if the infringement is proven. On the other hand, the defendant is entitled to provide proof that the overcharge has not been passed on or has only partially been passed on to the indirect purchaser.

4.3. The 'Damages Directive'

Finally, on 26 November 2014, the Directive 2014/104[103] on antitrust damages actions was approved and, with it, the load of amendments it brought.

With this Directive, the EU legislator intended to ensure effective application of the compensatory principle enshrined in the *Manfredi*[104] and *Courage*[105] landmark cases. In order to do this, the Commission proposed, firstly, to deny that the application of the right to compensation could lead to multiple compensation and artificial multiplication of lawsuits, and secondly, to avoid unjust enrichment of the claimant who actually passed on the overcharge[106]. By consequence, the Commission proposed to introduce the passing-on both as a 'sword' and as a 'shield' in the EU legislation, in order to make it applicable in the whole EU area.

[102] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. COM(2013) 404 (n 97) para 4.4.

[103] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349 (n 3).

[104] *Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (n 8).

[105] *Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others ECR I-06297* (n 8).

[106] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union. COM(2013) 404 (n 97).

In this vein, the Directive aims, in first instance, at ensuring effective application of TFEU's rules, in particular granting the right to full compensation[107]. Secondly, the Directive aims at the creation of a level playing field for undertakings and ensures equivalent protection of all market players in the European economic area[108].

Article 2 sets out the general rule of the right to full compensation based on which "*any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm*". The damage is composed of (and limited to) the actual loss and the lost profits, plus interests[109]. In this way, the European legislator has intended to oppose any form of overcompensation, "*whether by means of punitive, multiple or other types of damages*"[110].

With regard to passing-on, the compensatory and unjust enrichment principles are further developed in Article 12.2, for which "*compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level*". Article 12.1 lays down the general principle supporting both the indirect purchaser claims and the passing-on defence. Firstly, Article 12.1 applies the judgements *Manfredi* and *Courage* stating that compensation of harm can be claimed by anyone who suffered a damage, included indirect purchasers[111]. Moreover, it clarifies that, as for all the other claims based on infringement of competition law, the compensation consists of actual loss and loss of profits.

As a general rule, the indirect purchaser claiming for damages bears the burden of proving the passing-on[112]. This burden of proof for the claimant is, however, simplified (at least at first glance) by a sum of presumptions. Firstly, the Directive instructs the national judge that the passing-on has to be assessed "*taking into account the commercial practice that price increases are passed on down the supply chain*"[113]. This statement is partly disproved by part of the economic doctrine[114] and by the same Commission's Practical Guide on Quantifying Harm, which states that "*Where the direct customer of the infringing undertakings uses the cartelised goods to*

[107] Article 2.
[108] See Recitals 9 and 10
[109] Article 2.2.
[110] Article 2.3.
[111] Article 12.1.
[112] Article 14.
[113] Ibid.
[114] Maier-Rigaud (n 3).

compete in a downstream market, it is likely that the direct customer will normally not be able to pass on this increase in cost (or only to a very limited degree) if their own competitors in that downstream market are not subject to the same or a similar overcharge (for example, where they receive their input from a market that is not subject to the cartel)"[115].

Despite this apparent inconsistency, which might be justified by the objective of relieving the burden of proof to indirect purchasers, the Directive creates a further incongruence, this time between the aims and the dispositions of the legislative text. Article 14.2 lays out a presumption of damage dependent on the realisation of three conditions:

"*The indirect purchaser shall be deemed to have proven that a passing-on to him occurred where he has shown that:*

(a) the defendant has committed an infringement of competition law;

(b) the infringement of competition law resulted in an overcharge for the direct purchaser of the defendant; and

(c) he purchased the goods or services that were the subject of the infringement of competition law, or purchased goods or services derived from or containing the goods or services that were the subject of the infringement.".

In follow-on actions, the first condition is automatically fulfilled thanks to the disposal of Article 9 regarding the validity of the national competition authorities' decisions[116]. Moreover, the second requisite is also satisfied in case of cartels. Article 17.2 states that it shall be presumed that cartel infringements cause harm, in particular via price effects[117], and the infringer shall have the right to rebut that presumption.

Finally, the injured party needs to substantiate the purchase of a good or service that was subject to the infringement, or that derived from it or, finally, that contains the goods or services subject to the infringement. The broad formulation of the third condition placed by Article 14.2 also simplifies the burden of proof of the claimant but creates interpretative issues. What does the norm mean by "*goods or services derived from or containing the goods or services that were the subject of the infringement*"? This is open to question.

[115] Commission Staff Working Document – Practical Guide 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 SWD(2013) 205 (n 27).

[116] The decisions of national and EU Antitrust Authorities have -at least- the rank of prima facie evidence of the infringement.

[117] See Recital (42).

Let us create an example. The international law firm 'X' purchases a number of printers from the undertaking 'Y'. After few years, it is discovered that the seller took part in a printers' cartel. In the meanwhile, the law firm decides to raise its fees. Are the clients of the law firm entitled to claim compensation as indirect purchasers? Can we say that the service offered by the law firm is derived by the use of the printers and therefore its costs also reflect the cartel overcharge?

In favour of a positive response stands the consideration that the operating costs of the law firm increased in the relevant period. In this case, relying on the actual formulation of the Directive, the clients of the advising company should be able to claim damages against the cartelists, since they purchased a service from a direct purchaser and they also paid an overcharge due to the price increase. Their advisor, indeed, included - allegedly and presumably – an overcharge caused by the price increase, in which the cartel overcharge is embedded. However, this simple assertion is too feeble to prove causation. Indeed, the legal service is not directly derived from the printing devices. And also from a cost analysis perspective, the price overcharge of the printers weighs on the cost of the service only to a very limited extent. Therefore, it cannot be assumed that the cost increase is contained in one of the service fees[118].

This reasoning can be extended to all cases where the good or service passed through the supply chain is somehow related but not yet part of the good or service subject to the infringement. Otherwise, we should admit damages actions from any indirect purchaser related to any of the goods or services of subjects that purchased cartel products. The link of causation would be definitely lost as well as the function of the antitrust compensation being distorted. However, limiting the compensation to those market actors that purchased goods derived from the ones subject to infringement, may bring substantial inequalities in treatment. The identification of the damage into a token-overcharge, which can be passed on only vertically, fails to show that price changes are transmitted throughout the supply chain, rippling both horizontally and vertically. In other words, the victim of the antitrust infringement, rather than simply passing on the overcharge to the next stage, generally adapts prices of goods and services that she sells or buys, depending on the market and on the bargaining power she can exert in that specific market.

The right to compensation of the indirect purchasers finds a counterbalance in Article 13, which allows the passing-on defence. Thanks to this clause, the defendant can oppose against the claimant that he passed on all or at least a part of the overcharge resulting from the infringement

[118] See *Commercial Court of Paris, Laboratoires JUVA c/ Hoffmann La Roche* (n 67).

of competition law. The burden of proof for passing-on remains on the defendant, who may reasonably require disclosure from the claimant or from third parties.

The direct purchaser who passed on all or a part of the overcharge maintains, in any case, the possibility to obtain compensation for lost profits[119].

4.4. How passing-on works in the Directive: a game of opposing presumptions

Although Article 14 (1) states the principle that the burden to substantiate the claim rests on the claimant[120], this principle will hardly find application in pass-on cases, since a set of presumptions is laid down by the Directive. Firstly, a special clause completes Article 14(1), suggesting that the passing-on of price increases is a 'commercial practice'. This statement is further explained in Recital (41) which specifies that since *i)* it may be commercial practice to pass on price increases and *ii)* it may be particularly difficult for indirect purchasers to prove the harm as connected to the infringement, the claimant has to be regarded "*as having proven that an overcharge paid by that direct purchaser has been passed on to its level where it is able to show prima facie that such passing-on has occurred*". The same Recital (41) adds that "*This rebuttable presumption applies unless the infringer can credibly demonstrate to the satisfaction of the court that the actual loss has not or not entirely been passed on to the indirect purchaser".* This clause has been introduced only with the very last Parliamentary amendments[121]. Since it is embedded as acting commercial pattern, the pass-on is more likely to happen than not, at least for the law. Hence, the Directive prefers to presume the pass-on to have happened with the indirect purchaser being able to show prima facie evidence.

The second paragraph of the same Article 14 explains how the indirect purchaser can benefit from the pass-on presumption, which hinges on three conditions[122]. The reason for this rule mainly resides in motivations of substantial justice. The legislator followed a long-standing CJEU

[119] Article 12(3).

[120] Article 14 *"(...) the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties*".

[121] Committee on Economic and Monetary Affairs, Amendments to the Proposal for a directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013)0404 – C7-0170/2013 – 2013/0185(COD)), PE516.968v01-00 2014.

[122] The first condition requires proof that the defendant has committed an infringement of competition law. Secondly, the infringement has to result in an overcharge on goods or services. Finally, the indirect purchaser obtained goods or services subject of the infringement or derived or containing them. If all these three conditions are fulfilled, the judge can presume that the overcharge was passed-on to the indirect purchaser, reverting the burden of proof onto the defendant.

case law that considered that it would be better to burden the tort-feasor with the risk of having to substantiate the causal link, rather than the (possible) injured party, be it direct or indirect[123]. Moreover, the defendant in this case is also closer to the information crucial for proffering the proof.

Art. 17 (2) states that "*Member States shall ensure that it shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut this presumption*". The claimant therefore does not need to demonstrate the existence of a damage originating from the cartel, for the burden of proof for the rebuttal is shifted to the infringer. Also in this case, the reason for such presumption reflects the intention of the Directive to remedy the information asymmetry and other hurdles that the claimant has to face in antitrust litigation[124]. This should work as an incentive to litigation through alleviating the role of the claimant and as a tool to harmonise the different approaches to antitrust liability[125]. However, the presumption is limited to violations of Article 101 TFUE[126]. The subject who is closer to the information regarding pricing strategies is, beyond doubt, the same cartelist who fixed the price. In this fashion, the EU legislator has operated a redistribution of information costs, burdening the defendant to disclose the information regarding the influence of the cartel on the price it charged the claimant. However, the claimant still needs to substantiate that she suffered the damages as a consequence of the unlawful behaviour[127].

This presumption may, however, conflict with the presumption of passing-on. Based on a first, merely logical, consideration, the passing-on presumption should prevail, as it succeeds to the causation of the damage via price effect. On the other hand, it is hard to imagine how the judge can deny the application of the same presumption of passing-on embedded in Article 14(1) when it is submitted by the defendant who is using the passing-on defence[128]. Take the case of a direct purchaser who, relying on the general presumption set forth in Article 17(2), claims for the damages incurred as a consequence of the cartel overcharge. If the action is a follow-on type, the

[123] *Case 199/82 Amministrazione delle Finanze dello Stato v SpA San Giorgio ECR 1983 03595* (n 37) para 14; *C-331/85 - Bianco and Girard v Directeur général des douanes and droits indirects* (1988) ECR 1988 01099 para 12.

[124] See Recital (42).

[125] Recitals (9) and (10).

[126] In other words, the most common application of such rebuttable presumption is, in the mind of the legislator, for cases where the claimant purchases a good or service subject to cartel overcharge. The pricing of a good or service depends on a vast number of variables, each capable of influencing the price. See - in general for the economics theories - Özalp Özer and Robert Phillips, *The Oxford Handbook of Pricing Management* (Oxford University Press 2012); more specifically on antitrust pricing strategies, Einer Elhauge, *Research Handbook on the Economics of Antitrust Law* (Edward Elgar Publishing 2012), p. 30 ff.

[127] The indirect purchaser has to prove therefore: the purchase; the infringement; the prejudice suffered; the causation.

[128] Although Article 13 explicitly casts the burden of proof on the defendant who intends to use the pass-on defence.

infringement and the overcharge are already proven. However, if the defendant gives evidence that the claimant, at her turn, sold the goods or services subject to the cartel overcharge, the same presumption of pass-on should apply. Yet, the Directive does not give any clear explanation on this point. This lack of clarity may generate conflicting judgements and erratic effects on the internal market, in particular in cases involving multiple actions filed against the same antitrust infringers and addressing the same damage. For instance, it may happen that direct and indirect purchasers from the same supply chain claim for damages raising different actions. If we assume that the passing-on defence is not facilitated, the claimant benefits from a presumption of damage, which can be overturned only if the defendant successfully proves the pass-on. On the other hand, the indirect purchaser's action will benefit from the pass-on presumption, thus possibly bringing about a duplication of the damages.

The Directive partly solves these problems by warding off the danger of multiple liability through overcompensation. The total amount of the actual loss that the infringer might be called to compensate equates and is limited to the overcharge harm[129]. Moreover, the court seized for each case is supposed to decide the case taking "due account of" related actions for damages[130]. However, the effectiveness of this provision may be undermined by the well known difficulties in identifying and managing parallel procedures in civil actions[131].

Finally, unless the claimant is not the final consumer of the good or service, the presumption of passing-on should prevail. By consequence, the damage, in particular the actual loss identified in the overcharge, would be always presumed to be found at the bottom of the supply chain.

From this perspective, it is possible to observe that the Directive falls short of its original aims. The first aim of the Directive is to ensure full compensation to anyone who is damaged by a competition law infringement. Secondly, the Directive intends to improve the conditions for consumers to exercise their rights[132] and, thirdly, to create a 'level playing field' for all undertakings operating in the internal market[133]. The rules contained in the Directive tend to push

[129] Article 12 (2).
[130] Article 15.
[131] Albert Venn Dicey, John Humphrey Carlile Morris and Lawrence Collins, *Dicey, Morris & Collins on the Conflict of Laws: Secon Cumulative Supplement to the Fifteenth Edition* (Sweet & Maxwell 2015); Adrian Briggs, *The Conflict of Laws* (Oxford Univ Press 2010); David P Currie, *Conflict of Laws: Cases, Comments, Questions* (Thomson/West 2010).
[132] Recital (9).
[133] Ibid.

the overcharge to the bottom of the supply chain where consumers are not helped in any way to make a claim more easily. The 'big absent' of the Directive on damages actions is indeed a rule on collective actions, a topic that has been relegated to a Commission recommendation[134]. Therefore, given the very scarce results of collective redress at national level[135], at present, it is more likely that the damage passed through the supply chain will remain uncompensated.

The further aim of the Directive is the convergence of the different approaches adopted by the Member States' jurisdictions, in order to create a 'level playing field'. On this point, the Directive harmonises the rules on passing-on but fails to do the same with its consequences. Questions such as what damages are recoverable, how the different presumptions work and to what extent the causation test is proven, remain wrapped in uncertainty. Moreover, the Directive says nothing about the possibility of resorting to actions for restitutions and unjust enrichment instead of claims for compensation of damages, although they have already been excluded in different European jurisdictions were the conflict could arise[136].

4.5. Buyers' cartels

The Recital (43) of the Directive argues that "*Infringements of competition law often concern the conditions and the price under which goods or services are sold, and lead to an overcharge and other harm for the customers of the infringers. The infringement may also concern supplies to the infringer (for example in the case of a buyers' cartel). In such cases, the actual loss could result from a lower price paid by infringers to their suppliers. This Directive and in particular the rules on passing-on should apply accordingly to those cases*". In other words, the Directive maintains that the price reduction obtained by the cartelists should be treated as an overcharge[137]. Generally, the buyers' cartel either reduces prices downstream or leaves it unchanged, depending on the level of competition in the downstream market. Economic theory explains that when the buying cartel does not face enough competition in the downstream market

[134] See IP/13/524 and MEMO/13/530.

[135] Barry J Rodger, *Competition Law, Comparative Private Enforcement and Collective Redress Across the EU* (2014); Roger Van den Bergh, 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem' (2013) 20 Maastricht Journal of European and Comparative Law 12; 'Towards a Coherent European Approach on Collective Redress' (2011) SEC(2011) 4.2.201 173.

[136] *Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors (Rev 1)* (n 78) paragaph 109.

[137] This approach conflicts with the qualification of actual loss as an overcharge passed on. Article 2 (20) of the Directive defines the overcharge as "the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law".

it is likely that the cartel or similarly the monopsony will not pass on the price reduction downstream[138]. The cartel or monopsony will rather reduce the level of inputs, thus generating a welfare loss[139]. The quantity of inputs purchased by a company is determined at the point of intersection between the marginal costs and the purchase price, thus lower prices generally correspond to a reduction of inputs. However, in the case of a buying cartel this brings also a reduction of outputs and, therefore, a distortion to the downstream market.

Recital 43 of the Directive qualifies the lower price paid by the buying cartel as actual loss, that is the harm to the supplier corresponding to the difference between the competitive price and the price actually paid by the cartelists. Therefore, the lower price obtained by buying cartels and monopsonists, and paid by suppliers, qualifies as anticompetitive harm, which is subject inter alia to the rules on passing-on established by the Directive. By consequence, a presumption of passing-on in the vertical upstream chain will find application. The indirect buyers of the cartel's supplier will benefit from Article 14.2 as it is presumed that the price reduction will be passed on upstream if the three conditions specified are fulfilled. This presumption, though, does not take into consideration that upstream price adaptation is possible only if the supplier has a relevant buyer's power. In all other cases, the supplier will more likely adapt prices of its other outputs, especially to competitors of the infringers that are not able to impose similar discounts (the waterbed effect)[140]. Moreover, adopting a strict interpretation of the Directive, these subjects are not entitled to damages, at least based on passing-on, as they have not purchased goods or services derived from the ones subject to infringement. Furthermore, the application of the passing-on presumption to upstream cartels may create incongruent judgements in case the cartelists pass downstream at least part of the price reduction, maintaining that this pass-on does not fulfil the requirement of Article 101 (3) TFEU. Although the unjust enrichment of the infringers is not a criterion for determining compensation for the Directive[141], the passing-on principle originates from the aim of compensating the harm originated by a market distortion. Differently, the passing-on of the price

[138] Organisation for Economic Co-operation and Development, *Monopsony and Buyer Power: [Roundtable on Monopsony and Buyer Power Held in October 2008]* (OECD 2008).

[139] Jean Tirole, *The theory of industrial organization* (MIT Press 1988) 66–92; Ariel Ezrachi, 'Buying Alliances and Input Price Fixing: In Search of a European Enforcement Standard' (2012) 8 Journal of Competition Law and Economics 47. Jean Tirole, *The theory of industrial organization* (MIT Press 1988) 66–92; Ariel Ezrachi, 'Buying Alliances and Input Price Fixing: In Search of a European Enforcement Standard' (2012) 8 Journal of Competition Law and Economics 47.

[140] Inderst and Valletti (n 34); Majumdar (n 34); Chen (n 34).

[141] The Damages Directive does not mention the unjust enrichment or any other provision on restitution, leaving therefore the regulatory power to domestic laws.

reduction downstream may prove that at least that part of the reduction may have benefited the downstream market and not distorted it.

4.6. Lost profits

The Directive explicitly gives the right to the purchaser "*to obtain compensation for loss of profits due to a full or partial passing-on of the overcharge*"[142]. The passing-on of the price overcharge induces higher output prices that lead to lower demand and, therefore, to a loss of (future and potential) profits. The lost profits are, in general terms, incomes that cease to exist, although they have to be reckoned hypothetically as they, by definition, have never been gained. They are therefore "abstract damages"[143] in the sense that they amount to a pure economic future loss, the loss of expected wealth[144]. Depending on the jurisdiction where lost profits are claimed, judges apply different standards in order to assess the compensability of such damages caused by a volume effect[145]. The lost profits may in some cases overlap or even be confused with lost chances[146], which can be loosely defined as future income that exists only as a possibility to do business[147]. The claimant generally substantiates lost profits through a counterfactual showing that in absence of the infringement the profitability would have remained higher. However, the design of this counterfactual and the selection of the causal principles to use, all remain a matter of national law. In this regard Maier-Rigaud suggests that, from an economic point of view, "*A (direct) purchaser should therefore also benefit from a presumption that this pass-on implied a quantity effect of at least the size of the pass-on", as the price increase "implies the standard assumption of a negatively sloped (derived) demand function*"[148].

[142] Article 12.3.

[143] Christian von Bar, *The Common European Law of Torts: Damage and Damages, Liability for and without Personal Misconduct, Causality, and Defences* (Clarendon Press 1998) 18.

[144] Vernon V Palmer and Mauro Bussani, *Pure Economic Loss: New Horizons in Comparative Law* (Taylor & Francis 2009); Mauro Bussani and Vernon Valentine Palmer, *Pure Economic Loss in Europe* (Cambridge University Press 2003).

[145] Palmer and Bussani (n 137).

[146] As it is acknowledged by Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (Thomson/West 2005) 678; Laura Castelli, 'La Causalità Giuridica Nel Campo Degli Illeciti Anticoncorrenziali' (2013) 18 Danno e responsabilità 1049, 1059.

[147] Pietro Trimarchi, *Il contratto: inadempimento e rimedi* (Giuffrè Editore 2010) 144.

[148] Maier-Rigaud (n 3) 348. Moreover, he points out that "*under Cournot competition—there is not a single instance where the price effect is more substantial than the quantity effect*"(352). By consequence, he observes that a rebuttable presumption that also takes into consideration the quantity effect would offset in most cases the importance of the pass-on.

When the volume of sales decreases, generally companies respond by increasing prices. Therefore, if a company internalises the overcharge but, given for instance a (cartel) margin squeeze, it is forced out of the market, losing clients and sales, yet it neither can invoke the actual loss. Since it increased prices in the relevant period, it is presumed that the cartel overcharge is comprised in that amount. It should therefore rest with the direct purchaser to demonstrate that, the price increase depends on the loss of sales and that the cartel overcharge was internalised. The computation of the lost sales factor is particularly thorny. Economists typically apply an adjustment factor to the price of the overcharge which is a number between 0 and 1[149]. In a perfectly competitive market the lost sales adjustment factor is 0. In this case the profit margin of the direct purchasers' loss would be 0. Conversely, in a monopolist or oligopolist industry the adjustment factor would be equal to 1. In this case, the lost sales from passing-on exactly offset the gains from the pass-on.

Although lost profits caused by a violation of EU law are long recognised by the Court of Justice[150], their content and the standard of proof remains a matter of domestic law. The application of domestic law, as restated by the Directive[151], has to abide by the principles of equivalence[152] and effectiveness[153] of EU law[154]. In particular, the principle of effectiveness may be invoked in cases of refusal of a national court to award lost profits on the basis, for instance, of a lack of causative link.

In general, the solutions proposed by the Directive seem to be insufficient to cover the present needs of the private antitrust enforcement. The Directive registers - with a lag of almost a decade – what some doctrine suggested after the publication of the Ashurst Report[155]. In the meantime,

[149] Commission Staff Working Document – Practical Guide 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 SWD(2013) 205 (n 28) 188 ff.

[150] *Joined cases C-46/93 and C-48/93 Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (1996) ECR I-01029; *Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* (n 8); *Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others ECR I-06297* (n 8).

[151] Recital (11) "*All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence*".

[152] As explained in the Case C-45/76 Comet v Produktschap [1976] ECR 2043.

[153] See Joined Cases C-6/90 and C-9/90 Francovich v Italian Republic.

[154] The Euorpean legislator confirmed this approach stating that in the recently approved *Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance* Recital 11.

[155] Jürgen Basedow, *Private Enforcement of EC Competition Law* (Kluwer Law International 2007) 37.

though, many other issues gained importance in antitrust litigation and some others have been naturally digested and harmonised by the member states' systems, through case law and legislative adaptations.

Conclusion

Analysing the passing-on of a price overcharge relates to causation as the overcharge imposed by the infringer may be transmitted through the market chain, causing a series of damages that are not necessarily compensable due to the causal principles adopted by the domestic law of Member States. European national tort laws are generally based on corrective justice systems and therefore pursue the compensatory principle, in line with the present approach of European competition law. However, the way this objective is pursued by domestic laws often differs. In particular, the analysis of causation in competition damages actions is based on very diverse sets of principles, which are deeply rooted in the domestic legal systems[156]. In line with this, the Directive has opted for a formulation of the provisions that leaves enough room for national judges to apply the domestic principles of civil responsibility and causation. However, the Directive fails to clarify what types of damages are compensable under the passing-on provisions. The harm, in form of actual loss and lost profits, caused by the pass-through of the overcharge may affect a number of different subjects along the chain, including, for instance, counterfactual purchasers[157], buyers harmed by umbrella prices and buyers harmed by 'waterbed effects'. The statement that only the indirect buyer who has purchased "*the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them*"[158] has standing for the damages action does not give enough clarity. Firstly, the meaning of goods and services "derived from or containing" as applied to certain types of goods and services subject to infringement is questionable and subject to interpretation . The mutability of many goods and services - combined with their almost immediate worldwide diffusion on global markets - opens a plethora of options of compensable subjects and types of damages. Secondly, the passage of the price overcharge from one level to the following may create diverse damaging effects at each level, which are not covered by the Directive. Thirdly, the lost profits, allowed but almost

[156] See Cees van Dam, *European Tort Law* (Oxford University Press, 2013), 307-345.

[157] As the Directive specifically addresses actual buyers, the counterfactual purchase would refer exclusively to the possible part of the goods that the harmed claimant would have purchased but-for the infringement.

[158] Article 14 (c).

neglected by the Directive, may account for a substantial part of the damages claims, taking into consideration that the volume effect may, in some cases, even offset the actual loss, due to the overcharge[159]. Moreover, direct purchasers, who generally have more interests in claiming damages and who will most likely do so, will hardly obtain the compensation of the actual loss due to the passing-on defence, and therefore will seek damages for lost profits caused by the price rise. However, the claim for lost profits remains almost completely regulated by domestic laws, provided that the principles of equivalence[160] and effectiveness[161] of EU law[162] are complied with.

The Directive also operated heavily on the evidential burden of the passing-on, with the aim of facilitating the action for damages of indirect purchasers, through the adoption of a set of presumptions that will probably yield opposite effects. The presumption of passing-on is logically and structurally framed to prevail, bringing the overcharge damage down through the market chain. But market actors operating at this level, chiefly consumers, have had little if no participation in the private enforcement of competition law and the situation will hardly improve since the Directive gives no incentives to these classes of subjects to claim damages, in particular neglecting any specific initiative on collective redress. The risk would therefore be to have a large extent of overcharge damages left uncompensated.

Despite the initial aim of the Proposal Directive of creating a 'level playing field' for all undertakings operating in the internal market[163], the Damages Directive has opted for the constitution of a general framework where domestic laws will find application. In this regard, the passing-on of the overcharge is no exception, notwithstanding the detailed rules that the Directive laid down in this regard. European judges have no possibility to question the right to stand of indirect purchasers and the exercise of the passing-on defence by cartelists. At the same time, the presumptions of passing-on and of harm produced by cartels will find application. However, the Directive does not clarify what damages caused by passing-on are subject to compensation, neither does it provide general principles to delimit them. By consequence, and not necessarily with

[159] Maier-Rigaud specifically examines the economic relationship between the quantitative effect and the pass on, see F.P. Maier Rigaud '*Toward a European Directive on Damages Actions'* JCLE, 10(2), 349–354.

[160] As explained in the Case C-45/76 Comet v Produktschap [1976] ECR 2043.

[161] See Joined Cases C-6/90 and C-9/90 Francovich v Italian Republic.

[162] The Euorpean legislator confirmed this approach stating that in the recently approved *Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349 (n 3) Recital 11.*

[163] Recital (9).

counterproductive effects, the national judges will apply the domestic principles of factual and legal causation to solve such cases, eventually referring to the European Court of Justice.