Universidad Carlos III de Madrid

INDIRECT PURCHASERS AND PASSING-ON

Antonio Robles Martín-Laborda[1]

1. INTRODUCTION

Among the rights directly generated by the competition rules of the EU Treaty is the right to be compensated for damage suffered as a result of their infringement. In contrast to the right to claim that a prohibited agreement is null and void,[2] it is not expressly laid down in the Treaty, but is deduced by the Court by means of an interpretation based on the principle of effectiveness.[3]

In order to be effective, like any other EU right, it must be accompanied by adequate remedies; thus, the effectiveness of that primary right, generated directly by EU law, requires the recognition of the corresponding (secondary) right to an effective remedy, i.e., to a legal action before a judicial or administrative body that is adequate to enforce the primary right.[4] Therefore, any individual can claim compensation before national

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[1] Universidad Carlos III de Madrid – antonio.robles@uc3m.es (ORCID: 0000-0003-1179- 0426). This research has been funded by the Spanish Plan Nacional de I+D del Ministerio de Economía y Competitividad (PID2020-114549RB-I00).

[2] See Judgment of 13 July 2006, C-295/04 a C-298/04 - *Manfredi*, paras 56-59.

[3] *"The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition" (*Judgement of the Court of Justice, 20 September 2001, C-453/99 - *Courage Ltd y Bernard Crehan,* para. 26). See C. HEINZE: "Common Principles af Damages in EU Private Law?", in F. HOFMANN; F. KURZ (eds.): *Law of Remedies. A European Perspectiva, Intersentia* (2019), pp. 198-199; G. BACHARIS: "National law cannot exclude damages claims of public lenders against cartelists, Otis v. Land Oberösterreich (Otis II)", 57 (5) Common Market Law Review (2020), p. 1618.

[4] In this way, the principle of effectiveness in the broad sense generates the secondary right to an effective remedy (as a manifestation of effective judicial protection); establishes a negative limit to the autonomy of the Member States to configure that remedy (principle of effectiveness in the strict sense or Rewe-effectiveness); and provides the positive minimum content that the remedy itself must have in order to achieve the full effectiveness of the primary right. See , K. LENAERTS; I. MASEILS; K. GUUTMAN: *EU Procedural Law,* OUP (2014), pp. 107-156. It can be understood, therefore, that we are dealing with different principles [A. VON BOGDANDY; J. BAST: *Principles of European Constitutional Law.* Hart Publishing, 2nd edition (2010) pp. 29-32; S. PREECHAL; R. WIDDERSHOVEN: "Redefining the Relationship between 'Rewe-effectiveness' and Effective Judicial Protection", *Review of European Administrative Law,* vol. 4 (2011), pp. 31-50] or with different manifestations of the same principle of effectiveness in a broad sense [N. REICH,

courts for the harm suffered where there is a causal relationship between that harm and an infringement of the competition rules..[5] In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to provide the appropriate remedies and procedures to this aim. However, the autonomy of the Member States in this regard is limited by the requirement that they guarantee effective legal protection. Indeed, the full effectiveness of the EU primary right may require that the remedy has a certain minimum content. Thus, the effectiveness of the right to claim damages caused by infringements of competition law requires, for example, that compensation can be claimed by any individual who has suffered damage,[6] during an appropriate limitation period,[7] and including, as a minimum, actual loss (i.e. *damnum emergens:* reduction in assets caused by an increase in the price paid for products or services affected by the infringement) and loss of profit (i.e. *lucrum cessans*: increase in those assets which would have occurred if the harmful act, which has caused a reduction in sales resulting from the passing-on carried out by the indirect purchaser itself, had not taken place, plus the payment of interest.[8] Some of these aspects have subsequently been harmonized or simply codified by the *Damage Directive.*[9] However, the problem

"The Principle of Effectiveness and EU Private Law", in U. BERNITZ, X. GROUSSOT, F. SCHULYOK (eds.), *General Principles of EU Law and European Private Law.* Kluwer Law International (2013), pp. 301-326; Id: *General Principles of EU Civil Law,* Intersentia (2013), pp. 89-129; I. LIANOS; P. DAVID; P. NEBBIA: *Damages Claims for the Infringement of EU Competition Law,* Oxford (2015), pp. 6-7, 16-22; I. LIANOS: "The Principle of Effectiveness, Competition Law Remedies and the Limits of Adjudication", in P. LOWE; M. MARQUIS; G. MONTI (eds): *European Competition Law Annual 2013. Effective and Legitimate Enforcement of Competition Law.* Hart Publishing (2016), pp. 105–138]. Although the discussion is outside the scope of this paper, the reference to the principle of effectiveness is employed in this second sense for the sake of simplicity. See also W. van GERVEN: "Of Rights, Remedies and Procedures", 37 *Common Market Law Review* (2000), pp. 501-536; M. ROSS: "Effectiveness in the European legal order(s): beyond supremacy to constitutional proportionality?", *European Law Review,* no. 31 (2006), pp. 476-498; K. HAVU: "Private Enforcement of Competition Law: Notes Regarding the Roles of EU and National Law on the Basis of Recent Preliminary Rulings", *Europarättslig tidskrift ,* 2020 (2), pp. 193-205; M. STRAND: *The Passing-On Problem in Damages and Restitution under EU Law,* Edward Elgar (2017), pp. 24-59; D. LECZYKIEWICZ: "Effectiveness of EU Law before National Courts: Direct Effect, Effective Judicial Protection, and State Liability", in D. CHALMERS; A. ARNULL: *The Oxford Handbook of European Union Law,* OUP (2015), pp. 212-248; ID.: "Compensatory remedies in EU law: the relationship between EU law and national law" in P. GILIKER (ed.), *Research Handbook on EU Tort Law,* Edward Elgar (2017), pp. 63-92.

[5] Judgment of 13 July 2006, C-295/04 a C-298/04 - *Manfredi,* para. 61.

[6] Judgement of the Court of Justice, 20 September 2001, C-453/99 - *Courage Ltd y Bernard Crehan,* para. 26

[7] Judgement of the Court of Justice, 28 March 2019, C-637/17, *Cogeco,* paras 42-55.

[8] Judgment of 13 July 2006, C-295/04 a C-298/04 - *Manfredi,* para 95.

[9] *Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union* (OJ L 349, 5.12.2014, p. 1–19). Since the literature on the Directive is already vast, *see ad ex* I. LIANOS; P. DAVID; P. NEBBIA: *Damages Claims for the Infringement of EU Competition Law,* Oxford (2015); see M. STRAND: *The Passing-On Problem in Damages and Restitution under EU Law,* Edwad Elgar (2017); B. RODGER; M. SOUSA FERRO; F. MARCOS: *The EU Antitrust Damages Directive Transposition in the Member States,* Oxford (2018), P.L. PARCU; G. MONTI, M. BOTTA:

of the intertwining of Union law and national law, i.e. the relationship between the effectiveness of EU law and the procedural autonomy of the Member States) remains contentious.[10]

In addition, the configuration and scope of the right to be compensated for damage suffered as a result of the infringement of the competition rules of the EU Treaty is affected by the expansive nature of such damage, which can be passed on not only far down the production or distribution chain, but even beyond it. Indeed, the purchasers of goods affected by such infringements are harmed because they have to pay a higher price (or receive in exchange a lower quantity, quality or variety) in relation to what would have existed in the absence of the infringement (actual loss, *damnum emergens*). Morever, some effects of the infringement may propagate along the market chain. Direct customers of the infringing undertakings who pay an overcharge (actual loss) may pass-on at least part of it to their own customers. Each price increase caused by a company's passing-on of the overcharge also results in existing customers purchasing lower volumes from it, and in counterfactual customers not purchasing at all (loss of profits).[11] Thus, passing-on can cause both a reduction in actual loss and a corresponding increase in loss of profits for a given purchaser, as well as a transfer of all or part of such actual loss to that purchaser's customers: the overcharge effect at one level is the

Private Enforcement of Eu Competition Law. The Impact of the Damages Directive, Cheltenham (2018); D. Ashton: Competition Damages Actions in the EU, Cheltenham (2018).

[10] As evidenced by the numerous questions still being referred to the Court of Justice for a preliminary ruling on central components of private liability. See C. HEINZE: "Common Principles af Damages in EU Private Law?", in F. HOFMANN; F. KURZ (eds.): *Law of Remedies. A European Perspectiva, Intersentia* (2019), pp. 204-205; K. HAVU: "Private Enforcement of Competition Law: Notes Regarding the Roles of EU and National Law on the Basis of Recent Preliminary Rulings", *Europarättslig tidskrift ,* 2020 (2), pp. 193-205.

[11] The harm may also affect upstream markets. Since the level of production of infringers are reduced also their demand for inputs fall. Therefore, direct suppliers of infringers sell less and have to consequently adjust their own level of production, which in turn impacts upstream markets so that the sales of infringers' indirect suppliers fall as well. Similar problems arise in the case of buying cartels in upstream markets. Moreover, harm can also overgrow the vertical chain. The price increase or quantity reduction caused by the infringement diverts demand to substitute products. This increased demand may therefore lead to higher prices, forcing the customers of non-infringers to pay more for those substitute products than they would otherwise have paid. The harm produced by these "umbrella prices", as well, may in turn also propagate further upstream and downstream markets (and so on). See E. BUEREN; F. SMUDA, (2013): "A primer on damages of cartel suppliers: Determinants, standing US vs. EU and econometric estimation", *ZEW Discussion Papers,* No. 13-063; RBB ECONOMICS AND CUARTRECASAS, GONÇALVES PEREIRA: *Study on the Passing-on of Overcharges. Final Report* (2016), pp. 4-8; F. MAIER-RIGAUD; U. SCHWALBE: "Quantification of Antitrust Damages", in D. ASHTON; D. HENRY: *Competition Damages Actions in the EU. Law & Practice,* 2nd ed., Elgar (2018), pp. 401-466; C. VELJANOVSKI: *Cartel Damages. Principles, Measurement and Economics.* OUP (2020), pp. 312-333; 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], accompanying the *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, 13.6.2013, p. 19).

consequence of the passing-on effect at the previous one; they are two sides of the same coin.[12]

The substantive and procedural legal problems generated by the passing-on of the harm, however, are only partially harmonized by the *Damages Directive* with the consequence that it does not eliminate the problem of the interface between EU law and national remedial systems.[13] While there is an EU tort law, it is national law that regulates the conditions for this right to arise.[14]. Therefore, the assessment of the existence and legal consequences of the passing-on still has to be done by the national courts according largely to national rules subject to the principles of equivalence and effectiveness.[15] Thus, through the application in particular of the latter understood in a broad sense by the Court of Justice,[16] harmonisation in this area is also being brought about incrementally also after the entry into force of the Directive through case law, especially in relation to the causation requirement.[17]

The purpose of this chapter is to analyze the legal problems raised by the passing-on of the damage, which may be alleged by both the plaintiff indirect purchaser (as "sword") and the defendant infringer (as "shield").[18] Any indirect purchaser will base its action for damages on the argument that the previous direct or indirect purchasers of the

[12] See RBB ECONOMICS AND CUATRECASAS, GONÇALVES PEREIRA: *Study on the Passing-on of Overcharges. Final Report* (2016), pp. 9-16, 42-65; COMMUNICATION FROM THE COMMISSION. *Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser* (2019/C 267/07), pp. 16-22.

[13] See K. HAVU: "Private Enforcement of Competition Law: Notes Regarding the Roles of EU and National Law on the Basis of Recent Preliminary Rulings", *Europarättslig tidskrift ,* 2020 (2), pp. 193-205; F. HOFMANN; F. KURZ: "Introduction to the Law of renemdies", in F. HOFMANN; F. KURZ (eds.): *Law of Remedies. A European Perspectiva, Intersentia* (2019), p 7.

[14] See G. BACHARIS: "National law cannot exclude damages claims of public lenders against cartelists, Otis v. Land Oberösterreich (Otis II)", 57 (5) *Common Market Law Review* (2020), pp.1616-1621. See also *supra* n. 4.

[15] See I. LIANOS; P. DAVID; P. NEBBIA: *Damages Claims for the Infringement of EU Competition Law,* Oxford (2015), p. 7; B. J. RODGER; MIGUEL SOUSA FERRO; F. MARCOS: "A panacea for competition law damages actions in the EU? A comparative view of the implementation of the EU Antitrust Damages Directive in sixteen Member States", *Maastricht Journal of European and Comparative Law* (2019), Vol. 26(4), p. 481; G. BACHARIS: "National law cannot exclude damages claims of public lenders against cartelists, Otis v. Land Oberösterreich (Otis II)", 57 (5) *Common Market Law Review* (2020), pp.1616-1621

[16] See *supra* n. 4.

[17] See Judgments of the Court of Justice of 5 June 2014 (C-557/12, *Kone)* and 12 December 2019 (C-435/18 – *Otis II),* discussed below. On the other hand, for the determination of who is liable for damages, we are not faced with a situation in which there are no EU rules on the matter. It is clear from the wording of Article 101(1) TFEU that the concept of an 'undertaking' designates the perpetrator of an infringement of the prohibition laid down in that provision. Therefore, the entities which are required to compensate for the damage caused by a cartel or practice prohibited by Article 101 TFEU are the undertakings, within the meaning of that provision, which have participated in that cartel or that practice. See Judgment of the Court of Justice of 14 March 2019 (C-724/17, *Skanska).*

[18] For a description of the legal problems triggered by the passing-on, see M. STRAND: *The Passing-On Problem in Damages and Restitution under EU Law,* Edwad Elgar (2017), pp. 6-9.

infringers have totally or partially passed on the actual loss derived from the infringement, and that, therefore, that particular claimant has suffered a loss in the form of higher prices and lower quantities purchased.[19] Such claims raise specific problems related to standing, to the link between the infringement and the damage passed on and to the quantification of the compensatable damage. They are analyzed in section 2. For its part, the defendant/infringer may allege that the plaintiff (whether direct or indirect purchaser) has passed on the overprice, totally or partially, to its own buyers, so that, at least in part, it has not, ultimately, been absorbed by the plaintiff. In this case, the claim raises specific issues regarding the quantification of the compensable damage. They are discussed in section 3. Section 4 concludes.

2. INDIRECT PURCHASERS

2.1. The standing of indirect purchasers

The Damages Directive provides that Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm (Article 3.1), irrespective of whether they are direct or indirect purchasers from an infringer (Article 12.1). In this way, the Directive merely reaffirms the *acquis communautaire* on standing to claim damages for infringements of EU competition law, as set out in the case law of the Court of Justice (Recital 12).[20]

In fact, the European Court has not directly ruled on the standing of indirect purchaser harmed by competition law infringements.[21] Indeed, despite the breadth with which the

[19] In this sense, since damages caused by competition law infringements can be passed on to very distant points in the chain of production or distribution, indirect purchaser must be considered to be not only the one who acquires the product or service affected by the infringement -or products or services containing them or derived from them- from the direct purchaser, but also the one who has acquired it from another prior indirect purchaser. Although the first interpretation could follow from recital 41 of Directive 2014/104/EU, Article 2 (24) of Directive 2014/104/EU states -correctly- that *"'indirect purchaser' means a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom."*

[20] Despite this, claims brought by indirect purchasers have been very rare compared to those brought by direct purchasers. See I. LIANOS; P. DAVID; P. NEBBIA: *Damages Claims for the Infringement of EU Competition Law,* pp. 6, 73, table 4.1. In spite of this, the proportion of cases brought by indirect purchasers is now around 20%, including cases in which the claimants' purchases were partly direct and partly indirect. See J.-F. LABORDE: "Cartel damages actions in Europe: How courts have assessed cartel overcharges" (2021 ed.), *Concurrences,* Nº 3-2021, p. 236. For an empirical analysis on passing-on specifically in relation to cartels, see C. VELJANOVSKI: *Cartel Damages. Principles, Measurement and Economics.* OUP (2020), pp. 306-310.

[21] The standing of indirect purchasers is recognised in relation to Member States' liability actions for damages caused by infringements of Union law in the Judgment of the Court of 20 October 2011 (Case C-94/10, *Danfos),* para 39.

case-law has established the right of *"any individual"* to claim compensation for damage suffered, national legal systems may limit the scope of legal standing.[22] Hence, at the beginning of the pre-legislative work on drafting the Directive, the Commission considered the possibility of expressly excluding (together with the passing-on defense) indirect purchasers' standing to sue, so that only direct purchasers could sue the infringer.[23]

However, the Commission subsequently considered that *"any individual"* should also refer to indirect purchasers, which therefore also have standing to *"claim compensation for the harm suffered".*[24] In fact, depriving indirect purchasers of standing to sue would have been incompatible with the requirements of the principle of effectiveness,[25] as subsequent case law has confirmed. Accordingly, national rules that prevent purchasers of non-infringing companies (and who are therefore neither direct nor indirect purchasers)[26] or those not acting as suppliers or purchasers in the market affected by

[22] Thus, for example, in accordance with the principle that a litigant should not benefit from its own wrongful conduct, EU law does not preclude national law from denying a party who is attributed significant responsibility for the distortion of competition the right to obtain damages from the other contracting party. See Judgement of the Court of Justice, 20 September 2001, C-453/99 - *Courage Ltd y Bernard Crehan,* para 31.

[23] *Green Paper - Damages actions for breach of the EC antitrust rules* (COM/2005/0672 final), p. 8. This solution would presumably result more efficient for the prevention of anti-competitive conduct: direct purchasers are normally the best placed to prove the existence of a specific damage. It is precisely reasons of efficiency in the application of competition law that have led the U.S. Supreme Court to deny legal effectiveness to the passing-on both in its defensive (Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 [1968]) and offensive (Illinois Brick Co. v. Illinois, 431 U.S. 720 [1977]) aspects. See C. VELJANOVSKI: *Cartel Damages. Principles, Measurement and Economics.* OUP (2020), pp. 308-310. For a comparison between the North American and European regimes, see RBB ECONOMICS AND CUARTRECASAS, GONÇALVES PEREIRA: *Study on the Passing-on of Overcharges. Final Report* (2016), pp. 18-20; M. STRAND: *The Passing-On Problem in Damages and Restitution under EU Law,* pp. 290-315. On the economic rationality of the remedy, W.M. LANDES; R.A. POSNER: "Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick", 46 *University of Chicago Law Review* (1978-1979), pp. 602-635.

[24] *White Paper on Damages Actions for Breach of the EC antitrust Rules* (COM/2008/0165 final), p. 4.

[25] As already established in the *COMMISSION STAFF WORKING PAPER accompanying the WHITE PAPER on Damages actions for breach of the EC antitrust rules* {COM(2008) 165 final}, *"the wording used by the ECJ ("any individual" having suffered harm caused by the infringement) is such that it encompasses indirect purchasers"* (para.37).

[26] Judgment of the Court of Justice of 5 June 2014 (C-557/12, *Kone).* Its origin is to be found in the Commission's decision by which it found that the four main European manufacturers of elevators and escalators (the Otis, Kone, Schindler and ThyssenKrupp groups) had committed an infringement of Article 81 of the Treaty by allocating tenders and contracts to each other in different Member States (Decision of 21 February 2007, COMP/E-1/38.823 – *PO/Elevators and Escalators)*. In particular, the national court asked whether Article 101 TFEU precludes a national rule which excludes on legal grounds, in a categorical manner, undertakings participating in a cartel from being liable for damages resulting from prices which an undertaking not participating in the cartel has set at a higher level than it would have applied in the absence of the infringement. As a consequence of this "umbrella effect", the buyer of a product sold by a non-cartel firm may experience damage despite not having any relationship - direct or indirect - with the cartel members. Indeed, the existing price level - artificially high as a consequence of the prohibited agreement - causes a detour of demand towards other substitute products, among which would be, in

the infringement from claiming damages are incompatible with the full effectiveness of the competition rules of the Treaty.[27]

2.2. Legal link: causation

The right to be compensated for damage suffered is subject to the requirement of the existence of a causal relationship between such damage and the conduct prohibited by the Treaty competition rules.[28]

In relation to the possible additional requirement of a subjective link between the infringement and the harm, initially, the Commission considered the desirability of regulating the requirement of fault in the offender's conduct, without ruling out the possibility of abolishing it and setting up a system of strict liability.[29] Subsequently, the Commission expressed its agreement with the legislation of those Member States where the latter approach is adopted, either because the requirement of fault is not required or because an absolute presumption of fault is established once the infringement has been proved. In addition, the Commission suggested that, in line with the principle of effectiveness, those Member States where fault is required should provide for a relative

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the first place, those of competitors who have not been part of the cartel. In this way, their prices would be pushed upwards, regardless of whether the seller reacted strategically -without prior contact with the infringers, since otherwise its conduct could be considered a prohibited concerted practice- or simply followed the market price. Customers of producers who are not part of the cartel will also pay a higher price than they would have paid in the absence of the cartel. See R. INDERST; F. MAIER-RIGAUD; U. SCWALBE: "Umbrella Effects", *IESEG School of Management Working Paper Series* 2013-ECO-17; F. MAIER-RIGAUD: "Umbrella effects and the ubiquity of damage resulting from competition law violations", *Journal of European Competition Law & Practice* (2014), Vol. 5, No. 4, pp. 247-251; D. HANSBERRY *et al.:* "Umbrella Effect: Damages Claimed by Customers of Non-cartelist Competitors", *Journal of European Competition Law & Practice,* vol. 5 (2014), pp. 196-205; M. VEENBRINK; C.S. RUSU: "Case Comment – Case C-557/12 Kone AG and Others v ÓBB Infrastruktur AG", *The Competition Law Review,* vol. 10 (2014), pp. 107-115; K. HAVU: "Competition Restrictions, 'Umbrellas' and Damages Claims – Comment on Kone", *Global Competition Litigation Review* (2015), pp. 134-142; E. OLMEDO: "A legal approach to Kone decision. Does the private enforcement of European Competition Law need an umbrella?", *IIC: International Review of Intellectual Property and Competition Law,* 47 (2016), pp. 697-722.

[27] Judgment of the Court of 12 December 2019, C-435/18 - *Otis II.* In the main proceedings, the plaintiff *(Land Oberösterreich)* claimed to have been affected by the cartel insofar as it granted certain customers of the elevator manufacturers low-interest loans (subsidized loans) for the construction of social housing. As a result of the infringement, the elevators installed in the subsidized residential buildings were priced considerably higher than would have been the case if prices had been formed in free competition. Thus, if it had invested at the average interest rate of the federal bonds the difference between what it paid to the beneficiaries and the lower amount it would have paid without the extra costs caused by the cartel, it would have obtained a much higher amount in interest than it actually received, and therefore claimed compensation equal to the difference between the two amounts. See X. TAN: "The overarching principle of full effectiveness in compensation por indirect losses: the lesson from C-435/18 Otis and Others", *European Competition Journal,* vol. 16 (2020), pp. 387-403; W. Wurmnest: "National law cannot exclude damages claims of public lenders against cartelists, Otis v. Land Oberösterreich (Otis II)", Common Market Law Review 57 (2020) pp. 1609-1628.

[28] Judgement of the Court of Justice, 13 July 2006, C-295/04 to C-298/04, *Manfredi,* para. 63.

[29] *Green Paper - Damages actions for breach of the EC antitrust rules* (COM/2005/0672 final), p. 7.

presumption, rebuttable only in the case of an excusable error, where a reasonable person exercising a high degree of care could not have realized that the conduct in question restricted competition.[30] Ultimately, however, the Commission expressly ruled out this proposal,[31] so that Member States can maintain the fault requirement with apparently no limits other than the requirememt of conformity with the case law of the Court of Justice, the principles of effectiveness and equivalence and the provisions of the Directive itself.[32] However, it cannot be excluded that the full effectiveness of the competition rules determines, in practice, the existence of strict liability, since the case law of the Court of Justice does not require the existence of fault and makes the right conditional only on the existence of a causal link.[33]

The Court of Justice, however, has refrained from developing a common concept of causation in European Union law, stating that it is a concept specific to the domestic legal system of each Member State.[34] Indeed, Advocate General KOKOTT has proposed to distinguish between the existence of the right to claim damages and the modalities of the exercise of that right: only the question of how compensation is to be granted (i.e., the details of application of such claims and the rules for their actual enforcement and, in particular, jurisdiction, procedure, time-limits and the furnishing of proof) has to be dictated by national law; on the contrary, the determination of the existence of the right to claim damages and, therefore, the existence of the existence of the causal link, is a matter for EU law, so that there should be no substantial differences between the legal criteria used by the Member States to determine the existence of liability. In particular,

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[30] *COMMISSION STAFF WORKING PAPER accompanying the WHITE PAPER on Damages actions for breach of the EC antitrust rules* {COM(2008) 165 final}, pp. 50-54.

[31] *Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union,* COM(2013) 404 final, p. 14.

[32] Recital 11 of the Preamble to the Directive.

[33] See K. HAVU: "Fault in EU Competition Law Damages Claims", *Global Competition Litigation Review* (2015), pp. 1-13; M. STRAND: *The Passing-On Problem in Damages and Restitution under EU Law* (2017), pp. 279-280; O. ODUDU; A. SÁNCHEZ-GRAELLS: "The interface of EU and national tort law: competition law", in P. GILIKER (ed.): *Research Handbook on EU Tort Law,* Edward Elgar (2017), pp. 154-183; ASHTON; D. HENRY: *Competition Damages Actions in the EU. Law & Practice,* 2nd ed., Elgar (2018), pp. 34-39; B. RODGER; M. SOUSA FERRO; F. MARCOS: *The EU Antitrust Damages Directive Transposition in the Member States,* Oxford (2018), pp. 440-441. However, see *infra* footnote 56 and accompanying text.

[34] When there are no EU rules on the matter, *"it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed"* (Judgment of 13 July 2006, C-295/04 a C-298/04 - *Manfredi*, para. 64). This passage has been repeated invariably ever since. See Judgments of the Court of 5 June 2014 (C-557/12, *Kone,* para 24) and 12 December 2019 (C-435/18, *Otis II,* para 17). The solution would be similar to that adopted in relation to the liability of Member States for damage caused by breaches of Union law (see Judgment of the Court of 19 November 1991, C-6/90 and C-9/90, *Francovich,* paras 42-43), in respect of which *"the Court has been content to allow proof of substantial causation to be governed by national law subject to the principles of equivalence and effectiveness of EU law"* (M. STRAND: *The Passing-On Problem in Damages and Restitution under EU Law,* p. 247).

according to AG KOKOTT, under EU law -or, specifically the case law on the non-contractual liability of the EU institutions under Article 340(2) TFEU- there should be a sufficiently direct causal link between the harmful conduct and the damage alleged, to ensure that a person is only liable for damage that he/she could reasonably have foreseen and whose redress is consistent with the objectives of the legal provision he/she has infringed (scope of protection of the EU competition rules). [35] This approach was rejected by the Court of Justice,[36] which avoided examining the issue directly based on the competition rules of the Treaty and stressed, instead, that it is for the domestic legal system of each Member State to lay down the detailed rules governing the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed.[37] However, an increasing level of

[35] Opinions of Advocate General KOKOTT delivered on 30 January 2014 (Case C-557/12, *KONE AG and Others), and* 29 July 2019 (Case C-435/18, *Otis Gesellschaft m.b.H. and Others v. Land Oberösterreich and Others, Otis II).*

[36] In this sense, see O. ODUDU; A. SÁNCHEZ-GRAELLS: "The interface of EU and national tort law: competition law", in P. GILIKER (ed.): *Research Handbook on EU Tort Law,* Edward Elgar (2017), p. 162; K. HAVU "Adequate Judicial Protection and Effective Application of EU Law in the Context of National Enforcement, Remedies and Compensation", *Europarättslig tidskrift,* 2020(2), p. 196; G. BACHARIS: "National law cannot exclude damages claims of public lenders against cartelists, Otis v. Land Oberösterreich (Otis II)", 57 (5) *Common Market Law Review* (2020), pp.1616-1621; X. TAN: "The overarching principle of full effectiveness in compensation forindirect losses: the lesson from C-435/18 Otis and Others", *European Competition Journal,* vol. 16 (2,3) (2020), pp 387-403. On the contrary, it has also been understood, in apparent contradiction to the simultaneous criticism of the alleged ambiguity and silence of the judgment on the subject, that the Court subscribes to the AG's opinion. See M. SOUSA; G. OLIVEIRA: "Otis: Another Great Judgment on Private Enforcement from the CJEU… But It Could be Better", *Competition Policy International* (January 22, 2020), at https://www.competitionpolicyinternational.com/otis-another-great-judgment-on-private-enforcement-from-the-cjeu-but-it-could-be-better/.

[37] Judgement of 5 June 2014, para 24. The Court of Justice has also declined to rule on similar considerations of Advocate General WAHL in *Skanska.* The question referred for a preliminary ruling was not directly related to causation, but to standing to be sued; more specifically, to whether the determination of which parties are liable for the compensation of harm caused by conduct contrary to Article 101 TFEU is to be done by applying that provision directly or on the basis of national provisions. According to WAHL, the "constitutive conditions of the right to claim compensation" -including the causal link- are regulated by Union law, the full effectiveness of which must be protected by the national courts; only the application of that right is a matter for national law, which must respect the principles of equivalence and effectiveness (Opinion, 6 February 2019, Case C-724/17, *Skanska,* paras 34-45). Hence, previously, when recalling that *"in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU, provided that the principles of equivalence and effectiveness are observed"* (para. 27), WAHL omits the reference that those rules include *"those on the application of the concept of 'causal relationship",* according to the well-known formula used by the Court of Justice since *Manfredi.* The Court -as, incidentally, WAHL himself- resolves the question without the need to address the requirement of causation: we are not faced with a situation in which there are no EU rules on the matter; on the contrary, it is clear from the wording of Article 101(1) TFEU that the concept of an 'undertaking' designates the perpetrator of an infringement of the prohibition laid down in that provision. The functional concept of undertaking is the same in the context of both public and private enforcement of competition rules, so that the determination of the entity which is required to provide compensation for damage caused by an infringement of Article 101 TFEU is directly governed by EU law: *"the entities liable to make good the damage caused by an agreement or practice prohibited by Article 101 TFEU are the undertakings, within*

harmonization in this field is being achieved by the case-law of the Court of Justice through the principle of effectiveness, progressively reducing the scope of national law's autonomy in relation to questions of causation.

2.2.1. The limited harmonization by the Directive

In relation to the causal relationship between the infringement and the harm, the Damages Directive establishes only limited rules on evidence.[38] The notion of a causal link between the infringement and the damage, however, is not directly addressed in the Directive, which merely recalls that it continues to be regulated by national rules subject to the principles of equivalence and effectiveness.[39]

In this regard, the burden of proving the existence of the passing-on of the damage rests with the claimant.[40] The indirect purchaser, like any other person injured by an infringement of the competition rules of the Treaty, may benefit from the presumption that cartel infringements cause harm.[41] In addition, in view of the difficulties that may be encountered in the national rules of evidence, the Directive establishes, solely in favor of the indirect purchaser, a rebuttable presumption that there has been a pass-on of the damage when the indirect purchaser can prove that three conditions are cumulatively met: the defendant has committed an infringement of competition law;

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the meaning of that provision, which have participated in that agreement or practice" (CJEU of 14 March 2019, para. 32). See also *supra* footnote 17.

[38] See I. LIANOS: "Causal Uncertainty and Damages Claims for the Infringement of Competition Law in Europe", *Yearbook of European Law* (2015), pp. 43-47; M. STRAND: *The Passing-On Problem in Damages and Restitution under EU Law,* pp. 328-329; C. LOMBARDI: *Causation in Competition Law Damages Actions,* CUP (2019), pp. 148-149.

[39] Recital 11. For an overview of national regimes on causation, see P. SPIER (ed.), *Unification of Tort: Causation. Principles of European Tort Law* (vol. 4), The Hague/London/New York: Kluwer Law International (2000), *passim;* I. LIANOS, "Causal Uncertainty and Damages Claims for the Infringement of Competition Law in Europe, *Yearbook of European Law* (2015), pp. 4-43; L. LIANOS; P. DAVID; P. NEBBIA: *Damages Claims for the Infringement of EU Competition Law,* pp. 75-116; C. LOMBARDI: *Causation in Competition Law Damages Actions,* pp. 19-49; M. INFANTINO; E. ZERVOGIANNI: "The European Ways to Causation", in M. INFANTINO; E. ZERVOGIANNI (eds): *Causation in European Tort Law,* CUP (2017), pp. 85-128.

[40] Article 14.1. Certainly, when national courts rule on practices under Article 101 or 102 TFEU which are already the subject of a Commission decision, national courts cannot take decisions running counter to the decision adopted by the Commission (Judgment of the Court, 14 December 2000 - C-344/98, *Masterfoods,* para. 52; Article 16.1 Regulation 1/2003.). Likewise, the finding of an infringement may be irrefutably established in a final decision by a national competition authority or a review court for the purposes of an action for damages brought before their national courts under Article 101 or 102 TFEU or under national competition law (Article 9.1 Directive). However, the effect of the finding determined by the competition authority or review court covers only the nature of the infringement and its material, personal, temporal and territorial scope (Recital 34). Therefore, while the national court is required to accept that a prohibited agreement or practice exists, the existence of loss and of a direct causal link between the loss and the agreement or practice in question remains a matter to be assessed by the national court (Judgment of the Court, 6 November 2012 - Case C-199/11*, Otis NV,* para. 65. Apparently contrary to this interpretation, see the Opinion of Advocate General RANTOS delivered on 28 October 2021 - Case C-267/20, AB Volvo, paras. 137-138).

[41] Article 17.2.

the infringement of competition law has entailed extra cost for the defendant's direct purchaser; and the indirect purchaser has acquired the goods or services that were the subject of the infringement of competition law, or has acquired goods or services derived from or containing them.[42]

2.2.2. The increasing harmonization through the principle of effectiveness

From a substantive point of view, most national tort law systems take a two-step approach in order to establish a causal link between the conduct and the harm: factual causation or cause in fact, and legal causation or causation in law. First, it must be determined if certain conduct (an infringement of competition law, in this case) is a factual cause of the damage. To this end, it has been proposed that the cause must be a necessary condition, a sufficient condition or a necessary member of a set of conditions that are together sufficient for the outcome, and different tests have been consequently proposed *(conditio sine qua non*, but-for-test, equivalence theory, necessary element of a sufficient set, etc.).[43] Most national systems have adopted the *conditio sine qua non* or but-for-test, according to which one should mentally eliminate that conduct and consider whether or not the loss would still take place; if the loss would still occur, it has not been caused by the infringement. Therefore, the *conditio sine qua non* or but-for test is conducted in terms of "all or nothing", in such a way that causation must be proved with a high degree of certainty. Provided some damage has occurred, the goal of this test is to ensure that the damage cannot be explained by factors other than the action of the defendant.[44] Second, since not every factual cause is considered

[42] Article 14.2. Although it has been proposed that the presumption benefits only those who purchased the product from the direct purchaser [F. MARCOS: *Spain,* in B. RODGER; M. SOUSA FERRO; F. MARCOS: *The EU Antitrust Damages Directive Transposition in the Member States,* Oxford (2018), p. 339], the literal wording indicates that it reaches all indirect purchasers, which, according to the definition provided in the Directive, *"means a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser"* [Article 2 (24)].

[43] Of the legal systems reviewed in P. SPIER (ed.), *Unification of Tort: Causation. Principles of European Tort Law* (vol. 4), The Hague/London/New York: Kluwer Law International (2000), only in Belgium, at least theoretically, the theory of equivalence of conditions was applied without the subsequent limit of legal causation (pp. 23-26, 130). See also *supra* footnote 39.

[44] However, antitrust harm is defined in terms of the actual prices and quantities affected by the antitrust violation, which may be determined by the (predictable) effect of the infringement or by many other random factors affecting not only total offer and demand in the market, but the relative bargaining power of plaintiff and defendant. Therefore, the deterministic (mechanical) concept of causation (the all or nothing approach) employed in national systems of tort law is apparently in fundamental conflict with the economic approach to causality, which uses statistical techniques to establish patterns in the relationship between economic variables and to measure to what extent a certain variable (e.g., the price) is influenced by the infringement as well as by other variables that are not affected by the infringement. Therefore, there is always some degree of uncertainty about the existence of a causal link between the infringement and the harm. Economic causation is therefore to be regarded not as mechanical or deterministic causation, but as statistical correlation. See H. A. ADELE, G. E. KODEK, G. K. SCHAEFER: 'Proving causation in private antitrust cases' (2012) 7(4) *Journal of Competition Law and Economics,* pp. 847–69; L. LIANOS; P. DAVID; P. NEBBIA: *Damages Claims for the Infringement of EU Competition Law,* pp. 129-159; C. LOMBARDI: *Causation in Competition Law Damages Actions,* pp. 69-91.

legally relevant, factual causation is considered in national tort law systems as an insufficient basis for imputation of liability. Therefore, in a second step, the principal aim of causation in law *(legal causation)* is thus to limit liability once a factual causal link has been identified. The most general reason to exclude civil liability for lack of legal causation is the idea (manifested in the different legal systems through different concepts, such as proximate cause, remoteness, adequacy, foreseeability, etc.) that in normal and not improbable circumstances the tortfeasor could not reasonably have foreseen that his conduct was suitable for contributing to the damages. In addition, national tort law systems also consider as factors of legal causation other criteria like the protective scope of the rule, disproportionate loss, time or space proximity, nature of the loss, etc.[45]

The increasing level of harmonisation affects mainly the issue of legal causation. While antitrust harm may reach a very distant point in the market chain, the principal aim of legal causation is precisely to limit liability once a factual (economic) link has been identified. The further along the chain the indirect purchaser is from the infringer, the more difficult it would be for the indirect purchaser to prove under these national rules the existence of damage caused by the infringement of the Treaty's competition rules. National rules on causation, however, must be interpreted by national judges in accordance with the principles of effectiveness.[46] Although it has not expressly ruled on indirect purchasers,[47] the Court of Justice has increasingly imposed limitations on the autonomy of Member States in establishing the causal link between the infringement and the damages.[48] It does so mainly by establishing a negative limit upon the autonomy of the Member States in the regulation of the causal relationship; however, incipiently, it also indicates, in a positive way, what the minimum content of this regulation should be.

In this regard, the Court of Justice established in *Kone* that the principle of effectiveness prevents national law from excluding certain categories of injured parties from the right to be compensated for the damage suffered, subordinating it to the existence of a direct

[45] See *supra* footnote 39.

[46] According to Recital 11 of the Damages Directive: *"Where Member States provide other conditions for compensation under national law, such as […] adequacy […], 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"*.

[47] In relation to actions for Member States' liability for damages caused by infringements of EU law, the causal link in relation to indirect purchasers is adressed by the judgment of the Court of Justice of 20 October 2011 (Case C-94/10 Danfos), according to which, even if only hypothetically, national legal systems may even, under certain conditions, exclude the existence of a causal link between the damage caused by the Member State and the indirect purchaser (paras 36-39).

[48] I. LIANOS, "Causal Uncertainty and Damages Claims for the Infringement of Competition Law in Europe, *Yearbook of European Law* (2015), pp. 48-57; L. LIANOS; P. DAVID; P. NEBBIA: *Damages Claims for the Infringement of EU Competition Law,* pp. 116-128; ASHTON; D. HENRY: *Competition Damages Actions in the EU. Law & Practice,* 2nd ed., Elgar (2018), 174-178; M. STRAND: *The Passing-On Problem in Damages and Restitution under EU Law,* pp. 262-273; C. LOMBARDI: *Causation in Competition Law Damages Actions,* pp. 55-56.

causal link, according to which the causal link must not be broken by the interference of the conduct of a third party. Consequently, national law cannot exclude the existence of a causal relationship merely because the individual concerned had no contractual links with the infringer.[49] Moreover, the Court implicitly held that national rules cannot exclude the right to be compensated on the grounds that damages resulting from the increased price paid to a competitor who has not infringed the competition rules of the Treaty are outside the protective purpose of the rule.[50] Subsequently, in *Otis II,*[51] the Court of Justice established that any loss which has a causal connection with an infringement of Article 101 TFEU must be capable of giving rise to compensation in order to ensure the effective application of Article 101 TFEU and to guarantee the effectiveness of that provision. TNational rules on causation cannot require it to have, in addition, a specific connection with the 'objective of protection' pursued by Article 101 TFEU. Therefore, even persons not acting as suppliers or customers on the market affected by the cartel must be able to request compensation.[52]

The principle of effectiveness, moreover, not only obliges courts to disapply the national rules on causation where necessary (as a negative limit), but also provides some (positive) content to the concept of causation. In this regard, the Court established already in *Kone* that there is a causal link provided that the infringment at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of producing the loss, and that those circumstances and specific aspects could not have been ignored by the defendant.[53] Despite the apparent adoption of the adequacy criterion, by also adopting a subjective concept of

[49] Judgment of the Court of Justice of 5 June 2014 (C-557/12, *Kone)* paras 31-33. According to the question referred for a preliminary ruling, under the applicable national rules the damages resulting from the overcharge paid to a non-cartel competitor are a collateral effect of an independent decision taken by a person outside the cartel on the basis of a large number of factors. Even if there could be factual causation, there would be no legal causation: there is no adequate causal link between the infringment and the harm suffered by the buyer, whose interests are, moreover, outside the protective purpose of the rule.

[50] Ibid., para. 37.

[51] Judgment of the Court of Justice of 12 December 2019 (C-435/18, *Otis II).* The referring court explicitly acknowledged the existence of damages and their causal link with the infringement (factual causation), but considered that it could not be legally attributed to the cartelists' conduct (legal causation) because the loss did not present a sufficient connection with the purpose of the prohibition of cartel agreements. In accordance with the applicable national law, a pure material loss is capable of being compensated only if the unlawfulness of the harmful conduct is derived from infringement of protective provisions and it is manifested as a realization of the risk on account of which certain conduct is required or forbidden by them. Therefore, a loss does not give rise to compensation if it occurs because of a side-effect in a sphere of interests which is not protected by the prohibition set out in the protective provision which was infringed. Since Article 101 TFEU seeks to ensure the maintenance of effective undistorted competition in the internal market and, consequently, to ensure prices set on the basis of free competition, the personal scope of protection of the cartel ban would cover only those suppliers and customers active on the relevant product and geographic markets affected by a cartel.

[52] Ibid., paras. 25-32.

[53] Judgment of the Court of Justice of 5 June 2014 (C-557/12, *Kone),* para. 34.

foreseeability the Court seems to establish a requirement based more on fault than on legal causation, which will have to be clarified -or confirmed- by subsequent case law.[54]

Therefore, although the limits to the autonomy of the Member States and the corresponding minimum content of the remedy can only be established incrementally by the case law of the Court of Justice, it seems to follow so far from the latter that the limiting function played by legal causation in national legal systems is substantially reducd -or even eliminated- by the principle of effectiveness once a factual causal link has been identified. The problem of the causal link between the infringement and the damage suffered by the indirect purchaser thus appears to be progressively reduced to a matter of fact; i.e. proof of factual causation. In any case, the infringer's liability cannot in any way be excluded on the grounds of lack of a causal link merely because the plaintiff is an indirect purchaser.

2.3. Quantification

The quantification of compensatable damage, beyond the requirement to take into account the part of the damage that may have been passed on,[55] is not directly addressed in the Directive either. In relation to evidence, the Directive just provides that the indirect purchaser bears the burden of proof not only of the existence but also of the extent of the harm.[56] Therefore, it is also for the domestic legal system of each Member State to determine, subject to the principles of equivalence and effectiveness, its own rules on quantifying harm, what requirements the claimant has to meet, the methods that can be used in quantifying the amount and the consequences of not being able to fully meet those requirements.[57]

Quantification of the harm requires an assessment of how the market would have evolved had there been no infringement, which implies the need for a comparison with a situation which is by definition hypothetical and can thus never be made with complete accuracy. Since national courts need to assess complex economic issues of pass-on, they need to be able to review and verify economic evidence, including qualitative and quantitative evidence. In order to ensure coherence and predictability, the Commission has issued guidelines for national courts on how to estimate, subject to national law, the share of the overcharge which was passed on to the indirect purchase

[54] On the relation between fault and causation, see P. WIDMER (ed.): *Unification of Tort Law: Fault. Principles of European Tort Law (vol. 10),* The Hague/London/New York: Kluwer Law International (2005), pp. 337-39.

[55] In this case the passing-on is not alleged by the indirect purchaser to support its claim (as a sword), but by the defendant to reduce, or even suppress, the amount of the compensable damages (as a shield). It is analyzed in the following section.

[56] Article 14.1. On the elevance that national courts attach to expert reports, see RBB ECONOMICS AND CUARTRECASAS, GONÇALVES PEREIRA: *Study on the Passing-on of Overcharges. Final Report* (2016), pp. 168-175; C. VELJANOVSKI: *Cartel Damages. Principles, Measurement and Economics.* OUP (2020), pp. 367-405; J.-F. LABORDE: "Cartel damages actions in Europe: How courts have assessed cartel overcharges" (2021 ed.), *Concurrences,* Nº 3-2021, p. 239.

[57] Recital 46.

(the *Guidelines).*[58] It provides indications on the relevant parameters that can be taken into account when dealing with economic evidence relevant for assessing the passing-on of overcharges, based on the principles established in the *Practical Guide,* which it complements.[59] The *Guidelines* thus outline the way in which the existence and the magnitude of these passing-on effects are determined by a range of interdependent factors (i.e., the fixed or variable nature of input costs subject to an overcharge, the nature of the product demand, the strength and intensity of competition in the markets where the direct or indirect customers are active, etc., the relative importance which might vary from case to case),[60] and the different methods that can be used to calculate them.[61] In many of the judgments of national courts reference has been made to the *Practical Guide,* and in some cases the courts have even rejected the quantifications of damages made by the parties because they do not use one of the methods contained therein, the most frequently accepted by courts being the comparison of prices over time.[62]

The burden of proof of the existence and amount of the damage may constitute a substantial barrier to effective claims for compensation,[63] even more so when the damage has been passed on to indirect purchasers, thus aggravating the inevitable degree of uncertainty as to the existence of a causal link between the infringement and the damage. In addition, estimating what precise fraction of an overcharge has been passed on and at what point the overcharge passing through the market chain dissipates and ceases to be a proper causal link can be extremely difficult. Therefore, neither the burden nor the standard of proof required for the quantification of harm according to national rules should render the exercise of the right to damages practically impossible

[58] COMMUNICATION FROM THE COMMISSION. *Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser* (2019/C 267/07). The legal basis for the guidelines is Article 16 of the Damages Directive.

[59] 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], accompanying the *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, 13.6.2013, p. 19). On the assessment to be made by national courts of the different types of economic evidence of the existence and scope of passing-on and the use of economics experts, RBB ECONOMICS AND CUARTRECASAS, GONÇALVES PEREIRA: *Study on the Passing-on of Overcharges. Final Report* (2016), pp. 158-162, 168-170.

[60] *Guidelines,* paras. 49-56.

[61] *Guidelines,* paras. 65-153. See also, RBB ECONOMICS AND CUARTRECASAS, GONÇALVES PEREIRA: *Study on the Passing-on of Overcharges. Final Report* (2016), pp. 66-152.

[62] J.-F. LABORDE: "Cartel damages actions in Europe: How courts have assessed cartel overcharges" (2021 ed.), *Concurrences,* Nº 3-2021, pp. 237-238.

[63] Recital 45. According to the Commission Staff Working Document. Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, *"[…] quantification of harm in competition cases is, by its very nature, subject to considerable limits as to the degree of certainty and precision that can be expected. There cannot be a single 'true' value of the harm suffered that could be determined, but only best estimates relying on assumptions and approximations"* (para. 17).

or excessively difficult.[64] Accordingly, national courts should have the power to estimate the share of any overcharge that was passed on (i.e., the actual loss of the indirect purchaser),[65] and, in general, the amount of harm (including loss of profit and interest) if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.[66]

The power to estimate requires national courts not to reject submissions on passing-on merely because a party is unable to precisely quantify the passing-on effects, and to base their assessment on the information reasonably available and strive for an approximation of the amount or share of passing-on which is plausible.[67] The national court's power is conditional on the practical impossibility or extreme difficulty of the precise quantification of the harm suffered on the basis of the evidence available. This raises the question of whether the power is activated whenever the plaintiff's quantification is not considered convincing or contains gaps or ambiguities (and there is no alternative quantification better founded by the defendants) or only when, despite best efforts, a party is unable to precisely quantify the passing-on effects, for example, because there is an information asymmetry that is insurmountable for the injured party.[68] In undertaking such estimation, national courts may be assisted by the national competition authority, which, when requested, may assist them with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.[69]

3. THE PASSING-ON DEFENSE

The passing-on of actual loss may be invoked not only by the indirect purchaser to support a claim as to the existence and extent of the damage, but also by the defendant in relation to its quantification.[70] In this regard, the Damages Directive merely provides that

[64] Article 17.1.

[65] Article 12.5.

[66] Article 17.1.

[67] COMMUNICATION FROM THE COMMISSION. *Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser* (2019/C 267/07), paras. 33-34.

[68] See the request for a preliminary ruling lodged on 19 May 2021, the Juzgado de lo Mercantil n.º 3 of Valencia (Spain) (Case C-312/21,*Tráficos Manuel Ferrer, S.L. and Other v Daimler AG).*

[69] Article. 17.3 In this sense, the Juzgado de lo Mercantil n. 1 of Oviedo (Spain) has appealed to the CNMC, as *amicus curiae,* to assess certain specific aspects of the expert reports provided by the parties to the proceedings (Order of 28 October 2021, ordinary proceedings 0000151/2019).

[70] The defense was raised in approximately half of the cases reviewed in J.-F. LABORDE: "Cartel damages actions in Europe: How courts have assessed cartel overcharges" (2021 ed.), *Concurrences,* Nº 3-2021, pp. 232-242, 240. Although it is only applicable to damages caused by infringements of competition law, it cannot be ruled out, however, that the expansive force of competition law may cause the figure to go beyond its specific scope of application to extend to the general regime of tort law. On the contribution

> *"Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties."*[71]

The defence had been admitted by the case law on actions against the European Union under Article 340(2).[72] Moreover, the Court of Justice has held that the national rules applicable to actions against Member States which recognise the defence are not incompatible with EU law.[73] Yet the case law, in this context, did not require national systems to admit the defense based on the passing-on. On the contrary, the Court merely stated that the domestic rules of a Member State recognizing it were not contrary to the requirements of EU law.[74] Moreover, unlike in the field of competition

of competition law to the development of European tort law, see. N. DUNNE: "Antitrust and the Making of European Tort Law", *Oxford Journal of Legal Studies* (2015), pp. 1-34; more critically in relation to the distortion it causes in national tort liability regimes, T. EILSMANBERGER: "The Green Paper on damages actions for breach of the EC antitrust rules and beyond: reflections on the utility and feasibility of stimulating private enforcement through legislative action", 44 *Common Market Law Review* (2007), pp. 431-478; O. ODUDU; A. SÁNCHEZ-GRAELLS: "The interface of EU and national tort law: competition law", in P. GILIKER (ed.): *Research Handbook on EU Tort Law,* Edward Elgar (2017), pp. 154-183. More specifically, in relation to the impact of positive harmonization in the domestic legislation through the creation of a special regime applicable to infringements of competition law, F. MARCOS; F. SÁNCHEZ-GRAELLS: "Towards a European Tort Law? Damages Actions for Breach od the EC Antitrust Rules: Harmonizing Tort Law through the Back Door?", *European Review of Tort Law,* vol. 16, no. 3 (2008), pp. 469-488.

[71] Article 13. Regarding the regime established in the Directive, C. LOMBARDI: "The passing-on of price overcharges in European competition damages actions: A matter of causation and an issue of policy", *Discussion Paper, Europa-Kolleg Hamburg, Institute for European Integration,* No. 8/15, pp. 25-38; I. LIANOS; P. DAVID; P. NEBBIA: *Damages Claims for the Infringement of EU Competition Law,* pp. 52-59; M. STRAND: *The Passing-On Problem in Damages and Restitution under EU Law,* pp. 342-353; M. BOTTA: "The Principle of Passing on in EU Competition Law in the Aftermath of the Damages Directive", 5 *European Review of Private Law* (2017), pp. 881-90.

[72] Judgment of the Court of 4 October 1979 (Case 238/78, *Ireks-Arkady GmbH v Council and Commission of the European Communities).*

[73] Judgment of the Court of 27 February 1980 (Case 68/79, *Hans Just I/S v Danish Ministry for Fiscal Affairs).*

[74] See Opinion of AG MANCINI, 27 September 1983 (*199/82 - San Giorgio,* para 5). For an extensive review of this case law, vid. see RBB ECONOMICS AND CUARTRECASAS, GONÇALVES PEREIRA: *Study on the Passing-on of Overcharges. Final Report* (2016), pp. 20-24; and, specially, M. STRAND: *The Passing-On Problem in Damages and Restitution under EU Law,* pp. 98-113, 165-202, 250-255.

law, its existence is not recognised by EU law on trade marks,[75] copyright,[76] defective products,[77] or package travel.[78] It cannot therefore be regarded as a principle of EU law.

Notwithstanding the above, the introduction of the defence is justified as a necessary consequence of the adoption of the compensatory principle underlying the Damages Directive.[79] Yet the internal rules of a Member State allowing overcompensation for infringements of EU competition law were not only admissible until its entry into force (and remain so in general for all other damages),[80] but, in accordance with the principle of equivalence, were even mandatory whenever such special damages could be awarded in the context of similar national actions.[81] In fact, taking into account the complementary preventive role of private enforcement of competition law, the Commission raised in the Green Paper the possibility of doubling damages in cartel cases.[82] It was however expressly rejected by the European Parliament on the grounds that *"payments awarded to complainants should be compensatory and should not exceed the actual damage (damnum emergens) and losses ('lucrum cessans') suffered, in order to avoid unjust enrichment".*[83] Thus, the possibility of applying existing punitive damages in actions for damages under national law for infringements of the competition law provisions disappeared in the White Paper and was ultimately expressly prohibited in the Directive.[84] In relation specifically to the passing-on defense, the Commission suggested its exclusion in three of the four options presented in the *Green Paper.*[85]

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[75] Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (OJ L 336, 23.12.2015, p. 1–26).

[76] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004, p. 45–86).

[77] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 7.8.1985, p. 29–33).

[78] Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158, 23.6.1990, p. 59–64).

[79] See Articles 3.2, 12.2. See also I. LIANOS; P. DAVID; P. NEBBIA: *Damages Claims for the Infringement of EU Competition Law*, *passim,* esp. 16-31.

[80] See H. KOZIOL; V. WILCOX (eds.): *Punitive Damages: Common Law and Civil Law Perspectives,* Springer, Vienna (2009).

[81] Judgement of the Court of Justice, 13 July 2006, C-295/04 to C-298/04, *Manfredi,* paras. 92-93.

[82] *Green Paper - Damages actions for breach of the EC antitrust rules* (COM/2005/0672 final), p. 7. On the compensatory principle informing the Damages Directive, see C. LOMBARDI: *Causation in Competition Law Damages Actions,* pp. 13-16.

[83] European Parliament Resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules (2006/2207(INI)), para. 17.

[84] Article 3.3.

[85] *Green Paper,* pp. 7-8. Although in favor of that the ability of the victim to mitigate the damage and losses may be taken into account, the Parliament noted that the possibility of defendants arguing that all or part of the gains they made as a result of the infringement have been transferred to third parties (the passing-on defense) would be detrimental to establishing the extent of the damage and the causal link.

However, the Commission subsequently accepted it in the *White Paper,* not on the grounds of the principle of effectiveness, but on the grounds of the doctrine against unjust enrichment as well as on the basis of an (alleged) common compensatory principle of European tort law.[86] Despite this, the compensatory principle also underlies most national tort systems,[87] without the admissibility of the passing-on defence necessarily being recognised as such in these systems before the entry into force of the Directive.[88] In fact, it is also not recognised afterwards outside the scope harmonised by it. Generally, on the contrary, the deduction of the benefits obtained from the amount of compensatable damages is accepted, where appropriate, through the doctrines of *mitigatio* or *compensation lucri cum damno,* whose admissibility (not only in the area of contract law, but also in tort law) and the conditions for their application vary from one Member State's legal system to another. Indeed, the very harmonization of this part of the legal system was justified, *inter alia,* by the divergence between national rules on those doctrines, which affected the defendant's possibilities of avoiding compensation

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See *European Parliament Resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules* (2006/2207(INI)), paras. 17, 19.

[86] More specifically, its omission *"could result in unjust enrichment of purchasers who passed on the overcharge and in undue multiple compensation for the illegal overcharge by the defendant" (White Paper,* pp. 8-9). Against the admissibility of the defense on the basis of the principle of the principle against unjust enrichment, see Opinion of AG MANCINI, 27 September 1983 (199/82 - San Giorgio) para 7; M. STRAND, *The Passing-On Problem in Damages and Restitution under EU Law,* pp. 338-342. For a different reading of *Courage,* see ASHTON; D. HENRY: *Competition Damages Actions in the EU. Law & Practice,* 2nd ed., Elgar (2018), p. 44.

[87] See U. MAGNUS (ed.): *Unification of Tort Law: Damages. Principles of European Tort Law, vol. 5,* The Hague (2001), pp. 185-187.

[88] On the passing-on defence in national courts before the entry into force of the Damages Directive (not by chance, but with the aim of aligning itself with its future content, adopted mostly during its legislative process), see D. WAELBROECK; D. SLATER; G. EVEN-SHOSHAN: *Study on the Conditions of Claims for Camages in Case of Infringement of EC competition rules. Comparative Report,* Ashurst (2004), pp. 77-79; M. SIRAGUSA: "Private Damage Claims – Recent Developments in the Passing-on Defence", in K. HÜSCHELRATH; H. SCHWEITZER (eds): *Public and Private Enforcement of Competition Law in Europe,* ZEW Economic Studies, vol 48. Springer, Berlin, Heidelberg (2014), pp. 235-240; C. LOMBARDI: "The passing-on of price overcharges in European competition damages actions: A matter of causation and an issue of policy", *Discussion Paper, Europa-Kolleg Hamburg, Institute for European Integration,* No. 8/15, pp. 16-25; RBB ECONOMICS AND CUARTRECASAS, GONÇALVES PEREIRA: *Study on the Passing-on of Overcharges. Final Report* (2016), pp. 24-38; M. STRAND, *The Passing-On Problem in Damages and Restitution under EU Law,* pp. 98-111, 165-202, 338-342; M. BOTTA: "The Principle of Passing on in EU Competition Law in the Aftermath of the Damages Directive", 5 *European Review of Private Law* (2017), pp. 881-907; ASHTON; D. HENRY: *Competition Damages Actions in the EU. Law & Practice,* 2nd ed., Elgar (2018), pp. 56- 79; P. CARO DE SOUSA: "EU and national approaches to passing on and causation in competition damages cases: a doctrine in search of balance", *Common Market Law Rewiew,* 55 (2018), pp. 1760-1766; B. RODGER; M. SOUSA FERRO; F. MARCOS: *The EU Antitrust Damages Directive Transposition in the Member States,* Oxford (2018), *passim;* C. LOMBARDI: *Causation in Competition Law Damages Actions,* CUP (2019), pp. 172-180; F: WEBER: "Tackling pass-on in cartel cases: a comparative analysis of the interplay between damages law and economic insights", *European Competition Journal,* vol. 16 (2020), pp. 576-590. On the defense of passing-on at common law, see M. RUSH: *The Defence of Passing On,* Hart Publishing, Oxford and Portland, Oregon (2006).

for the damage caused.[89] In this regard, it is clear also from the work on the elaboration of principles of European tort law that it is not possible to draw general principles on the subject from the various national systems, given the diversity of national solutions adopted.[90] As a general rule, however, neither in national tort law systems nor in existing works on the principles of European tort law (in particular, the *Principles of European Tort Law* and the *Draft Common Frame of Reference*)[91] is the passing-on defense allowed, as it is configured in the Damages Directive: benefits that come from a different and subsequent legal transaction (the resale of the goods affected by the infringement) to the event giving rise to the damage (which is carried out with malice), which is not for the purpose of compensation, and are obtained from sources outside the infringer (such as indirect purchasers), through the performance of a conduct (the increase of its own prices) that cannot be demanded from the injured party.[92]

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[89] See *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union* - COM/2013/0404 final, p. 9.

[90] U. MAGNUS (ed.): *Unification of Tort Law: Damages. Principles of European Tort Law, vol. 5,* The Hague (2001), pp. 303-304.

[91] Article 10:103 of the *Principles of European Tort Law* (PETL), under the heading 'Benefits gained through the damaging event', establishes: 'When determining *the amount of damages benefits which the injured party gains through the damaging event are to be taken into account unless this cannot be reconciled with the purpose of the benefit."* See M. Martín-Casals: "The Principles of European Tort Law (PETL) at the beginning of a second decade", in P. GILIKER (ed.), *Research Handbook on EU Tort Law,* Edward Elgar (2017), pp. 361-391. Article VI. – 6:103 of the *Draft Common Frame of Reference* (DCFR) establishes: *'(1) 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. (2) In deciding whether it would be fair and reasonable to take the benefits into account, regard shall be had to the kind of damage sustained, the nature of the accountability of the person causing the damage and, where the benefits are conferred by a third person, the purpose of conferring those benefits.* See C. VON BAR; E. CLIVE (eds.): *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR),* Full Edition. European Law Publishers *(2009)*, p. 3.747. See also J. BLACKIE: "The tort provisions of the Study Group on a European Civil Code and their uses", in P. GILIKER (ed.), *Research Handbook on EU Tort Law,* Edward Elgar (2017), pp. 392-414.

[92] The compensation depended on whether losses and benefits arise from the same title in Italian law, at least until 2018. See U. MAGNUS (ed.): *Unification of Tort Law: Damages. Principles of European Tort Law,* vol. 5, The Hague (2001), p. 129. Therefore, *"benefits must be immediate and direct conquences of the tort (and, viceversa, the tort must be immediate and direct cause of benefits) in order to be deducted from damages. Consequently […] benefits received by the plaintiff from a source collaterlal to de defendant may not be used to reduced the defendant's liability".* See C. SPADDA: "The Equalisation of Benefits (Compensatio Lucri Cum Damno) in the Italian Law. A Possible Inspiration for Other European Member States?", *European Review of Private Law,* [2020], pp. 670-673. Moreover, if the benefit is provided by a third party, as in the case of the passing-on defence, whether or not compensation is reduced depends on the purpose of the benefit, for example, in Austrian law [cfr. U. MAGNUS (ed.): *Unification of Tort Law: Damages. Principles of European Tort Law,* p. 18], French law (ibid., p. 78), German law (ibid, p. 100), and Italian law (C. SPADDA: "The Equalisation of Benefits (Compensatio Lucri Cum Damno) in the Italian Law" pp. 674-681). In the same sense, according to the official commentary of Article 10:103 PETL, *"the deduction must be reconcilable with the purpose of the benefit. Rather often it is the purpose of the benefit to provide the victim with financial help but not to relieve the tortfeasor from liability […] the provision does not in fact establish the firm presumption that collateral gains always have to be taken into account – leading to a deduction- unless another purpose of the benefit can be shown. Therefore, collateral gains*

The defense based on the passing-on of the actual loss, therefore, is not required by the principle of effectiveness nor by any general principle of European tort law. It is in fact a special rule introduced in many national legal systems -at least in its current form and scope- by the Damages Directive.[93] However, in addition to stating implicitly in the Recitals that its legal consequences result in the deduction of the profits obtained from the amount of the damage,[94] the Directive only establishes that the passing-on defence should be recognised as admissible and that the burden of proof should be on the defendant. Therefore, some doubts arise as to the scope of the harmonization of the requirements for its applicability (subsection 3.1) and even as to its proof (subsection 3.2).

3.1. Substantive requirements

In the absence of European Union rules on the quantification of harm beyond the recognition of the passing-on defence, the reduction of the amount of compensatable damage resulting from the application of the defense has to be made within the framework of the national rules on quantification of damage.[95] It is therefore necessary to determine the extent of the harmonisation brought about by the Damages Directive on the existence of the causal link between the infringement of competition rules and the passing on of the damage (3.1.1), as well as the question whether the national court may impose additional requirements beyond the causal link to be fulfilled under national legal rules (3.1.2).

3.1.1. Causation

The passing-on defence requires, in any event, that the claimant has passed on all or part of the overcharge resulting from the infringement of competition law, i.e. the existence of a causal link between the infringement and the alleged overcharging by the injured party. Since the Directive does not regulate (at least directly) the causal link between the infringement and the passing on of the overcharge, it is up to the Member States to establish the requirements for its application.

According to factual causation or cause in fact, it is not sufficient that prices on the aftermarket also increased in the period following the infringement, but that the

will often reduce the amount of damages. However, […] the contrary is rather the rule." See EUROPEAN GROUP ON TORT LAW, *Principles of European Tort Law. Text and Commentary,* SpringerWienNewYork (2005), pp. 156-159.

[93] This may be indicative of a certain reticence on the part of the Commission towards the preventive function that the Court of Justice attributes to private actions for damages for infringements of competition law, because of its possible interference with public enforcement.

[94] *"(T)he loss which has been passed on no longer constitutes harm for which the party that passed it on needs to be compensated"* (Recital 39).

[95] *Damages Directive,* recital 46.

increase in the price is a consequence of the infringement, i.e. that the price set by the plaintiff is not the consequence of a commercial decision at his/her own risk, but that it is higher than the price that would exist if the infringement had not occurred.[96] Since the price is merely a reflection of the changing information available at any given moment in the market, it can be influenced by an increase in production costs caused by the passing-on of the overcharge, but also by an increase in market power, an increase in demand, or a combination of some of these or multiple other causes, often unknown even to the plaintiff. Consequently, in order to isolate the effects of the infringement from those of other factors that would have affected that price even if the infringement had not taken place, it is necessary to establish a counterfactual scenario, i.e. a hypothetical situation in which the infringement has not taken place. For this purpose, as when the passing-on is alleged by the indirect purchaser, the court may take into account the principles and methods set out in the Commission's *Guidelines*.[97]

More doubtful is the possible application of national rules on legal causation or causation in law to limit the applicability of the defence by excluding a proper legal link between the infringement and the passing-on of the damage.[98] In contrast to the national rules on the causal link between infringement and damage, the full effectiveness of the Treaty competition rules does not impose any requirements in relation to the passing-on defence. It could therefore be understood that the case law of the Court which appears to progressively reduce the problem of the causal link between the infringement and the damage suffered to a matter of fact is not applicable in relation to the *compensatio.* Thus, the other national rules on legal causation would

[96] See Judgments of the German Federal Court of Justice of 28 June 2011 (KZR 75/10 - *ORWI*, para 46), 23 September 2020 (KZR 35/19 – *Trucks,* para 102) and 13 April 2021 (KZR 19/20, para 96); Judgment of the UK Court of Appeal of 4 July 2018, [2018] EWCA 1536 (Civ) *(Sainsbury's Supermarkets Ltd v Mastercard Inc,* para 230). See also M. STRAND: *The Passing-On Problem in Damages and Restitution under EU Law,* Edward Elgar (2017), pp. 106-107; C. LOMBARDI: *Causation in Competition Law Damages Actions,* pp. 168-170.

[97] However, as the Commission itself recalls, such guidelines *"are non-binding and do not alter existing rules under EU law or the laws of the Member States. Accordingly, there is no obligation on a national court to follow them"* (paragraph 2). See also, on such methods, RBB ECONOMICS AND CUARTRECASAS, GONÇALVES PEREIRA: *Study on the Passing-on of Overcharges. Final Report* (2016), pp. 72-91.

[98] The establishment of a causal link between the infringement and the passing-on of the damage may require different legal tests, depending on whether it has been alleged by the plaintiff (as a sword) or by the defendant (as a shield). When alleged by the plaintiff (as a sword) the passing on affects not only the quantification of the damage *(quantum respondatur),* but -beforehand- whether or not there is a damage to be compensated *(an respondatur)*. As noted above, according to the applicable domestic law it will be necessary to prove, firstly, that the infringement constitutes a factual cause of the damage passed on to the indirect purchaser and, second, the existence of legal causation: that is to say, that the damage passed on is also legally imputable to the infringer. On the contrary, when alleged by the defendant (as a shield) in order to reduce the amount of the compensatable damage, passing on may concern only the quantification of damage which is already known to be compensatable. Consequently, from the defendant's perspective, only factual (economic) causation would be relevant.

remain applicable as long as they do not conflict with the provisions of the Directive.[99] In any event, however, the very recognition of the passing-on defence in the Directive precludes the applicability of national rules that require the purpose of the benefit to be compensatory, as well as those that require the benefits to be immediate and direct consequences of the infringement in order to be deducted from the damages.[100]

3.1.2. Additional requirements As under the *Draft Common Frame of Reference,*[101] according to the national rules on the *compensatio* the conditions for its application to the individual case include not only the existence of a factual and legal causal link between the infringement and the benefits. In addition, it is necessary that the computation of the benefits is reasonable, so that there is no unfair relief for the defendant.[102]

In this regard, since damages may be passed on to a large number of indirect purchasers in a very fragmented way, it may be that, in practice, they have no interest in claiming them even if it is legally possible, especially in the case of final consumers in jurisdictions without an adequate system of collective redress. In addition, harm may become no longer forensically identifiable as it becomes more diffuse each time it is passed on from one link in the market chain to another. Therefore, the application of the passing-on defense could result in infringers becoming factually released from their liability when the indirect purchasers to whom the damage has been passed on, although legally entitled to sue, are unlikely in practice to do so. To avoid that unfair relief of infringers,

[99] In this regard, the 2013 Directive Proposal provided for the inapplicability of the defense for reasons based on legal causation criteria. In particular, when the overcharge was passed-on to persons at the next level of the supply chain for whom it was legally impossible to claim compensation according to the national law on causation, in order to avoid the infringing undertaking from becoming freed from liability for that harm. See *Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union* (COM/2013/0404 final), Article 12.2. In the same sense, the Jugdment of the UK Competition Appeal Tribunal of 14 July 2016, Case *Sainsbury's Supermarkets v. MasterCard* [2016] CAT 11, para 484. See C. VELJANOVSKI: *Cartel Damages. Principles, Measurement and Economics.* OUP (2020), pp.338-346; F: WEBER: "Tackling pass-on in cartel cases: a comparative analysis of the interplay between damages law and economic insights", *European Competition Journal,* vol. 16 (2020), pp. 591-592. However, its elimination in the final text of the Directive has probably less to do with a change of mind of the Commission than with its uselessness: the breadth with which it established the right of *"any individual"* to claim compensation and the reduction of the issue of causation to a question of fact means that there are no indirect purchasers who cannot make a claim *"for legal reasons".* See Judgment of the Court of Justice of 5 June 2014 (C-557/12, *Kone),* para 37.

[100] See supra footnote 92.

[101] According to the official Comments of Article VI. – 6:103 of the *Draft Common Frame of Reference* (DCFR), the injured person is entitled in principle to multiple payments by reason of the damage suffered and a mitigation of liability only comes into the picture if it is fair and reasonable, on grounds that *'the acts of third parties benefiting the injured person are no concern of the liable person; the fact that others are looking after the victim does not free the liable person of personal responsibility'.*

[102] See U. MAGNUS (ed.): *Unification of Tort Law: Damages. Principles of European Tort Law, vol. 5,* The Hague (2001), pp. 37, 78, 100, 152, 203.

before the entry into force of the Direcive some national courts relied on legal grounds of national law other than causation to subordinate the defense not to the legal possibility (as in the 2013 Directive Proposal), but to the factual probability that the injured parties to whom the harm is alleged to have been passed on will actually claim their compensation.[103]

The limited regulation in the Directive can be interpreted as harmonising not only the mandatory recognition of the defense, but also the requirements for its application. Therefore, after its entry into force the defense of passing-on could not be excluded on normative grounds: it would be sufficient for the defendant to prove the existence of a causal link between the infringement and the passing-on for the court to have to apply the *compensatio*.[104] The assessment of the existence and extent of the passing-on thus would become just a question of fact, to be determined by national courts in accordance with the relevant national law.Consequently, after the Damages Directive, national judges should accept the defense whenever it is proven that the passing-on has occurred from an economic point of view. The application of the passing-on defense could theoretically result, this way, in any infringers becoming factually released from their liability when there is no class of indirect buyers who are likely to claim for damages. On the contrary, it is also possible to interpret the Damages Directive as harmonising only the mandatory recognition of the defense, but not the (or at least not all) legal requirements necessary for its application to the specific case under domestic law.[105] Therefore, even after the entry into force of the Damages Directive, national courts could rely on national legal grounds other than causation to reject the passing-on defense in the specific case, even when its existence has been demonstrated from an economic perspective.[106] While some national courts do not seem to have raised the question, thus implicitly assuming that only the first interpretation is possible,[107] the

[103] See *ad ex.* Competition Appeal Tribunal, judgment of 14 July 2016, [2016] CAT 23 *(Sainsbury's Supermarkets Ltd v MasterCard Inc,* para 484); Court of Appeal, judgment of 4 July 2018, [2018] EWCA 1536 (Civ) *(Sainsbury's Supermarkets Ltd v Mastercard Inc,* paragraphs 332 and 340; Dutch Supreme Court (Hoge Raad), judgment of 8 July 2016, case 15/00167 *(TenneT v ABB,* paragraphs 4.4.1-4.4.5). See also *supra* footnote 88.

[104] Implicitly, C. KERSTING: *Germany,* in B. RODGER; M. SOUSA FERRO; F. MARCOS: *The EU Antitrust Damages Directive Transposition in the Member States,* Oxford (2018), pp. 151-152.

[105] While unjust enrichment from 'over-compensation' of a claimant who passed on the overcharge must be avoided (Articles 3.3., 12.1, 12.2, 15.1), an 'absence of liability of the infringer' must be avoided as well (Article 12.1), so that the recognition of the defense is not absolute: where the injured party has reduced the actual loss suffered by passing it on, it is *in principle* appropriate to allow the passing-on defense (Recital 39).

[106] In agreement on the substance, with arguments that do not necessarily coincide, P. CARO DE SOUSA: "EU and national approaches to passing on and causation in competition damages cases: a doctrine in search of balance", *Common Market Law Rewiew,* 55 (2018), pp. 1777-1784; F: WEBER: "Tackling pass-on in cartel cases: a comparative analysis of the interplay between damages law and economic insights", *European Competition Journal,* vol. 16 (2020), pp. 592-93.

[107] In Spain, for example, the courts limit themselves to analysing the plausibility of the existence of the passing-on from a purely economic point of view on the basis of the parties' expert reports. See *ad ex.* Judgemnt of the Provincial Court of Barcelona, 18 November 2021 (13564/2021), paras. 31-33.

second interpretation has been accepted by other national courts. The Commission seems to agree with the latter.

In this regard, despite the fact that the passing-on had occurred from an economic point of view, the defence has been rejected even after the entry into force of the Directive for legal reasons arising from the general principles of national tort law other than the absence of causation. In this way, it has been held that that the *compensatio* must correspond to the purpose of tort law, must be reasonable for the injured party and must also not unjustifiably relieve the injured party.[108] The purpose of damages claims is not only compensatory, but is part of the system for the effective enforcement of competition law prohibitions and complements the public enforcement of these provisions by the authorities.[109] Therefore, the defence should not be applicable when it serves to prevent the infringer from avoiding civil liability by keeping the fruits of the unlawful conduct, which would be contrary to the effectiveness of the competition rules.[110]To this end, national courts should take into account whether, according to the legal and economic circumstances of the case at hand, the claim of indirect purchasers against the infringers of competition law is to be expected or not.[111]

The Commission itself apparently assumes this interpretation in its soft law. In this sense, it establishes that national courts are empowered to quantify the harm suffered on the basis of equitable considerations, taking account of the unlawful profit made by the infringer.[112] Even more specifically, they have to consider the passing-on defense under the rules and principles of national law, such as *compensatio lucri cum damno,* provided that they comply with the principles of equivalence and effectiveness.[113]

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[108] Judgment of the German Federal Court of Justice, 23 September 2020 (KZR 4/19 – *Rails V),* para 52.

[109] According to consolidated case law (since Judgements of the Court of Justice, 20 September 2001, C-453/99 – *Courage,* para 27; and 13 July 2006, C-295/04 a C-298/04 - *Manfredi,* para 91) the right of any individual to claim compensation *"actually strengthens the working of the European Union competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union."* Hence, the General Advocate Wahl points that, as a close corollary to the emphasis put on the full effectiveness of Article 101 TFEU, the rationale of a right to claim compensation for harm caused by an infringement of EU competition law has been firmly tied to deterrence (Opinion, 6 February 2019, Case C-724/17, *Skanska,* para 48).

[110] In fact, as opposed to the right of any individual to claim compensation, the defense does not constitute a requirement for the effectiveness of the competition rules of the Treaty. On the contrary, since it constitutes a restriction of a right recognized by European Union law, it requires that its applicability be interpreted restrictively. See Judgment of the Court of Justice, 2 October 2003 (C-147/01, *Weber's Wine World Handels-GmbH),* para 95.

[111] See German Federal Court of Justice, Judgments of 23 September 2020 (KZR 4/19 – *Rails V,* paras 51-58), 13 April 2021 (KZR 19/20 - *Trucks II,* paras 89-103).

[112] 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], paras 4-5.

[113] *Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser,* para 15.

Therefore, in Member States that allowed the defense prior to the adoption of the Directive, the general requirements for its application to the specific case could still be applicable to actions for infringement of competition law. Furthermore, in Member States that did not allow the defense, it could be possible to impose -once it has been introduced as a special rule by the Directive- additional requirements for its application to the specific case in accordance with the principles and rules of national law. To remove any uncertainty, however, the question will probably have to be resolved by the Court of Justice.

3.2. Evidence

The requirements of proof are only partially covered by the Damages Directive, which establishes that the burden of proving that the overcharge was passed is on the defendant,[114] including not only the existence but also the extent of the pass-on of the actual loss.[115] All other aspects are a matter for the national law of each Member State to determine.[116]

While national courts have the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on,[117] it is debatable whether this power can be exercised not only when the passing-on is alleged by the indirect purchaser (as a sword), but also when it is alleged by the defendant (as a shield). Since, as opposed to the right of any individual to claim compensation, the defense does not constitute a requirement for the effectiveness of the competition rules of the Treaty but a restriction of a right recognized by the EU law, it requires that its applicablity be interpreted restrictively.[118] Therefore, the evidentiary requirements for the recognition of the passing-on in the specific case when it is alleged by the defendant are not necessarily the same as when it is alleged by the claimant.

As the Commission recalls, the power to quantify the passed-on share of the overcharge follows from Article 17(1) of the Damages Directive which applies more generally to the quantification of harm,[119] according to which:

> *'Member States shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national procedures, to*

[114] Art. 13.1

[115] Recital 39. However, see C. KERSTING: *Germany,* in B. RODGER; M. SOUSA FERRO; F. MARCOS: *The EU Antitrust Damages Directive Transposition in the Member States,* Oxford (2018), p. 150-151.

[116] See recital 46.

[117] Article 12.5.

[118] See *supra* footnote 110.

[119] *Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser,* para. 30.

estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.'

The attribution to judges of the power to estimate the damage, therefore, seems to be aimed at preventing, in those cases in which the plaintiff has proven the existence of damages, the burden of proof or the standards of proof necessary for the quantification of the damage from making it 'practically impossible or excessively difficult to exercise the right to damages. Consequently, they could only be exercised when the passing-on is alleged by the plaintiff/indirect purchaser, and, moreover, only if the latter has managed to prove its existence, but it is found to be excessively difficult for the precise quantification of the damage caused by means of the available evidence. Therefore, it could not be exercised *ex officio* by the national courts to make up for the lack of proof of the infringing defendant claiming the passing-on in order to oppose compensation.

In relation to the object of proof, it is not sufficient to demonstrate that prices on the aftermarket also increased in the period following the infringement, but that the increase in the price is a consequence of the infringement.[120] In addition, since there is an inherent link between the price and volume effects, when passing-on becomes relevant both effects and their interaction should be taken into account.[121] Therefore, before the Directive, some national courts required not only proof that the claimant had passed on the actual loss *(damnus emergens)* through an increase in its own prices, but also that it had not suffered any loss of profit *(lucrum cessans)* as a result of a fall in demand caused by that increase.[122] After the approval of the Directive, this interpretation no longer seems possible.[123] Without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge,[124] the application of the defense *"is only concerned with the fate of the price overcharge".*[125] If, on the other hand, national judges could estimate the amount of the actual loss passed on, they should at the same time also have the power

[120] See *supra* subsection 3.1.1.

[121] *Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser,* para 16.

[122] German Federal Court of Justice, Carbonless Paper Cartel (ORWI), Case n° KZR 75/10, 28 June 2011; Spanish Supreme Court, Nestlé v. Ebro (Sugar II), Case nº 589/2013, 7 November 2013. SEE F. WEBER: *"The volume effect in cartel cases – a special challenge for damage quantification?", Journal of Antitrust Enforcement* (2021), pp. 1-21.

[123] C. KERSTING: *Germany,* in B. RODGER; M. SOUSA FERRO; F. MARCOS: *The EU Antitrust Damages Directive Transposition in the Member States,* Oxford (2018), p. 151.

[124] Article 12.2.

[125] F: WEBER: "Tackling pass-on in cartel cases: a comparative analysis of the interplay between damages law and economic insights", *European Competition Journal,* vol. 16 (2020), p. 591.

to estimate the possible actual loss of profit when quantifying the compensable damage.[126]

Finally, in relation to the standard of proof, national courts may not establish a less stringent standard than that applicable to proof of damage, as this would lead to a reversal of the burden of proof contrary to the principle of effectiveness.[127] Therefore, it should not be sufficient to prove that, according to economic theory, the necessary market conditions exist for the plaintiff to pass on the actual loss to its customers. On the contrary, the viability of the defense depends on the necessary presentation of data supporting the argument that the existence and amount of the passing-on is not only plausible, but -at least- probable according to the available empirical evidence.[128] Economic theory provides the court with a framework within which to evaluate the quantitative and qualitative evidence provided,[129] but the reliability of predictions based on a given economic model depends crucially on the existing factual support.[130]

4. Conclusion

The actual content of the right to be compensated for damage suffered as a result of the infringement of the competition rules is affected by the expansive nature of these particular losses, which can be passed by the directly injured party to other market participants. The substantive and procedural legal consequences of the pass-on of the harm, which may be alleged by both the plaintiff indirect purchaser (as "sword") and the defendant infringer (as "shield"), are only partially harmonized by the *Damages Directive.* They are therefore largely governed by national rules, which cannot undermine the effectiveness of the Treaty's competition rules. In this regard, increasing harmonization in this area is also taking place incrementally through the case law of the Court of Justice, particularly on the configuration of the causal relationship.

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[126] See Judgment of the German Federal Court of Justice, 23 September 2021 (KZR 4/19 – *Rails V,* para 54). In this sense, *"the power to quantify the passed-on share of the overcharge " […] must cover all passing-on effects, i.e. price and volume effect" (Guidelines,* para. 30).

[127] See *COMMISSION STAFF WORKING PAPER accompanying the WHITE PAPER on Damages actions for breach of the EC antitrust rules,* {COM (2008) 165 final}, para 214).

[128] RBB ECONOMICS AND CUARTRECASAS, GONÇALVES PEREIRA: *Study on the Passing-on of Overcharges. Final Report* (2016), pp. 157-158. Since ORWI, the German Federal Court of Justice has ruled that the defendant should plausibly argue, on the basis of the general market conditions in the relevant sales market, in particular the elasticity of demand, the price development and the product characteristics, that passing on the cartel-induced price increase is at least a serious possibility (citing previous rulings, see Judgment of the German Supreme Court, 23 September 2020, KZR 35/19 – *Trucks)*or a reasonable and technically well-founded hypothesis based on verifiable and non-erroneous data (Judgment of the Spanish Supreme Court, 7 November 2013, 589/2013 – Sugar II; lately, in the same sense, Judgment of the Audiencia Provincial de Valencia, 23 January 2020 - case 80/2020).

[129] *Guidelines,* para 47.

[130] *Study on the Passing-on of Overcharges* (2016), pp. 43-44, 183.185, 202, 205; T. BINZ ET AL.: "Passing on of cartel Overcharges: Why is it so difficult to formulate robust predictions", *Concurrences,* núm. 1 (2019), p. 56.

Therefore, while some of the legal issues raised by the passing-on of damage relating to standing, to the legal link between the infringement and the passing-on and to the quantification of the compensable damage have been resolved, others have yet to be decided by the national courts or, where appropriate, by the Court of Justice.