
EU and National Approaches to Passing on and Causation in Competition Damages Cases

– A Doctrine in Search of Balance

PEDRO CARO DE SOUSA*

1. Introduction

Victims of anticompetitive behaviour suffer harm and are entitled to compensation. The paradigmatic example of anticompetitive harm suffered by individuals is an illegal overcharge – i.e. the amount that companies add to their price as a result of the competition infringement. An illegal overcharge can be passed down a production or distribution chain, and the extent of loss can be reduced by the amount of overcharge that victims at each level of the chain are able to pass on downstream. The award of damages for losses arising out of competition infringements in systems that focus on achieving full compensation – such as those in the EU – thereby requires judges to address passing on in order to determine exactly who suffered harm and in which amounts.

An example may be useful to illustrate this. When a price-fixing manufacturer overcharges for the goods it sells, a ‘direct purchaser’ will buy the goods. This ‘direct purchaser’ may then incorporate the goods subject to the overcharge into its own products, and sell those products to ‘indirect purchasers’ at a higher price to reflect the increase in cost of its inputs – thereby passing on all or part of the original overcharge to the indirect purchasers. In turn, these indirect purchasers may be further able to pass on all or part of the overcharge they incurred in the form of higher prices, and so on, all the way to the final consumer. In this way, the harm from the original competition law infringement may flow from direct to indirect purchasers.¹

In practice, it is extremely difficult to identify who ultimately bore the loss caused by a competition infringement. The situation is analogous to the intractable problem of determining the ultimate incidence of a tax in Public Finance theory.² In both the competition and tax contexts, a charge will be shifted in

* Oxon (DPhil), OECD, DAF/COMP. The opinions expressed in this paper exclusively reflect the views of the author, and in no way represent the views of the OECD, its committees or its members. The traditional academic disclaimer applies.

¹ Report and Recommendations of the Antitrust Modernization Commission (2007), p. 265.

² S. J. Butlin ‘The Incidence of Taxation’ (1937) *Econ Rec* 13(1-2) 189, p. 191 (“*Simple and obvious as such equation of the amount of incidence and amount of tax may appear to be, the result is, in most cases, to make*

varying degrees backwards to suppliers, employees, and shareholders; or forward to direct and indirect purchasers, with the degree of shifting depending on a number of different factors. The charge will also create inefficient substitution effects (also known as ‘deadweight losses’) that will be next to impossible to measure with any degree of accuracy or at reasonable cost.³ These challenges have not prevented the development of economic techniques to measure or estimate passing on. It has also not stopped the EU Damages Directive from setting up a full compensation scheme for the redress of competition losses;⁴ nor precluded the European Commission from preparing detailed guidance focusing on economic and practical insights that may be of use for courts as regards the assessment of economic evidence of passing on.⁵

Instead of relying on these economic insights, a number of national courts in the EU have dealt with passing on in the context of national legal doctrines regarding the calculation of damages. In particular, passing on has been commonly treated as a variant of *compensatio lucri cum damno*, a set of doctrines that allow courts to discount from the damages award those benefits to the aggrieved party caused by the wrong that gave rise to liability.

In other words, national courts have adopted an openly ‘legal approach’ to passing on, in some cases expressly disavowing the suitability of adopting an economic approach.⁶ While this approach has been criticised as unwarranted and unjustified by some authors,⁷ the main question it raises is whether such

the distribution of incidence undiscoverable – not in the sense that there is insufficient information, but in the sense that incidence cannot be isolated even in abstraction”).

³ William Breit and Kenneth G. Elzinga ‘Private Antitrust Enforcement: The New Learning’ (1985) *J. Law Econ* 28(2) 405, p. 415; Kent Roach and Michael J. Trebilcock ‘Private Enforcement of Competition Laws’ (1996) *Osgoode Hall LJ* 34(3) 461, p. 491.

⁴ 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 OJ L 349, 5.12.2014, p. 1–19 (henceforth, the ‘EU Damages Directive’)

⁵ Communication from the Commission 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, OJ C 167/19, 13.6.2013; 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, 11.6.2013, SWD(2013) 205 (henceforth the Practical Guidance’). Passing on is dealt with solely at paras. 161-171. Additional guidelines, specifically on passing on, are currently under consultation – see http://ec.europa.eu/competition/consultations/2018_cartel_overcharges/index_en.html.

⁶ *Sainsbury’s Supermarkets v. MasterCard* [2016] CAT 11, para. 484(4).

⁷ Peter Davis ‘Economic Analysis in Damages Actions—Insights from Recent Proceedings in the UK’ (2017) *J.E.C.L. & Pract.* 8(9) 593; Cento Veljanovski ‘The law and economics of pass-on in price fixing cases’ (2018) *Eur.Compet.L.Rev.* (forthcoming, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2903208).

‘legal approaches’ infringe the rules on passing on and the principle of full compensation set out in EU law.

This article seeks to answer this question. It argues that the adoption of such ‘legal approaches’ by national courts does not, by itself, infringe EU law. It is untenable for courts to take a purely economic approach to passing on. This is both for practical and normative reasons. From a practical standpoint, even when economic concepts of passing on and causation are relevant for legal purposes, they still need to be adapted to fit the requirements of legal adjudication. From a normative standpoint, *compensatio lucri cum damno* doctrines raise questions regarding whether and to what extent the law should allow the deduction of any benefits caused by a wrong from the loss caused by that same wrong. Economic evidence or analysis is unable to answer such normative questions – only legal analysis can do so. As regards whether passing on should be taken into account in the context of competition law, the question is answered in the affirmative by EU law.⁸ However, EU law does not fully specify how passing on is to be established. Dealing with passing on is thus a matter left to national laws, within the overarching parameters set by EU law.

It is theoretically possible that, within the confines set by the EU Damages Directive, courts are required to pursue an approach that is as close as possible to economic approaches to passing on. Such an approximation would ensure the highest possible level of compliance with the EU principle of full compensation. Instead, this article submits that the adoption of legal approaches by national courts that deviate from an ‘ideal’ economic approach to passing on will be in line with the case law of the ECJ and with the EU Damages Directive as long as such national legal approaches do not denude passing on of practical effect. In particular, ‘legal’ approaches will only be contrary to EU law if they either infringe the specific contents of the Damages Directive, or strike the wrong balance between the relevant EU legal principles (in particular, the principles of full compensation, effectiveness and natural procedural autonomy).

The argument is structured as follows. The next section describes passing on and its role in calculating damages for competition infringements. It will also quickly review the economics of passing on, and show that any economically comprehensive passing on analysis is bound to be onerous and expensive. Section 3 describes the role of passing on in tort systems that pursue full compensation as an objective in competition damages cases, as is the case of the EU and its Member States. Section 4 then reviews national approaches to passing on. This review shows that senior national courts have adopted approaches to passing on that are based on traditional national legal doctrines regarding the calculation of

⁸ Case C-453/99 *Courage v. Crehan*, EU:C:2001:465, para. 30; EU Damages Directive, Articles 12 to 16.

damages amounts, instead of engaging in an analysis of passing on inspired by economic principles. Section 5 argues that judicial departures from pure economic analysis, and the courts' reliance on 'legal' approaches, are unavoidable. It is further submitted that dealing with passing on in the context of specific legal doctrines related to the calculation of the amount of damages is in line with the ECJ's case law and the EU Damages Directive, inasmuch as the application of such legal doctrines does not deprive passing on of practical effect.

2. Passing On and Damages

The damage suffered as a result of a competition infringement can be broken down into in three parts: the price overcharge, the pass-on effect and the volume effect. The price overcharge corresponds to the price increase that results from an anticompetitive conduct, multiplied by the total number of products purchased from the infringing parties. Passing on is the result of firms operating at an intermediary level of a production or distribution chain responding to an increase in their costs with price increases of their own. The volume or output effect corresponds to lost sales flowing from the higher prices caused by the overcharge.⁹

The calculation of competition damages usually starts by identifying the overcharge.¹⁰ In order to allocate damages correctly, one must then calculate the amount of the overcharge that the claimant has been able to pass on. Economic theory indicates that the strength of the incentives for firms to pass on cost increases depends on the type of costs that are affected and on the market environment in which the affected firm operates:¹¹

- Type of Costs – An overcharge can affect fixed costs and variable costs. It is usually thought that an overcharge affecting variable costs is more likely to be passed on. However, where the overcharge affects a fixed cost of the claimant, it is unclear what impact this may have on the pass-on rate.¹²

⁹ Frank Verboven and Theon Van Dijk 'Cartel Damages Claims and the Passing On Defense' (2009) *The Journal of Industrial Economics* LVII(3) 457, p. 466; Martijn A. Han, Maarten Pieter Schinkel and Jan Tuinstra 'The Overcharge as a Measure for Antitrust Damages' Amsterdam Center for Law & Economics Working Paper No. 2008-08, p. 6.

¹⁰ Despite criticisms that the overcharge fails to reflect adequately the harm caused by an anticompetitive infringement – Frank Maier-Rigaud and Ulrich Schwalbe 'Quantification of Antitrust Damages' in David Ashton (ed.) *Competition Damages Actions in the EU* (2nd Ed. Elgar, 2013), p. 424.

¹¹ *Id.*, p. 426; Benoît Durand and Iestyn Williams 'The Passing-On of Overcharges: An Economic Perspective' (2016) *Global Private Litigation Bulletin* (American Bar Association) 8(7), p. 8-9.

¹² As explained in Oxera '*Quantifying antitrust damages, Towards non-binding guidance for courts, Study prepared for the European Commission*' (2009), available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf, p. 120: "fixed costs do not directly determine price in the same way as marginal costs, at least in the short run (in the longer run, many fixed

- Intensity of Competition – Under textbook conditions of perfect competition and elastic supply (i.e. supply that is highly sensitive to even very small changes in price), 100% pass-on is predicted when an overcharge is ‘industry-wide’ and all competitors are similarly affected. Conversely, if the overcharges are specific to an individual firm operating in a perfectly competitive market, there will be no scope for passing on.¹³ This may also be the case if, for example, an entire industry is affected by the overcharge, but that industry competes with another industry that uses a different upstream input not subject to the overcharge – in which case that other industry can leave its prices unchanged.¹⁴ In practice, few markets are perfectly competitive. When competition is not perfect, or when demand is not perfectly elastic, rates of passing on will vary widely depending on the precise market context. Economics predicts that, even if the overcharge only affects one of a number of competitors, that firm may still be able to pass on at least part of the overcharge when competition is imperfect – but the extent of passing on will typically be less than for industry-wide overcharges of the same magnitude.¹⁵
- Buyer power – The result of buyer power may be slightly counter-intuitive. For example, if customers are so strong that negotiations result in prices anchored to the manufacturer or seller’s costs, substantial pass-on of any overcharges affecting those costs may be expected. On the other hand, if the price that a buyer secures from a firm is affected by competition from another firm, the extent to which an overcharge that is specific to the first firm is passed on may be limited if the customer has the option of switching to the latter firm.¹⁶
- Volume Effect – This is also known in economic theory as deadweight welfare loss. Volume effects arise from the fact that some purchasers are not willing to pay the higher price caused by the anticompetitive practices, and therefore cease purchasing a product that they would have acquired in

costs tend to become variable). Therefore, a change in fixed costs due to an infringement may not be passed on in the same way.”

¹³ Verboven and Van Dijk, op. cit. *supra* note 9, p. 466.

¹⁴ See id., p. x: “*This result (which can seem counterintuitive) simply follows from the fact that, under perfect competition, prices equal marginal costs in equilibrium. In contrast, for a cost increase that affects only one, or some, of the competitors in the market, the expected pass-on rate would be 0%, since those competitors that do not face the increase can leave their prices unchanged. This may also be the case if, for example, an entire industry is affected by the overcharge but that industry competes with another industry that uses a different upstream input not subject to the overcharge and that can therefore leave its prices unchanged.*”

¹⁵ Id., p. 117-118; Verboven and Van Dijk, op. cit. *supra* note 9, p. 480-481; Leonar Basso and Thomas Ross ‘Measuring the True Harm from Price-Fixing to Both Direct and Indirect Purchasers’ (2010) *The Journal of Industrial Economics* LVIII(4) 895, p. 919; Durand and Williams op. cit. *supra* note 11, p. 8.

¹⁶ Oxera, op. cit. *supra* note 10, p. 121; Durand and Williams, op. cit. *supra* note 11, p. 9.

the absence of an overcharge.¹⁷ However, identifying consumers that suffered loss from the infringement because they did not buy the product at an increased price is very difficult – and even more difficult to prove, since evidence must be adduced showing that these customers would have acquired the product were it not for the price increase.¹⁸

- Consequently, the claimants most likely to raise volume effects in court operate at intermediate levels of a production and distribution chain, where they are likely to suffer a measurable decline in sales as a consequence of passing on the overcharge.¹⁹ This provides a basis for a claim for profits foregone because of the volume reduction in sales caused by the increased price of its products. However, this means that passing-on and volume effects will have opposing effects when the claimant is an intermediate seller: whilst passing on reduces damages, the volume effect increases those damages.

The magnitude of each effect depends on the specific conditions of the market. When the claimant is a monopolist in the downstream market, economic theory indicates that the volume effect will exceed the passing-on effect. In this case, a damages estimate based on a measure of the overcharge alone will understate the harm caused.²⁰ Outside monopoly, however, the balance of the passing-on and volume effects in imperfectly competitive settings will depend on the strategic interactions between competitors, and can lead to higher or lower damages awards depending on the circumstances.²¹

In theory, it is possible to estimate empirically the relevant pass-on rates in the case at hand. In practice, this requires access to data on actual prices and costs at all relevant layers of the supply chain, which are unlikely to be available.²² The guidance that economics can offer to courts will become more

¹⁷ Martin Hellwig ‘Private Damage Claims and the Passing-On Defense in Horizontal Price-Fixing Cases: An Economist’s Perspective’ in Jürgen Basedow (ed.) *Private Enforcement of EC Competition Law* (2007, Kluwer), p. 125; Oxera, op. cit. supra note 10, p. 100.

¹⁸ Durand and Williams, op. cit. supra note 11, p. 15.

¹⁹ The volume effect is not relevant for the calculation of antitrust damages in the US: see *American Crystal Sugar Co. v. Mandeville Island Farms*, 195 F:2d_622 (9th Cir., 1952).

²⁰ Hellwig, op. cit. supra note 17, p. 125, 136-137.

²¹ Durand and Williams, op. cit. supra note 11, p. 9. Verboven and Van Dijk, op. cit. supra note 9, expect the passing on effect to dominate the volume effect in most such cases. Hellwig, op. cit. supra note 17, p. 152 seems to be critical of this position, arguing that ‘*the passing-on defense is actually irrelevant to a proper assessment of damages, given the impact of the volume effect*’. Hellwig’s argument has been understood as applying only to downstream monopolists /cartelists, and as not challenging that the balance of passing-on and volume effects may change depending on market circumstances – see Verboven and Van Dijk, op. cit. supra note 9, p. 459; Han, Schinkel and Tuinstra, op. cit. supra note 9, p. 3.

²² Oxera, op. cit. supra note 10, p. 16.

accurate the more information is available about the essential facts of a case; at the same time, the more information is available, the harder and more costly the analysis is likely to become.²³

As should be apparent from the discussion above, economic theory provides limited guidance on whether and to what extent passing on takes place. Any comprehensive analysis of passing on is thus bound to be lengthy, onerous and expensive.²⁴

3. Passing on and Full Compensation

While a purely compensation-oriented system will have to take passing on into account, it can do so in two guises: as a sword or as a shield. As a shield, passing on allows respondents to argue that the claimant passed on the overcharge to its downstream customers fully or in part, and that the damages award should be reduced accordingly. As a sword, passing on allows indirect purchasers to claim damages for losses caused by a competition law infringement further up the supply chain.

It is possible to set up systems with only limited recourse to passing on; such choices are ultimately matters of policy. However, given the difficulties that passing on raises in practice, and its connection with ideas of accurate compensation, if a jurisdiction takes passing on into account, it will often recognise it as both shield and sword.²⁵

This is the situation in the EU, where passing on is frequently raised in competition damages claims. The ECJ recognised the passing on defence in the seminal *Courage* case,²⁶ and this recognition of the defence was reiterated in a number of subsequent cases.²⁷ The EU Damages Directive expressly recognises passing on as a defence,²⁸ while also putting significant effort into trying to enable passing on to be used as a sword. The Directive sets out that if price increases caused by an infringement have been

²³ Jon Lawrence ‘Reflections on the EU Pass-On Study’ (2016) Global Private Litigation Bulletin (American Bar Association) 8 12, p. 13.

²⁴ Hellwig, *op. cit. supra* note 17, p. 145-146, identifies additional conceptual challenges for the assessment of passing on – such as how to identify the relevant causation mechanisms and impute responsibility for a price increase – regarding which economics may have little to say.

²⁵ This is particularly evident in the Bundesgerichtshof’s decision of 28 June 2011 (KZR 75/10 – ORWI), which decided that indirect purchasers were entitled to claim in damages and also set out the conditions for passing on defences to succeed.

²⁶ Case C-453/99 *Courage v. Crehan*, EU:C:2001:465, para. 30 (‘Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them’).

²⁷ Case 295/04 *Manfredi* ECLI:EU:C:2006:461; Case C-199/11 *Otis* ECLI:EU:C:2012:684; Case C-536/11 *Donau Chemie* ECLI:EU:C:2013:366; Case C-557/12 *Kone AG and others* ECLI:EU:C:2014:1317.

²⁸ EU Damages Directive, Article 13.

passed on along the production or distribution chain, those who ultimately suffered the harm will be the ones entitled to claim compensation, irrespective of whether they are direct or indirect purchasers.²⁹ The Directive also creates a legal presumption of passing on for claims brought by indirect purchasers which arises when certain conditions are met. Lastly, the Directive adopts a number of mechanisms to ensure that passing on can be deployed as an effective means to achieve full compensation. These include: measures to ensure that direct and indirect purchaser claims are rendered coherent and a defendant does not end up paying more than the harm it has inflicted; a provision allowing courts to estimate passing on; and a requirement for the European Commission to issue guidelines providing guidance to national courts on how to address passing on issues.³⁰

It is also possible for passing on not to be relevant for the calculation of competition damages. This is the case in the US, where indirect purchasers are not granted standing to sue for antitrust damages³¹ and defendants are not allowed to invoke passing on as a defence^{32,33}. Ignoring passing on concentrates competition claim in the hands of those most likely to sue.³⁴ However, such rules often lead to the ultimate victims of a competition law infringement not being compensated, and to companies which were able to pass on the overcharge to obtain a windfall in the form of damages. Such an approach is justified by a focus on punishment to the detriment of compensation. Another reason to refuse to address matters relating to passing on is to promote more effective private enforcement and avoid the need to “trace the complex economic adjustments” required to determine the impact of an infringement on indirect purchasers.³⁵ The burden on courts to manage the complexity of estimating the damages incurred by indirect purchasers has remained an important concern in the US to this day.³⁶

²⁹ Id., Articles 4 and 12.

³⁰ Id., Articles 14 to 17. See also Veljanovski op. cit. *supra* note 6.

³¹ *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1977), at 728–29. Direct purchasers have been entitled to recover damages on the basis of the overcharge they paid as a result of the antitrust infringement since *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 396 (1906).

³² *Hanover Shoe, Inc. v. United Shoe Mach. Corp.* 392 U.S. 481, 494 (1968).

³³ This is merely at the federal level. Many states allow passing on to play a role in competition damages cases.

³⁴ Alison Jones ‘Private Enforcement of EU Competition Law: A comparison with, and lessons from, the US’ in M Bergström, M Iacovides, M Strand (eds), *Harmonising EU Competition Litigation: The New Directive and Beyond* (Hart, 2016), p. 7.

³⁵ *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1977), at 730-734.

³⁶ Id., at 731–37. See William H. Page ‘The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick’ (1999) *Antitrust L.J.* 67 1, p. 12–19. The Antitrust Modernization Commission, op. cit. *supra* note 1, p. 274, explained that, while recent advances in econometrics and other methodologies have made

4. National Approaches to Passing On

Courts often seem reluctant to engage with the complexities of passing on. In the US, the refusal to take passing on into account has judicial origins.³⁷ In Europe, studies have revealed that courts tend to assign round numbers to passing on – i.e. courts find that the overcharge was passed on either fully or not at all.³⁸ This seems to be the result of national courts in Europe refusing to adopt purely economic approaches to passing on in competition cases. Instead, they have developed ‘legal’ approaches that build on national legal doctrines that regulate when benefits flowing to the victim from a wrong can reduce the amount of damages awarded for that same wrong.³⁹ A number of examples will help to illustrate this point.

4.1 United Kingdom

Until recently passing on had not been explicitly addressed by English courts, despite a number of *dicta* over the years.⁴⁰ The first decision to do so was adopted only in 2016, when the Competition Appeals Tribunal rejected a passing on defence because it had not been proven.⁴¹ More relevant than the result, for

passing on assessments somewhat more manageable, managing the complexity of damage calculation for direct and indirect purchasers remains a non-trivial problem, see.

³⁷ *Hanover Shoe, Inc. v. United Shoe Mach. Corp.* 392 U.S. 481 (1968); *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1977).

³⁸ Paul Hitchings ‘The EU Pass-On Study’ (2016) Global Private Litigation Bulletin (American Bar Association) 8 3, p. 4-5, puts the number of cases in which passing on was determinative of the outcome of a competition damages claim at 24 as of December 2016. In most cases, passing on had been raised as a defence. In more than half of the cases, the court rejected the passing on defence entirely, whereas in about 40% of the cases the court determined that the claimant had passed on the overcharge entirely. Of the 10 cases in which passing on was totally successful, three were cases brought before the French courts in which passing on was raised as a defence and where the burden of proof was on the claimant to show that it had not passed on the overcharge. In one case – Danish Maritime and Commercial Court, Case no. U-4-07 *Cheminova A/S v. Akzo Nobel Functional Chemicals BV and Akzo Nobel Base Chemicals AB*, judgment of 15 January 2015 – 50% passing on was held to have occurred (reducing the overcharge harm by half) and loss of profits was also quantified and awarded. See also Oxera, op. cit. supra note 10, p. 119-120.

³⁹ Till Schreiber ‘Comment on the Study on the Passing-On of Overcharges’ 2016) Global Private Litigation Bulletin (American Bar Association) 8 16, p. 17.

⁴⁰ *Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors* (Rev 1) [2008] EWCA 1086, para. 90 (“[A claim for damages] is subject to the question of the passing-on defence with which we are not concerned on this appeal”) and 96 (focusing on whether the risks to success of private damages claims created by passing on justifies the award of restitutionary remedies); *Emerald Supplies Ltd & Anor v British Airways Plc* [2010] EWCA Civ 1284 (EWCA (Civ) 2010), paras. 54 and 66 (deeming passing on relevant to the fact that the members of a class in group litigation do not have the same interests in a representative action); *WH Newson Holding Ltd & Ors v IMI Plc & Ors* [2013] EWCA Civ 1377, paras. 39-41, and *British Airways Plc v Emerald Supplies Ltd and Others* [2015] EWCA Civ 1024, paras. 167-169 (both of which relied on passing on as evidence that cartelists did not care about where damages lay and that, as a result, the “intention” element required for economic torts such as conspiracy was not fulfilled).

⁴¹ *Sainsbury’s Supermarkets v. MasterCard* [2016] CAT 11. As noted at para. 483, previously there had been no case under English law substantively dealing with the passing on defence.

our purposes, is that the Tribunal created a legal test which was explicitly held to be different from economic approaches to passing on.⁴² The Tribunal considered that although an economist might define pass-on to reflect: “*how an enterprise recovers its costs (...) a lawyer is concerned with whether or not a specific claim is well founded*”.⁴³ Passing on is part of the normal quantification of damages, and as such it must ensure that the claimant is not overcompensated and the defendant does not pay damages twice for the same wrong.⁴⁴ The legal test for passing on has two elements, both of which need to be established by the defendant: (i) an “identifiable” increase in the purchasers’ prices causally connected with the overcharge; and (ii) a class of downstream claimants who paid the higher prices. This legal test differs from economic approaches to passing on across a number of dimensions, including:

(a) its scope: the legal test is only concerned with identifiable prices increases by a firm to its customers that result from an overcharge, whereas an economist may define pass-on more widely (e.g. to include cost savings and reduced expenditure);

(b) its attitude towards under-compensation: the economic approach focuses on ensuring that compensation is allocated exactly in line with losses. The legal approach refuses to acknowledge passing on unless the defendant meets the criteria outlined above, in order to avoid situations where: “*any potential claim becomes either so fragmented or else so impossible to prove that the end result is that the defendant retains the overcharge in default of a successful claimant or group of claimants.*”⁴⁵ In other words, the legal approach expressly takes the risk of under-compensation into account and seeks to limit it by means of the allocation of the burden of proof.⁴⁶

At the same time, this approach is in line with general law on the determination of damages, as was recognised on appeal. The Tribunal’s judgment was appealed to the Court of Appeal, which upheld the decision and took the opportunity to elaborate on the foundations of the passing on defence. It held that the EU principles underpinning passing on ‘*are entirely consistent with common law principles of the*

⁴² Peter Davis op. cit. *supra* note 7, p. 599, argues that this difference may be overblown, since economic theory could be used to assign damages on the basis of available evidence. Cento Veljanovski op. cit. *supra* note 7, argued that the tribunal’s distinction between economic and legal approaches is misguided, and arises from a limited understanding of economic passing on.

⁴³ *Sainsbury’s v MasterCard* [2016] CAT 11, para. 484(4).

⁴⁴ Id., para. 480 and 484(4). Supporting this view well before the case was decided, see Peter Whelan ‘An Argument in Favour of the Passing-On Defence: A Response to Private Actions in Competition Law: A Consultation on Options for Reform’ (2012) Comp Law 211.

⁴⁵ *Sainsbury’s v MasterCard* [2016] CAT 11, para. 484 (5).

⁴⁶ Id., para. 484 (4).

assessment of damages and, in particular, mitigation'.⁴⁷ Under these principles, the circumstances in which the wrongdoer can obtain a discount from damages as a result of acts undertaken by the victim are limited: "*The essential question is whether there is a sufficiently close link between the [benefit and the loss] and not whether they are similar in nature. The relevant link is causation. The benefit to be brought into account must have been caused either by the breach (...) or by a successful act of mitigation.*"⁴⁸

Applying these principles, the Court of Appeal held that sums received by the victim because it passed on an overcharge can only be taken into account and deducted from the damages award *if there is a sufficiently close causative link* between the price increase and the wrong committed by the defendant.⁴⁹ The Court of Appeal ultimately held that it is a matter for the judge to decide whether, on the evidence before her or him, the defendant can show that there is a sufficiently close causal connection between an overcharge and an increase in the direct purchaser's price; and that it saw no reason why that increase should not be established by a combination of empirical fact and economic evidence.⁵⁰ Lastly, the Court of Appeal explained that passing-on in the form of an increase in the retail price might also give rise to a loss of profit on the part of the claimant, which would need to be taken into account in the assessment of damages.⁵¹

These judgments, in addition to expressly endorsing legal over economic approaches to passing on, raise a number of interesting questions. A first question concerns what exactly might be the test of causation that should be deployed to determine whether a price increase following an overcharge is sufficiently related to the competition infringement.⁵² A second question is whether the same strict requirements for establishing a passing on defence also apply to indirect purchasers, who must establish passing on in order to receive damages.⁵³ If so, it would mean that claims brought by indirect purchasers

⁴⁷ *Sainsbury's v MasterCard; AAM v MasterCard; Sainsbury's v Visa* [2018] EWCA 1536 (Civ), para. 327.

⁴⁸ *Globalia Business Travel SAU v Fulton Shipping Inc.* [2017] UKSC 43, para. 30.

⁴⁹ *Sainsbury's v MasterCard; AAM v MasterCard; Sainsbury's v Visa* [2018] EWCA 1536 (Civ), paras. 328-330.

⁵⁰ *Id.* paras. 332.

⁵¹ *Id.* paras. 334.

⁵² In particular, it is not clear whether the same causation test applies to instances of mitigation and passing on, even if it arguable that the Court of Appeal's decision points in that direction. See Emily Neil 'The passing-on "defence" after Sainsbury's' at <https://competitionbulletin.com/2016/08/03/the-passing-on-defence-after-sainsburys/>.

⁵³ Tristan Jones 'The English law of causation and the passing-on defence', available at <https://competitionbulletin.com/2014/06/30/the-english-law-of-causation-and-the-passing-on-defence/>.

would be less likely to be successful, which might run against the principle of full compensation and the efforts of the Directive to ensure that indirect purchasers are able to bring successful claims for loss.

4.2 Netherlands

A second example comes from the Netherlands, where the Dutch Supreme Court held that passing on is available as a defence.⁵⁴ However, passing on under Dutch law can be either a defence going to the amount of damages, or a mechanism to offset any collateral benefits from the infringing conduct against the amount of damages to be awarded in line with the legal doctrine of ‘*voordeelstoerekening*’. This second approach requires a sufficiently close causal link between the wrongdoing and the benefit, and for the court to take into account the reasonableness of taking the victim’s benefit into account. The Supreme Court ultimately held that a court might choose between these approaches because they are broadly equivalent, especially in that both require deductions to the damages amount to be reasonable.⁵⁵

In the relevant case, TenneT, the Dutch electricity grid operator, sued a cartel that operated in an upstream market and had sold TenneT gas insulated gear, an input for electricity. The court found that TenneT likely had passed on the cartel overcharge to its direct customers through higher electricity prices. In turn, these direct customers had passed on this subsequent overcharge to the general public. Nevertheless, the court awarded damages for the entire overcharge to TenneT – i.e. it ignored passing on. The basis for this decision was that the public was very unlikely to initiate legal proceedings against the cartel to recover their losses, which meant that it would be unreasonable for the passing on defence to be allowed. Instead, awarding damages to TenneT, a fully-owned entity of the Dutch state, was likely to benefit the general public, including end-users who had suffered direct losses. The Dutch courts stressed that the damages awarded to TenneT were in conformity with the EU principle of effectiveness, which requires that a Member State’s rules for obtaining compensation must not be such as to render it practically impossible or excessively difficult for a victim to claim damages.⁵⁶

The approach adopted in this case bears comparison to the US’ refusal to take passing on into account. One reason given by the US Supreme Court for adopting this position was that it thought it would promote more effective private enforcement and avoid the need to “trace the complex economic

⁵⁴ HR, July 8, 2016 (*TenneT TSO BV, Saranne BV v ABB BV, ABB Ltd.*) ECLI:NL:HR:2016:1483.

⁵⁵ Id. See also Jost Fanoy and Jan-Willem de Jong ‘Dutch Court Awards Damages in Follow-On Cases’ (2017) ABA International – Antitrust Section (2) 25, p. 25; Matthijs Kuijpers, Tommi Palumbo, Elaine Whiteford, Thomas B. Paul ‘Actions for Damages in the Netherlands, the United Kingdom and Germany’ (2018) J.E.C.L. & Pract. 9(1) 55, p. 58.

⁵⁶ District Court of Gelderland, Mar. 29, 2017 (*TenneT TSO BV, Saranne BV / ABB BV, ABB Ltd.*) ECLI:NL:RBGEL:2017:1724. See also articles mentioned in note 55 *supra*.

adjustments” necessary to determine the impact of a competition infringement on indirect purchasers.⁵⁷ This links with a wider issue affecting the effectiveness of private competition enforcement in the EU: many indirect purchasers are consumers who are disinclined to take large corporations to court. The TenneT decision could thus be read as implicitly holding that the effectiveness of private enforcement of competition law may require courts to disregard passing on defences, particularly when it is unlikely that indirect purchasers will rely on passing on as a ‘sword’.

4.3. Germany

A third example comes from Germany. In *Orwi*, the Federal Supreme Court (*Bundesgerichtsof*) held that a passing on defence will only be allowed if the defendant is able to explain why, based on pertinent market conditions, the passing-on of the cartel surcharge to indirect customers can be reasonably assumed to have occurred. A defendant will also have the burden of proving that: (i) the claimant has not suffered any other form of disadvantage in connection with the anticompetitive practice, such as a decline in sales as a result of higher prices arising from the cartel surcharge (i.e. losses related to volume effect); and (ii) that any increase in price by a claimant which is said to amount to passing on is not, instead, the result of the claimant’s entrepreneurial achievements (e.g. the increased price reflects added value due to further processing of the product or negotiating skills).⁵⁸

These stringent requirements align with the legal doctrine of ‘*Vorteilsausgleichung*’ (‘Adjustments of Benefits’), which requires a causal link between the damaging event and the claimant’s advantage.⁵⁹ The underpinning of this doctrine is similar to that of the Dutch ‘*voordeelstoerekening*’ doctrine reviewed above – a defendant may rely on benefits accruing to the claimant, but only if there is an adequate causal link between the injury and the benefit, and if taking the benefit into account neither contradicts the policy

⁵⁷ *Illinois Brick Co. v. Illinois* 431 U.S. 720 (1977), at 730-734.

⁵⁸ KZR 75/10 – ORWI, para. 69.

⁵⁹ KZR 75/10 – ORWI, para. 59-60 (‘*A prerequisite for an adjustment of benefits is, first of all, that the price increase that the injured party passed on to its customers is in an adequate causal relationship with the cartel-related price (...) [The direct purchaser’s] price increase and antitrust advantage is the mirror image of the damage caused to it by the cartel. To determine whether the price increase by the direct purchaser is caused by the cartel requires an analysis of the economic conditions in the downstream market, as with the assessment of the cartel overcharge*’). Translation is mine.

objectives inherent to claims for damages nor unjustifiably exonerates the defendant.⁶⁰ Unsurprisingly, these requirements have proven very difficult to meet in practice.⁶¹

Similarly to the Dutch Supreme Court, the *Bundesgerichtshof* relied on the principle of effectiveness when adopting these stringent conditions for a passing on defence to succeed, implicitly assuming that it may be unlikely for indirect purchasers (or, at least, a significant number of them) to be able to bring successful claims.⁶² The principle of effectiveness and concerns about the ability of indirect purchasers to bring competition damages claims might have also underpinned the *Bundesgerichtshof* decision that, while the burden of proof of the passing on defence will normally rest with the defendant, it is possible for it to fall with the claimant in certain circumstances.⁶³

The stringency of the conditions set out in *Orwi* gave rise to doubts about whether such an approach to the passing on defence was in line with the EU Damages Directive.⁶⁴ Such concerns were addressed when the Directive was transposed into German law. In particular, the amended law allows the passing on defence to succeed whenever an overcharge has been passed on to indirect purchasers, with the defendant no longer being required to prove that the claimant has not suffered any harm as a result of the volume effect.⁶⁵ At the same time, the law now clearly distinguishes between the overcharge and a claim for loss of profit. In particular, claims for loss of profit will still be allowed even if passing on is established.

⁶⁰ KZR 75/10 – ORWI, para. 58. See Ulrich Magnus “Vorteilsausgleichung” – a typical German institute of the law of damages?” in Magnus/Van Dijk (eds.), *Voordeeltorekening naar Duits en Nederlands recht* (2015), p. 8; Laura Lalikova ‘Implementation of Antitrust Damages Directive in Germany, France, and Ireland’ (2018) *Journal of European Competition Law & Practice* 9(4) 226, p. 233.

⁶¹ Kuijpers *et alia* op. cit. *supra* note 55, p. 66.

⁶² Josef Drexler ‘Public and Private Enforcement of Competition Law’ in Hans W Micklitz and Andrea Wechsler (eds.) *The Transformation of Enforcement: European Economic Law in a Global Perspective* (Hart, 2016), p. 152.

⁶³ KZR 75/10 – ORWI, paras. 74-77. Under German civil law, the burden of proof lies with the party relying on the facts in question, except where the other party has superior access to the facts and the party with the burden of proof has no such insight. In such cases, the party relying on the facts needs to establish their plausibility, and the burden of disproving the facts may then shift to the opposing party. See Ahrens Böttcher ‘The German Federal High Court rules on damage claims by indirect purchasers and the passing-on defence in a cartel case (Carbonless paper cartel)’ *e-Competitions Bulletin* November 2011, Art. N° 40926.

⁶⁴ Christian Kersting ‘Transposition of the Antitrust Damages Directive into German Law’ in Rodger, Ferro and Marcos (eds.) *The EU Antitrust Damages Directive: Transposition in the Member States* (forthcoming, OUP), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2998586, p. 22.

⁶⁵ Sec. 33c(1) GWB. For recent examples of a continued strict approach, even after the Damages Directive has been transposed, see the decisions in LG Hannover 20.06.2018 - Cases 18 O 21/17 and 18 O 23/17 and LG Stuttgart 20.06.2018 – Case 45 O 1/17.

4.4 Spain

A last example comes from Spain. In a number of damages claims related to a sugar cartel, it was argued that the claimants had not suffered any damage because they had passed on the overcharge to final consumers. The lower courts were divided: one decision found no evidence of passing on,⁶⁶ while another did not award damages because passing on had been proved.⁶⁷

On appeal, the Spanish Supreme Court held that, in the absence of detailed EU rules, Spanish legal principles apply. Such legal principles – including the principle of unjust enrichment – allow a defendant to prove that the claimant did not suffer harm because it transferred the loss it suffered onto others. However, mere evidence of a price increase does not suffice to establish passing on; the defendant must show that the claimant's price increase successfully transferred the harm suffered as a result of the cartel overcharge onto others. Furthermore, if the claimant has suffered other losses – e.g. loss of profit flowing from the volume effect – the passing-on defence cannot be accepted in its totality. In this particular case, there was no evidence that the claimant's price increase transferred onto others the harm suffered as a result of the defendant's competition infringement, and, as such, the passing on defence was not made out.⁶⁸

4.5. Interim Conclusions

Passing on has been regularly incorporated into national laws as a variant of national legal doctrines that allow the amount of damages to be adjusted to reflect the benefit that the victim derived from the tortious conduct. These national legal doctrines require that the benefit be causally related to the wrong that caused the loss – i.e. the competition infringement. Consequently, courts do not seek to determine which amount of the overcharge was effectively passed on in accordance with economic principles, but instead deal with passing on as a matter connected to the allocation of the burden of proving this causal relationship. The focus is thus on identifying who must prove that passing on occurred, and whether that party met its burden of proof to the requisite standard.

This is not to say that economics are not relevant – on the contrary, some of the decisions reviewed above engaged in extensive economic analysis. However, the courts' analyses expressly subordinate

⁶⁶ A decision upheld by Supreme Court – Judgment of 8 June 2012, *Galletas Gullón et al v ACOR* (STS 5462/2012).

⁶⁷ Judgment of the Provincial Court of Madrid (s 8) of 3 October 2011, *Nestlé et al v Ebro* (JUR/2011/386351).

⁶⁸ Supreme Court Judgment of 7 November 2013 – *Nestlé et al v Ebro Foods* (STS 5819/2013). See Fernando Diez Estella and Clara Estrada Meray 'Las Acciones de Danos Derivadas de Ilícitos Competitivos en España' (2014) *Comentarios de Jurisprudencia* 15 189, p. 193-194; Francisco Marcos 'Damages Claims in the Spanish Sugar Cartel' (2015) *J.A.E.* 3(1) 205, p. 222-223.

economic approaches to legal principles related to the calculation of damages and the allocation of the burden of proof. This may help explain why such defences often either succeeded or failed completely (i.e. why passing on is found to be either 100% or 0% in virtually every case).

A second trend is that courts have displayed widespread concern with the possibility that passing on might allow defendants (i.e. the entities which infringed competition law) to avoid paying damages. As a result, courts have set high thresholds for a passing on defence to succeed, often invoking the principle of effectiveness of EU law to justify this stringent approach.

A last trend is that all these cases are about passing on as a ‘shield’. It is remarkable that none of these cases concerned claims for damages by indirect purchasers. This may provide support for the European Commission’s focus on promoting claims by indirect purchasers – which found its way into Directive and subsequent guidelines⁶⁹ - and for the national courts’ restrictive approach to the passing on defence. In effect, the available empirical evidence shows that claims brought by indirect purchasers are rather rare, except in certain cases – such as wholesalers who are indirect purchasers. This has led some to argue that promoting damages claims by indirect purchasers may require the adoption of collective redress mechanisms, which is something that the EU Damages Directive does not impose.⁷⁰ At the same time, it is unclear whether the stringent legal approaches adopted by national courts as regards passing on defences would also apply for passing on as a ‘sword’ – and, if they did, whether they would comply with EU law.

Whether the measures adopted in the Directive to promote claims by indirect purchasers work remains to be seen. With the exception of the decision by the English Court of Appeal, the decisions reviewed above were adopted before the Damages Directive came into effect. Even if these measures succeed, they will do so by creating an imbalance – indirect purchasers will often benefit from a presumption of harm, while defendants will be subject to a demanding evidentiary burden to rebut this presumption. This creates risks of overcompensation – a concern that had already been identified prior to the transposition of the Directive in some Member States.⁷¹ It is true that the Directive sets out mechanisms to address this risk – in particular the requirement for courts to take due account, by procedural or substantive means available under Union and national law, of any related actions and of the resulting

⁶⁹ See EU Damages Directive, Recital 41, Arts 12, 13 and 14. The guidelines are under consultation at the time of writing: see http://ec.europa.eu/competition/consultations/2018_cartel_overcharges/index_en.html.

⁷⁰ Robert Land and Joshua Davis ‘Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases’ (2008) U.S.F. L. Rev. 42 879; Barry J. Rodger ‘Why not court? A study of follow-on actions in the UK’ J Antitrust Enforcement (2013) 1(1) 104.

⁷¹ Drexl, *op. cit. supra note 62*; Christian Kersting, ‘Cartel Damage Claims after the 9th Amendment of the Act against Restraints of Competition’ (2017) Insurance, Liability and Damages Law Journal 581 (VersR), p. 15.

judgments, particularly where they find that passing-on has been proven.⁷² Furthermore, national courts should have at their disposal appropriate procedural means, such as joinder of claims, to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level.⁷³ The challenge to the effectiveness of these tools is that claims further down the supply chain are likely to be fragmented, and hence difficult to identify or take into account. In effect, the reasons behind the adoption of incentives to promote claims by indirect purchasers in the Directive – namely difficulty of proof, the fragmentation of claims and the absence of adequate collective redress mechanisms – are the same that make it doubtful that a ‘duty to take into account’ or national joinder mechanisms will be able to address these concerns effectively.⁷⁴

These are fundamental matters for the ultimate effectiveness of the EU’s private enforcement regime. While they are related to discussions regarding passing on, such matters ultimately require an analysis of the suitability of the institutional framework of private competition enforcement in the EU, e.g. whether collective redress mechanisms are necessary. These questions require detailed treatment and exceed the scope of this article.⁷⁵

5. National and European Approaches to Passing On

Treating passing on as falling within the scope national doctrines regarding the calculation of damages is a natural consequence of competition “damages” being a type of tort law damages that, like civil law in general, remain a national competence.⁷⁶ It is thus unsurprising that passing on has been treated as a variant of *compensatio lucri cum damno* doctrines known in the tort laws of most EU Member States – i.e. doctrines that regulate how damages awards in general can be adjusted to reflect the benefit that the victim derived from the tortious conduct. The general importance and relevance of such doctrines is apparent in a number of instruments that seek to develop models of uniform private law – e.g. the Draft of

⁷² EU Damages Directive, Art. 15.

⁷³ Id., Recital 44.

⁷⁴ Drexl, op. cit. *supra* note 62, p. 153, criticises the *Orwi* decision along these lines.

⁷⁵ But see the discussion in OECD (2007) Private Remedies DAF/COMP(2006)34; OECD (2015) Relationship between Public and Private Enforcement WP3(2015)14; European Commission ‘Report on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law’ (COM/2018/040 final).

⁷⁶ Hellwig, op. cit. *supra* note 17, p. 122.

a Common Frame of Reference (Principles, Definitions and Model Rules of European Private Law)⁷⁷, the European Principles of Contract Law,⁷⁸ and the UNIDROIT principles.⁷⁹

These doctrines nonetheless seem to be in tension with the EU law principle of ‘full compensation’. The judgments reviewed above were mostly adopted before the Directive entered into force, and as such raised issues mainly regarding compliance with the principles of effectiveness and full compensation under primary EU law. The implementation of the Directive raises an additional question: whether adopting this case law in future cases will infringe the Directive, even if the case law could be said to be in line with EU primary law. Given the absence of detailed rules in the Directive on how to determine passing on, the answer to this question is unlikely to be different from that which would be reached under EU primary law alone. The question is still, in the main, whether national ‘legal’ approaches to passing on reach a correct balance of the principles of effectiveness, full compensation and procedural autonomy of the Member States.⁸⁰

Different answers have been proposed to this question. On the one hand, it has been said that the use of a reasonableness test for passing on under Dutch law seems difficult to reconcile with the notion that compensation should be available for actual loss at every level of the supply chain and should not exceed the loss suffered at each level.⁸¹ On the other, it has been argued that to allow the passing-on defence in cases where an overcharge was passed on to a large number of consumers, each of which only suffered marginal loss, would contravene the Directive’s objective to avoid ‘absence of liability of the infringer’ in the absence of collective redress mechanisms.⁸² Since serious minds may reasonably disagree

⁷⁷ Chapter III. – Article 3:702: General measure of damages, which should be read together with Chapter VI, Section I, 6:103: Equalisation of benefits, according to which benefits arising to the person suffering legally relevant damage as a result of the damaging event are to be disregarded unless it would be fair and reasonable to take them into account.

⁷⁸ Chapter IX, Section 5, Article 9:502 devoted to the calculation of the amount of damages. Its formulation accepts the principle of *compensation lucri cum damno*, whereby loss should be computed with gains and should thus amount to a net loss. See Luisa Antonioli and Anna Veneziano ‘Principle of European Contract Law and Italian Law – A Commentary’, p. 448.

⁷⁹ Article 7.4.2 on the rule of full compensation, s. 1, makes it clear that account is to be taken of any gain the aggrieved party has received resulting from its avoidance of cost or harm. In the commentary, it is explained that the aggrieved party must not be enriched by the payment of damages.

⁸⁰ EU Damages Directive, 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 principle of effectiveness and equivalence.”

⁸¹ Kuijpers *et alia*, op. cit. *supra* note 55, p. 58

⁸² Christian Kersting, op. cit. *supra* note 64, p. 21.

on the correct treatment of passing on, disputes on such matters may easily find their way to the ECJ via preliminary references and, potentially, infringement procedures.

It is submitted that the adoption of national ‘legal’ approaches to passing on does not infringe EU law as long as these approaches respect certain substantive parameters. This argument is developed sequentially below. A first sub-section argues that, while the rules for the assignment and allocation of damages in competition cases fall within the competence of the Member States, such rules must nonetheless comply with EU law. A second sub-section argues that ‘legal’ approaches to passing on that depart from ‘full compensation’ will nonetheless not usually infringe EU law. Such approaches will only infringe EU law if they fail to respect certain parameters, e.g. if they infringe the principle of effectiveness, by making recourse to passing on practically impossible or excessively difficult. A third sub-section reinforces this argument by showing that similar approaches to passing on were adopted in other areas of EU law, in particular those concerning the reimbursement of unlawfully paid taxes. A fourth sub-section demonstrates that even if the argument developed in the previous sub-sections is mistaken, and EU law can be said to require perfect ‘full compensation’ and the adoption of a purely economic approach, such an interpretation of the law would be unfeasible and nonsensical. This is because economic concepts relevant for passing on are ill suited for legal reasoning and adjudication. As a result, even if the Directive were to require perfect ‘full compensation’, national courts would only be able to develop ‘legal’ approaches that would seek to approximate such an outcome – at substantial cost for parties, legal certainty and the ultimate effectiveness of the right to compensation.

5.1. National Procedural Autonomy and EU law

It can be argued that the national judgments reviewed above do not infringe EU primary law or the Damages Directive because they leave it to the laws of the Member States to lay down detailed rules governing competition damages claims. EU law does not exclude *a priori* that Member States may deny compensation for certain types of harm on the basis of doctrines such as remoteness, proximate causation, or directness of injury.⁸³ The same line of reasoning should apply to passing on.

At the same time, it is undisputed that national rules governing competition damages claims must comply with EU law. A very good example of this are rules on causation – which typically underpin decisions on the existence and amount of damages, and that, as we saw above, are a crucial element in successfully establishing a passing on defence. European case law expressly holds that, while causation is a matter left to the Member States, it is subject to control under EU law inasmuch as it can preclude the

⁸³ Joined Cases C-295/04 to 298/04 *Manfredi* EU:C:2006:461, para 64.

effective exercise of a victim's right to claim damages for infringements of competition law.⁸⁴ Pursuant to the principle of effectiveness, codified in Article 4 of the EU of the Damages,⁸⁵ national rules relating to the exercise of claims for damages must not render the right to claim damages “*practically impossible or excessively difficult*.”⁸⁶

The tension between the European objective of ensuring full compensation and the principle of national procedural autonomy in setting the applicable causation test raised its head in *Kone*, an Austrian case on umbrella pricing. Umbrella pricing occurs when companies not party to a cartel set their prices higher than would have been expected in the absence of the cartel, leading to losses by customers who buy the cartelised product from non-infringing sellers. Austrian rules contained a directness requirement for causation that precluded claims for umbrella prices. The ECJ found that the effectiveness of the right to competition damages would have been: ‘*put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto*’.⁸⁷ As a result, the Austrian rule on causation was found to be in breach of EU law.

This case makes it clear that European law can reach into national rules governing the compensation of competition damages and require that such national rules be amended when they go against the principles set out in the EU Damages Directive. It follows that national approaches to passing on likewise must comply with EU law. The question is, therefore, whether they do so.

5.2. Do National Approaches to Passing On comply with the Directive

This article takes no position on the conformity with EU law of the individual national approaches to passing reviewed in section 4 above. It nonetheless submits that reliance by courts on such approaches will comply with European law inasmuch as national ‘legal’ approaches respect the EU principles of

⁸⁴ EU Damages Directive. Recital 11: “*Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive.*”

⁸⁵ Which sets out that: “*In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law.*”

⁸⁶ This approach reflects Case C-453/99 *Courage v. Crehan*, EU:C:2001:465, para. 29.

⁸⁷ Case C-557/12 *Kone AG and others* ECLI:EU:C:2014:1317, para. 33.

equivalence and effectiveness – in particular, as long as national legal doctrines do not deprive passing on of practical effect – and the rules on passing on set out in the Damages Directive.

The EU Damages Directive and the ECJ’s case law set out a number of related objectives for the private enforcement of competition law. These include; (i) the effectiveness of individual rights to claim compensation for loss;⁸⁸ (ii) full compensation;⁸⁹ and (iii) absence of overcompensation.⁹⁰ These objectives are theoretically compatible, at least in the purity of economic theory. In practice, however, they must be reduced to legal concepts which require that each objective be partially sacrificed in the interest of the others.

The national approaches reviewed above seek to balance these differing goals, as they must. The question is then whether they achieve a correct balance – or, at least, one which conforms to EU law. It may be said that national ‘legal’ approaches unlawfully depart from the principle of ‘full compensation’, in particular by unduly sacrificing the goal of avoiding overcompensation. Two main arguments can be adduced against this: one practical, and the other legal.

The practical argument is two-fold. First, while perfect ‘full compensation’ that avoids overcompensation is a logical outcome of the deployment of economic theories and concepts underpinning the calculation and allocation of damages, it is impossible to achieve in practice. As such, it cannot be right that departures, however slight, from the principle of ‘full compensation’ will run counter to EU law, even if they lead to claimants being potentially overcompensated. Secondly, defendants are unlikely to pay damages in excess of the loss they caused – an insight that seems to underpin the national decisions reviewed above. The practical challenges of bringing a successful damages claim for competition infringements are such, and the costs are so high, that it is extremely unlikely that indirect purchasers – and final consumers – will be able to obtain compensation, particularly in the absence of effective collective action mechanisms.⁹¹ Such concerns are recognised in Recital 41 of the EU Damages Directive, which acknowledges that consumers or undertakings to whom actual loss has been passed: “*have suffered harm caused by an infringement of Union or national competition law. While such harm should be compensated by the infringer, it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringer to prove the extent of that harm.*”

⁸⁸ Joined Cases C-295/04 to 298/04 *Manfredi* EU:C:2006:461, para 64; EU Damages Directive, Recital 11.

⁸⁹ *Id.*, Article 3 and Recital 12.

⁹⁰ *Id.*, Recital 13.

⁹¹ Christian Kersting, *op. cit.* note 64, p. 21.

This leads to the legal argument, which is that the Directive not only allows for the balancing of different objectives, but also places the effectiveness of the right to compensation above the prevention of overcompensation.⁹² The focus of the ECJ's case law and the Directive is on ensuring that national tort systems respect the principles of effectiveness and equivalence. The principle of effectiveness, in turn, seeks to ensure that national law does not make it excessively difficult or practically impossible for victims to exercise the right to compensation granted to them by the Treaties.⁹³ A restrictive approach to national rules of causation and quantification of damages as regards passing on defences, such as the one adopted by national courts in the cases reviewed above, does not detract from the effectiveness of the right to compensation; if anything, it enhances that right.

Ultimately, this reflects a view on the part of the European legislator that overcompensation is unlikely to occur in practice. The rule against overcompensation is not even framed in terms of passing on in the Directive – it simply aims to preclude the imposition of damages that are not compensatory, such as “*punitive, multiple or other damages*”.⁹⁴

This view has led the Directive to create an imbalance in favour of the right to compensation when compared to the objective of preventing overcompensation. First, the Directive establishes a rebuttable presumption that, in certain circumstances, indirect purchasers suffered loss as a result of an overcharge paid by direct purchasers, making it easier for indirect purchasers to prove that passing on occurred.⁹⁵ This presumption significantly limits the scope for the stringent approaches adopted by national courts concerning passing on defences to be also applied when passing on is used as a ‘sword’. For the presumption to operate, an indirect purchaser must show that: an infringement of competition law took place; the direct purchaser has paid an overcharge as a result of the infringement; and the indirect purchaser has purchased goods or services that were the object, or were affected, by the competition law infringement. It is then for the defendant to show that the harm was not, or was not entirely, passed on to

⁹² This, in turn, seems to reflect the position adopted in the 2004 Special Report on the Reform of the Law Against Restraint of Competition by the German Monopolies Commission, which recommended that the passing-on defence be prohibited while granting standing to indirect purchasers to claim damages. Because of the indirect purchasers' difficulties in providing sufficient evidence for the damages that they suffer, the latter recommendation was held to be of practical significance only in those cases where the link between upstream and downstream prices was obvious, and direct purchasers have few incentives to sue for damages themselves. See Monopolkommission, *Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle – Die Pressefusionskontrolle in der Siebten GWB-Novelle*, Sondergutachten 41/42, Nomos Verlag, Baden-Baden 2004.

⁹³ EU Damages Directive, Recital 11 and Article 4.

⁹⁴ *Id.*, Article 3(3).

⁹⁵ *Id.*, Art. 14; OECD (2015) *op. cit. supra* note 75, p. 6.

the indirect purchaser.⁹⁶ This presumption is not balanced by any provision that eases the defendant's burden to show that passing on – here used as a 'sword' – did not occur. Simultaneously, the Directive explicitly imposes the burden of proof of the existence and amount of the passing on defence on the defendant seeking to rely on such a defence without qualification.⁹⁷ According to the Directive, it is "*in principle appropriate to allow an infringer to invoke the passing-on of actual loss as a defence against a claim for damages. It is appropriate to provide that the infringer, in so far as it invokes the passing-on defence, must prove the existence and extent of pass-on of the overcharge.*"⁹⁸ The combined effect of these evidentiary rules is that indirect purchasers often benefit from a presumption of harm, while defendants are subject to a demanding evidentiary burden to rebut that presumption.⁹⁹

This is not to say that concerns about overcompensation are irrelevant, or that courts can just ignore passing on. After all, the Directive explicitly requires passing on to be taken into account; it also requires the European Commission to prepare a study on the passing on of overcharges which can be used by national courts.¹⁰⁰ As noted above, the instruments prepared by the Commission have focused mainly on the economics of passing on – providing extensive analyses of current thinking on the topic, and setting out and evaluating alternative economic approaches to quantifying the impact of passing on in damages claims.¹⁰¹ However, this did not prevent the Directive from also adopting mechanisms that pragmatically reflect the realities of judicial practice. Good examples of this are how the Directive sets out that a court must be allowed to estimate the amount of the overcharge which was passed on;¹⁰² and how, in order to avoid both over- and under-compensation, the EU Damages Directive allows national courts seized in actions for damages to take due account of any related actions for damages that are brought by claimants from other levels in the supply chain, as well of relevant information in the public domain.¹⁰³

It would thus seem that Member States: (i) are required to take passing on into account and to create procedural mechanisms – including as regards disclosure and the estimation of damages – allowing

⁹⁶ EU Damages Directive, Article 14.

⁹⁷ Id., Article 13.

⁹⁸ Id., Recital 39 and Article 13.

⁹⁹ Okeoghene Odudu and Albert Sanchez-Graells 'The interface of EU and national tort law: competition law' in Paula Giliker (ed.) *Research handbook on EU tort law* (Elgar, 2017), p. 163-164.

¹⁰⁰ Id., Article 16.

¹⁰¹ RBB Economics / Cuatrecasas Goncalves Pereira '*Study on the passing-on of overcharges*', available at http://ec.europa.eu/competition/publications/reports_en.html.

¹⁰² EU Damages Directive, Article 12(5).

¹⁰³ Id., Article 15.

passing on claims to be effective; while also (ii) ensuring that passing does not allow infringers to avoid liability. Within these two parameters, Member States enjoy an area of discretion regarding how to frame passing on. If this conclusion is correct, the adoption of ‘legal’ approaches to passing on such as the ones reviewed above would broadly comply with European law – even if the lawfulness of individual judgments may ultimately depend on whether they make reliance on passing on impossible or excessively difficult in practice.

5.3. Passing on in other areas of EU Law

The argument above finds further support in the fact that other areas of EU law that deal with matters of passing on have adopted similar approaches. Passing on has been allowed as a defence in cases related to the non-contractual liability of the EU, even if the content of the passing defence was not elaborated by the European courts in these cases.¹⁰⁴ On the other hand, there is a long line of case law on passing on as a potential defence invoked by the State against claims for reimbursement of taxes or levies charged by tax authorities contrary to EU law.

In particular, the question arose as to whether amounts that have to be reimbursed by the tax authorities would still have to be paid even when the tax subject passed on the charge to third parties. The case law sets forth that a Member State may resist repayment of a charge levied but not due *only* where it is established by the national authorities that the charge has been borne in its entirety by someone other than the taxable person, and that reimbursement of the charge would constitute unjust enrichment of the latter.¹⁰⁵ The reason for this is that, since the passing on defence is a restriction on a subjective right derived from the EU legal order, it must be *interpreted restrictively*, taking into account that the passing of a charge does not necessarily neutralise the economic effects of the tax on the taxable person. As such, reimbursement can only be denied by the tax authority if the degree of unjust enrichment that repayment of charges passed on entails is established in the light of the evidence adduced before the court, following an economic analysis in which all the relevant circumstances are taken into account.¹⁰⁶

The importance of this line of case law for competition law is apparent in how the ECJ reasoned that passing on should be a defence to competition damages claims because it was already recognised as a mechanism to prevent the unjust enrichment of the claimant in the fields of tax and non-contractual

¹⁰⁴ Case 238/78 *Ireks-Arkady* ECLI:EU:C:1979:226.

¹⁰⁵ Case 68/79 *Just* ECLI:EU:C:1980:57, para. 26-27; Passing on was expressly accepted as a defence in Joined cases C-192/95 to C-218/95 *Societe Comateb* ECLI:EU:C:1997:12, para. 21.

¹⁰⁶ Case C-147/01 *Weber's Wine World* ECLI:EU:C:2003:533, para. 94-102; Case C-309/06 *Marks & Spencer* ECLI:EU:C:2008:211, paras. 41-43; Case C-191/12 *Alakor* ECLI:EU:C:2013:315, para. 30; Case C-308/09 *Lady & Kid A/S and Others v Skatteministeriet* ECLI:EU:C:2011:540, para. 20.

liability.¹⁰⁷ Its relevance is obvious from how passing on is applied similarly in the tax and in the competition contexts. In both cases, it is theoretically required that an economic analysis in which all the relevant circumstances are taken into account be pursued. At the same time, passing on plays a secondary role to concerns about the effectiveness of the right to compensation – both for a victim of a competition infringement and for an unduly charged taxpayer. In both cases, passing on is a defence to defeat or limit compensation due to someone which should be interpreted restrictively to ensure that the defendant does not avoid its liability to pay compensation. As such, it can be reasoned by analogy that similar approaches should be applied to passing on in the tax and competition context.

Against this, it can be argued that the situation in tax is different from that in competition law. In tax, the entity benefitting from passing on is the State, which obtained the monies as a result of an exercise of public power that contravened EU law.¹⁰⁸ Failing to require a State to prove passing on would place the burden of proving that the charge was not passed onto third parties on the taxable person. This would amount to establishing a presumption in favour of the State that the charge had been passed on to third parties, which would be incompatible with the effectiveness of the right to recoupment and inconsistent with EU law.¹⁰⁹ The situation is not comparable to that of a private party asked to provide compensation under competition law – damages claims are civil procedures between similarly placed parties, and the goal is to ensure correct compensation. As such, the objective of avoiding overcompensation should be put at the same level as the goal of providing full compensation in competition claims. Furthermore, the principle of effectiveness in the tax field is concerned with ensuring that the economic burden of the duty unduly paid can be neutralised¹¹⁰ – which is akin to the principle of full compensation as regards competition damages. In both cases, the goal is to ensure that claimants are duly compensated, and hence the tax cases do not suggest a restrictive reading of passing on for competition cases – only that passing on is duly proved, as required in the Directive.

These arguments have strength – but are nonetheless overridden by the fact that the Damages Directive seems to consider that overcompensation is unlikely to occur in practice and emphasises the effectiveness of the right to compensation. At the same time, this line of reasoning provides support to the argument that courts must ensure that passing on defences are not ignored – e.g. courts must not require

¹⁰⁷ See Case C-453/99 *Courage v. Crehan*, EU:C:2001:465, para. 30, and cases cited therein.

¹⁰⁸ Case C-62/00 *Marks & Spencer* ECLI:EU:C:2002:435, para. 30.

¹⁰⁹ Case C-147/01 *Weber's Wine World*, para. 111; Case C-129/00 *Commission v Italy* ECLI:EU:C:2003:656, paras. 37-39.

¹¹⁰ Case 199/82 *San Giorgio* ECLI:EU:C:1983:318, para. 14; Case C-191/12 *Alakor* ECLI:EU:C:2013:315, paras. 26-27.

evidence that the overcharge was fully passed on, or that the victim did not suffer losses as a result of the volume effect. Court must also make use of the tools at their disposal to minimise the risk of overcompensation – e.g. if the defendant has proven that passing on took place but is unable to quantify it, courts must apply their powers to estimate passing on.

5.4. The Priority of Legal over Economic Concepts of Passing On

This article has argued repeatedly that, while ‘full compensation’ is theoretically achievable in light of economic theory, it cannot be achieved in practice in legal proceedings. This is an important basis for the argument that EU law does not, and cannot envision perfect allocation of compensation, and a crucial insight for any future discussion about how to strike a balance between promoting the effectiveness of the right to compensation and avoiding overcompensation. It is thus worth discussing it in more detail.

The role of economics as regards establishing passing on is, of necessity, limited. To begin, the role of passing on in damages claims is a legal issue that cannot be solved by economic evidence. We saw above that EU case law and the Damages Directive require passing on to be taken into account in competition damages case. As regards the question of whether a pure economic approach is a suitable approach to establishing passing on, this article answered ‘no’: the case law and Damages Directive allow national courts to adopt ‘legal’ approaches in line with national tort doctrines. However, what if this answer is wrong? What if the Directive could be said to impose the adoption of a pure economic approach to passing on to ensure that compensation is perfectly allocated at all levels of the supply chain? More importantly, what if it was proposed that the Directive be amended to remove the imbalance between claimants and defendants, and to require courts to achieve full compensation in line with economic principles?

In short, it is submitted that such an approach would be unfeasible. Pure economic concepts related to the allocation of damages are conceptually ill-suited for judicial proceedings and the application of legal rules. If under an obligation to follow purely economic approaches, courts would still have to develop legal approaches to deal with cases. Such approaches might achieve outcomes closer to those required by the principle of full compensation than those reached currently; but the cost of doing so would likely be immense, with detrimental impact on the effectiveness of the right to compensation for competition damages. To understand why, it is useful to look at the concepts of causation that courts would have to deploy if they had to apply an economic approach to passing on, and compare it to the legal concepts of causation that they currently employ.

Economic concepts of causation focus on the regularity of the occurrence of types of events, in order to infer causal generalisations from such regularities.¹¹¹ Causation is thus often understood in statistical terms – involving a description of a class of events which probability must be shown to have been significantly increased by the condition or conduct in question.¹¹² All data that may be relevant to identify a causal regularity may be used, and the scientific method predominates.

This is not so in legal proceedings. Judges, who will often lack scientific expertise, must make findings of causation. A number of rules that seek to ensure the fair, just and swift resolution of disputes limit the terms of any investigation into a causal relationship – such as rules on standing, on admissible evidence, and on the standard and burden of proof. Furthermore, the physical and social sciences – including economics – focus on explaining the world and how it works. Instead, legal causation must not only explain the occurrence of particular outcomes, but also attribute liability to agents whose action has provoked those outcomes.¹¹³ Legal causation is explanatory insofar as it is concerned with understanding how some event or state of affairs came about; it is attributive because it is also used to assign liability.¹¹⁴ Probabilistic assessments which may be sufficient to fulfil the (explanatory) role of science by identifying the likelihood of an event contributing to a certain outcome are of dubious relevance for the (attributively inclined) law, which requires judges to give a legitimate (in the sense of persuasive) solution to a legal dispute regarding whether someone should be liable for a given outcome.¹¹⁵

One should thus distinguish between conceptions of factual causation in the economic and legal realms. This distinction is based on two characteristics of the legal system: the dual role that causation plays in legal analysis, where it has both an explanatory and an attributive role; and the institutional setting and evidentiary rules applicable when attributing liability.

¹¹¹ Antony Honore ‘Causation and Remoteness of Damage’ in A. Tunc (ed.) *International Encyclopaedia of Comparative Law*, vol. XI (Torts) Ch. 7, p. 29. As explained by Hellwig, op. cit. *supra* note 17, p. 147: ‘Economists think about causality in terms of the joint dependence of all the endogenous variables of a given system on all the exogenous variables’.

¹¹² Antony Honore, ‘Causation in the Law’, *The Stanford Encyclopaedia of Philosophy* (Winter 2010 Edition), Edward N. Zlatan (ed.), URL = <http://plato.stanford.edu/archives/win2010/entries/causation-law/>; Ioannis Lianos ‘Causal Uncertainty and Damages Claims for the Infringement of Competition Law in Europe’ (2015) *YEL* 1, p. 13-14.

¹¹³ Antony Honore ‘Necessary and Sufficient Condition in Tort Law’ in D. Owen (ed.) *Philosophical Foundations of Tort Law* (OUP, 1995), p. 375.

¹¹⁴ Honore, op. cit. *supra* note 112, p. 29

¹¹⁵ Ioannis Lianos ‘Judging Economists: Economic Expertise in Competition Law Litigation’ *CLES Working Paper* 1/2009, p. 44, available at https://www.ucl.ac.uk/cles/research-paper-series/research-papers/cles_1_2009.

In this context, economic (and scientific) concepts and methods of causation may be helpful but are rarely determinative. The cases reviewed above provide a good example of why this is so. In competition cases, courts are under a legal obligation to take the passing on of an overcharge into account when calculating damages, and to determine the extent to which an infringer of competition law can rely on the fact that the claimant had passed on all or part of its loss to someone else. If courts were required to exactly determine passing on and perfectly assign compensation, this would raise serious practical and normative challenges.

The practical challenge relates to the difficulty and cost of pursuing such exercises. The conceptual challenge is two-fold. First, a purely economic approach would run counter to doctrines applicable across the full spectrum of a legal system that limit the extent of inquiries into causality and assignment of liability. Conversely, such an approach would make it impossible for courts to assign liability at all, and for parties to meet their burden of proof to the requisite standard.

Starting with the practical challenge, following a purely economic approach to causation is bound to be onerous and error prone – as was already remarked in section 2. To use again cartels as an example – which will typically be the simplest competition damages case – the claimant may be an intermediary instead of a final consumer. It may be that the claimant's loss corresponds merely to the lost profits from reduced sales caused by the (cartelised) higher prices, particularly if the claimant was able to pass on its actual loss (i.e. the overcharge) onto final consumers.¹¹⁶ Even in this simple case, proof of a causal link between infringement and loss, or between infringement and passing on, may be difficult to achieve due to the economic complexity of the issues involved – such as the amount of the higher price, the elasticity of demand, and the rate of passing on of price increases to final consumers.¹¹⁷ The situation gets more complicated the further away we move from straightforward cartel cases.

Courts face significant difficulties when trying to establish causation as regards loss and passing on. Markets are complex institutions. Competition infringements very often impact on sophisticated supply chains working in highly complex market structures, which make the identification of causative links particularly difficult. While microeconomic and industrial organisation theory are devoted to understanding how markets and firms work, and the conditions under which anti-competitive behaviour might occur, even at their simpler level they are technical and complex.¹¹⁸ The combination of complexity

¹¹⁶ David Ashton and David Henry *Competition damages Actions in the EU: Law and Practice* (Elgar, 2013), p. 39.

¹¹⁷ Green paper on Damages actions for breach of the EC antitrust rules [COM(2005) 672 final].

¹¹⁸ Herbert Hovenkamp *The Antitrust Enterprise – Principle and Execution* (Harvard, 2005), p. 45-46.

of markets, dispersion of losses and difficulty in identifying causal links creates a broad range of potential claimants. Economic injuries have a way of rippling through markets, creating a much larger numbers of victims than the typical contract or tortious dispute. The victims are not only competitors, but also rivals, suppliers, and firms operating in complementary markets. The impact of an overcharge on the pricing behaviour of an entity facing a cost increase is hard to disentangle from all other factors that may be relevant for the pricing of downstream products, or from the reactions of other market players.

These difficulties are common, to a certain extent, to all situations of pure economic loss. It is commonly accepted that liability for pure economic loss, such as those involved in competition claims, must be limited in order to constrain socially wasteful litigation and undue restrictions on individual freedom. If antitrust infringers could be held liable for all individual losses that may be causally linked with their wrongdoing, this would entail significant risks of over-deterrence and, therefore, result in an undue restriction on commercial freedom.¹¹⁹ It would also be fantastically difficult for courts to establish causation and loss accurately in such settings.

Ideas of ‘causation in law’ are often deployed to deal with such challenges. This is a class of legal doctrines that limit liability once a factual causal nexus has been established, and which is known in virtually all legal systems.¹²⁰ Some (factual) consequences of an illegal conduct are ‘too remote’ from the illegal act and, in these cases, the imposition of liability is thought to be inappropriate. Policy reasons also operate to limit legal assessments of causality for reasons external to considerations related directly to the existence of causal connections – and such reasons also apply to competition law. As has been said: “*An antitrust violation may be expected to cause ripples of harm to flow through the Nation's economy; but [...] there is a point beyond which the wrongdoer should not be held liable.*”¹²¹ These concerns account for many rules that deny recovery in circumstances too ‘remote’ from the infringement, such as the refusal to lack standing to indirect purchasers in the US.¹²² Lastly, rules concerning the existence of presumptions or the allocation of the burden of proof also introduce policy considerations into the assessment of factual causation.¹²³

¹¹⁹ Jens-Uwe Franck and Martin Peitz ‘Towards a Coherent Policy on Cartel Damages’ (2017) Centre For European Economic Research Discussion Paper 17-009, p. 1.

¹²⁰ Alex Broadbent, ‘Fact and Law in the Causal Inquiry’ (2009) *Legal Theory* 15(3) 173, p. 184.

¹²¹ *Blue Shield of Virginia v. McCready* 457 U.S. 465, 476-477 (1982)

¹²² Herbert Hovenkamp op. cit. *supra* note 118, p. 49.

¹²³ Honore, op. cit. *supra* note 111; Lianos, op. cit. 115, p. 15-16.

None of these mechanisms, inherent to the allocation of damages or the assignment of liability by legal processes, is compatible with the deployment of pure scientific or economic concepts of causation. Further, the reasons that underpin the adoption of these mechanisms – to prevent over-deterrence, constrain socially wasteful litigation, and prevent undue restrictions of individual freedom – broadly overlap with the reasons why economic or scientific approaches to causation are ill suited for legal proceedings.¹²⁴

At the same time, the adoption a non-legal – i.e. economic – approach to causation risks preventing courts from being able to assign liability at all. After all, such approaches to causation are mostly probabilistic. If courts were to acknowledge the probabilistic nature of the exercise, they might be unable to establish loss or passing on to the requisite legal standard. In other words, economic approaches risk interfering with the attributive function of causation in law.

In short, it is practically and conceptually unfeasible for courts to adopt pure economic approaches. This is not to say that scientific or economic approaches are not useful for the identification of causal relationships in legal contexts; on the contrary, they provide models for identifying causation that legal operators can rely on, even if these concepts and models must be adapted to the legal setting in which they are deployed. Economic theory plays a large role in competition litigation: it helps determine what the “normal scenario” is, what ‘causal generalisations’ are plausible, and what inferences can be made from the facts.¹²⁵ The assessment of the evidence in competition proceedings often focuses on the relative plausibility of hypotheses presented by the parties. *Ex post* probabilities can provide evidence of factual causation, and allow to choose between such hypotheses, particularly when taken together with the particular evidence of the case.¹²⁶ Economic experts have become fundamental in gauging economic data submitted to courts, and statistical and econometric evidence have an important role that can assist in the drawing of evidential inferences and in evaluating whether the burden and standard of proof have been met.¹²⁷

¹²⁴ It would also overtax the notion of legal responsibility if legal liability encompassed all direct and effects of a conduct, including those indirect effects that arise from the “equilibrium reactions” of other people, i.e., fully responsible individual decision makers, to the initial legal violation. See Hellwig, *op. cit. supra* note 17, p. 147.

¹²⁵ John Lopatka and William Page ‘Economic Authority and the Limits of Expertise in Antitrust Cases’ (2005) *Cornell L. Rev.* 90 617, p. 635, 637-638.

¹²⁶ Richard W. Wright ‘Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts’ (1988) *Iowa L.Rev.* 73 1001, p. 1049-1050.

¹²⁷ Econometric models interpret data through economic theories, in order to infer effects from selected causes – its aim is “to obtain knowledge concerning relations that exist in the social reality” through a theory-data – i.e. establish connections between causes and effects. See Bernt P. Stigum, *Econometrics and the Philosophy of Economics: Theory-Data Confrontations in Economics* (Princeton University Press, 2003), p. 3.

Nonetheless, this does not detract from the fact that a pure scientific or economic approach to causation in legal contexts is inappropriate and, ultimately, unfeasible. As noted by Frederic Jenny, a distinguished economist who was also a judge of the French *Cour de Cassation* and is currently the chair of the OECD's Competition Committee, economists speak of theories of harm and counterfactuals, whereas judges are interested in establishing causation on the basis of the facts of the case. These different professional approaches may go some way towards explaining the lack of usefulness of the Commission's Practical Guidance on the quantification of damages to judges in practice: economists seem to have prepared such guidance without much judicial input. The Guidance focuses on the underlying economic principles for the estimation of damages; but judges are used to estimating damages. They would rather learn how best to identify and discard economic techniques that game the system or identify correlations that are spurious or unreliable. Jenny also notes that the Practical Guidance provides an overview of all economic damages flowing from a competition infringement, without paying any attention to the fact that judges are constrained by the legal framework as to the type of damages they can award.¹²⁸

Beyond the difficulties inherent to the 'translation' of economic concepts into legal practice, pure economic approaches to passing on are practically and conceptually unsuited for legal proceedings. Legal approaches to passing on, grounded on national rules on causation, mitigation and quantification of damages, are not only appropriate but, in reality, essential and inherent to a well-functioning system for assigning liability and awarding legal compensation.

6. Conclusion

The adoption of 'legal' approaches to passing on by national courts is unavoidable. The question is not whether adopting a legal approach would infringe EU law, but whether specific 'legal' approaches adopted by national courts strike a correct balance between the competing objectives set out in EU law. The adoption of mechanisms that ensure that passing on is related to an infringement and does not preclude the effectiveness of the right to compensation will be in line with EU law, but only inasmuch as passing on defences do not become impossible or excessively difficult. If Member States were to deprive passing on of all practical effect, this would not only run expressly against the Directive's provisions requiring that courts take passing on into account, but also against provisions requiring Member States to ensure that neither the burden nor the standard of proof make it practically impossible or excessively difficult to

¹²⁸ Frederic Jenny 'Antitrust in the Courts' in *Annual Proceedings – Fordham Competition Law Institute* (2013, Competition Law Institute), p. 426- 429.

accurately quantify harm.¹²⁹ Furthermore, such an approach would directly affect the effectiveness of the right to compensation if it were to prevent passing on from being used as a ‘sword’ by indirect purchasers.

It is thus argued that Member States: (i) are required to take passing on into account, and to adopt procedural mechanisms – including as regards disclosure and the estimation of damages – allowing passing on claims to be effective; while also (ii) ensuring that passing does not allow infringers to avoid liability. Within these two parameters, Member States enjoy an area of discretion which is nonetheless subject to control on the part of the European courts.

National approaches to passing on are likely to remain a live issue in years to come, given doubts about the extent of national procedural autonomy on this field. For example, there may be doubts about the appropriateness of consistently deciding that either the overcharge was passed on fully or not at all, as seems to have been decided by national courts in most cases. A number of provisions in the EU Damages Directive seem to require a slightly more sophisticated approach – one that takes into account whether other entities are likely to bring claims¹³⁰ and that expects courts to estimate passing on even in the absence of *quantum* being clearly established in light of the available evidence.¹³¹ While such provisions may require courts to pay closer attention to the economic realities of individual cases, they also require a departure from pure economic principles and reflect the need to adopt a legal approach to passing on.

In short, legal approaches to passing on must comply with European law, and must not be such as to make it practically impossible or excessively difficult to rely on passing on. As this article showed, there is nothing preventing such an objective from being achieved through the deployment of national doctrines on the calculation of damages or on the basis of national rules of evidence and causation, as national courts have been doing. However, the line between national approaches to passing on that comply and infringe EU law is a fine one, and care must be taken to avoid ending up on the wrong side of the divide.

¹²⁹ EU Damages Directive, Article 17 and Recital 43.

¹³⁰ *Id.*, Article 15 and Recital 43.

¹³¹ *Id.*, Article 12(5).