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Litigation:
Passing-on Defense and Indirect
Purchaser Standing –
*finding a consumer-orientated
option*

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Summary

Private enforcement of antitrust law has recently become an important issue in Europe. Most obviously, Europe and its businesses and citizens would profit from a stronger competition culture. It can be assumed that an appropriate degree of private enforcement can promote this.

In the *Courage* the ECJ expressed its support of private enforcement, indicating that “*the existence of such a right strengthens the working of the Community competition rules... [and] make[s] a significant contribution to the maintenance of effective competition in the Community*”¹.

Therefore, in the light of current work of the European Commission in facilitating private enforcement actions for the breach of the EC competition law, it is interesting to follow the way of ongoing findings and producing binding measures at Community level. This process is going with the Commission’s collaboration with the market undertakings, government representatives and academics of both European and international dimensions. One of the most controversial issues in relation to private enforcement is the passing-on defense and a right of an indirect purchaser to sue the infringer. These issues are the most vexed question in European private competition law litigation and they will be central of the whole paper.

The purpose of this paper is to discuss the consumer-welfare orientated combination of the passing-on defense and indirect purchaser standing which would protect at most, the European consumer. Furthermore, the paper gives an insight into the legal background of the substantive right on bringing private actions for damages in the EU, the characteristics of US private litigation system as well as the American indirect purchaser rule.

The defenders of a certain combination of passing-on defense and indirect purchaser standing and their opponents raise arguments within a particular circle of issues. The central idea, however, which unites all arguments of defendants and opponents is the orientation of the EU competition policy on the welfare society.

¹*Courage v. Crehan*, Case C-453/99 [2001] ECR I-6297, para 57.

Abbreviations

EC	European Community
ECJ	European Court of Justice
EC Treaty	European Community Treaty
EU	European Union
USA, US	United States of America

1 Introduction

1.1 Background

Private enforcement of EC competition rules in general, and actions for antitrust damages in particular, have been the source of many recent topical debates.

The work of the European Commission on producing European-level rules on private enforcement has started with analysing the situation in this field in the Member States' legislation and practice. As the result of this, the Commission's study report was introduced² where the main obstacles reaching towards to private enforcement were discovered.

The next step of the European Commission was bringing public discussion of the ways to facilitate private enforcement proceedings. The Commission has chosen to take on a very difficult set of issues in its Green Paper³ on "*Damages actions for breach of the EC antitrust rules*"⁴, with the intention to highlight and discuss a few of the most essential elements of damages action which are further discussed in the related "*Commission staff working paper*"⁵. The Commission presented four policy options for the discussion relating to the passing-on defense and indirect purchaser standing. In response to its request on public discussion the Commission received nearly 200 comments from business, academic and government representatives. The academic surrounding has also prompted discussion and this was mirrored in the legal writings in the journals of law before and after issuing the Green Paper. In an attempt to find the most appropriate variant, the question has been analysed through the perspective of both an European and American antitrust environment.

² *Study on the conditions of claims for damages in case of infringement of EC competition rules*. Comparative report. Arshust, August 2004.

³ In Commission terminology, a *Green Paper* is a discussion paper which the Commission, normally at an early stage in a legislative procedure in order to get reactions and comments on the analysis of a particular issue with options for action that might be suggested later on. S. Norberg. *Some Elements to Enhance Damages Actions for Breach of the Competition Rules in Article 81 and 82 EC*. 32nd Annual International Antitrust Law and Policy Conference, Fordham, New York, September 2005.

⁴ European Commission (COM (2005) 672, SEC (2205) 1732), *Green paper - Damages actions for breach of the EC antitrust rules* (19 December 2005)

⁵ European Commission (COM (2005) 672, Commission Staff working paper – Annex to the green paper - *Damages actions for breach of the EC antitrust rules* (19 December 2005).

1.2 Definition

The *passing-on defense* can be understood as the right which allows a defendant to argue that the claimant's loss has been reduced or negated by the claimant having passed on to his consumer (the indirect purchaser) all, or a proportion of, any overcharge resulting from the defendant's action. Thus, damages are calculated by reference to the actual loss rather to the entire amount of overcharge.

Before giving definition to the term "indirect purchaser standing", it is important to define the notion of *antitrust standing* or antitrust *locus standi* as it is known in European tradition.

In the Community system there is a broad understanding of the rule of antitrust *locus standi*. Private actions based on Article 81 and 82 recognises the antitrust *locus standi* is supposed to be granted to natural and legal persons who claim that the defendant has infringed Article 81 or 82 and the infringement is adversely likely to affect the legitimate interests of the plaintiff or adversely has affected the legitimate interests of the plaintiff. One of the reasons for adopting such broad rule of antitrust *locus standing* is that the EC Treaty has been referred to as the *constitutional charter* of the Community⁶, and thus, confers fundamental rights over citizens. The right to reparation is considered by the ECJ as the necessary corollary of the direct effect of the community provisions the breach of which has caused damages, and would stand with meaning if an additional corollary to direct effect is the existence of *locus standi*. Also, "direct effect is not just a *locus standi* but a matter of substantive enjoyment of rights"⁷. Thus, under the doctrine of direct effect in the Community law, a plaintiff, who can show injury caused by an infringement has a private right of action which is coextensive with the substantive reach of the directly effective competition rules of the EC Treaty. In this regard, under the EC regime, the principle limitation on who can sue for damages will be the plaintiff's evidence of causation⁸.

Indirect purchaser standing in this context will be regarded as the ability of an indirect purchaser to initiate proceedings in order to recover damages from the defendant based on the proportion of the overcharge that has been passed on by the direct purchaser. It is fair to indicate the direct purchaser as a wholesaler who buys goods from a manufacture, and the indirect purchaser as a buyer not from the infringer (but further on in the supply chain).

⁶ Opinion 1/91, Draft EEA Agreement, [1991] ECR 6079, para. 21.

⁷ M. Ross. *Refining Effective Employment*, (1990) 15 Eur. L Rev. 476, 478.

⁸ Jones, Clifford. *Private enforcement of antitrust law in the EU, UK and USA*. Oxford university press, 1999.

1.3 Purpose

In the welfare society the important role is given to the citizens, or the ultimate consumer in business relations. Therefore, the first priority here is customer protection and through this, protection of the society as a whole. The purpose of this paper is to find out the consumer-welfare orientated combination of the passing-on defense and the indirect purchaser standing, which would at most; protect European consumers.

Furthermore, this paper gives an insight into the legal background of the substantive right on bringing private actions for damages and characteristics of the US private litigation system with the American indirect purchaser rule.

1.4 Delimitations

Although such topics of the facilitating of private actions have access to evidence, fault requirement, calculating damages, class actions and costs of actions, which are of essential importance in private litigation and interconnect with the key subject of this paper, they are excluded from this research.

1.5 Method

The main method of research is traditionally legal and in particular this means studying the relevant legislation and case law. An essential part of the research is formed by the analysis of the legal writings presented in the legal journal reviews. This also includes investigating the European Commission's *Green paper - Damages actions for breach of the EC antitrust rules*⁹, the *Commission Staff working paper*¹⁰ as well as comments on the Green Paper received by the Commission and presented in Section 2.1.

Comparative method is also used in this paper. The three main dimensions chosen for the detailed analysis are the EU, USA and UK. This is not a spontaneous choice:

The US dimension is chosen since the US antitrust system is well-developed, although at some point is contradictory to the EU one. Nevertheless, it is useful to see how the same issues are solved and to discover potential possibilities to apply them in Europe or at least to use them in finding a European solution. Thus, as to the US private

⁹ Id. 4

¹⁰Id. 5

enforcement, consideration would be placed amongst the American antitrust background (as regard to the punitive system, treble damages) and legislation of the American antitrust rules as well as case law whilst placing attention on the reasoning of the US Supreme Court in the main cases (*Hanover Shoe* and *Illinois Brick*).

The UK has been used as an example to represent the EU stance. The attitude within the UK to private actions will be considered here. Central issues concerning the UK dimension include the UK experience of private enforcement actions and general principles of UK law.

2 Four options, two dimensions, one example

2.1 Passing-on defence and indirect purchaser standing in the EU

2.1.1 The right to bring an action

Implementation of procedural rules on bringing actions for damages for breach of competition law is essentially linked with the substantive right of an injured party to be awarded damages for loss related to the breach of the concerned rules. In this regard, it is important to review legal background of the right to claim damages in the community order.

First of all, it is important to notice that Article 81 (1) and (2) and Article 82 of the EC Treaty are directly applicable and create rights for individuals which national courts must protect¹¹, and Article 81 (3) has become directly applicable after the reforms implemented in 2004¹². Moreover, these rules have supremacy over national legislation¹³. In particular, the concept of direct effect and supremacy ensure that community law rights are recognised at the national level system and they prevail over national law.

Nevertheless, these rules do not themselves indicate what remedies are available to guarantee those rights as the EC Treaty itself is silent on the matter. This gap was plugged by the case law of the European Court of Justice which will be presented below.

The main rule was established in *Frankovich*¹⁴ guaranteeing that damages for loss resulting from a breach of community law shall be awarded pursuant to national law. This starting-point concerned the claim of loss suffered as a result of inadequate implementation of directives in national law¹⁵. In this case the ECJ only considered damages awarded in the vertical relation, i.e. from state to individual. Therefore initially it was uncertain to which extent this practice can be extended to the horizontal relation, so that e.g. Article 81 EC, in itself, qualifies as to award damages independently of national law.

¹¹ *Van Gend en Loos v. Netherlands Tariefcommissie*, case 26/62, [1963] ECR 1, 12.

¹² Council Regulation (EC) 1/2003 of 16 December 2002, on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, OJL1, 4 Jan 2003.

¹³ *Costa v. ENEL*, case 6/64, [1964] ECR 585, 593.

¹⁴ *Francovich and Bonifaci v. Italy* (joined cases C-6 and 9/90) ECR I-5357, para 42.

¹⁵ *Supra* para. 38-46

Advocate General Van Gerven considered the question in his opinion to *Banks*¹⁶. *Banks* concerned the competition rules in the ECSC Treaty, but it can be assumed that the same apply in relation to Article 81 EC. In this opinion Van Gerven expressed that national courts pursuant to community law are obliged to award an injured party damages for loss related to breach of Art. 81 EC¹⁷, provided that certain conditions are fulfilled (the existence of damage, a causal link between the damage claimed and the conduct alleged against the institution, and the illegality of such conduct)¹⁸.

More certain solution came in *Courage v Crehan*¹⁹ where the ECJ established that there existed a duty for national courts to ensure the full effect of the competition rules and to protect the rights which they confer on individuals²⁰: “*The full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81(1)] would be put at risk if it were not open to any individual to claim damages caused to him by a contract or by conduct liable to restrict or distort competition*”²¹.

The Court in *Courage* was quite straight in its conceptual support of private enforcement and indicated that private enforcement is an essential part of effective competition: “*The existence of such a right strengthens the working of the Community competition rules and discourages agreements, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community*”²².

Thus, the ECJ states that liability for damages under Art. 81 is not only a possibility which is dependant on national law but a necessary part in securing the direct effect of a prohibition. In this way, the possibility of damages in relation to Art. 81 has become a right, which rest on the national courts²³.

Consequently, it follows that national law shall award damages in cases concerning breach of Art. 81 to the same extent as it would in the event of a similar case based on national law (principle of equal treatment). Furthermore, the national courts may not make it impossible or excessively difficult to exercise rights deriving from Community law (principle of protection).

¹⁶ *H. J. Banks & Co. Ltd v British Coal Corporation*. Case C-128/92

¹⁷ *Supra*, para. 43-45.

¹⁸ *Supra*, para. 50.

¹⁹ *Id.* 1.

²⁰ There are the three other cases which also deal with the relevant question: *Eco Swiss China Times v. Benneto*, C-126/97, 1999 ECR I – 3055 CJ; *Masterfood v. HB Ice Cream* C-344/98, 2000 ECR I 11369 CJ, and *Consortio Industrie Fiammiferi (CIF) v. Autoria Garante della Concorrenza e del Mercato*, C-198/01, 2003 ECR I 8055, CJ.

²¹ *Id.* 1 para 23.

²² *Id.* 1 para. 27.

²³ *Id.* 1 para. 29

The ECJ has conformed this conclusion in its recent judgement in *Manfredi*²⁴ handed down in 2006, in which the question on damages action for breach of European competition law arose.

Adoption of the Regulation 1/2003 was an important step toward increasing the involvement of national courts in antitrust enforcement, and it “*revolution[ised] the way competition rules are enforced in the European Union*”²⁵. This was made by abolishing the Commission’s exemption monopoly under Art. 81(3) of Regulation 17/62, and thereby empowering national courts to apply Art. 81 and 82 EC in full. In support of the present situation, where article 81(3) is directly applicable, Regulation 01/2003, article 1, has stated that Regulation 17/62, by impeding and delaying private enforcement, was an obstacle to a more effective private enforcement. The Regulation, in particular Article 3, provides that national courts shall apply Community competition law to anticompetitive conduct that effects trade between Member States. The recital 7 of the Regulation explicitly acknowledges the importance of a private right of action: “*National courts have an essential part to play in applying the Community competition rules. When deciding disputes between private individuals, they protect the subjective right of infringements. The role of national courts here complements that of the competition authorities of the member states. They therefore are allowed to apply Article 81 and 82 of the Treaty in full*”.²⁶ Regulation 01/2003 is thus seen as increasing the incentive for private enforcement, although private actions constitute a necessary complement to the public enforcement by the Commission and National Competition Authorities and both continue to support each other. The overall objective is achieving a uniform and effective application of Article 81 and 82 and “*establish[ing] a system which ensures that competition in the common market is not distorted*”²⁷.

Consequently, actions for damages for breach of EC competition law is an established right in Community law. The infringement of EC competition law is constituted by the Articles 81 and 82 of the EC Treaty and conditions for exercise of the right to damages is determined by national law. The diversity of the latter leads to the large divergences between Member States’ laws and proceedings.

²⁴ *Vinacenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA and onthers*. Joined Cases C-295/04 to C-298/04

²⁵ Interview with Mario Monti, *published in EC Competition Policy Newsletter*, 2004, available at:

http://europa.eu.int/comm/competition/publications/special/interview_monti.pdf.

²⁶ Council Regulation (EC) 1/2003 of 16 December 2002, on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty, OJL1 , 4 Jan 2003. Recital 7.

²⁷ *Supra* recital (1) of Reg. 1/2003 and Article 3 (g) EC.

2.1.2 Study Report

The work of the European Commission on producing European-level rules on private enforcement has started with analysing the situation in this field in the Member States' legislation and practice. As the result of this, the Commission's study report was introduced²⁸ where the main obstacles on the way towards to private enforcement were discovered.

Study reveals that in the circumstances of "total underdevelopment"²⁹ of competition law in the European Union³⁰ European experience lacks the case law which would highlight the right on passing-on defense and indirect purchaser standing. Despite Denmark, Germany and Italy³¹ where questions relevant to indirect purchaser rules have arisen, no Member State has any case law exactly on this subject³².

Nevertheless, the Study shows that passing-on defense and indirect purchaser standing are theoretically possible in all Member States, since the *general principle of compensation restitution* applies and *analogy* is being used there. Therefore, only hypothetical analysis is taken. But even taken hypothetically, there is a view that lack of clarity concerns the possibility for the indirect purchaser to claim the loss, his burden to prove the link between the loss and the infringer's actions, as well as the defendant's burden to prove passing-on – all these issues complicate private damages action. This means that existence at the same time, both of the possibility of passing-on defense and obstacles which indirect purchaser might face, makes the private actions highly restricted.

It is wise to mention that the ECJ has in several proceedings regarding unlawful taxes and administrative charges touched upon the concept of passing-on³³.

²⁸ Id. 2

²⁹ Id., p. 1

³⁰ The study has discovered that there are only 60 cases for damages actions (12 on the basis of EU law, around 32 on the basis of national law, 6 on both). Of these judgments 28 have so far resulted in an award being made. Id., p.1

³¹ Id., p. 6

³² The ECJ does not allow the passing-on defense and indirect purchaser standing in litigations against the Community and its Members. See *Societe Comateb and Others v. Directeur general des douanes et droits indirects*, joined cases C-192/95 to C-218/95, [1997] ECR I-165; *Cotter and McDermott v. Minister for Social Welfare and Attorney General*, case 377/89, [1991] ECR I-1155.

³³ See e.g. *Just v. Danish Ministry for Fiscal Affairs*, case 68/79, [1980] ECR 501; *Express Dairy v. IBAP*, case 130/79, [1980] ECR 1887; *Ireks-Arkady v. Council and Commission*, case 238/78, [1979] ECR 2955; *Comateb and Others v. Directeur general des douanes et droits indirect*, joined cases C-192/95 to C-218/95, [1997] ECR I-165.

2.1.3 The Green Paper

The next step of the European Commission was bringing public discussion of the ways facilitating private enforcement proceedings. The Commission has chosen to take on a very difficult set of issues in its Green Paper³⁴ on “*Damages actions for breach of the EC antitrust rules*”³⁵, with intention to highlight and discuss a few of the most essential elements of damages actions which are further discussed in the related “*Commission staff working paper*”³⁶.

The presented by the Commission policy options for the discussion passing-on defense and indirect purchaser standing were as following:

- (i) *Allowing the passing-on defense and ensuring that both direct and indirect purchasers can sue the infringer (option 21);*
- (ii) *Excluding the passing-on defense and only allowing direct purchaser to bring actions for damages (option 22);*
- (iii) *Excluding the passing-on defense but allowing both direct and indirect purchasers to bring actions (option 23);*
- (iv) *Introducing a two-step procedure whereby the passing-on defense is excluded, the infringer can be sued by any victim and the overcharge resulting from the infringement is then distributed between all parties who suffered loss (option 24)*³⁷.

The question for the public discussion given in the Green Paper as to the passing-on defense and indirect purchaser standing is: “*Should there be rules on the admissibility and operation of the passing on defense? If so, which form should such rules take? Should the direct purchaser have standing?*”³⁸ indicated as question G.

2.1.4 Comments on the Green Paper

2.1.4.1 Max Plancks Institute findings

In response to its request on public discussion the Commission received nearly 200 comments from business, academic and government representatives. Some of the comments are discussed below. Academic perspective is given by Max Plancks Institute for Intellectual Property,

³⁴ In Commission terminology, a *Green Paper* is a discussion paper which the Commission, normally at an early step in a legislative procedure in order to get reactions and comments on the analysis of a particular issue with options for action that might be suggested later on. S. Norberg. *Some Elements to Enhance Damages Actions for Breach of the Competition Rules in Article 81 and 82 EC*. 32nd Annual International Antitrust Law and Policy Conference, Fordham, New York, September 2005.

³⁵ Id. 4

³⁶ Id. 4

³⁷ Id.

³⁸ Id.

Competition and Tax Law and Competition Law Forum³⁹; Burges Salmon LLP, UK⁴⁰ and Kesko Corporation⁴¹ present perspectives of the practitioners; and the Office of Fair Trading⁴² underlines one of the EU Member State (the UK) government's perspective. Finally, the International Bar Association⁴³ brings an international view.

Max Plancks Institute for Intellectual Property, Competition and Tax Law considers that allowing both the passing-on defense and indirect purchaser standing would entail the risk that the direct purchaser will be unsuccessful in claiming damages. As such, the infringer will be able to use the passing-on defense resulting in unsuccessful indirect purchasers either because they are unable to show if and to what extent the damages are passed on along the supply chain. In case of prohibiting both the passing-on defense and indirect purchaser standing, the direct purchaser is put in a better position as there are limited difficulties associated with the passing-on defense. In case of allowing indirect purchaser standing only, Max Plancks Institute takes a view that the defendant will be put into risk of paying multiple damages as both the indirect and direct purchasers can claim. Finally, as to the two step procedure option, Max Plancks Institute expresses a view that this procedure would be technically difficult. However, it has the advantage of proving fair compensation for all victims. This variant closer to reconciliation the two concerns dealt in the first three variants, although the problem of proof will still stay. Allowing any victim to sue would unnecessarily swell the ranks of claimants and thus be procedurally cumbersome allowing the problem of proof to stay.

Moreover, Max Plancks Institute underlines that the first three options brought in the Green Paper highlights that allowing the defense tends to isolate direct purchasers as potential litigants, and draws in customers further downstream instead. While it is most likely that they have ultimately suffered damages through the infringement, they will also find it harder to prove that the breach of competition law was causal for their loss. In other words, substantive justice and procedural difficulties are in conflict.

³⁹ The Competition Law Forum (CLF) of the British Institute of International and Comparative law. Submission to the European Commission in Response to its *Green Paper on Damages Actions for Breach of the EC Antitrust Rules*. Submitted on behalf of the Competition Law Forum of the British Institute of International and Comparative Law-prepared by the Competition Law Forum's Working Group on Private Actions.

⁴⁰ Burges Salmon LLP, UK. Response to Green Paper, at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/032.pdf

⁴¹ Kesko Corporation. Response to the public consultation on the Commission' green paper. April, 2006. Available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/012.pdf.

⁴² Office of Fair Trading. Response to the Commission Green Paper. May, 2006, at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/062.pdf

⁴³ International Bar Association. Antitrust Committee. Working Group on private antitrust litigation in Europe. Submission regarding the European Commission's Green Paper on Damages Actions for the breach of the EC Antitrust rules. Available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/151.pdf.

It is worth seeing which variant of solution the Max Plancks Institute finds by itself. It states that the direct purchasers should be allowed to bring the actions, and in order to forestall any conflicts of interest, certain companies should not be counted as “direct customers”. Namely those companies which are connected to infringements in the same way as the “block exemptions” regulations for the application of Article 81(3) define “connected undertakings”.

At the end, the Max Plancks Institute comes to the conclusion that the passing-on defense should be excluded but customers further removed from the infringement should be given the right to sue if direct customers are unwilling or unable to bring an action and therefore direct customers should share the damages with customers further removed.

2.1.4.2 Practitioners’ approach

The Competition Law Forum of the British Institute of International and Comparative law believes that both passing-on defense and indirect purchaser standing should be allowed. The Competition Law Forum explains it in terms of principle of compensation: as compensation should be allowed where the loss falls. However, allowing passing-on defense and indirect purchaser standing will require specific proof by the defendant of the pass-on of the loss or overcharge and granted discovery rights.

The Burges Salmon LLP, UK (BS) finds that passing-on defense largely concerns actual loss and therefore there is a necessity to accurately review the economic scenario surrounding the anti-competitive agreement or conduct in question to establish the actual loss and the extent to which they should be compensated. However, it assumes, such economic analysis will never be accurate beyond reasonable doubt, but it will be possible to come up with appropriate figures using the range of economic tools available.

Moreover, Burges Salmon comes to the conclusion that existence of passing-on defense calls to life indirect purchaser standing. Once the cartel has proved that the downstream undertaking has passed on, it would seem to have gone a considerable way to proving that indirect purchasers have suffered loss – and thereby gone a good way to establishing the indirect purchasers’ claim for damages.

Kesko Corporation suggested that the passing-on defense must be admitted. The burden of proof must rest with the claimant, as it is normal in damage proceedings.

2.1.4.3 A view from the Office of Fair Trading

The governmental approach is presented by the Office of Fair Trading which is a part of UK national competition authorities⁴⁴.

Concerning the options proposed by the Commission, Office for Fair Trade notes that adopting both the passing-on defense and indirect purchaser standing will lead to the situation where the claimant (direct or indirect purchaser) will be unsuccessful in the actions, because the infringer will be able to pass on defense and indirect purchaser will not be able to show to which extent the damages are passed on along the supply chain.

In case of prohibiting both the passing-on defense and indirect purchaser standing, the direct purchaser will have better position to sue, since difficulties associated with the passing on defense will not burden the process, therefore this could facilitate initiating private damages action. But such combination obviously will not impose compensation for all victims suffered from the infringer. At the same time, the Office for Fair Trade illustrates that option which provides exclusion of the passing-on defense and allowing indirect purchaser standing is favorable for the claimant because in this case he will endure the easier burden of proof, although this option leads to awarding unfair multiple damages. A two-step procedure, the fourth option of the Green Paper which the Office of Fair Trade calls “technically difficult”, but provides the opportunity for all victims to be compensated.

Moreover, the Office for Fair Trade expresses an opinion that the focus of competition law should be protecting consumer welfare. Therefore, it is inappropriate in policy terms to deny consumers and other end-users the right to sue for damages arising from breach of the competition rules. There should be a clear defined key policy choice of the Commission: whether to aim for fair compensation for all at the expenses of practicality or deterrence, or to risk an unfair distribution of the damages in the interests of simplicity and deterrence. Although the Office for Fair Trade does not express the final view on Green Paper option, it stands apparently in favor of allowing indirect purchaser standing.

2.1.4.4 International Bar Association

From the international perspective, the opinion of the International Bar Association is interesting to view.

First, the International Bar Association considers that the use of the passing-on defense should be allowed. However, when allowing it there is still a need for the passing-on defense to serve for the compensatory goal, since this may allow the infringer to escape the antitrust liability. One more

⁴⁴ More detailed insight into the system of UK national competition authorities will be presented in the Section 2.2.

concern is that such system will result in uncertainty which will discourage claimants from bringing action.

As the International Bar Association notes, concern about potential infringer's possibility to avoid liability in case of allowing the passing-on defense may be overcome by accurately allocating burden of proof between claimant and defendant. The claimant seeking damages should bear the burden of proving the infringement and the overcharge amount. The defendant wishing to use the passing-on defense should bear the burden of proving the fact the overcharge was shifted on the claimant's consumer and the average amount was passed on by the claimant. Hence, the claimant will have to disclose the information regarding costs and the prices at which he brought and sold the relevant goods.

An alternative to this variant is a system in which the defendant has to prove that passing-on can be discovered from an economic perspective due to specific features of the relevant market. If the defendant can prove this, the claim duties are then to prove specific damages have not been passed.

At the same time, the International Bar Association brought about arguments against allowing passing-on defense. Use of the passing-on defense will lead to fragmenting the claimant's side and make it more difficult for claimants to successfully bring action. Meanwhile, these concerns may be overcome by the procedural remedies which would prevent over compensation, double damages and ability of the defendant to use the passing on defense to avoid liability.

In respect of indirect purchaser standing, the International Bar Association notes that in case of disallowing the passing-on defense and permitting indirect purchaser standing, there could be the following consequences:

1. Direct purchaser would almost always be over compensated, potentially at the expenses of another group of claimants;
2. To the extent that direct purchasers pass on the overcharge, their motivation to initiate a private action may be reduce;
3. If pass-on theory can be used offensively by indirect purchasers, defendants face the possibility of having to pay up to twice the amount of overcharge – this raises the same policy issues regarding whether private actions should be a vehicle for imposing financial penalties⁴⁵.

Also, the International Bar Association adds that although the Commission's goal is to promote recovery by or on behalf of consumers, the interest of the indirect purchasers who are businessmen should not be ignored; since they may be more interested in bringing an action and may be more financially able to pursue their claims.

⁴⁵ Id. 42, p. 21

As to the option about the two-step procedure, the International Bar Association expressed the following main points:

1. This type of system will satisfy the policy goals of providing compensation for damages actually sustained;
2. This type of system acknowledges and accounts for the fact that overcharges are generally passed-on , but does not allow defendants to use the passing-on defense to avoid liability;
3. There is the possibility for duplicative litigation at the liability stage;
4. A bifurcated process may prolong litigation and increase uncertainty;
5. The damages allocation phase affectively forces claimants to litigate against each other and a process that encourages this does not seem to be something the EC should be encouraging – however, there is always the possibility that claimants could agree to the allocation of the overcharge amount themselves;
6. Where claimants cannot agree on the apportionment issue, and possibly in any event, allowing the passing-on defense may reduce the initiatives of potential claimants to bring damages due to uncertainty with regard to the value of their claims;
7. If damages are assessed on an individual basis to compensate for actual injury the damages allocation phase is likely to be complex and unwieldy (i.e. potentially large number of parties/counsels, etc.);
8. This type of process should not be mandatory and its availability in a particular case should be a matter for the parties and the national court before which the action is brought - while this process is most likely effective where the parties agree to adopt it, courts should, at the request of one or more parties, have the discretion to impose the process where appropriate⁴⁶.

The International Bar Association points out that a decision on the passing-on defense will have a significant impact on the types of private actions to be brought. It is important to disallow Member States to adopt such national laws which would conflict with those of the EU, thus creating the situation under the same issue in the USA. In its decision on the passing-on defense, the Commission should determine types of incentives/non-incentives and the group of the claimants which the Commission is intending to encourage to bring private action. It also adds that while the EC antitrust rules are European, it is the task of the individual legal systems of the Member States to give guidance for bringing damages action.⁴⁷ The legal systems vary greatly not only in their procedural rules but also in their opinions regarding when and how to compensate victims of legal wrongdoing.

⁴⁶ Id, p. 22

⁴⁷ Id. 4, para. 1.2

Now the European Commission is working on preparing the White Paper where the concrete suggestions on the private damages action will be presented.

2.2 UK approach

In the UK there are two systems of competition law: domestic law and the law of the European Community. Basic statutes in the field of competition law in the UK are the Competition Act 1998, the Enterprise Act 2002, the Fair Trading Act 1973. The 1998 Act is a specific statutory basis for the claims based on EU law. The guidance of procedure is contained in Regulation 2000⁴⁸, the Director's Rules⁴⁹, the notification Form N⁵⁰ and the Office for Fair Trade's Guidance Notes⁵¹.

The Competition Act 1998 has constituted regime modeled on EC competition law with prohibitions of anti-competitive agreements and conduct amounting to abuse of a dominant position based on Article 81 and 82 of the EC Treaty.

As to the legislation basis for bringing damages action, it is necessary to specify section 47A, 47B, 58A, 60 (section 2 and section 18) of the 1998 Competition Act which is the statutory basis of the UK based claims, and section 2 (1) of the European Community Act which is the statutory basis for EC law based claims. It is worth to add that the procedure is also governed by the Rules of Procedure of Competition Commission Appeal Tribunal, Civil Procedure Rules Act, 1998⁵². Thus, there is a specific statutory basis for the claims based on EU law. Article 81 (1) and (2) and Article 82 of the EC Treaty are directly applicable and create rights for individuals which national court must protect, and article 81 (3) has become directly applicable after the reforms implemented in 2004 as it was already mentioned in Chapter II/Section 2.1⁵³.

⁴⁸ SI 2000/263.

⁴⁹ SI 2000/293.

⁵⁰ Form N (OFT Guidelines 409).

⁵¹ OFT Guidance 431.

⁵² In the English law, conditions for liability are generally regulated by the general rules of tort and contract.

⁵³ It is interesting to know that the English anti-monopoly law traces back to the Dyer's Case in 1415 and English Statute of Monopolies of 1623. In the present day, the 1998 Act provides with clear provisions for procedures of notification of agreements and conduct to the regulatory authorities for clearance and exemptions; powers of investigation and enforcement of the new prohibitions by those authorities and a new Appeal body to determine appeals from rulings of the regulatory authorities under the new prohibitions.

The Enterprise Act 2002 includes provisions over system of market investigations, merger regime, criminal sanctions for individuals involved in cartel cases and the disqualification of directors of companies that infringe competition law.

As to the Fair Trading Act 1973, it contains provisions for the control of concentrations (mergers) under UK law and the investigation of market power (monopolies).

In reference to the restraint of trade, under the English law the Courts will enforce only such a contract which "protects a legitimate interest of the covenantee (know-how, trade

The general principle of the UK national policy is to minimise inconsistency between UK rules and European rules upon which they are based. For this purpose, the national competition authorities and regulators are obliged to apply principles laid down by the EC Treaty and the European Court of Justice (including the Court of First Instance) and the decisions of these courts.

Thus, following the above principles, UK law must recognise the right of individuals to claim recovery for damages in breach of community antitrust law as this has been determined by the European Court of Justice in *Courage v Crehan*. Nevertheless, the UK experience of private enforcement action is limited. The first award of damages has been made in 2004⁵⁴. However, there is no case law at all which would decide upon the issues of passing-on defense and indirect purchaser standing.

Consequently, there is a view that the passing-on defense is likely to be available under English law. The UK courts should not exclude the application of the passing-on defense. Exclusion of the passing-on defense would not sit comfortably with the fundamental principles applied by the UK courts in making damages awards. The first principle makes it clear that the primary objective of an award of damages in the UK courts is to compensate the claimant for the harm done to him. At the same time, the claimant is under a duty to mitigate his loss if he is reasonably able to do so. If the passing-on defense were to be excluded, it would contradict these principles by over-compensating the direct purchaser. It therefore would represent a significant exemption to the tradition stance seen in the UK courts.

secrets); the provisions is no more than is reasonable as between the parties to protect the legitimate interest and the restriction is reasonable in the public interest. Other contracts may be named under the English restraint of trade doctrine “an unreasonable restraint of trade”.

The secretary of State for Trade and Industry is the member of the government member responsible for competition policy and has a series of important functions under the UK competition law. Another authority includes the Competition Commission established by the 1998 Act and in its role as Competition Commission Appeal Tribunal hears appeals from decisions of the Director General of Fair Trading. The latter is the head of the Office of Fair Trading and has responsibilities under each piece of competition legislation. The Office for the Fair Trade is also a part of national competition authorities system. A number of sectoral regulator operates broadly having jurisdiction over the application of the 1998 Act monopoly provisions. Clifford A. Jones, *Private enforcement of antitrust law in the EU, UK and USA*. Oxford university press, 1999. p. 35; *Competition Law in the EU, its Member States and Switzerland*. Ed. By prof Floris O. W. Vogelaar and others. Kluwer Law International – W. E. J. Tjeenk Willink – 2002. p.15; *Competition Law in the EU, its Member States and Switzerland*. Ed. By prof Floris O. W. Vogelaar and others. Kluwer Law International – W. E. J. Tjeenk Willink – 2002. p.27; A summary of the areas may be found at p. 28 *Competition Law in the EU, its Member States and Switzerland*. Ed. By prof Floris O. W. Vogelaar and others. Kluwer Law International – W. E. J. Tjeenk Willink – 2002, p. 28.

⁵⁴ *Bernard Crehan v Innpreneur Pub Company CPC* [2004] EWCA 63.

Passing-on defense as such has been recognised in other areas of UK national law, in particular in relation to taxation. Where the state has imposed an unlawful tax on an individual, the courts have allowed the tax authorities to raise the passing-on defence in the face of claims for repayment.⁵⁵

Exclusion of the passing-on defense in circumstances where there remained the possibility of indirect purchasers actions (and therefore duplicative recovery) would effectively manipulate the process to the disadvantage of the defendant and thereby introduce a punitive element in the UK proceedings. The UK courts have only introduced a punitive element in exceptional circumstances.

As to the indirect purchaser standing, although the position is not yet determined by case law and there is no case law which has determined the notion “indirect purchaser”, it is believed that the law would allow the right for indirect purchaser to sue provided that they did not themselves pass on the overcharge on their consumers. This notion is explained through the principle of direct effect of the community law and general principle of the UK national policy is to minimise inconsistency between the UK rules and the European rules. In particular, the UK courts do not deny standing to indirect purchaser since such court action would be incompatible with EC law and contrary to the principle of direct effect. As made clear by the European Court in *Courage v Crehan* that “any individual” may pursue a private action for breach of antitrust competition law⁵⁶.

⁵⁵ See, for example, *Marks & Spencer v Commissioners for Customs & Excise* [1999] STC 205, (Appeal [2000] 2 CMLR 256 – issue not considered) and *CCE v National Westminster Bank* [2003] STC 1072.

However, there is very significant doubt that the availability of a passing-on defence is recognised in domestic law outside the scope of tax cases or, perhaps more broadly, cases where there has been an unlawful imposition of a charge by the state. The Court of Appeal has explicitly rejected the existence of such a defence in the context of a claim for restitution of sums paid under a void contract. In *Kleinwort Benson v Birmingham City Council* it was argued by the local authority (who had been the net beneficiary of the swap transaction) that the counter-party bank was not entitled to any money back once the swap deal was held to be void because the bank had taken specific steps to hedge against any loss which it might suffer under the swap contract. In other words, the bank had passed on any losses it might incur by entering into further hedging contracts. The Court - having regard to the tax cases and the EC jurisprudence available at that date - rejected this argument see *Evans LJ* at pp.389 and 393.

⁵⁶ In response of further discussions about treble damages in the US, it is interesting to note that in the UK law exemplary or punitive damages may be awarded in addition to compensatory damages in respect of both national and Community antitrust claims. Punitive damages there are the UK’s multiplier and are in addition to pre-judgment interest. In England and Wales, exemplary damages are limited to the circumstances set out by Lord Patrick Devlin in the leading case of *Rookes v Barnard*. They are: oppressive, arbitrary or unconstitutional actions by the servants of government; where the defendant’s conduct was “calculated” to make a profit for himself; where a statute expressly authorises the same. The leading cases under national law are *Rookes v. Barnard*, [1964] AC 1129; *Broome v. Cassell*, [1972] AC 1027; *AB v. South West Water Service Ltd*, [1993] QB 507, [1964] AC 1129, [1964] 1 All ER 367.

2.3 The passing-on defense and indirect purchaser standing in the USA

2.3.1 Legislation Basis

Legal practice in the USA shows that the private damages action serves as the real weapon against anticompetitive behavior and complements the public enforcement. Both successfully search for the two goals of antitrust policy – deterrence of the infringement and compensation of victims of the infringement.

The central course of US antitrust legislation is the Sherman Act⁵⁷, about which as the US Supreme Court once noted “*antitrust law in general and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is the protection of our fundamental personal freedoms*”⁵⁸.

Thus, the Sherman Act was introduced in 1888 and adopted in 1890. Paragraphs 1 and 2 cover largely the same ground as Articles 81 and 82 of the EC Treaty. Paragraph 1 prohibits concerted action in unreasonable restraint of trade and paragraph 2 prohibits anticompetitive conduct that contributes to the acquisition or preservation of monopoly power⁵⁹. It provides that a contract which restrains trade or commerce shall be declared illegal as well as a person who monopolises any part of the trade or commerce shall be deemed guilty of a felony.

Section 7 contains provisions for private enforcement of the antitrust laws: “*any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue thereof in any district court of the United States...and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney’s fee*”⁶⁰.

In the *Standard Oil*⁶¹ the Supreme Court overcome the literal interpretation of the Sherman Act paragraph 1 – that every restraint was illegal⁶² – and established the “*Rule of Reason*” according to which only unreasonable restraints were forbidden by the statute. This led to the supplement antitrust

⁵⁷ Act of July 1890, c. 617, 25 Stat. 209, 15 USC para 1-17.

⁵⁸ In the *United States v. Topco Association*, 450 US 596, 610 (1972).

⁵⁹ 15 U. S. para. 1, 2; see *Standard Oil Co. v. United States*, 221 U.S. 1, 60/70 (1911) and *United States v. Grinnell Corp.*, 384 U. S. 563, 570/71 (1966).

⁶⁰ Luis Ortiz Blanco. *European Community Competition Procedure*. Clarendon Press - Oxford, 1996, p. 8.

⁶¹ *Standard Oil Co. of New Jersey v. United States*, 221 US 1 (1911).

⁶² This was established by the decision in *United States v. Trans-Missouri Freight Association*. 166 US 290 (1897).

measures containing more explicit prohibitions – the Clayton Act⁶³ – was adopted.

The Clayton Act imposes the new standard of legality which is not “restraint of trade” or “monopolisation”, but about “*the effect [which] may be substantially to lessen competition or to tend to create a monopoly in any line of commerce*”⁶⁴. In particular, Section 7 of the Clayton Act can be comparable to the EC Merger Regulations⁶⁵ and deals specifically with price discrimination, tying or exclusive dealing contracts, merges and acquisitions and interlocking corporate directorates. As to the private remedies, it underlines the inclusion of a specific right to injunctive relief in favour of any person and provides that if the violation has been found in the public enforcement proceedings that this violation is *prima facie* evidence of violation in private civil action.

At the federal level, responsibilities for the enforcement of antitrust law are distributed among the United States Department of Justice and the Federal Trade Commission. At the state level the enforcement actions are being made by the Attorney General of a particular state. The U.S. Department of Justice has authority to enforce the Sherman Act, both civilly and criminally, and to enforce the Clayton Act civilly. The Federal Trade Commission has authority to investigate and civilly to prosecute the same conduct. However, the authority of these two federal agencies overlaps and as such, they have established a so-called "clearance" procedure to ensure that any particular matter is handled by only one of them⁶⁶.

In 1976 the Congress empowered State Attorneys General to bring *parens patriae* lawsuits on behalf of state citizens to recover treble their aggregate damages. Also, for three years starting in 1976 the Congress gave State Attorneys General "seed money" to investigate and enforce the federal antitrust laws⁶⁷.

It is important to point out that under US antitrust law⁶⁸ any person “injured in his business or property by reason of anything forbidden in the antitrust laws” – a “private attorney general”⁶⁹ - may recover treble damages, costs and legal fees⁷⁰.

⁶³ Act of October 1914, c. 323, 38 Stat. 730, 15 USC para 12-27.

⁶⁴ *Supra*, para. 12-27.

⁶⁵ Douglas H. Ginsburg. *Comparing Antitrust Enforcement in the United States and Europe*, journal of Competition Law and Economics 1 (3), 427-439.

⁶⁶ ABA Section of Antitrust Law, *Antitrust Law Development* 727 (5th ed. 2002).

⁶⁷ Pub. L. No. 94-503, 116, 90 Stat. 2415 (1976), *omitted by* Pub. L. No. 96-157, 93 Stat. 167 (1979).

⁶⁸ 15 U.S.C. para. 15, 26.

⁶⁹ See *e.g.*, *Agency Holding Corp. v. Malley-Duff and Assocs.*, 483 U.S. 143, 151 (1987) (Clayton Act “bring[s] to bear the pressure of “private attorneys general” on a serious national problem for which public prosecutorial recourses are deemed inadequate”).

⁷⁰ Comparing figures in 2004, according to the study the Commission released in August 2004, there were then in Europe only 60 reported cases in which a private litigant sued for

2.3.2 Hanover Shoe

Unlike in the UK and under the EU, the US does have case decisions upon the passing-on defense and indirect purchaser standing. The two central cases here are *Hanover Shoe, Int. v. United Machinery Corp.*⁷¹, which have determined that defenders are prevented from invoking the passing-on defense, and *Illinois Brick Co. v. Illinois*⁷², which held that indirect purchasers do not have standing.

As the US Supreme Court ruled in the *Hanover Shoe case*, the passing-on defense cannot be evoked before the federal courts. The contest of the case is as following:

The United Shoe exercised the monopoly power over the shoe-making equipment market and offered the equipment on a lease-only without sale. This led to the overcharge by the shoe manufacture, the plaintiff. In its defense, the United Shoe argued that the plaintiff suffered no injury since he passed on this overcharge to its customers when he raised prices of the shoes.

The Court rejected this argument and found that an antitrust infringer cannot avoid liability proving that the claimant did not suffer any harm since the latter was able to pass on the whole overcharge to its ultimate consumers. It stated: *“We are not impressed with the argument that sound laws of economics require recognizing this defense... Normally the impact of a single change in the relevant conditions cannot measure after the fact; indeed a businessman may be unable to state whether, had one fact been different... he would have chosen a different price... Treble damages actions would often require long and complicated proceedings involving massive evidence and complicated theories”*⁷³.

The Court reasoning was determined by the main goals of the antitrust policy – deterrence and compensation – and the three main points: (1) calculating the pass-on would “normally prove insurmountable”; (2) allowing the defense would reduce the incentive of direct purchasers to sue for damages, which would adversely affect the deterrent value of private enforcement; (3) allowing the pass-on defense would mean that infringers would gain from their violations since law suits by direct purchasers will decline.

violation of competition law – and only 18 of those alleged a violation of Article 81 or 82, while 32 were based upon the laws of Member States. In contrast, individual plaintiffs in the United States filed 683 antitrust lawsuits in the federal courts in the 12 months ending March 31, 2004. See further Denis Waelbroek, Donald Slater and Gil Evan-Shoshan, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules* (Aug. 31, 2004) and Administrative Office of the United States Courts, Federal Judicial Caseload Statistics 2004, Table C-2.

⁷¹ 392 USA 481 (1968).

⁷² 431 US 720 (1977).

⁷³ 431 US 720 (1977), at 494.

Concerning indirect purchaser standing, firstly, it is worth to recall that the Sherman Act can be called the “*Magna Carta of free enterprise*”⁷⁴ and has not constitutional provisions as it is in the Community law⁷⁵. Therefore, interpretation of antitrust standing in the US law is narrow and does not mean implication of fundamental rights. US case law says that the “*mere presence of antitrust violation does not by itself bestow on any plaintiff a private right of action for damages*”, but such actions are a “*gift of section 4 of the Clayton Act*”⁷⁶.

2.3.3 Illinois Brick

In the *Illinois Brick* the US Supreme Court set the rule which denies the right of the indirect purchaser who have been harmed by unlawful overcharges to sue the infringer under the federal law⁷⁷: “*Permitting the use of passing-on theories... essentially would transform treble-damages actions into massive efforts to apportion recovery among all potential plaintiffs that could have absorb part of the overcharge – from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness*”⁷⁸.

The background of the case is as follows:

In *Illinois Brick* the state of Illinois was the indirect purchaser of concrete blocks who sued in its capacity as a consumer of buildings, which incorporated concrete blocks that had been purchased at above-market price. The defendants argued that since there were at least two purchasers between the plaintiff and defendants and none of them had joined the law suit, the indirect purchaser cannot be permitted to claim damages. The central reasoning of the defendant was that since the passing-on defense is forbidden, the Court should also forbid the indirect purchaser using passing-on offensively.

The Court generally agreed with the defendants and brought more arguments in favor for forbidding the indirect purchaser standing: (1) the use of a “pass on offence” would be inconsistent with the holding in the *Hanover Shoe Case*; (2) allowing affective but not defensive passing on would create a serious risk of multiple liability for defendants; (3) federal indirect purchaser damage actions would be too complex, as they would require

⁷⁴ In the *United States v. Topco Association*, 450 US 596, 610 (1972). *Private enforcement of antitrust law in the EU, UK and USA*. Clifford A. Jones. Oxford university press, 1999.

⁷⁵ *Supra*, p. 187

⁷⁶ *Indiana Grocery Co. v. Super Valu Stores*, 864 F 2d 1409, 1418-19 (7th Cir. 1989).

⁷⁷ *Illinois Brick* is considered as a case regarding standing, but it was decided on the basis of concerns over effective judicial administration and enforcement. Other cases such as *Blue Shield v. McCready*, 457 U.S. 465 (1982) and *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983) are dealing with the technical requirements of antitrust standing.

⁷⁸ *Id.* 71, p. 727.

parties to trace alleged overcharges through multiple layers of distribution; (4) deterrence will be best served by concentrating the right to recover exclusively in the direct purchaser. Thus, the indirect purchaser standing had been disallowed.

Nevertheless, the Court set two exceptions from the Illinois rule. The indirect purchaser may sue (1) where there was a pre-existing cost-plus contract between the first purchaser and its customer; and (2) where the first purchaser is owned or controlled by its supplier. The reason for that is that the first purchaser is not at risk to suffer antitrust injury when there is a cost-plus contract which commits its customer to purchase a fixed quantity of the product without regard to price. The second exception prevents an infringer from avoiding liability when he could create a situation in which he could serve as a “direct purchaser” and thus avoiding antitrust liability.

Moreover, in *Illinois Brick* the Court again expressed its concerns about passing on defense, underlying possible administrative complexity in case of allowing it: “*Permitting the use of passing on defense... essentially would transform treble-damages actions into massive efforts to apportion recovery among all potential plaintiffs that could have absorbed part of the overcharge – from direct purchasers to middlemen to ultimate consumer. However, appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble damages suits and seriously undermine their effectiveness*”⁷⁹.

The rule of *Illinois Brick* applies only in such cases those involve damages from overcharging⁸⁰. It does not apply to actions for injunctive relief⁸¹, to vertical price fixing situations⁸² and to non-price restraints⁸³.

The opponents of *Illinois* ruling brought their arguments: (1) the rule fails to compensate all victims of antitrust behavior, in particular, indirect purchaser; (2) the goal to deter will be weakened because the direct purchaser – who is regarded by the Court as the most empowered to sue – will avoid litigation since he usually has business with the infringer and would not ruin such business interest-related connections and will simply pass on damages on those who do not have the right to sue; (3) this contradicts with the ruling of the Congress which prescribes the state in some cases bring cases

⁷⁹ *Id.* 71, p. 737.

⁸⁰ *Dart Drug Corp. v. Corning Glass Works*, 480 F Supp. 1091, 1101 (D Md. 1979); *Fontana Aviation, Int. v. Cessna Aircraft Co.*, 617 F 2d 478, 481 (7th Cir. 1980).

⁸¹ *Midwest Paper Products Co. v. Continental Group, Inc.*, 596 F 2d 573, 589-94 (3d Cir. 1979). In such cases there is no concerns of multiple liability or tracing the allocation of the overcharge among different levels of purchaser.

⁸² *Link v. Mercedes Benz of N. America*, 788 F 2d 918 (3d Cir. 1986). In such cases the retailer who has a claim at all has one for lost profits while the indirect purchaser has the claim for overcharge.

⁸³ This explains by the view that non-price restraints do not present *Illinois Brick* problem because damages are based on loss, but not on overcharge. There is a point that “which persons have been injured by an illegal overcharge” is “analytically distinct” from “persons have sustained injuries too remote to give them standing”. 431 US at 728 note 7.

on behalf of the citizens of the state; (4) procedural concerns such as duplicative judgments, multiple suits, inconsistent outcomes which are seen by the Court as obstacles can be overcome with the certain procedural mechanism such as mandatory consolidation, and pointed by the Court other concerns, such as complex or impossible damages calculating, are always a part of the antitrust litigations. Although effectiveness of such procedural measures as consolidation were disputed by the supporters of the decision.

Thus, as was said above, there were also supporters of the decision of the Court. One of the interesting arguments among them is that, indeed, determining the amount of overcharging which indirect purchaser had to put on indirect purchaser because of the overcharging formally put on by the supplier. A direct purchaser may increase his prices for reasons independent of he received from his supplier. Among such behavior unrelated or independent of any antitrust behavior might be increased labor costs, other expenses or general desire to increase profitability. Supporters come to the conclusion in these terms that economic models (to sort out such unrelated overcharging) prove their unreliability.

Case law puts limitations where the alleged injury is several steps and products removed from the alleged anticompetitive behavior. This is linked with the purpose of allowing indirect purchaser standing and meaning of private enforcement as a whole, which is to give injured consumer to relief.

2.3.4 California's compromise

As to the states⁸⁴, today 19 States and the District of Columbia have enacted statutes or obtained court decisions interpreting pre-existing statutes to allow indirect purchasers to recover treble damages⁸⁵, and in certain states this remains unsettled⁸⁶. Consequently, defendants in antitrust actions face the

⁸⁴ The States also enforce their own antitrust laws. Every State has passed some form of antitrust statute, most of which are facially comparable to 1 and 2 of the Sherman Act.¹ Many states have also passed laws respecting competition in particular industries (insurance, for instance) and outlawing particular practices (such as bid rigging and predatory pricing). State involvement in antitrust actually pre-dates federal involvement; in addition to the common law governing restraints of trade in every jurisdiction, 26 states had some form of antitrust statute on their books when the Sherman Act was passed in 1890. States have sometimes led the way in identifying certain business practices as anticompetitive, such as the *per se* condemnation of naked price-fixing. A State may not make lawful conduct unlawful by the Congress, but a State may prohibit conduct that does not violate any Act of Congress. A State may also adopt a more aggressive interpretation of federal law. Ginsburg, D. H. (2005), *Comparing Antitrust Enforcement in the U.S. and Europe*, in: *Journal of Competition Law and Economics*, 1, pp. 427 - 436.

⁸⁵ See Antitrust Law development 5th, p. 811. According to some accounts as many as forty four states permit some form of recovery for indirect purchaser under state antitrust law. Daniel R. Karon, "Your honour, tear down that Illinois Brick Wall!", *The national Movement towards indirect purchaser antitrust standing and consumer justice*, 30 Wm. Mitchell L. Rev. 1351 (2004).

⁸⁶ Some authors believe that the US states adopted legislation allowing the indirect purchaser standing because of the undesired public policy results. See further Adward P. Henneberry *The passing on defense and standing for indirect purchasers, representatives organizations and other groups*. Paper, March 9, 2006.

unfortunate possibility being sued for the treble damages in the federal courts by the direct purchaser and treble damages for the same conduct in the state courts by indirect purchaser (multiple suits and duplicative recovery). Among other unfortunate consequences of the Illinois decision there are the risk of inconsistent verdicts, complex and potentially speculative damage analysis.

Question whether federal antitrust law preempted state antitrust law that allows the indirect purchaser to sue arose before the Supreme Court in 1989 in *California v. ARC America*⁸⁷. The Court rested its decision on the principle of federalism and preemption and did not revise the reasoning of its earlier decisions in the *Hanover Shoe* and *Illinois Brick* cases. Thus, the Court concluded that federal law supplements (but not displaces) the state law, and the indirect purchaser having the right to sue under the state law may invoke this right before the state court and this will not complicate federal antitrust litigation.

The central reasoning in all three cases (*Hanover Shoe*, *Illinois Brick*, *ARC America*) was that unlike state courts the federal courts are less equipped to trace the overcharge in a supply chain. The result of the federal courts to do so may lead to the unreliable results and duplicative recoveries. Therefore, the Supreme Court believed that indirect purchaser law suits can be managed only by state courts.

2.3.5 Some critics of the *American* rule

There is a view that complicated damages issues can be handle through retention of court appointed experts and the use of specialised courts with expertise or training in handling such matters⁸⁸.

Moreover, and as a proof of this thought, one of the US courts have commented the ability of the expert testimony to facilitate complex determinations of damages in a manner that might not have been envisioned a quarter century ago. In particular, the court said: “*In the years that have passed since the Illinois Brick decision, experience has shown that court can manage the complexity of indirect purchaser recovery in antitrust cases. Defendant raise the concerns regarding the difficulty of the proof of damages, but fail to provide examples of cases of unfavorable complexity. Our research has similarly revealed none. In contrast, recent developments in multi-state litigation show that plaintiffs may be able to produce satisfactory proof of damages... We think our courts can resolve the complex damages issues that may arise*”⁸⁹.

⁸⁷ 490 U. S. 93 (1989).

⁸⁸ Id. 85, p. 9

⁸⁹ *Bunkers's Glass Co v. Pilkington*, PLC, 75 P. 3d 99, 109 (Ariz. 2003).

This can lead to the logical thought that capability of the states courts to manage the indirect purchaser law suits proves the potential capability of federal courts as well to handle such matters.

Today, direct purchasers typically file damage action in the federal courts, and indirect purchasers file the case in the state court which can be transferred to the federal court or consolidated with the federal cases.

Strikingly, the rule which would balance between maximising deterrence and providing compensation from one side, and avoiding inconsistent results and duplicative recoveries from the other side, the Antitrust Law Section issued a report⁹⁰ where it developed examples of optimal rule for pass-on defense and indirect purchaser standing and best procedure of allocation of damages. It included the following provisions:

1. Indirect purchasers and sellers would be permitted to recover overcharge damages under federal antitrust law;
2. Claims would be consolidated in a single forum thereby eliminating the risk of inconsistent results or duplicative recoveries (except in so far as state law permitted duplicative recoveries);
3. Prejudgment interest would be allowed;
4. Federal and state cases would be consolidated in federal court;
5. State laws would not be preempted;
6. *Hanover Shoe* would not be overturned, and defensive pass-on would not be permitted or necessary inasmuch as all plaintiffs would be consolidated in a single proceeding⁹¹.

It is clear that an effective private damage regime must provide compensation for all victims of antitrust overcharge, and for indirect purchaser as well.

For example, Professor Andrew I. Gavil suggested that the consolidated trial should be as follows: (1) a first phase in which there is a liability determination as to all actions; (2) a second phase in which the aggregative overcharge is determined (this phase can be combined with the first phase at the discretion of the court); (3) a third phase presided over by a special master or magistrate, to address the allocation of damages among the various plaintiff⁹².

⁹⁰ Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules, April 2006, p. 38. Available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/135.pdf.

⁹¹ *Supra*.

⁹² *Id.* 89, p. 41

Antitrust Law in the US offers treble damages which means compensation over and above the actual injury. In response of arguing that it represents a sort of excessive punishment which the society ought to leave to criminal law, the US Supreme in a substantial number of decisions has stated that compensation and deterrence are the purpose of the treble damages remedy⁹³. It is accepted that although the US antitrust law means treble damages, it in fact does not provide for prejudgment interest which can be awarded only in narrow circumstances⁹⁴. No punitive damages beyond the statutory treble damages can be awarded.

The indirect purchaser rule is a clear policy choice of the US Supreme Court. As some authors consider⁹⁵, these two concepts of the rule best promote the private enforcement of the antitrust laws and largely independent of the specific US statutory scheme.

⁹³ E.g. *Atlantic Richfield Co. v. USA Petroleum*, 495 US 328, 330 (1990); *California v. ARC America Corp.*, 490 US 93, 102 (1989); *American Society of Mechanical Engineers, Int. v. Hydrolevel Corp.*, 456 US 556, 557, (1982); *Reiter v. Sonotone Corp.*, 442 US 330, 343 (1979); *Illinois Brick Co. v. Illinois*, 431 US 720, 746, 748, 749 (1977); *Brunswick Corp v. Puebl-O-Mat, Int.*, 429 US 477, 486 (1977); and *Perma-Life Muffers, Int. v. International Parts Corp.*, 392 US 134, 139 (1968).

⁹⁴ 15 USC para. 15 (a), as amended by the Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, 94 Stat. 2716.

⁹⁵ *Id.* 7, p. 180

3 Choosing a *right* option

3.1 Short summary

As described in Section 2.1, there are four models of combination of the passing-on defense and indirect purchaser standing brought by the Commission in the Green Paper. The present chapter will analyse all four options and research views of experts and circumstances where these options might operate. The aim of this analysis is to try to find out the most suitable variant of the passing-on defense and indirect purchaser standing for European legal order. In this connection, experience of the UK, as a Member of the EU, and the US, as a long-playing actor in private enforcement field is highly relevant.

Before starting the analysis, it is important to highlight again a particular objective of the European competition policy - a citizen, or a consumer in the market. Consumer-orientated policy seeks a way of protecting and satisfying consumers' rights and needs entirely. Therefore, an option which serves for this purpose at most is seen as a *right* one and remains the core goal of this paper.

The following options will be under scrutiny. The first, is the situation where both passing-on defense and indirect purchaser standing are allowed. This variant complies with the current position in all Member States, particularly in the UK. The Commission's Study founded that although no Member State has case law exactly on this subject, they all consider passing-on defense and indirect purchaser standing theoretically possible. This is so because in hypothetical constructing the situation of bringing such an action where the issues of passing-on defense and/or indirect purchaser standing should be solved, Member States apply the general principle of compensation and use the analogy in law, in particular the law of tort. For instance, the UK has an argument that exclusion of passing-on defense in the UK complies with the fundamental principles in making damages award. The same as it is in all Member States, exclusion of indirect purchaser standing is not permissible in the UK due to the principle of direct effect of EC law. Member States look over the decision of the ECJ in *Courage v. Crehan* which suggests that "any individual" may pursue a private action for breach of competition laws.

The second combination is disallowing both the passing-on defense and indirect purchaser standing. This might be called *American* procedural antitrust regime. The US Supreme Court pronounced clearly that the antitrust infringer cannot avoid liability proving that the claimant did not suffer a harm since the latter has passed on the overcharging to his ultimate consumers (*Hanover Shoe*), and the indirect purchaser who has been harmed by unlawful overcharging cannot sue the infringer under the federal law (*Illinois Brick*).

The third variant prohibits passing-on defense and allows the indirect purchaser to sue. Finally, “two-step” procedure is the fourth option brought in the Green Paper.

3.2 Current situation in the EU

The Commission’ Study shows that allowing passing-on defense and indirect purchaser standing by national courts is possible in the future, in particular, when such case arises. However, since the Commission initiates finding a way of facilitating private damages action, this is a sign that such combination is far from being perfectly suitable for the European legal order in the circumstances of the Commission’s consumer-orientated antitrust policy.

The two further arguments which might be relevant to a consideration of whether a passing on defence should be permitted and whether indirect purchasers should be entitled to sue are: (a) the practicality of proving the passing on; and (b) the practical impact upon deterrence.

It may be possible for economists to make predictions based on a generalised analysis of the market. For example, if all the competitors on a competitive downstream market are affected by an abuse by a dominant supplier, it is likely that passing-on by those competitors to their customer will be significant.⁹⁶ ECJ has not yet dealt with passing-on in private action, but it has toughed these issues in the tax-relevant public actions. Advocate General, Sir Gordon Slynn, in the *Bianco* and *Gerard* case⁹⁷ outlined the practical considerations which show the difficulties that can arise when it becomes necessary to inquire whether the burden of the overpayment has been passed on to customers in the form of increased charges for the taxpayer’s goods or services. It was recognised that difficult economic questions arise such as: has the taxpayer by raising his prices reduced the demand for what he supplies, so that he has not benefited overall? And, why should it be assumed that a repayment of tax will not be passed on to future customers in the form of reduced prices?⁹⁸

Thus, the effectiveness and practical usefulness of the passing-on defence might be questioned. The effect of its existence may simply serve to

⁹⁶ See Ben Dubow, *The passing on defence: an economist’s perspective*, [2003] ECLR 238

⁹⁷ *Les Fils de Jules Bianco S.A. and J. Girard Fils S.A. v. Directeur Général des Douanes et Droits Indirects*, joined cases 331/85, 376/85, 378/85, [1988] E.C.R. 1099

⁹⁸ LIDC Amsterdam 2006, *Damages in competition law litigation in the United Kingdom*, Competition Law Association rapporteur: Daniel Beard, Monckton Chambers.

complicate and extend proceedings and to raise their costs. Given the costs of litigation in the UK, that alone may mean that potential claimants will be more reluctant to bring claims against defendants with deep pockets.

Moreover, it might be argued that since the primary burden of proving the defence appears to fall upon the defendant, the complexity of the defence might reduce its chances of success and thereby reduce the extent to which valid claims are stifled by the fear of incurring high costs. However, although, in principle, the burden of making out the defence might lie upon the defendant, since the passing-on defence refers to and relies upon the actions of the claimant, in practice, if the defendant can make out a *prima facie* case that all or part of the excess price charged has been passed on by the direct purchaser to others further down the supply chain, it may be that greater scrutiny will fall upon the behaviour of the claimant. Thus, whilst a court may not be seeking formally to transfer the burden of proof, significant questions may be asked (potentially wide-ranging disclosure demanded) of the claimant.

Apart from the complexity of the defence reducing the deterrent effect⁹⁹ of private actions, there is also the practical problem that if the direct purchaser is not able to claim the entirety of, for example, the excess price charged, it will have less of an incentive to bring a claim at all. Of course, if the defendants were to face claims from indirect purchasers just as much as from direct purchasers, this might not undermine the overall deterrent effect of the possibility of claims being brought. The fact that different people would recover different components of the overcharging would not reduce the overall deterrent effect. However, it should be noted that in many circumstances, those who have suffered eventual loss may be many and their individual losses small. This is often the case where anti-competitive behaviour increases the retail prices of goods or services. In those circumstances the loser is, in particular, the final consumer, or, more accurately, all the final consumers. Each of those final consumers will have suffered a small loss which would never justify their taking the risk of bringing an action. In practice, therefore, whilst many parties may have good claims against infringing parties, they will not ever enforce them.

Thus, alone with difficulties in proving pass-on and its calculating, the nature of the passing-on defence as such is seen as an incentive for the claimant to bring action, which obviously constitutes an essential obstacle on the way of private actions for breach of antitrust law.

⁹⁹ Deterrence in the sense of deterring infringement rather than deterring claims for damages.

3.3 European Antitrust Policy Bans an Import of an *American* Indirect Purchaser Rule

In the USA, litigation has long existed in the antitrust area, and its existence is viewed as a part of regulatory policy. Outlined below, is an inspection of the decisive issues of the US private antitrust actions that will be presented in order to determine if US private enforcement fits into the scheme of the EC legal order.

The *Hanover Shoe* and *Illinois Brick* pair of rulings has been heavily debated at length in the US¹⁰⁰. The American system has sought-after for the best rule which would provide a balance between maximising deterrence and providing compensation from one side, and avoiding inconsistent results and duplicative recoveries from another side.

The US Supreme Court justified disallowing passing-on defense by difficulties in calculating pass-on and straightening the deterrence through taking the direct purchaser to the better position and therefore making the infringer unable to gain from the violation. Among the justifications of disallowing indirect purchaser standing the Court put prevention of a risk of multiple liability of the defendant and a risk of duplicative judgments, multiple suits, inconsistent outcomes. It pointed out also, that allowing of indirect purchaser standing would be inconsistent with ruling in *Hanover Shoe* ruling and distorting deterrence function of the competition policy.

Among arguments against the Court's decision the opponents expressed the view that such system failures to compensate all victims, leads to multiple suits in different jurisdictions, complex and potentially speculative damage analysis. Moreover, this distorts deterrence because direct purchaser has business relations with the infringer and would rather not sue. Moreover, it contradicts the decision made by Congress to allow the states to bring action on behalf of citizens of the state. Finally, opponents argue that procedural complexity related to the indirect purchaser to sue may be overcome by imposing for that certain procedural mechanism

As for now, many American states have legislation which allows indirect purchaser standing. The US Supreme Court decided on states' law contradiction with the federal law in *California v. ARC America*: the indirect purchaser having the right to sue under the state law may invoke

¹⁰⁰ See e. g. R. G. Harris and L. A. Sullivan, *Passing on the Monopoly Overcharge: a comprehensive policy analysis*, (1979) 128 U. Pa. L. Rev. 269; W. M. Landes and R. A. Posner, *Should indirect purchaser have standing to sue under the Antitrust Law? An economic analysis of the Rule of Illinois Brick*, (1979) 46 U.Chi.L.Rev. 602; R. G. Harris and L. A. Sullivan, *Passing on the Monopoly overcharge; a response to Landes and Posner*, (1980) 128 U.Pa.L.Rev. 1280; W. M. Landes and R. A. Posner, *The economics of passing on: a reply to Harris and Sullivan*, (1980) 128 U.Pa.L.Rev. 1274;

this right before the state court. This decision connects *Hanover Shoe* case and *Illinois case* between each other. Moreover, it connects itself through the central idea: the US Supreme Court was sure that the federal court are less equipped to trace the overcharge in a supply chain. Therefore, the state courts may resolve these issue avoiding a risk of unreasonable results and duplicative recoveries.

The US litigation system has certain characteristics which differ from the EU.

Firstly, the US litigation model is decentralised. This may be proved by the fact that private enforcement actions exceed government ones by a factor of ten and there is no co-ordination between the various governmental enforces. The US competition enforcement is totally litigation-orientated which seeks to secure compliance, compensation, punishment and deterrence. There is no notification/exemption system. From the very beginning the US system was structured with a view towards pluralistic enforcement and relies much on private enforcement and active criminal prosecution of certain antitrust violations.

The next important characteristics of the US antitrust system is that the conduct is neither conclusively legal or illegal according to the outcome of a trial. Each trial determines legality of a practice or conduct on a case-by-case basis, and the fact that one federal jury approves the practice does not prevent another from condemning it where a new plaintiff is involved¹⁰¹.

The third outcome of the US litigation model is that each type of enforcement at time serves different purposes. Thus, government action cannot compensate the victims of illegal practice any more than private actions can bring business executives in prison. Treble damages actions compensate victims, deter and punish violators and draws private recourses into the enforcement process as a supplement to government actions¹⁰².

Antitrust Law in the US offers treble damages which means compensation over and above the actual injury. The treble damages may seem to create an award which exceeds actual compensation¹⁰³.

¹⁰¹ See further S. D. Susman, in panel discussions, "*Mandatory Treble Damages – Time For a New Look?*", Committee on Corporate and Antitrust Law of the Section of Corporation, Banking, and Business Law, 1981 American Bar Association Annual Meeting, New Orleans, reprinting in *Antitrust Damages Allocation: Hearing before the Subcomm. On Monopolies and Commercial Law of the House of Comm. On the Judiciary, 97th Cong., 1st and 2nd Sess.* 170, 185, 193 (1981-2).

¹⁰² *Id.* 7, p. 20

¹⁰³ Albeit, certain studies have found out that a victim may not be made even whole as to actual damages, much less received a windfall. It is accepted that the US antitrust law failures to provide for prejudgment interest and leaves a plaintiff less than whole. Treble damages do not make a plaintiff whole even once where the measure of *actual* recoverable damages is itself deficient. At the same time, it seems clear that the EC law insists that prejudgment interest to be included under the recoverable heads of damages in order to make the plaintiff whole and case law supports it. Therefore the single damages under Community antitrust law in most cases will be equivalent or close to award of treble

One more difference is *locus standi*, which is broader in the Community than in the USA, because of the directly effected nature of the Treaty provisions. Then, the antitrust injury principle in the USA is inapplicable because it focuses on purely economic considerations. Moreover, the American approach might appear both to be in tension with the compensation principle articulated by the ECJ and to require significant judicial intervention in the absence of any statutory framework which places constraint on such claims.

There is widely recognised that there is excessive litigation in USA often involving unmeritorious claims. These features are produced by the existence within the US civil litigation system of class action rules (at Federal and state levels), contingency fees, excessive discovery, and various other matters. These mechanisms lead to:

1. Excessive volumes of litigation;
2. Frequently unmeritorious claims;
3. The imposition of high transactional costs (huge legal fees in class actions);
4. The inability of consumers to control claims brought in their names;
5. Settlements in consumer claims in which lawyers reap disproportionately large fees but consumers gain little benefit (e.g. coupon settlements);
6. Incentives for businesses to settle irrespective of the merits of claims, so as to avoid increasing costs and recover shareholder value

damages under US law and from the real economic perspective, community antitrust claims are actually treble damages claims. While US law disallowing prejudgment interest may reduce treble damages to “less than single damages”.

In the light of the fact that under the UK law exemplary or punitive damages may be awarded in addition to compensatory damages – and in respect to Community antitrust claims as well – the combination of this factor with recoverable pre-judgment interest could render the Community antitrust remedy superior to the US treble damages actions. As US practitioner S. D. Susman suggested in regard of importance of punitive damages to antitrust claims notes: “This is precisely more than treble damages, since punitive damages are added to actual damages”. See further ABA Section of Antitrust Law, *Providing Antitrust Damages: Legal and Economic Issues* (Chicago, Ill., 1996), 109 note 16, Cf. A. van Casteren, *Article 215 (2) EC and the question of interest*, in T. Heukels and A. McDonnel, *The action for Damages in Community Law* (The Hague, 1997), 199, 200 (“in national law, interest is considered as an essential part of damages”); Case 152/84, *Marshall v. Southampton and South-West Hampshire area Health Authority (Teaching) (Marshall I)*, [1986] ECR 723 and Case C-271/91, *Marshall v. Southampton and South-West Hampshire area Health Authority (Teaching) (Marshall II)*, [1993] ECR I-4367, para. 9, 31; V. Sarris, *The Efficiency of Private Antitrust Enforcement: The “Illinois Brick” Decision* (New York, 1984), 17-18; S. D. Susman, in panel discussions, *Mandatory Treble Damages – Time For a New Look?*, Committee on Corporate and Antitrust Law of the Section of Corporation, Banking, and Business Law, 1981 American Bar Association Annual Meeting, New Orleans, reprinting in *Antitrust Damages Allocation: Hearing before the Subcomm. On Monopolies and Commercial Law of the House of Comm. On the Judiciary, 97th Cong., 1st and 2nd Sess. 170, 185, 193 (1981-2), p. 177.*

- (over 90% of cases settle, many being unmeritorious: blackmail settlements);
7. Inconsistent decisions and ineffective coordination of enforcement policy between regulatory authorities and multiple courts;
 8. The imposition on any defendant of huge costs of disclosure of evidence, and of business disruption;
 9. The exploitation of evidence for plaintiffs' improper commercial advantage;
 10. A large, unnecessary and debilitating tax on business and the economy, with disproportionately little benefit to competition, consumers or the economy¹⁰⁴.

We may recognise that the US civil litigation system with its treble damages recovery has many features that are not compatible with the nature of European legal order. American competition enforcement system is litigation orientated and decentralised. Each type of enforcement there at time serves different purposes and antitrust injury principles focus on purely economic considerations, which contradicts, in particular, the compensation principle in the EC order.

The American system thus may be found not only undesirable but also harmful for an economy, for civil society, business and consumers in Europe¹⁰⁵. The position of competition law (may as a fundamental principle of the Community) give it a rank in the legal order which is inexpedient for the Sherman Act in the USA. A policy so vital to the founding and development of the Community deserves enforcement efforts to correspond to its "*constitutional*" rank.

3.4 Closer To A *Right* Option. Who benefits at most?

According to the Commission Study Report¹⁰⁶, no Member State has any case law exactly on the issue of the passing-on defense and indirect purchaser standing in private litigation disputes. However, the ECJ has several public proceedings regarding unlawful taxes and administrative charges touched upon the concept of passing-on¹⁰⁷. Therefore, the

¹⁰⁴ *European Justice Forum*. Response to the Commission's Green Paper, p. 4.

¹⁰⁵ "I believe the U.S. experience can serve as a useful guide to reform of the competition law enforcement regime in Europe; we have found some aspects of private enforcement that work well and [however] others that Europe would do best to avoid". Douglas H. Ginsburg. *Comparing Antitrust Enforcement in the United States and Europe*. *Journal of Competition Law and Economics* 1 (3), 427-439.

¹⁰⁶ *Id.* 2

¹⁰⁷ See e.g. *Just v. Danish Ministry for Fiscal Affairs*, case 68/79, *Just v. Danish Ministry for Fiscal Affairs*, [1980] ECR 501; *Express Dairy v. IBAP*, case 130/79, [1980] ECR 1887; *Ireks-Arkady v. Council and Commission*, case 238/78, [1979] ECR 2955; *Comateb and Others v. Directeur general des douanes et droits indirect*, joined cases C-192/95 to C-218/95, [1997] ECR I-165.

interesting question is whether the ECJ will follow the US antitrust approach to the problem of passing-on in antitrust private litigations when it has not done so in litigation against the Community and its Member States.

As to the *Hanover Shoe* rule, AG van Gerven has argued that EC case law implies that the passing-on theory is available for defensive use under EC antitrust laws¹⁰⁸. Jones disagrees with the view of the Advocate-General and claims that there are no legal barriers for the ECJ to forbid the passing-on defense in antitrust litigations¹⁰⁹. Jones states that existing EC case law on passing-on is not of any relevance to the antitrust field¹¹⁰. He claims that applying the passing-on defense in cases when the plaintiff is recovering unlawfully paid taxes is accurate, since compensation is the one and the only purpose of such actions. In antitrust law, however, he argues, the effectiveness of antitrust law must prevail. Discussing the *Illinois Brick* rule, Jones claims that an adoption of this rule is incompatible with EC law and that EC law does not permit the same severe limitation of *locus standi* as does US law. Moreover, the *Illinois Brick* rule implication would result in an intolerable disparity between the scope of the remedy and the substance of directly effective rights under EC antitrust laws¹¹¹.

It is important to note that EU law does not preclude the operation of a passing-on defence. More precisely, the ECJ has recognised that national rules which allow for such a defence to operate do not fall out of the principles of effectiveness or equivalence.¹¹² Apparently, prohibiting a passing-on defence can be seen as the natural counterpart to a prohibition on indirect purchasers being able to bring claims that might themselves undermine the operation of the principle of effectiveness in relation to those potential claimants.

On view of Dr. Sven Norberg under Community law a passing-on defense should not be accepted and indirect purchaser standing should be allowed¹¹³, because this will contribute to increased enforcement of Community law as well as more deterrence, although this can create a risk of multiple liability to defendants and imply procedural complications.

There is a view that the recent discussion on private enforcement of antitrust law systematically neglects one important effect of price cartels – the harm caused to the owners of the production factors. The inclusion of harm to the

¹⁰⁸ AG van Gerven. Opinion in *Banks v. British Coal*, case C-128/92, [1994] ECR I/1209.

¹⁰⁹ *Id.* 7, pp. 366-369

¹¹⁰ *Id.* p. 196.

¹¹¹ *Id.* pp. 192-245.

¹¹² See, for example, *Hans Just I/S v Danish Ministry for Fiscal Affairs*, case C-68/79 [1980] ECR 501 and *Amministrazione delle Finanze dello Stato v SpA San Giorgio*, case C-199/82 [1983] ECR 3595.

¹¹³ See further S. Norberg. *Some Elements to Enhance Damages Actions for Breach of the Competition Rules in Article 81 and 82 EC*. 32nd Annual International Antitrust Law and Policy Conference, Fordham, New York, September 2005.

owners of production factors changes the results dramatically. At least in the case of hardcore price cartels, strengthening the importance of private enforcement will neither be an appropriate instruments for improving deterrence – this can be achieved at lower cost by increasing the fines for infringements of antitrust law – nor is it appropriate to achieve corrective justice, since damages will be only loosely related to the harm actually suffered by the true victims of antitrust infringement¹¹⁴.

Jakob Ruggeber and Maarten Pieter Schinkel¹¹⁵ brought some interesting views on the problem of the indirect purchaser rule. The authors looked at it through the perspective of deterrence and compensation, i. e. of policy purposes.

They stated that the US experience in limitation of defendants' and plaintiffs' rights, in particular, denying of the pass-on and limiting standing to sue resulted in a complex system of multi-district and multi-party litigation which do not provide neither fair compensation nor efficient deterrence. Exclusion of passing-on defence in Europe would lead to similar consequences. The authors explain that Hanover Shoe rule implies the gross overcharge method and *Illinois Brick* is unfair and ineffective. Although *Hanover Shoe* indeed stimulates the bringing of private damages actions, it awards monetary compensation to parties that are not in fact injured, as well as to some that are. The overcharge method means that the overcharge is defined as the difference between the anticompetitive raised price and the price that would have prevailed under anti-competition instead. Total damages are then calculated as the overcharge multiplied by the actual volume of sales under the anticompetitive regime ("total overcharge"). This calculating does not necessary correspond to the actual injury. For example, based on actual sales, it ignores damages on sales that could have been made, if prices had been at competitive levels, i. e. it underestimates the actual damages by the amount of the deadweight-loss.

As to the denying indirect purchaser standing, when distribution chains widen towards the bottom, it effectively deprives the majority of victims of their right to compensation, whereas arguably the smallest of damages occurs in the upper layers of the productive chain. Denying affected parties the right to recover their damages, the rule is deemed unfair by many authors¹¹⁶.

¹¹⁴ Thomas Eger and Peter Weise. *Limits to the private enforcement of antitrust law*. Second Draft, December 2006.

¹¹⁵ Jakob Ruggeber and Maarten Pieter Schinkel. *Consolidating Antitrust Damages in Europe: A proposal for Standing in Line with efficient private enforcement*. World Competition. Law and Economics Review. Volume 29 (3), 395-420, 2006.

¹¹⁶ See also K. Roach and M. J. Trebilcock, *Private Enforcement of Competition Law*, 34 Osgoode Hall Law Journal 3, 461, (1996); M. Denger and D. J. Arp, *Does Our Multifaceted Enforcement System Promote Sound Competition Policy?*, 15 Antitrust, (2001).

The authors also underline that a direct purchaser may have a decreased incentive to sue when they are able to pass-on a large part or all of their damages. Indirect purchaser may also be reluctant to sue their direct suppliers in order not to disturb long-term business relationships. The author argues that *Hanover Shoe* and *Illinois Brick* created an isolated incentive and low legal transaction costs discovery of antitrust violations, but at the expenses of fairness by possibly permitting unaffected parties to bringing damages claims and denying compensation to parties that did suffer damages. The result of this is increased number of private damages actions since 1977¹¹⁷.

The article suggests that from the point of view of effective and efficient deterrence, it can be desirable to allow only a single collective antitrust damage claim, preferably brought by an interested party (or collection of parties) with first hand evidence of the infringement¹¹⁸. The authors explain this by referring to the fact that each individual injury is too small and remote to amount to a sufficiently large claim to overcome the legal expanses. This lack of incentive to sue weakens deterrence. Moreover, many different individuals may each have a sufficient incentive to litigate. When they separately decide to do so, a multiplicity of court cases related to one and the same upstream infringement unduly inflates aggregate litigation and court costs, which are a dead-weight loss to society.

The authors propose an alternative constitutional design for the European Union: *“The proposal involves a centralized consolidation of fragmented individual antitrust damage claims. The assessment of damages is allocated to a central authority, which acts as amicus curia upon a definitive infringement decision in an initiated to a competition authority. It would conduct a public investigation and assess and specify the combined economic damages caused by the infringement. Its consolidated damage report is offered as an advice to the court, which subsequently apportions individual damages to the initiated plaintiff. Later related claims can refer to the report in consequential actions before national courts. The procedure provides an efficient, single, consistent and complete damage estimate, while still utilising the full detection potential of unrestricted private damage actions. This allows for an effective and efficient mechanism of private antitrust enforcement, whilst achieving compensation of actual damages for those injured by anti-competitive acts“* (at 395).

¹¹⁷ See, for example, J. E. Lopatka and W. H. Page, *Indirect purchaser suits and the consumer interest*, Antitrust Bulletin, 48 (2003).

¹¹⁸ See also W. M. Landes and R. A. Posner, *Should Indirect purchaser have standing to sue under the antitrust laws? An economic analysis of the rule of Illinois Brick*, University of Chicago Law Review, 46, (1979); J. Baker, *Private Information and the Deterrent Effect of Antitrust Damage Remedies*, Journal of Law and Economics and Organization 4, (1988); D. Besanko and D. F. Spulber, *Are treble damages Neutral? Sequential Equilibrium and Private Antitrust Enforcement*, American Economic Review 80, 4 (1990).

Professor Spencer Weber Waller, Loyola University Chicago School of Law, believes that the right balance between public and private competition enforcement is critically important for the EU jurisdiction¹¹⁹. Indirect purchaser actions may be understood as a form of private action necessary in a proper functioning private enforcement system. Consequently, some forms of private enforcement are a necessary complement to public competition law enforcement. Moreover, such public-private enforcement networks should be encouraged to create stable and effective competition law regime.

Pr. Waller in particular discusses indirect purchaser right to sue referring to the American experience. He argues that most of the American economy is subject to indirect purchasers' actions since virtually all of the larger economy states make such actions available. However, the author acknowledges that a number of states limit such indirect purchaser actions to actions by the state Attorney General, making enforcement subject to the priorities and resources of such state enforcement bureau. The author concludes that enacting or permitting indirect purchaser suits is necessary for the jurisdictions of EU Member States, and this should be done in the name of consumer welfare where an average consumer has the right to bring such action. Meanwhile, the author underlines that implementation of indirect purchaser rule requires much of jurisdiction in the way of a court system and a practising bar and recalls about a need of developed culture of competition and divergences in many jurisdictions which history, culture and legal system will not permit a meaningful right of action in the foreseeable future.

Economic analysis shows that overcharge imposed by cartels or monopolists are not entirely, if at all, absorbed by their purchaser, Foad Hoseinian in his article *Passing-on Damages and Community Antitrust Policy – An Economic Background*¹²⁰ supposes. He thinks that the harm is instead inflicted upon actors in an interminable number of sub-markets. Under EC law it is unclear whether the passing-on reasoning should be accepted in private litigations. Assuming that competition law should enhance overall social welfare, a theoretic model can be borrowed from relevant US experience to gain an understanding of how the damage remedy should be contemplated within the system of EC antitrust law and how the passing-on question should be dealt with.

The author points out that while those who see antitrust solely in terms of economic efficiency tend to approve *Illinois Brick*, those who are concerned with compensating victims generally disapprove. He makes reference to Landes and Posner who express: “*the most important consideration from the standpoint of deterrence is not who receive the proceeds of any judgment levied against the antitrust violator, but that there be adequate*

¹¹⁹ Spencer Weber Waller. *Towards a Constructive Public-Private Partnership to enforce competition law*. World Competition. Law and Economics Review. Volume 29 (3), 367-381, 2006.

¹²⁰ World Competition. Law and Economics Review. Volume 28 (1), 3-23, 2005.

*incentives to bring suit and prosecute it to judgement*¹²¹. This means that the authors of the citation emphasise the deterrence impact of the passing-on rulings, rather than showing concern as to the right of the consumer to claim damages. Further, the authors bring the three relevant arguments:

1. The end-consumers have small purchasers and their incentives and resources to sue for damages are limited compared to direct purchaser;
2. The direct purchasers typically have superior information on the effects of any anti-competitive acts of their suppliers, which also enhances deterrence;
3. In line with Becker's economic theory of enforcement, that the social costs of litigations must be taken into consideration. In this regard such factors should be counted: monetary incentives with the direct purchaser are less than in cases with many fragmented indirect purchasers cases; any costs involved in coordinating class actions are less than in case when a private damages claim is placed in a single hand; tracing everyone who is damaged and calculating the extent of individualised damages in all sub-markets are highly expensive.

Foad Hoseinian mentions the notion of "*Illinois Wall*", a hypothesis which accepts the potential of the Illinois Brick rule to reduce the costs of legal procedures and increase private incentives to bring anticompetitive practices to light. The authors who research this theory¹²² claim that firms may use *Illinois Brick* to put up an *Illinois Wall* in order to shield themselves from private damages claims. They find that the *Illinois Brick* rule may facilitate upstream firms in engaging horizontally in a collusive arrangement, with concealed side-payment to their direct purchasers that discourage them from filling suits¹²³.

The author concludes, that if efficiency, overall social society welfare and minimum transfer costs are to determine competition policy, then it is submitted that the Community must take initiatives to follow the symmetry of the passing-on option adopted in the US law. If corrective justice and the solicitude for small and medium size enterprises are to prevail, then at least offensive, but arguably also defensive, passing-on should be encouraged.

In her article M. Brkan¹²⁴ states that a decision on the standing of indirect purchasers will be a policy orientated decision, and she claims that the current EC antitrust policy orientations demonstrate that the indirect purchaser standing should be allowed. For the purposes of her

¹²¹ W. M. Landes and R. A. Posner, *Should indirect purchaser have standing to sue under the Antitrust Law? An economic analysis of the Rule of Illinois Brick*, (1979) 46 U.Chi.L.Rev. 602, at 608.

¹²² *Supra*.

¹²³ The authors however call for an empirical study of the matter in order to find out whether the *Illinois Wall* theory corresponds to the real world. See further *Id.* 120.

¹²⁴ Maja Brkan. *Procedural aspects of private enforcement of EC antitrust law: heading toward new reforms?* World Competition. Law and Economics Review. Volume 28 (4), 479-506, 2005.

argumentation, the author assumes that the vast majority of the indirect purchasers will be final consumers, as well as consumers may be purchasers. “The mere fact” that damages are difficult to prove and that their apportioning is difficult to determine should not result in negation of standing.

And the last weighty argument follows that since the Commission has *de facto* taken into account consumer protection already in public enforcement, why would it not do so in private enforcement? Such Commission efforts cannot be subsumed merely within the framework of the principle of transparency; they also confirm that the consumer plays a role within the EC antitrust in general. If, however, the Commission nonetheless decides not to grant standing to indirect purchaser, it will have to provide for a number of exemptions to this rule, as it is done in the Illinois Brick rule, in particular, in case of fixed quantity contract and direct purchaser owned or controlled by the seller.

As to the question about passing-on defense, the answer on it is now as straightforward as the answer to whether the indirect purchaser should be granted a right to sue. From the one side, this leads to double recovery and unjust enrichment of the defendant, although it is questionable if a direct purchaser who passed on the overcharging and sued, would have a sufficient incentive to bring a case as the loss he suffered was minimal? Then, the question arises: *“if he [a direct purchaser] does file a suet and wins his case and the “double recovery” occurs, then the argument of effective antitrust enforcement must be invoked prefer to have some cases of “double recovery” than to run a risk of putting all private enforcement in the hands of direct purchasers who might not sue because of the lack of incentive, as mentioned above [he suffered a minimum loss]. The same argument applies to unjust enrichment: it is better to unjustly enrich the plaintiff than to have relevant cases brought”* (at p. 498). The author underlines again that damages in antitrust cases play a different role to damages within classic tort law: the main purpose of tort law is to redress, whereas the main purpose of private antitrust enforcement is deterrence. On the other hand, tort law does constitute the basis of damages claims in antitrust and main tort principles should not be entirely disregarded, as the private antitrust enforcement still has to abide by general tort law.

The author draws her speculations to the economic perspective, stating that the competitor’s decision on passing-on of overcharging is determined by market structure. Therefore, the decision on whether to allow passing-on defense depends on difficulty of proof of economic-related factors, in particular, whether it is done at the circumstances of monopoly market or perfect competition. Moreover, impartial economic analysis should be the basis of any antitrust litigation, but the cost of such analysis can be a factor reducing the incentive of the middleman to sue.

We may also notice one aspect in defense of option when the passing-on defense is prohibited and indirect purchaser standing allowed. As it has

already been mentioned before, in the central cases in the US antitrust private enforcement which deals with passing-on defense and indirect purchaser standing - *Hanover Shoe*, *Illinois Brick* and *California v. ARC America* – the US Supreme Court was sure that the federal courts are less equipped to trace the overcharge in a supply chain. Therefore, the state courts may resolve disputes where indirect purchaser standing is allowed avoiding a risk of unreasonable results and duplicative recoveries. Taking an analogy with the US states courts, is it justified to say that national courts of the EU Member States are “equipped to trace the overcharge”? This however, is difficult to say since there is no case law in the Member States which would highlight problem of passing-on defense and indirect purchaser standing.. Therefore, the hypothetical speculations based on respect of general principles of national law and use of analogy are possible.

In the Chapter 2/Section 2.1. comments on the Green Paper received by the European Commission were presented. Revising these answers, one may find out a diversity of views.

Thus, Max Plancks Institute concludes in its comment that the passing-on defense should be excluded, but customers further removed from the infringement should be given the right to sue if direct customers are unwilling or unable to bring an action and direct customers should share the damages with customers further removed. The Competition Law Forum of the British Institute of International and Comparative law believes that both passing-on defense and indirect purchaser standing should be allowed. The Burges Salmon LLP, UK (BS) shares the same opinion, although comes to it with another arguments. The International Bar Association considers that the use of the passing-on defense should be allowed. As to the view of the Office for Fair Trade, although it does not express the final view on Green Paper option, it stands apparently in favor of allowing indirect purchaser standing and expresses an opinion that the focus of competition law should be protecting consumer welfare¹²⁵.

As to the “two-step” procedure, this option seems only possible and effective in those instances where an action is brought subsequent to the resolution of a cartel investigation or proceeding, and when many liability and overcharge issues have already been established. But in most cases this solution will bring difficulties in consolidating multiple claims in one proceeding and will present additional issues of coordination in contrast to multiple indirect purchaser law suits taking place in various jurisdictions.

Consumer-orientated competition policy of the EU has been not only once stipulated by the officials from DG Competition. In particular, Mario Monti, a former competition Commissioner, stated that he believes “*that actions by consumers themselves and the groups which represent them can be an effective tool in the fight against anticompetitive behaviour and allow the consumer to be directly compensated for the loss he or she suffers at the*

¹²⁵ Detailed arguments of all these commentators are presented in the Section 2.1.

hands of the companies which break the law”¹²⁶. What is more, views of the DG Competition officials precisely reveal that the Community is interested in allowing standing to indirect purchaser¹²⁷.

To conclude, it might be stated that the option when the passing-on defense is prohibited and indirect purchaser standing is allowed seems to be more consumer-welfare oriented in nature and consistent with *Courage* ruling in that the ultimate consumer would have the ability to seek compensation. However, this variant will pose a risk of multiple recoveries since antitrust violators would be liable to both direct and indirect purchasers. In response to the argument, there is a view that the policy rationale should start from the point that maximised deterrence without regard to whether over-recovery was enacted from the culpable party¹²⁸. Moreover, this might pose conflict with established rules within the Member States regarding punitive exemplary damages.

¹²⁶ Interview with the commissioner Mario Monti in *Competition Policy Newsletter*, Special Edition, 2004.

¹²⁷ See Donncadh Woods, Alisa Sinclair and David Ashton, *Private enforcement and Community Competition Law: Modernisation and the road ahead*, (2004) *Competition Policy Newsletter* No. 2, at. 35.

¹²⁸ See *ARC America Corp.*, 490 U. S. at 105.

4 Concluding remarks

It seems that the question about the right combination between the passing-on defense and indirect purchaser standing in the EU might have a long discussion. This discussion can be further extended when it seems likely to evolve into an indisputable answer.

The defenders of a certain combination and their opponents bring arguments within a particular circle of issues. Among them, for example, includes a risk of multiple recoveries, procedural complexity and a fear to fail to compensate all victims suffered from the infringer, to calculate overcharge or to distort deterrence, and others. Most apparently, there are four options to choose.

The central idea which unites all arguments of defendants and opponents is about orientation of the competition policy of the EU on the welfare society. The argument that consumer-orientated policy is reflected in the ECJ's case law flows from the *Courage*, which states that “*any individual*” who suffered loss caused “*by a contract or by conduct liable to restrict or distort competition*” should be granted standing. Consumer-orientated competition policy of the EU has been stipulated by the officials from DG Competition on numerous occasions. Moreover, since the Commission has *de facto* taken into account consumer protection already in public enforcement, it can do the same in private enforcement.

In respect of choosing among those four options suggested, the *American* variant does not suit to Europe. US experience in limitation of defendants' and plaintiffs' rights, in particular, denying of the pass-on and limiting standing to sue resulted in a complex system of multi-district and multi-party litigation. Therefore, these do not provide neither fair compensation nor efficient deterrence. Exclusion of the passing-on defence and indirect purchaser standing in Europe would lead to similar consequences. As it was correctly pointed out in one of the articles analysed in this paper, while those who see antitrust solely in terms of economic efficiency tend to approve American indirect purchaser rule, and those who are concerned with compensating victims generally disapprove.

Although Member States do not have case law on the passing-on defense and indirect purchaser standing in antitrust litigation, some of them (in particular the UK) have recognised the passing-on defense as such in other areas of national law, for example, in relation to taxation. Also, EU law itself does not preclude the operation of the passing-on defence when it has in several proceedings regarding unlawful taxes and administrative charges touched upon the concept of passing-on. More precisely, the ECJ has stated that national rules which allow for such a defence to operate do not fall out of the principles of effectiveness or equivalence. Apparently, prohibiting

the passing-on defence can be seen as the natural counterpart to a prohibition on indirect purchasers being able to bring claims that might themselves undermine the operation of the principle of effectiveness in relation to those potential claimants. However, national courts of the Member States (UK courts in particular) do not deny standing to indirect purchaser since such court action would be incompatible with EC law and contrary to the principle of direct effect. Almost all defenders of allowing the indirect purchaser to sue refer to *Courage v Crehan* which states that “any individual” may pursue a private action for breach of antitrust competition law.

Nevertheless, it is easy to notice that any argument has its opposing argument. Grouping them all together makes the whole analysis appear to sound contradictory. Thus, EC case law implies that the passing-on theory is available for defensive use under EC antitrust laws, although there is nothing what cannot forbid the passing-on defense. Allowing the indirect purchaser to sue and prohibiting passing-on defense will contribute to increased enforcement of Community law as well as more deterrence, although this can create a risk of multiple liability to defendants and imply procedural complications. Denying indirect purchaser standing, it effectively deprives the majority of victims of their right to compensation and procedural difficulties may arise. Allowing both will not be an appropriate instrument for improving deterrence – this can be achieved at a lower cost by increasing the fines for infringements of antitrust law – nor is it appropriate to achieve corrective justice, since damages will be only loosely related to the harm actually suffered by the true victims of antitrust infringement.

After revising an essential bulk of legal literature and analysis of legal writings on these issues, it still remains difficult to find out the most desirable combination of the passing-on defense and indirect purchaser standing and conclude with precise advice or a clear suggestion. There can be only one opinion that the option when the passing-on defense is prohibited and indirect purchaser standing is allowed is something that the European legal order needs since such combination evidentially is more consumer-welfare oriented in nature. Most obviously, welfare society is the factor, and this could determine the most appropriate option or at least narrow the reasons for hesitating in making the final decision on a suitable option. This is the factor which is easy to find but complicated to apply.

Bibliography

Burges Salmon LLP, UK. Response to Green Paper. Available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/032.pdf

Cahill, D., ed. The modernisation of EU Competition Law enforcement in the EU. FIDE 2004 National Reports. Cambridge University Press, 2004.

Comments Max Plancks Institute for Intellectual Property, Competition and Tax Law on the DG Competition Green Paper. Available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/084.pdf.

Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules, April 2006. Available at: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/135.pdf.

European Commission (COM (2005) 672, Commission Staff working paper – Annex to the green paper - *Damages actions for breach of the EC antitrust rules* (19 December 2005).

European Commission (COM (2005) 672, SEC (2205) 1732), *Green paper - Damages actions for breach of the EC antitrust rules* (19 December 2005).

Foad Hoseinian. *Passing-on Damages and Community Antitrust Policy – An Economic Background*. World Competition. Law and Economics Review. Volume 28 (1), 3-23, 2005.

Frank L. Fine, Mark Furse, ed. Competition Law of the UK and EC. Oxford University Press, 2002.

Franklin M. Fisher. *Economic Analysis and Antitrust Damages*. World Competition. Law and Economics Review. Volume 29 (3), 383-394, 2006.

George Kosicki and Miles B. Cahill. *Economics of cost pass through and damages in indirect purchaser antitrust cases*. The Antitrust Bulletin. Vol. 51, No. 3/ Fall 2006.

Ginsburg, D. H. (2005). *Comparing Antitrust Enforcement in the U.S. and Europe*. Journal of Competition Law and Economics, 1, pp. 427 - 436.

Harlow, Carol and Rawlings, R.. *Accountability and law enforcement: the*

centralised EU infringement procedure. European Law review. Volume 31 No. 4. August 2006.

Henneberry, E. P. *The passing on defense and standing for indirect purchasers, representative organizations and other groups*. Private enforcement of EC Competition Law: The Green Paper on Damages Actions. March 9, 2006.

International Bar Association. Antitrust Committee. Working Group on private antitrust litigation in Europe. Submission regarding the European Commission's Green Paper on Damages Actions for the breach of the EC Antitrust rules. Available at:
http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/151.pdf

Jakob Ruggeber and Maarten Pieter Schinkel. *Consolidating Antitrust Damages in Europe: A proposal for Standing in Line with efficient private enforcement*. World Competition. Law and Economics Review. Volume 29 (3), 395-420, 2006.

Joel Davidaw. *Recent Developments in US Antitrust*. World Competition. Law and Economics Review. Volume 28 (3), 299-312, 2005.

John E. Lopatka. *Overcharge damages for monopolization of new economy markets*. The Antitrust Bulletin. Vol. 51, No. 3/ Fall 2006.

Jones, Clifford. Private enforcement of antitrust law in the EU, UK and USA. Oxford university press, 1999.

Kesko Corporation. Response to the public consultation on the Commission' green paper. April, 2006. Available at:
http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/012.pdf.

Katherine Holmes. *Public enforcement or private enforcement? Enforcement of competition law in the EC and UK*. European Competition Law Review. Volume 25: Issue 1 - January 2004.

Kirstly Middleton, Barry J. Rodger and Angus MacCulloch. Cases and Materials on UK and EC Competition Law. 1 st ed.. Oxford University Press, 2003.

Leslie, Chrispofer. *Antitrust damages and deadweight loss*. The Antitrust Bulletin. Vol. 51, No. 3/ Fall 2006.

Luis Ortiz Blanco. European Community Competition Procedure. Luis Ortiz Blanco. Clarendon Press - Oxford, 1996.

Maja Brkan. *Procedural aspects of private enforcement of EC antitrust law: heading toward new reforms?* World Competition. Law and Economics Review. Volume 28 (4), 479-506, 2005.

Mark Furse. *Competition Law of the UK and EC*. 3d edition. Oxford University Press, 2002.

Nick Gardner. *A Guide to United Kingdom and European community competition policy*. Macmillan, 1990.

Norberg, S. *Some elements to enhance damages actions for breach of the competition rules in article 81 and 82*. 32nd Annual international antitrust law and policy conference, September, 2005.

Office of Fair Trading. *Response to the Commission Green Paper*. May, 2006, Available at:
http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/062.pdf

Roger D. Blair and Christiane A. Piette. *Antitrust Damages: Theory and practice*. *The Antitrust Bulletin*. Vol. 51, No. 3/ Fall 2006.

Slot, P. and McDonnell, A., ed. *Procedure and enforcement in EC and US on user-friendly competition law*. London. Sweet and Maxwell, 1993.

Spencer Weber Waller. *Towards a Constructive Public-Private Partnership to enforce competition law*. World Competition. Law and Economics Review. Volume 29 (3), 367-381, 2006.

Vogelaar, F. and others, ed. *Competition Law in the EU, its Member States and Switzerland*. Kluwer Law International – W. E. J. Tjeenk Willink – 2002. p.12.

Table of Cases

European Court of Justice

Comateb and Others v. Directeur general des douanes et droits indirect
(Joined Cases C-192/95 to C-218/95) [1997] ECR I-165

*Consortio Inductrie Fiammiferi (CIF) v. Autoria Garante della
Concorrenza e del Mercato* (C-198/01) 2003 ECR I 8055, CJ

Costa v. ENEL (Case 6/64) [1964] ECR 585, 593

Cotter and McDermott v. Minister for Social Welfare and Attorney General,
(Case 377/89)[1991] ECR I-1155

Courage v. Crehan (Case C-453/99) [2001] ECR I-6297

Eco Swiss China Times v. Benneton (C-126/97) 1999 ECR I – 3055

Express Dairy v. IBAP (Case 130/79) [1980] ECR 1887

Francovich and Bonifaci v. Italy (joined cases C-6 and 9/90) ECR I-5357

Just v. Danish Ministry for Fiscal Affairs (Case 68/79) [1980] ECR 501

Ireks-Arkady v. Council and Commission (Case 238/78) [1979] ECR 2955

Masterfood v. HB Ice Cream (C-344/98) 2000 ECR I -11369

*Societe Comateb and Others v. Directeur general des douanes et droits
indirects,* (joined cases C-192/95 to C-218/95) [1997] ECR I-165

Van Gend en Loos v. Netherlands Tariefcommissie (Case 26/62) [1963]
ECR 1, 12

Vinacenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA and onthers.
Joined Cases (C-295/04 to C-298/04) OJ C 224

UK courts

Marks & Spencer v Commissioners for Customs & Excise [1999] STC 205,
(Appeal, 2000)

Rookes v. Barnard, [1964] AC 1129

US Supreme Court

Agency Holding Corp. v. Malley-Duff and Assocs., 483 U.S. 143, 151 (1987)

California v. ARC America. 490 U. S. 93 (1989).

Illinois Brick Co. v. Illinois. 431 US 720 (1977)

Hanover Shoe, Int. v. United Machinery Corp. 392 USA 481 (1968).

Standart Oil Co. v. United States, 221 U.S. 1, 60/70 (1911) and *United States v. Grinnell Corp.*, 384 U. S. 563, 570/71 (1966).

United States v. Topco Association, 450 US 596, 610 (1972).