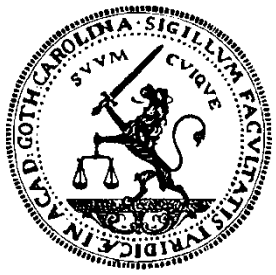

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The Implementation of the Passing-on-defence into EU Law

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Contents

Summary

Since 2001 the CJEU has repeatedly stated that, as a matter of EU law, any individual must be able to obtain compensation for harm suffered because of an infringement of EU competition law. As of today, victims of infringements of EU competition law are unable to effectively exercise that EU right. By introducing a Proposal for Directive, the Commission has taken a major step forward in promoting damages actions and private antitrust litigation within the EU. The main aim of the Proposed Directive is to ensure full compensation of victims of violations of competition law and to optimise the interaction between the public and private enforcement of EU competition law.

The Proposal for Directive implements the passing-on-defence along with recognition of indirect purchaser standing into EU law. The US law and the EU law on the measures are based on different justifications. In US, features like the exclusive enforcement of direct purchasers, the litigation culture, the award of treble damages and the penalties for violations of the antitrust laws are all instruments clearly serving the aim of effectiveness and deterrence. In EU law, it is clear that priority has been given to the interest of fairness and the objectives of full compensation and consumer welfare.

The passing-on-defence and indirect purchaser standing serves the overall EU objective of consumer welfare and the objective of full compensation. Following *Manfredi* case, the Proposed Directive implements a broad rule of standing to sue for damages. Clearly, the Proposed Directive aims at compensation, not at litigation. The indirect purchaser standing will facilitate the possibility for victims distant from the infringer, such as consumers, to obtain compensation in order to recover from a violation of competition law. The Proposed Directive places the burden of proof that the passing-on-defence applies on the infringer and implements a rebuttable presumption that the entire overcharge has passed on, for the indirect purchasers to rely on. Such solution facilitates damages claims for all claimants and a different solution would risk offending the EU principle of full effectiveness.

In designing a litigation system based on EU competition law, the public and the private enforcement should play different roles. The public enforcement of the EU competition rules should aim at deterrence and effectiveness since the public enforcement never can serve the objective of compensation. In contrary, the private enforcement should primarily aim at compensation for victims of competition law infringements. An effective system of private damages actions, making liability for damages rule rather than exception, will however also serve the aim of deterrence to some extent, since the fear of infringers for liability of damages. To the extent possible, the public and private enforcement should therefore aim at complement each other.

Sammanfattning

Sedan 2001 har EU-domstolen vid upprepade tillfällen framhållit att var och en som har lidit skada som orsakats av en överträdelse av EU:s konkurrensregler ska kunna kräva full ersättning för denna skada. Det har dock visat sig svårt för personer och företag som drabbats av en konkurrensskada att utnyttja denna EU-rättsliga rätt till ersättning. I syfte att främja skadeståndsprocesser baserade på konkurrensrätten har Kommissionen utfärdat ett direktivförslag. Avsikten med direktivet är att säkerställa att skadelidande vid överträdelser av konkurrensreglerna kan få full ersättning för den skada de lidit. Dessutom ämnar direktivet optimera samspelet mellan den offentliga tillämpningen och den privata tillämpningen av konkurrensreglerna.

Direktivförslaget medför att så kallade övervältringsinvändningar kommer att accepteras i konkurrensrättsliga skadeståndsmål samt att indirekta kunder ges rätt att föra en skadeståndstalan baserad på konkurrensrätten. Olika motiv ligger bakom den amerikanska konkurrensrätten respektive den EU-rättsliga konkurrenslagstiftningen, gällande övervältringsinvändningar och indirekta kunders rätt till ersättning. I amerikansk lagstiftning har de direkta kunderna exklusiv talerätt, konkurrensrättsliga skadestånd tredubblas automatiskt och det finns straffsanktioner för de som bryter mot konkurrenslagstiftningen. Alla dessa instrument syftar till att verka preventivt och avskräckande. I EU har istället det så kallade rättviseintresset prioriterats. Detta intresse ska främja målet att skadelidande vid överträdelser av konkurrensreglerna kan få full ersättning för den skada de lidit samt det övergripande EU-rättsliga målet avseende konsumentvälfärd.

Införandet av ett övervältringsförsvar samt indirekta kunders rätt till skadeståndsanspråk är förenligt med det övergripande EU-rättsliga målet avseende konsumentvälfärd och målet att skadelidande till fullo ska bli kompenserad för liden skada. EU-domstolens dom i *Manfredi* innebär att det inte är förenligt med EU-rätten att begränsa rätten till skadestånd för personer som har lidit skada på grund av en överträdelse av konkurrensreglerna. Direktivförslaget medför att var och en som lidit sådan skada ges rätt att begära skadestånd. Direktivet placerar bevisbördan för att övervältring har skett på det företag som har begått överträdelsen samt inför en presumtion att övervältring av priset har skett till de indirekta kunderna. Förslaget underlättar således för skadelidande som befinner sig långt bort från skadegöraren i distributionskedjan (såsom konsumenter) att få skadestånd. En annan lösning hade riskerat kränka principen om EU-rättens fulla genomslag.

Vid utformningen av systemet för konkurrensrättsliga skadestånd ska den offentliga och den privata tillämpningen av EU:s konkurrensregler syfta till att uppfylla olika mål. Den offentliga tillämpningen av konkurrensrätten kan aldrig uppfylla målet att till fullo kompensera skadelidande för överträdelser

av konkurrensreglerna. Den offentliga tillämpningen av konkurrensreglerna bör därför syfta till att verka preventivt och avskräcka från brott mot konkurrenslagstiftningen. Den privata tillämpningen bör å andra sidan huvudsakligen syfta till att kompensera skadelidande. Om Kommissionen lyckas skapa ett effektivt regelsystem för skadeståndsanspråk kommer den privata tillämpningen även i viss mån verka preventivt. Detta eftersom risken för omfattande skadeståndsansvar kommer verka avskräckande för företag. I den utsträckning det är möjligt bör därför den offentliga och privata tillämpningen syfta till att komplettera varandra.

Preface

I want to thank my supervisor Henrik Norinder for help and support in the process of writing this thesis.

I also want to extend my gratitude to Vinge where I wrote this thesis as a thesis trainee, and especially to lawyer Grant McKelvey for inspiration and in-depth knowledge on the subject.

Lastly, I want to thank Joel and my family for support and my friends for six great years in Lund!

Stockholm, January 2014.
Malin Berggren

Abbreviations

CJEU	Court of Justice of the European Union (the common notion for the European Court of Justice and the General Court, along with a number of specialised courts)
Commission	The European Commission
ECSC	European Coal and Steel Community
EEC	European Economic Community
e.g.	for example
EGC	The General Court of the European Union (former Court of First Instance)
EU	The European Union
GWB	Gesetz gegen Wettbewerbsbeschränk-ungen
ibid.	ibidem ("the same place")
i.e.	id est lat ("that is")
NCA	National Competition Authorities
no.	number
OJ	Official Journal of the European Union
p.	page
pp.	pages
para.	paragraph
paras.	paragraphs
Proposal for a Directive/ Proposed Directive	Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final

TEU	Treaty on European Union
TFEU	Treaty of the Functioning of the European Union
TPN	third party notice
UK	United Kingdom
US	United States of America

1 Introduction

1.1 Background

The European competition law has been a story of progress. Regulation No 17/62 was the first regulation implementing Articles 101 and 102 of the Treaty. The Regulation was based on a prior notification system whereby restrictive practices of the kind that Article 101 concerned, required a decision of exemption by the Commission. The Regulation thus conferred the central role in the application and enforcement of EU competition law upon the Commission. Hence, the Commission had exclusive competence in monitoring the EU competition law and controlled the development of EU competition policy.

In 2004 the so-called modernisation took place with Regulation 1/2003 entering into force, replacing Regulation 17/62. The modernisation aimed at, among other things, decentralising the enforcement of EU competition rules and enhance a private enforcement of the rules. The Regulation implied that NCA and the national courts of the Member States were given a significant greater role in relation to the Commission, in comparison to their role in the prior system. Since the modernisation entered into force in May 2004 all NCA are, alongside the Commission, in charge of public enforcement of Articles 101 and 102 TFEU. The NCA and the Commission are to fully apply the provisions of the TFEU in order to ensure that competition is not distorted or restricted. Private enforcement aims at the application of EU competition rules by the national courts in the Member States. The national courts are obliged to apply Articles 101 and 102 in order to protect the individual rights conferred to citizens by the Treaty and to ensure that the competition rules within the EU is applied and enforced effectively. Damages claims for breaches of Articles 101 and 102 are an important area of the private enforcement of EU competition law. The direct effect of the two Articles implies that an individual who has suffered harm because of an infringement of EU competition law has a right to damages.

The right to damages based on EU competition law has evolved through the case law of the CJEU. The right to full compensation for harm suffered is guaranteed by the Treaty itself, however it has been difficult for the victims of competition violations to exercise this right in the national courts of the Member States. The right to compensation for victims of competition infringements has been a significant issue for the Commission for almost a decade. In 2005 the Commission published a Green Paper in order to identify the main obstacles to a more effective system for bringing damages claims and to present a series of proposals for further discussion. In 2008 the Commission presented a White Paper on damages action with the main objective to ensure that all victims of infringement of competition law can obtain full compensation.

One of the measures discussed in the above Papers is if a defendant (the infringer of competition law) should be able to rely on the passing-on-defence in an action for damages based on EU competition law. The passing-on-defence refers to defendants right to invoke as a defence against a damages claim that the claimant passed on all or part of the overcharge resulting from the infringement to its own customers further down the distribution chain (the indirect purchasers). The defence thus allows an infringer to escape liability in a damages action by a claimant to the extent of any pass on by that claimant. Closely linked to the passing-on-defence is the indirect purchaser standing, i.e. the indirect purchasers right to initiate a claim for damages in competition cases.

Both the passing-on-defence and the standing of indirect purchasers have been denied under US federal antitrust law. To date, EU does not provide legislation regarding the issues and the national law of the Member States varies. The uncertainty regarding the existence of the passing-on-defence is therefore considered to be one of the major hurdles for an effective enforcement of private damages claims based on EU competition law.

1.2 Purpose

This thesis' main purpose is to analyse the implementation of the passing-on-defence into EU law. Since the issues of passing-on-defence and indirect purchaser standing are closely related, this thesis will also analyse the indirect purchaser standing in competition cases. Potential barriers in incorporating these measures into EU competition law and, above all, if such incorporation is practical, appropriate and desirable, will be discussed.

In order to address the subject of this thesis in a proper way, the thesis will mainly focus on the following questions:

1. Is the proposed EU law of passing-on-defence and indirect purchaser standing founded on the same justifications and values as the US law? If not, which distinguishing features can be found in the different jurisdictions?

2. Do the passing-on-defence and indirect purchaser standing serve the stated objective by the Commission in the Proposal for Directive of full compensation and the overall objective of consumer welfare within the EU competition law?

3. Another objective of the Commission in the Proposal for Directive aims at optimising the interaction between the public and private enforcement. Which roles should the public and the private enforcement play regarding the implementation of passing-on-defence in order to achieve this objective?

1.3 Method and Material

This thesis is written using mainly a legal dogmatic method since such method well serves the aim of this thesis. In order to address differences and resemblances between the EU law and the US law regarding the passing-on-defence and indirect purchaser standing, a comparative method and analysis is used. The thesis mainly concerns EU law, hence a EU legal method is used when interpreting the EU competition law. When applying and interpreting EU law, the CJEU mainly uses a teleological interpretation.[1]

To date, EU law does not provide legislation regarding the passing-on-defence and the Member States have dealt with the issue in different ways. Thus, the thesis will mainly discuss the Proposal for Directive by the Commission implementing the measures of passing-on-defence and indirect purchaser standing into EU law. The analysis will be based upon the approach taken by the doctrine and the Commission in the preparatory documents for the Proposed Directive as well as the final Proposal for Directive. In contrast to the EU law, the passing-on-defence is well established under US law, however controversial. In order to address the issue of passing-in-defence and the closely linked issue of indirect purchaser standing properly, the US law will be used as a comparative example. In US law, the passing-on-defence has been recognised for decades and is heavily debated in the judicial doctrine. It is therefore considered useful and suitable to compare the US system with the European one. Such comparative study will make it possible to better understand the solution chosen by the Commission in the Proposal for Directive as well as the future development of the EU competition law.

The material reviewed in this thesis is mainly EU legislation, guidelines, recommendations, papers and preparatory work by the Commission, case law of the CJEU as well as national courts of the Member States, US case law and doctrine.

The passing-on-defence is a relatively new area of EU law and there is a limited amount of material regarding the matter from a European perspective. The limited material also implies that the authority of the sources varies. The analysis and discussion have therefore to a large extent been based on the preparatory work by the Commission, as well as the commentators to the Green Paper and White Paper mentioned above. In regards to the US law, the doctrine is more comprehensive and has been the starting point for this thesis when explaining the practical use and consequences of the passing-on-defence, as well as when explaining the US law. Because of the rather few sources and material holding a European

[1] The CJEU also uses other methods and principles of interpretation, such as the comparative method and interpretation involving a comparison of different language versions, see case C-283/81 *CILFIT mot Ministero della Sanità* REG 1982 p. 3515, at para. 18. See also Hettne (2011), pp. 158-170.

perspective, the sources will be reviewed critically, bearing in mind that the perspective is relatively limited.

1.4 Delimitations

The Proposal for Directive implementing the passing-on-defence has been preceded by extensive preparatory work. Within the limits of this thesis it is not possible, nor desirable, to discuss all these documents in detail. Further, a full examination of the EU competition law and the US antitrust law is neither possible nor appropriate within the scope of this thesis. The thesis will therefore focus on the main aspects of the passing-on-defence in the competition law of the EU and the US.

Allowance of a passing-on-defence is often considered to complicate the antitrust litigation and damages actions in the courts. One major practical difficulty in allowing the defence is to estimate how much of the alleged overcharge that has been passed on to the indirect purchasers. Also, the size of the alleged initial overcharge to the direct purchaser must be determined. Another difficulty is to quantify the loss in sales that occurs when the direct purchasers are passing-on an overcharge downstream the distribution chain. There are several economic and econometric techniques available in order to overcome these difficulties, however these will not be discussed in this thesis. Such economic aspects mainly relate to the practical assessment of the defence in the national courts and do therefore not serve the purpose of this thesis.

The US antitrust law regarding the passing-on-defence is comprehensive. The main aim in discussing the US law is to provide the reader a solid ground of knowledge regarding the passing-on-defence and to make the defence and its consequences understandable. Furthermore, the reference to the US law aims at putting the solution chosen by the Commission in perspective. To serve this purpose, the US law of the matter is briefly discussed and only the main cases from the US case law are analysed.

As in regards to the indirect purchaser standing, the proposal of collective redress is of major practical importance. The measure of collective redress is also to be considered important for the overall understanding of the consequences in allowing the indirect purchaser standing. However, the subject is outside the scope of this thesis and will therefore only be discussed in brief.

The aim is to provide a reader, assumed to possess basic knowledge of EU competition law, a solid base and an extensive, if not exhaustive, introduction to the issues of passing-on-defence and indirect purchaser standing. In order to do this, bearing in mind the complexity of competition law, the thesis is comprehensive, both in length and scope, since this has been regarded a necessity in order to analyse the measures of passing-on-defence and indirect purchaser standing in a correct manner.

The thesis briefly examines the application of the passing-on-defence in three Member States: the UK, Germany and France. The Member States chosen are large economies within the EU and they all have significant influence on the EU law. Further, the selection of Member States has been made bearing in mind that these Member States represent both the common law system and the civil law system.

1.5 Outline

After the introduction chapter, the thesis starts with a brief presentation and overview of the EU competition law, explaining the historic development of the private enforcement of competition law within the EU. This part of the thesis is mainly descriptive, describing the emergence of a common competition law in Europe and the right to damages based upon it, as well as the overall objectives of the EU competition law.

After the basic introduction, the passing-on-defence is described and examined. Since the EU law does not provide legislation regarding the matter, the passing-on-defence within the national legal systems of the UK, Germany and France is discussed.

In the fourth chapter, the US federal antitrust law regarding the passing-on-defence is discussed. In the analysis of the US law, both federal law and state law are examined to fully capture the different aspects that should be taken into consideration by the Commission introducing the passing-on-defence into EU law.

Chapter five constitutes the bulk of this thesis. The chapter contains the primary analysis of both the EU solution on the passing-on-defence and the preparatory work leading to the Proposal for Directive presented in June 2013. In the chapter, the Green Paper and the White Paper are discussed as well as the arguments for implementing the passing-on-defence and indirect purchaser standing into EU law. The solution chosen by the Commission on the passing-on-defence in the Proposed Directive is then presented.

The analysis and discussion part naturally aim at discussing the findings of this thesis. It is discussed if the implementation of a passing-on-defence into EU law will serve its stated purpose and the arguments justifying such implementation are closer analysed. Furthermore, the roles of the public enforcement and the private enforcement of EU competition rules are analysed and discussed. In the final section of this thesis the answers to the three questions asked above are presented in a summarising conclusion.

2 EU Competition Law

2.1 The Development of EU Competition Law

EU competition law is a complex subject, however of great practical importance since it sets the rules and control the everyday conduct of European businesses and industries. The law is an on-going story of progress and under constant development. The birth of a common European competition law can be traced back to the ratification of the Treaty of Paris, creating the European Coal and Steel Community.[2] The Treaty contained basic competition provisions, including prohibition of both cartels and abuse of dominant position.[3]

The Treaty of Rome established the European Economic Community (EEC) in 1957. The EEC Treaty included substantive competition provisions and held competition policy as a fundamental objective for the Community.[4] The present core provisions of EU competition law are stated in Article 101, which prohibits anti-competitive collaborations, and in Article 102,[5] in turn prohibiting abuse of dominant position, both stated in the TFEU[6]. Traditionally, the enforcement of EU competition law has been centralised upon the Commission, largely due to the previous regulation dated back to 1962.[7] Up until 2004, the Commission had exclusive competence in the monitoring of the EU competition rules and could govern and control the development of competition law principles within the EU.[8] As a consequence, the Commission's workload increased and in combination with limited resources, their work became increasingly onerous. Hence, the Commission has for several years encouraged an increased private monitoring of the EU competition rules.[9]

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[2] The Treaty of Paris in 1951 established the European Coal and Steel Community (ECSC). The Treaty was ratified in June 1952 and the Common Market of Coal and Steel opened in 1953. The Treaty is hereinafter referred to as the ECSC Treaty.
[3] Goyder and Albors-Llorens (2009), pp. 27-30. See Articles 4, 65 and 66 in the ECSC Treaty.
[4] Articles 85 and 86 in the EEC Treaty (the present Articles 101 and 102). The provisions were implemented in 1962 when the Council adopted Regulation 17/62, which laid down specific measures for the application of the competition rules. See Kerse and Khan (2012), p. 2.
[5] Previously Articles 85 and 86 respective Articles 81 and 82. In this thesis consistently entitled Articles 101 and 102.
[6] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (2007).
[7] Kerse and Khan (2012), pp. 2, 8 and 34. About Regulation 17/62, see footnote no. 4.
[8] The role of the Commission is often described as that of "Guardian of the Treaty".
[9] Whish and Bailey (2012), pp. 295-296 and White Paper on Modernisation (1999), pp. 4-5 and 19.

2.2 The Objectives of EU Competition Law

The aims and objectives of EU competition policy have changed over time. Until the modernisation in 2004, EU competition law had two stated objectives: the promotion of effective competition in the Community and the promotion of European and single-market integration.[10] More recently, post 2004, the Commission has established that the overall objective of the EU competition law is to create economic welfare in the EU, often referred to as maximising of "consumer welfare" and to ensure an efficient allocation of resources. Competition and market integration are considered to serve these goals.[11]

Before the implementation of the Lisbon Treaty, Article 3 in the EEC Treaty listed the necessary policies of the Community law in order to achieve the overall objectives of the Common Market. Article 3(f) held that activities of the Community should ensure that "competition in the common market is not distorted". When implementing the Lisbon Treaty in 2009, Article 3(f) was removed and is now placed in a protocol annexed to the Lisbon Treaty.[12] The relocation of Article 3(f) was initiated by the French President Nicolas Sarkozy. Mr Sarkozy addressed the subject in a speech in which he questioned what competition has done for Europe.[13] Regardless of the relocation of the provision, the CJEU has confirmed that the interpretation of EU competition law will remain the same and the relocation of Article 3(f) seems to be no more than symbolic.[14]

2.3 The Modernisation

Plans to modernise EU competition law was first discussed in the late 1990s. The Commission worked out a White Paper on modernisation, where several changes of the competition law system in Europe were proposed.[15] As part of the modernisation reform, Regulation 1/2003 was introduced replacing Regulation 17/62, and laying the groundwork for a further use of a more decentralised and private enforcement of Articles 101 and 102. The

[10] Craig and de Búrca (2011), p. 960 and Jones and Sufrin (2011), pp. 42-44. See also Jones (1999), pp. 25-26.
[11] See Goyder and Albors-Llorens (2009), p. 11, Whish and Bailey (2012), p. 23 and Jones and Sufrin (2011), pp. 42-43.
[12] Protocol (No 27) on the internal market and competition OJ C 115, 9.5.2008.
[13] European Council, Statement made by French President M. Nicolas Sarkozy at post-EU Council press conference, Brussels 23 June 2007. The speech is available at http://www.ambafrance-uk.org/President-Sarkozy-s-post-EU, 27.11.2013.
[14] In case C-52/09 *TeliaSonera* REU 2011 p. I-527 the Court held that *"Article 102 TFEU is one of the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of that internal market. The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union."*, at paras. 21-22. See also Kerse and Khan (2012), p. 2.
[15] White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty [1999], OJ C 132/1.

Regulation 1/2003 implied, inter alia, that the NCA and the national courts of the Member States were given a significant greater role in relation to the Commission, in comparison to their role in the prior system.[16]

The aim of the modernisation and the implementation of Regulation 1/2003 were to enhance an effective enforcement of the EU competition rules. The reform was embossed by three main objectives; first, it would enable the Commission to focus on the most serious infringements of competition law by ending the system of notification and authorisation while ensuring intensified *ex post* control.[17] Further, it would reduce bureaucracy for companies while providing them sufficient legal certainty and thirdly, decentralise the enforcement application of competition rules with a particular focus on private antitrust enforcement and simultaneously maintain and create a common standard of the competition law.[18]

2.4 The Enforcement of EU Competition Law

2.4.1 The Public Enforcement

Since the implementation of the modernisation in May 2004, the application of EU competition rules is commonly divided into public enforcement and private enforcement. Public enforcement refers to enforcement of competition law through the Commission and the NCA and aims at maintaining the protection for competition in the internal market.[19] The NCA are, alongside the Commission, to fully apply Articles 101 and 102 of the TFEU in order to ensure that competition is not distorted or restricted. The Commission and the NCA may initiate proceedings acting on their own initiative, *ex officio*, or on a complaint.[20] Further, they may impose fines on undertakings found to infringe the EU competition rules.[21]

The parallel enforcement competence of the Commission and the NCA has resulted in the creation of a network of NCA together with the Commission, named the European Competition Network. The main objective of the Network is to promote a coherent application of the EU competition rules

[16] Jones and Sufrin, (2011), pp. 1026-1028. See also Regulation 1/2003 preamble (6) and (8).
[17] A directly applicable exception system replacing the *ex ante* control of the Commission was established and the exceptions in Article 101(3) became directly applicable.
[18] Komninos (2008), p. 84. See also the White Paper on Modernisation (1999), pp. 9-15, 24-25 and 46.
[19] Jones and Sufrin (2011), p. 1301. Regulation No 1/2003 empowers the Commission and the NCA to apply Articles 101 and 102. Article 105 in TFEU gives the Commission competence to ensure that the application of the principles in Articles 101 and 102 are complied.
[20] Articles 5 and 7 in Regulation 1/2003. See also Articles 5-9 in Regulation 773/2004. It has been held that the Commission plays the role of investigator, prosecutor and judge in competition cases, see Jones and Sufrin (2011), p. 1026.
[21] Articles 3 and 4 in the Regulation 1/2003. See also Kerse and Khan (2012), p 34.

and to ensure efficient work sharing between the public enforces.[22] Although the Regulation 1/2003 creates a system of decentralisation and parallel competence between the NCA and the Commission, the Commission has wide powers in the application of the EU competition rules and is yet to be seen as the "watchdog" of the European competition policy.[23] The EGC has in several cases stated that the Commission has an overall responsibility in the development and application of the EU competition law.[24] According to the EGC the Commission's task *"encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles"*.[25]

2.4.2 The Private Enforcement

The national courts are obligated to apply Articles 101 and 102 in order to protect the individual rights conferred to citizens by the Treaty and to ensure that the competition rules in the EU is applied and enforced effectively.[26] Private enforcement of the competition rules aims to the situation that the parties take their claims before national court or arbitration.[27] The application of competition rules in courts may result in nullity of the agreement or conduct in question, and the rules in the Treaty can also be used in action for an injunctive relief.[28] The main advantage with the private enforcement is however that individuals and companies can sue for damages in domestic court in order to get compensation for the harm they have suffered because of the infringement of the competition rules.

2.4.3 The Foundation of Private Enforcement

Some fundamental principles of EU law are essential to the private enforcement of EU competition law since without these principles the matter of private enforcement would not exist.[29] Already in 1963 the CJEU established the fundamental principle that the EU law does not only create obligations for the Member States, but also rights of individuals. These rights may be invoked by individuals in the national courts of the Member States, regardless of the national law of that Member State. The Court hereby established the principle of direct effect of the EU law.[30] A year

[22] Jones and Sufrin (2011), pp. 1036 and 1152-1154.
[23] Jones and Sufrin (2011), p. 1026.
[24] See cases T-38/07 *Shell Petroleum and Others v. Commission* REU 2011 p. II-4383, para. 119, T-42/07 *Dow Chemical and Others v. Commission* REU 2011 p. II-4531, para. 148 (appealed to the Court of Justice C-499/11 *Dow Chemical and Others v. Commission* 18 July 2013) and T-31/99 *ABB Asea Brown Boveri v. Commission* REG 2002 p. II-1881, para. 166.
[25] T-38/07 *Shell Petroleum and Others v. Commission* REU 2011 p. II-4383, para. 119.
[26] Komninos (2008), p. 76.
[27] Whish and Bailey (2012), p. 295 and Regulation 1/2003 Article 6. See also Komninos (2008), p. 84.
[28] Article 101(2) TFEU.
[29] Jones (1999), pp. 45-47.
[30] See case C-26/62 *Van Gend en Loos v. Administratie der Belastingen* REG 1963 p. 3.

later, the CJEU declared in the *Costa* case[31] that the Member States have limited their sovereign rights and that EU law are supremacy the law on the Member States. The direct effect and the supremacy of the EU law creates the foundation of the EU legal system and the fundamental base for the private use of Articles 101 and 102. It is because of the directly applicable rights that individuals are given by the Treaty that the question of private enforcement of EU competition law arises.[32]

2.5 Damages Based on the EU Law

The right to damages based on the Treaty has evolved in the case law of the CJEU. In the *Francovich* case[33], the CJEU established the foundation for state liability based on EU law:[34]

"It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty"[35]*,* and

"It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible."[36]

The importance of the principle established in the *Francovich* case is twofold. First, the case confirms the principle of a EU right to damages for individuals. Such right exists regardless of whether national law in a Member States recognise a right to damages in the specific case. Consequently, individuals within the EU have a right to obtain compensation for breach of the Treaty and this right is based directly on EU law, not national law.[37] Secondly, as a consequence of the *Francovich* case the Member States themselves may be in breach of the EU law and their obligations under Article 4 in the TEU[38]. The EU law implies an obligation

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[31] C-6/64 *Costa v. E.N.E.L.* REG 1964 p. 1141.
[32] Jones (1999), pp. 46-47.
[33] C-6/90 *Francovich and Bonifaci v. Italy* REG 1991 p. I-5357.
[34] Prior to *Francovich* case the CJEU in *Humblet* case (C-6/60 *Humblet v. Belgian State* REG 1960 p. 1125) stated that *"[…]the Court rules in a judgment that a legislative or administrative measure adopted by the authorities of a Member State is contrary to Community law, that Member State is obliged, by virtue of Article 86 of the ECSC Treaty, to rescind the measure in question and to make reparation for any unlawful consequences which may have ensued. This obligation is evident from the Treaty and from the Protocol which have the force of law in the Member States following their ratification and which take precedence over national law."* at p. 569.
[35] C-6/90 *Francovich and Bonifaci v. Italy* REG 1991 p. I-5357, para. 35.
[36] C-6/90 *Francovich and Bonifaci v. Italy* REG 1991 p. I-5357, para. 37.
[37] Jones (1999), p. 71.
[38] In Article 4.3 of the Treaty on European Union (TEU) the principle of sincere cooperation is declared, holding that the Member States shall take any appropriate measure to *"ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union"*.

for the Member States to provide fully effective judicial remedies and to provide protection of the rights granted by EU law to individuals, including damages.[39]

In subsequent joined cases *Brasserie du Pêcheur* and *Factortame III*[40] the CJEU stated that individuals right to rely on the direct effect of provisions of the Treaty before the national courts *"is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty"*.[41] According to the Court, the purpose of this principle is to ensure the EU laws supremacy of national provisions. The judgment clarifies that the rules that establish liability are the rules that creates rights of individuals, i.e. the direct effect.[42] Furthermore, the Court held that *"the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law"*.[43] Regarding the calculation of damages, the Court held that the domestic law should determine the criteria for the damages, however the national regulations governing the damages must not render it practically impossible or excessively difficult to obtain reparation.[44]

2.6 Damages for Breach of EU Competition Law

In 1973, the CJEU in the *BRT v. SABAM* case[45] confirmed the direct effect of Articles 101 and 102. The Court held that the Articles create direct rights in respect of the individuals concerned and that the national courts must safeguard these rights. Further, the case clarified that a regulation cannot deprive individuals of directly effective rights held under the Treaty.[46] In the subsequent *Delimitis* case[47], the CJEU ruled that the competence to apply the Articles 101 and 102 is shared between the Commission and the national courts. Hence, the national courts are obliged to protect the individual rights guaranteed by the Treaty when applying the EU competition law.[48]

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[39] Jones (1999), pp. 72-73.
[40] C-46/93 *Brasserie du pêcheur v. Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others* (joined cases C-46/93 and C-48/93) REG 1996 p. I-1029. Hereinafter referred to as *Factorframe III.*
[41] The *Factorframe III* case, para. 20.
[42] See the *Factorframe III* case, paras. 22-23.
[43] See the *Factorframe III* case, para. 20.
[44] The principle of effectiveness.
[45] C-127/73 *BRT v. SABAM* REG 1974 p. 51.
[46] Jones (1999), p. 49.
[47] C-234/89 *Delimitis v. Henninger Bräu* REG 1991 p. I-935.
[48] C-234/89 *Delimitis v. Henninger Bräu* REG 1991 p. I-935, para. 45. In the case the Court refers to case C-127/73 *BRT v. SABAM* REG 1974 p. 51, in which the CJEU held that Articles 101 and 102 had direct effect and that these Articles create direct rights in respect of the individuals concerned which the national courts must safeguard, at para. 16. Following the judgment in *Delimitis* the Commission issued the so called *"Co-operation Notice"* in order to encourage a private enforcement of Articles 101 and 102 in the national courts of the Member States. See the *Notice on Co-operation between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty* OJ C/39/6 [1993].

Concerning the matter of damages based on breach of EU competition law, the judgment in *Courage* case[49] is regarded as the landmark case.[50] In the case, the CJEU recognised a right to damages in case of infringement of competition law. Further, the Court for the first time directly commented on the civil consequences, in addition to invalidity, resulting from a violation of the EU competition rules and expanded the principle established in the *Francovich* case to include individual infringements of the competition rules. According to the Court, effective protection of the rights granted by the Treaty requires that individuals who have suffered a loss due to an infringement of Articles 101 or 102 have a right to claim damages. The Court emphasised the direct effect of Article 101 in relations between individuals and that the national courts must safeguard the rights created by the Article. Further, the CJEU held that actions for damages in the national courts could be a significant contribution to the maintenance of effective competition within the EU. The Court clarified that domestic law does not prevent individuals from claiming their rights under the Treaty and the national courts must ensure that the EU law is fully effective. It was considered that this principle could be eroded if not every person who suffered a loss due to an infringement of competition law could obtain compensation.[51]

The principle established in the *Courage* case was clarified in subsequent *Manfredi* case in 2006.[52] The *Manfredi* case was a preliminary reference case from Italy, where the Italian Competition Authority (upheld on appeal by the Council of State) had found that a number of insurance companies had exchanged information in violation with the Italian competition law. Customers of the insurance company brought actions before the Italian court to obtain damages based on both Italian and EU competition law. The national court submitted questions to the CJEU under Article 267 TFEU regarding the interpretation of Article 101. The CJEU repeated its statement in the *Courage* case and clarified that the full effectiveness of Article 101 requires that *"any individual can claim compensation for the harm suffered where there is a causal relationship between the harm and an agreement or practice prohibited by Article 101"*.[53]

In the *Manfredi* case the Court made a distinction between the *existence* and the *exercise* of the right to damages. According to the Court, the existence of a right to damages is a matter of EU law, however the exercise of such right is a matter for the domestic law of the Member States, subject to the principles of equivalence and effectiveness.[54] Regarding the calculation of

[49] C-453/99 *Courage and Crehan* REG 2001 p. I-6297.
[50] Whish and Bailey (2012), p. 298.
[51] In the case the CJEU emphasised the primacy of Article 101 in the EU law and held that *"Article 85 of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market"* at para. 20. See also case C-126/97 *Eco Swiss* REG 1999 p. I-3055, para. 36.
[52] C-295/04 *Manfredi* REG 2006 p. I-6619.
[53] C-295/04 *Manfredi* REG 2006 p. I-6619, para. 61.
[54] The *Manfredi* case, paras. 61 and 64. See also Whish and Bailey (2012), pp. 299-300.

the damages granted in competition matters, the Court made the significant statement that the damages awarded shall cover both compensation for the actual loss and the loss of profit plus interest.[55]

Since the *Manfredi* case it is clear that *any individual* has a right to damages as long as there is *harm,* a *breach of competition law* and a *causal relationship* between the harm suffered and the infringement of competition law.[56] In the subsequent *Otis* case[57], the CJEU confirmed the requirement of a causal relationship in order to obtain compensation.[58] The questions of quantification of the loss and the requirement of causal relationship were however for the national court to assess.[59]

Since 2001 and the ruling in the *Courage* case it is clear that, as a matter of EU law, individuals have a right to obtain compensation based on an infringement of EU competition law. The modernisation in 2004 opened the door for an increased private enforcement of competition law, however some obstacles in the national law of the Member States has remained as regards damages actions based on EU competition law. The ineffectiveness of private antitrust damages actions is largely due to various national legal and procedural hurdles of the Member States.[60] One of the most prominent problems is that Member States retain the procedural rules of their domestic judicial system or that their substantive rules for damage compensation inhibit successful damages claims.[61] In order to identify and analyse the obstacles in obtaining successful damages actions and a more active private antitrust enforcement the Ashurst Report[62] was carried out for the Commission in August 2004.[63] The results of the report showed that *"the picture that emerges from the present study on damages actions for breach of competition law in the enlarged EU is one of astonishing diversity and total underdevelopment"*.[64] This motivated the Commission to publish a Green Paper[65] for public consultation in 2005.[66]

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[55] See the *Manfredi* case, paras. 94-100.
[56] See Komninos (2011), pp. 448-449.
[57] C-199/11 *Otis and Others* 6 November 2012.
[58] See the *Otis* case, para. 43.
[59] See the *Otis* case, para. 65.
[60] Becker, Bessot and De Smijter (all at DG Competition in Brussels) (2008), p. 2.
[61] Whish and Bailey (2012), pp. 299-300. See also the former Advocate General Van Gerven who believes that the underdevelopment of private actions in Europe depends on several obstacles, such as the absence of a statutory basis for bringing suits based on EU competition law, institutional problems, limitations on the aggregation of damages claims, difficulties in proving the existence of a causal relationship and the extent of harm, uncertainty in the existence and the extent of the "passing-on-defence" and uncertainty in the calculation of damages. Another obstacle is the problem regarding full recovery of costs and fees. See Van Gerven (2005), p. 1.
[62] The study was performed by the Ashurst lawfirm.
[63] Whish and Bailey (2012), p. 296.
[64] The Ashurts Report, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, p. 1.
[65] Commission Green Paper Damages actions for breach of the EC antitrust rules COM(2005) 672 final, 19.12.2005.

2.7 The Green Paper

As described above, the Commission had been in favour of an enhanced private antitrust enforcement within the EU for several years. Since having received the full support of the CJEU in the *Courage* case, the Commission quickly initiated a Green Paper in order to facilitate actions for damages for breach of EU competition law.[67] The purpose of the Green Paper was to identify the main obstacles in the promotion of actions for damages for competition infringements and to present a series of proposals for further discussion. The Paper aimed to encourage and stimulate a debate and to generate feedback from the stakeholders on the proposals.[68] The Paper emphasised that an increased private antitrust enforcement would have several advantages for private parties.[69] According to the Commission, the most fundamental advantage was the right for victims of violations of the competition law to recover. Another advantage was the facilitation of damages claims that would make it easier for consumers and firms to recover their losses due to an infringement of competition law. It was also considered that an enhanced private enforcement would deter from anti-competitive behaviour and bring the competition law closer to the citizens of the Member States. The Paper stressed that such enforcement regime would strengthen the enforcement of competition law in general.[70]

The main obstacles identified by the Commission in the promotion of damages actions based on the EU competition law were: the access to evidence, the requirement in many Member States of fault to be proven, the scope of the damages claim and the calculation of the damages, the passing-on-defence and the indirect purchaser standing, the defending of consumer interests, the costs of actions, the coordination between public and private enforcement and the issues of jurisdiction and applicable law. Regarding the scope of the damages, the Commission considered introducing double damages into EU competition law, however this was not implemented in the Proposed Directive.[71] The Green Paper[72] listed different options in order to encourage private damages actions and to establish a more litigation-based system of private antitrust enforcement in Europe. The Paper had several proposals on how to handle the passing-on-defence in EU law, which will be further discussed in section 5.2.

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[66] The Green Paper (2005). See also the Commission Staff Working Paper annex to the Green Paper. The Staff Working Paper discusses the issues and proposals identified in the Green Paper in more detail.
[67] See Komninos (2011), p. 450.
[68] *Ibid.,* p. 451. See also Press release IP/05/1634, 20.12.2005.
[69] *Ibid.,* p. 451.
[70] The Green Paper (2005), p. 3 and the Commission Staff Working Paper annex to the Green Paper (2005), pp. 6-7. See also Press release MEMO/05/489, 20.12.2005.
[71] See the Green Paper (2005). The discussion of double damages at p. 7.
[72] The Green Paper (2005) together with the Commission Staff Working Paper annex to the Green Paper (2005).

2.8 The White Paper

In April 2008 the Commission published a White Paper[73] on damages actions.[74] In the Paper, the Commission emphasises that the right to compensation is guaranteed by the EU law as stressed by the CJEU in the *Courage* and *Manfredi* cases. The Paper presents a number of proposals in order to ensure that all victims of infringement of competition law have access to effective redress mechanisms.[75] The primary objective of the Paper is to guarantee that all victims of competition law violations are fully compensated for the harm that they have suffered. Thereof, full compensation is said to be the foremost guiding principle that will permeate the European antitrust litigation system.[76]

The Paper presents a number of measures to improve the ability to bring a successful claim for damages in competition cases. In brief, the Paper proposes that: collective redress should be a possible measure in competition cases, the national courts should be able to order parties to disclose relevant evidence, decisions of NCA shall have the status of binding proof in civil proceedings and strict liability for damages in competition cases should apply (no fault requirement).[77] Further, full compensation should be available for victims of competition infringement covering not just actual losses but also lost profit and interest. The Paper suggests that both the passing-on-defence and indirect purchaser standing should be recognised under EU law.[78] According to the Paper, there are several legal and procedural obstacles in the Member States' legal systems concerning the rules governing actions for damages based on competition law before the national courts.[79] The Commission therefore considers that there is a need for EU legislation in order to obtain effective private actions for damages.[80]

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[73] A White Paper is a paper that contains proposals for EU action in a specific area. It sometimes follows a "Green Paper" published to initiate a process of consultation at European level. The Green Papers thereby sets out a number of ideas and proposal for public discussion and debate while the White Papers contain official proposals in a specific area of EU policy and law. A White Paper often precedes EU legislation.

[74] Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules COM(2008) 165 final. See also the Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules SEC(2008) 404, 2.4.2008 which in more detail explains the proposals and the underlying considerations in the White Paper, and the Impact Assessment Study Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios, Final Report for the European Commission, 30.5.2005 which analyses the costs and benefits of various options.

[75] The White Paper on Damages Actions (2008), pp. 2-10.

[76] *Ibid.,* p. 3.

[77] Punitive damages are not implemented into EU law, however the Commission stresses in its Staff Working Paper that punitive damages are not contrary to the European order and Member States can award such damages under national law for violation of national competition law, para. 190 in the Commission Staff Working Paper (2008).

[78] The White Paper on Damages Actions (2008), pp. 2 and 7.

[79] *Ibid.,* p. 2.

[80] The Commission Staff Working Paper (2008), para. 321.

The Paper emphasises that the legal framework for damages actions should be based on a "genuinely European approach".[81] The concern among many stakeholders and practitioners that the EU competition law should follow the US antitrust law system with excessive litigations and tremble damages[82] is thereby rejected by the Commission. Instead, the White Paper is said to include measures and proposals that are rooted in the European legal culture and traditions. Moreover, the Commission stresses the importance in maintaining a strong public enforcement of the European competition rules. The measures proposed in the White Paper are therefore to be seen as complement, and not replacement, of the public enforcement.[83]

The White Paper has been subject for an intense debate and several Member States and stakeholders have submitted comments in the public consultation.[84] It has been held that the proposals may lead to a US style system that undermines the "European legal culture and traditions" that the Commission is trying to preserve.[85] Several stakeholders question the Commission's authority to legislate in the area and some have explicitly rejected that there is a need for EU legislation.[86] However, in June 2013 the Commission proposed legislation in order to facilitate damage claims by victims of antitrust violations. According to the Commission a directive is the most appropriate instrument and based on the White Paper, the Commission has presented a proposal for directive to the European Parliament and the Council.[87]

The White Paper and its proposals on the passing-on-defence and indirect purchaser standing will be further discussed in section 5.3 of this thesis.

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[81] The White Paper on Damages Actions (2008), p. 3.
[82] In the US, damage awards based on infringement of US federal antitrust law are automatically trebled, see section 4.1 below.
[83] The White Paper on Damages Actions (2008), p. 3. See also Komninos (2008), p. 86 and Becker, Bessot and De Smijter (all at DG Competition in Brussels) (2008).
[84] The Comments on the White Paper on Damages Actions for breach of the EC antitrust rules are available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html, 29.10.2013. See also the Commission Staff Working Document, Impact Assessment Report (2013), p. 6.
[85] See the joint comments of the American Bar Association section of Antitrust law, section of International law and section of Business law, p. 3.
[86] See for example the comments of Freshfields Bruckhaus Deringer LLP and the comments of The Central Chamber of Commerce of Finland and the comments of the Business Europe (the Confederation of European Business). See also the Commission Staff Working Document, Impact Assessment Report (2013), pp. 7-8.
[87] See the Press release MEMO/13/531, 11.6.2013.

3 The Passing-on-defence

3.1 A Brief Introduction

Suppose that a number of book producers have been involved in a cartel and entered into a price-fixing agreement for several years. The price paid by the immediate customers of the producers, i.e. the suppliers (the direct purchasers)[88], will be higher (let us say five per cent) than it would have been in absence of the price-fixing agreement. However, the supplier will adjust the price of the goods to his or her costs in order to obtain a profit margin and thus the five per cent price increase may be "passed on" to the supplier's own customers (the indirect purchasers)[89].[90] Thereby, any overcharge (the five per cent) due to the illegal cartel will be passed on further down the distribution chain and, eventually, end up at the final consumer.[91] Hence, the overcharge from the producer has been compensated for when the supplier sells the books to his own customers. This situation give rise to two questions: firstly, can the infringer of competition law (the producer in this example) escape liability in a damages action of the supplier to the extent that the overcharge has been passed on to the suppliers own customer? In other words, can the producer invoke as a defence that the loss of the supplier has been passed on and thereby that the supplier has not suffered any loss (i.e. harm)? If the extra costs are passed on, the direct purchaser has already been compensated and a reward of damages would create a double compensation and an unjust enrichment.[92] Secondly, there is the question of the indirect purchasers' standing; if the producer can claim as a defence that the extra costs have passed on, can the indirect purchasers bring an action for damages against the price-fixers (the producer in this example), for the costs that has been passed on to them?[93]

In short, the passing-on-defence gives rise to two different issues: the liability of the infringer and the position of the indirect purchasers. The first issue described above, i.e. the infringers possibility to escape or mitigate liability by claiming that the overcharge has passed on to the downstream buyers, is called passing-on-defence.[94] The passing-on-defence can be invoked by the defendant (the infringer) not only against the direct purchasers but also against the indirect purchasers who is not final consumers. This is due to the fact that also the indirect purchasers can have customers on whom the overcharge can be passed on upon. Hence, the issue

[88] Often referred to as "the direct purchaser" or "the direct customer".
[89] The customers of the supplier may be other undertakings or final consumers and are often referred to as "the indirect purchaser" or "the indirect customer".
[90] Strand (2010), p. 3.
[91] Whish and Bailey (2012), p. 300.
[92] *Ibid*., p. 300. See also Strand (2010), p. 3 and Petrucci (2008), p. 33.
[93] See Whish and Bailey (2012), p. 300 and Strand (2010), p. 3.
[94] Petrucci (2008), p. 33.

of passing-on concerns all claimants who are not final consumers.[95] The second issue above refers to the standing of the indirect purchasers and their right to claim damages when the overcharge has been passed on to them.

The issues of passing-on-defence and indirect purchaser standing include three main elements:

(i) The *fairness* interest which requires that every victim of an illegal behaviour who has suffered a loss should be entitled to claim damages in order to recover,

(ii) The interest of *effectiveness* according to which the private enforcement aims at deterrence of anti-competitive behaviour, and,

(iii) The *efficiency* interest by which the questions of judicial economy and potential burdens on the legal system must be taken into consideration.

By nature, these interests may be incompatible and in conflict with each other. For example, the interest of fairness requires that all individuals who have suffered harm should be able to recover, however this may unavoidable conflict with the interests of effectiveness and efficiency.[96] It has been argued that there is a fundamental conflict between the interests of fairness and deterrence and that competition policy should exclusively aim at accomplish the second one.[97] Therefore, in order to achieve the objective of deterrence the direct purchasers should have monopoly in standing, since they are closer to the infringement of competition law and have better access to information and evidence, and consequently enjoys better prospect in an action for damages.[98] There are however inconsistency among the doctrine, and some argue that both the interest of fairness and the interest of deterrence require standing for the indirect purchasers.[99]

3.2 The Law of Passing-on-defence in Three Member States

To date, EU does not provide legislation concerning the matter of passing-on-defence and indirect purchasers standing. In several Member States it has been uncertain whether or not the passing-on-defence is recognised as a legal measure. Below, the passing-on-defence in the UK, Germany and France is briefly examined with the main features of the law taken into consideration.

[95] Strand (2010), p. 14.
[96] Cengiz (2007), p. 8.
[97] Landes and Posner (University of Chicago Law Review 1979), p. 604.
[98] *Ibid.,* p. 609.
[99] Harris and Sullivan (1980), pp. 273 and 354.

3.2.1 The United Kingdom

Reforms in order to obtain a stronger system for private actions in competition law where proposed in the UK in 2012.[100] In the consultation regarding the reform, the government confirmed that the existing regime of private actions is not working and especially that small companies and businesses as well as consumers are unable to reach justice through private actions.[101] Regarding the passing-on-defence, the government held that the defence will not be recognised in legislation.[102] Since legislation on the matter was rejected, it is unclear whether or not the defence is recognised within the UK.[103] Many of the responders of the consultation held that the defence is already available under English law and that legislation regarding the matter is likely to advantage either direct purchasers or indirect purchasers at the expense of the other.[104] This is however a controversial issue in the UK and several commentators are of the opposite opinion and argues that there is no passing-on-defence available under English law, though the law already deals with the issue by other means.[105] Furthermore, some responders in the consultation held that the passing-on-defence is nothing else than a reflection of the principle that any person claiming damages must prove that he has suffered a loss.[106] Summarised, no reason for legislation regarding the passing-on-defence was found by the UK government as the matter will be better addressed through evolving in case law. Consequently, the question of passing-on-defence in English law is not definitely resolved.[107]

3.2.2 Germany

In Germany, the majority of the doctrine consider the passing-on-defence available under German law, however it is difficult to successfully plead in practice. The 7th amendment of the German Act against Restraints of

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[100] In April 2012 the ministerial department ”The Department for Business, Innovation & Skills” (BIS) in the UK presented a consultation on options for reforms on private actions in competition law. The BIS-consultation *Private Actions in Competition Law: a consultation on options for reform* April 2012.
[101] The Department for Business, Innovation & Skills *Private Actions in Competition Law: A consultation on options for reform – government response* January 2013.
[102] The Department for Business, Innovation & Skills *Private Actions in Competition Law: A consultation on options for reform – government response* January 2013, pp. 23-25.
[103] Which and Bailey (2012), pp. 310-311.
[104] The Department for Business, Innovation & Skills *Private Actions in Competition Law: A consultation on options for reform – government response* January 2013, p. 24.
[105] Sheehan, Duncan (2012). According to Sheehan, the so called passing-on-defence is not a defence, it is a question of quantification of loss and loss allocation between claimants. See also Whelan, Peter (2012). Whelan is of the opinion that the passing-on-defence should be recognised by legislation in English law. In an article from 2005 Greg Olsen (partner at Jones Day in London) held that the English courts are likely to recognise the passing-on-defence since an exclusion of the defence would conflict with established compensatory principles on which damages are usually awarded in the UK, see Olsen (2005).
[106] The Department for Business, Innovation & Skills *Private Actions in Competition Law: A consultation on options for reform – government response* January 2013, p. 24.
[107] The Department for Business, Innovation & Skills *Private Actions in Competition Law: A consultation on options for reform – government response* January 2013, p. 25.

Competition[108] provides:

"If a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service"[109].

Most legal commentators agree that the amendment limits the scope of the passing-on-defence, but does not exclude it. Hence, the defence is restricted under German law, however it is unclear to what extent and in which way.[110] The scope of the passing-on-defence and indirect purchaser standing was however clarified in 2011 when the German Supreme Court[111] found that indirect purchasers as well as direct purchasers can claim damages against cartel members. Further, the German Supreme Court found that cartel members are entitled to invoke the passing-on-defence by claiming that the defendant has passed on the overcharge to its own customers.[112] The judgment entails that the passing-on-defence is available under German law, however the defendant invoking the defence has the burden of proving that the costs and overcharge has been passed on down the distribution chain.[113]

In order to avoid the risk of awarding multiple damages for the same damage, direct and indirect purchasers are treated as joint creditors in the case law of the Higher Regional Court of Berlin. The direct purchaser is responsible of allocating damages to the various levels of the distribution chain concerned and distributing the awarded compensation accordingly.[114] This approach by the Court of Berlin has been criticised as such assumes that the customer side has common interests, which in the critics opinion does not exists. It has been held that the risk of multiple liability is limited since the indirect purchasers often are far from the infringer in the distribution chain. Accordingly, it is difficult for the indirect purchasers to show the causal relationship required and to quantify the alleged losses suffered.[115] In order to solve such procedural problems, it is possible for the defendant in a German competition case to emit a so-called third-party notice (TPN). This implies that the defendant (the infringer) will inform uninvolved parties of the proceedings, if the claimant has not brought a joint action against the infringer of competition law. The Federal Supreme Court in Germany has confirmed that a TPN can be issued in a cartel case in order for the infringer to avoid being held liable twice for the same damage by direct and indirect purchasers.[116]

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[108] The "Gesetz gegen Wettbewerbsbeschränkungen" (GWB) in German.
[109] Section 33(3) in the GWB.
[110] Blanke and Nazzini (2012), pp. 292-293 (chapter Germany, pp. 279-366). See also Thomas (2005).
[111] The Bundesgerichtshof in German.
[112] See the judgment of the German Supreme Court of 28 June 2011, KZR 75/10. The case is often referred to as the *Carbonless Paper Cartel* case.
[113] See Komninos (2012).
[114] Blanke and Nazzini (2012), p. 286.
[115] Blanke and Nazzini (2012), pp. 286-287.
[116] *Ibid.,* p. 306.

3.2.3 France

The passing-on-defence is available in the French competition law. The France Commercial Court of Nanterre accepted the defence in the judgement of the *La Roche* case[117] in 2006. The Supreme Court in France confirmed the approach against the passing-on-defence in a more recent decision from 2010.[118] In contrast to German law, the burden of proof in French law is placed upon the claimant (the direct purchaser). The placement of the burden of proof entails that the direct purchaser must show both that he or she has suffered a loss (since the overcharge was not passed on) *and* that he or she could not mitigate the loss suffered by passing-on the overcharge further down the distribution chain.[119] The judgment has been criticised since the placement of the burden of proof on the claimant imposes a significant hurdle for the claimant in question that may violate the principle of effectiveness in EU law.[120] Furthermore, the French approach is in contrast to the Commission's Proposal for Directive, wherein the burden of proof is placed on the defendant (the Proposal for Directive will be further discussed in section 5.4).[121]

[117] See the France Commercial Court of Nanterre 11 May 2006 No RG 2004F02643 *Arkopharma v. Roche et Hoffman (La Roche)*.
[118] Court of Cassation 15 June 2010 No 09-15.816 *Doux Aliments v. Ajinomoto Eurolysine.*
[119] Vande Walle (2013), pp. 175-176. See also the *La Roche* case.
[120] See Vande Walle (2013), p. 176 and Komninos (2012).
[121] The Commission Staff Working Document, Impact Assessment Report (2013), p. 213. See also the Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, 11.6.2013. According to Article 12.1 in the Proposed Directive the *"burden of proving that the overcharge was passed on shall rest with the defendant"*.

4 The Passing-on-defence under US Law

The issue of passing-on-defence was introduced into US law several decades ago and is nowadays a well established principle in US federal antitrust law. The defence was applied for the first time in 1968 and ten years later the indirect purchaser standing was introduced. Both the passing-on-defence and the standing of indirect purchasers have caused a great debate in the US and the law has been queried insofar that several states have adopted a different approach regarding these issues.

4.1 A Brief Introduction to US Antitrust Law

The US is a federal state and the Constitution of the United States established the federal system (the federalism). Under federalism, the system of government is divided between the federal government and the state and local governments. US states are sovereign in all areas that have not been assigned as a matter of federal law in the Constitution. In a landmark court decision from 1824 the Supreme Court of the United States ruled that the power to "regulate commerce" was granted the Congress and that the federal law is given precedence over state laws.[122] The antitrust law is subject to federal government in the US, however the states have subsidiary authority in the area.[123]

When the European Community adopted the Treaty of Rome in 1957 this was seven decades after the birth of the US antitrust law. The Sherman Act was passed by the US Congress in 1890 as the first federal antitrust law. Today there are three major federal antitrust laws: the Sherman Act[124], the Clayton Act[125] and the Federal Trade Commission Act[126].

Although antitrust law is a matter for the federal government in the US, the states may, based on their subsidiary authority, grant more far-reaching rights than the federal law as long as the law of the states does not infringe the federal rights. Consequently, the antitrust state law varies from one state

[122] The Supreme Court in *Gibbons v. Ogden* 22 U.S. 1 1894.
[123] Bogdan (2003), p. 129.
[124] The Act prohibits anti-competitive businesses such as anti-competitive agreements and other collusive practices. Further, it prohibits the creation of a monopoly under certain circumstances and restricts the abuse of a monopoly power. The Act includes criminal penalties for some breach of competition law.
[125] The Act is a merger regulation and prohibits merger or acquisitions which are likely to restrict competition.
[126] The Act prohibits unfair methods of competition in interstate commerce.

to another.[127] However, in accordance with the preemption doctrine, federal law preempts state law if the state law conflicts with the federal law.[128]

The US antitrust law has had great influence on the competition thinking in Europe, however some features of US antitrust law differ from its European counterpart.[129] One major difference is that the US antitrust law is enforced by a significant amount of private litigation and the antitrust system in the US has therefore mainly developed on a case-by-case basis by the courts.[130] Also public parties enforce the US antitrust law however private litigants suing for damages for violation of the antitrust law is the driving force.[131] Under the public enforcement of the Sherman Act, individuals or businesses can be prosecuted by the Department of Justice. The Sherman Act imposes criminal penalties of up to $1,000,000 for individuals along with maximum 10 years in prison, and up to $100,000,000 for a corporation.[132] As in regards to the civil actions, successful claimants in an action for damages based on US antitrust law are automatically rewarded threefold the amount of their injury in compensation ("treble damages").[133] This rule serves to deter from anti-competitive conduct and to ensure that victims obtain full compensation.[134]

4.2 The Passing-on-defence under US Law

The passing-on-defence is not accepted under US federal antitrust law and neither is the standing of indirect purchasers. The rejecting of indirect purchaser standing is a direct consequent of the denying of the passing-on-defence since the indirect purchasers base their claim on the fact that an overcharge was passed on to them.[135] Hence, allowing indirect purchaser standing would risk multiple liability and multiple compensation for the same act and damage, while it would not be possible for the defendant to rely on the fact that the damage may have been passed on.[136] The US

[127] See the United States Department of Justice website http://www.justice.gov/atr/about/antitrust-laws.html, available at 6.11.2013.
[128] Article VI of the US Constitution dictates that the federal law is the "suprems law of the land".
[129] Jones (1999), pp. 23-24 and Jones and Sufrin (2011), p. 19.
[130] Jones and Suffrin (2011), p. 19.
[131] See the website of the Washington State Office of the Attorney General *Guide to Antitrust Law,* available at http://www.atg.wa.gov/antitrustguide.aspx#.UqCCsCilDZ0, 5.12.2013.
[132] See the website of the US Federal Trade Commission, available at http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws, 9.12.2013.
[133] The Antitrust Modernization Commission, Report and Recommendations, p. 265.
[134] The Antitrust Modernization Commission, Report and Recommendations, p. 246. In Europe, only single damages are awarded however the European Commission in the Green Paper considered introducing double damages for horizontal cartels, see section 2.7 above.
[135] See Komninos (2011), p. 456.
[136] *Ibid*.

approach has evolved through case law and the federal US antitrust law primarily consists of three judgments regarding the subject.[137]

4.2.1 The *Hanover Shoe* case

In the *Hanover Shoe* case[138], the Supreme Court of United States embodied the principle that the passing-on-defence is generally unavailable to defendants in private damages actions brought under federal US antitrust law. In the case, Hanover Shoe sued United Shoe for tremble damages on the ground that United Shoes tried to monopolize the shoe machinery industry in violation with the Sherman Act.

In the judgement, the Supreme Court held that the passing-on-defence cannot generally be invoked by price-fixers when sued by a direct purchaser. According to the Court, a defendant can only establish a passing-on-defence if three circumstances can be proved. Firstly, it must be proved that the buyer raised its prices as a response to the overcharge, second, that the buyer thereafter did not lose sales of profit margin and, thirdly, that the buyer would not have raised its prices absent the overcharge. The Court further held that the burden to prove these three circumstances would ordinarily be insurmountable without a so-called "cost-plus"[139] contract or any other circumstances that would facilitate proving that the buyer was not injured.[140]

According to the Supreme Court, a direct purchaser does always suffer a loss due to an illegal overcharge. As a response to the overcharge, the direct purchaser may (1) absorb the cost of the overcharge, (2) raise the prices as a consequence of the overcharge and thereby lose sales volume, or (3) suffer a loss of profit margin for inelastic goods.[141] Furthermore, the Court was not impressed with the United Shoe's argument that the "sound law of economics"[142] required recognition of the passing-on-defence and the Court emphasised that the pricing policy of companies is affected by several factors. Regarding the indirect purchasers the Court held that if the passing-on-defence is approved, both direct and indirect purchasers may have to face the argument that they have passed on the overcharge to their customers, ultimately to the final consumer. These final consumers usually have a tiny stake in a lawsuit and little interest in attempting a class action. Consequently, the treble damages actions were considered to be substantially reduced in effectiveness if allowing a passing-on-defence and the infringers of the antitrust law would escape damages claims since no one would bring a suit against them.[143]

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[137] The *Hanover Shoe* case, the *Illinois Brick* case and the *ARC America* case. All cases are further discussed below.
[138] Case *Hanover Shoe v. United Shoe Machinery* 392 U.S. 481 (1968).
[139] A "cost-plus" contract is a pre-existing contract between the seller and the purchaser with a fixed markup and fixed quantity to be delivered.
[140] *Hanover Shoe v. United Shoe Machinery*, pp. 489-494.
[141] *Ibid.,* pp. 493 and 495.
[142] *Ibid.,* pp. 492-493.
[143] *Ibid.,* p. 494.

4.2.2 The *Illinois Brick* case

In subsequent case *Illinois Brick Co v. Illinois*[144] the Supreme Court ruled that the indirect purchaser standing is denied under US federal antitrust law. Indirect purchasers can therefore not, under federal antitrust law, claim damages on the basis that an overcharge has been passed on to them. The Court justified the denial of indirect purchaser standing by three main arguments. First, the Court held that allowing an offensive use[145] of passing-on-defence but not a defensive use[146] would create a risk of multiple damages. Secondly, one problem in allowing the defence is the difficulty to prove whether and how much an overcharged input affects the price of a product further down the distribution chain. This may be even more problematic if the overcharged input is incorporated in another product. The Court stressed that (as held in the *Hanover Shoe* case) owing the difficulties in evidence, the effective enforcement of antitrust laws would be put at risk if the defence were allowed.[147] Thirdly, the Court considered that the direct purchasers are better enforcers than the indirect ones. According to the Court, *"the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers, rather than by allowing every plaintiff potentially affected by the overcharge to sue only for the amount it could show was absorbed by it"*.[148]

According to the Supreme Court, there were only two alternatives on how to address the issue in the case: overrule the *Hanover Shoe* case (or at least limit its scope), or preclude indirect purchases to recover on the pass on theory. The Court chose the latter one and since, indirect purchaser standing is denied under US federal antitrust law.[149]

4.2.3 The Arguments of the *Illinois Brick* case

One of the arguments in the *Illinois Brick* case is that the direct purchasers are better enforces of antitrust law than the indirect purchasers.[150] It has been argued that the enforcement of direct purchasers better serves the two objectives of antitrust enforcement: compensation of victims of antitrust infringements and deterring of future infringements. These objectives may conflict with each other, however the deterring objective is to prefer. Hence, especially from a deterrence viewpoint, it has been argued that only the direct purchasers should be entitled to sue for damages.[151] However, these

[144] *Illinois Brick Co v. Illinois* 431 U.S. 720 (1977).
[145] The standing of indirect purchasers is sometimes referred to as the "offensive passing-on".
[146] The defendants invoking of the passing-on-defence is sometimes referred to as the "defensive passing-on".
[147] *Illinois Brick Co v. Illinois*, p. 741.
[148] *Ibid.,* p. 735.
[149] *Ibid.,* p. 736.
[150] *Ibid.,* p. 735.
[151] Landes and Posner (University of Chicago Law Review 1979), p. 605 and Petrucci (2008), p. 36. See also Landes and Posner (University of Pennsylvania Law Review 1979).

arguments have been questioned by Professors Robert Harris[152] and Lawrence Sullivan[153] who are of the opposite opinion. According to the Professors, the Congress should overrule the *Illinois Brick* case since it disserves the antitrust enforcement.[154] Also the Court itself in the *Illinois Brick* case pointed that direct purchasers might refrain from bringing proceedings since such damages action may disrupt their business relationship with the suppliers.[155] Another issue, delivered by Herbert Hovenkamp[156], is that the direct purchasers do not in every case have an intention to sue for damages. If the overcharge is passed on, no damage has been suffered and hence there is no incentive to sue.[157] It has also been held that there is no empirical evidence supporting that direct purchasers are more likely to sue than the indirect ones.[158] Altogether, it can be concluded that the argument of the effectiveness of direct purchasers' enforcement of the antitrust laws is a controversial one.[159] In recent years it has been held that even though it is likely that litigation by direct purchasers provide more effective deterrence than litigation by indirect purchasers, the latter may supplement that deterrence.[160]

Another argument supporting that direct purchasers are the most effective ones is that the enforcement costs and information costs of identifying and suing the infringer are lower for the direct purchasers than the indirect. This argument in the *Illinois Brick* case refers to the difficulties in proving the effects and dynamics of the overcharge passed on. It has been argued that it is difficult and costly to determine the amount of the damage that has been passed on. Professors William M. Landes[161] and Richard A. Posner[162] defends the denial of indirect purchaser standing and argue that indirect purchasers are indirectly compensated since the direct purchasers will charge their customers less if the direct purchasers have a right of action for damages. Consequently, they consider that a standing for indirect purchasers is unnecessary.[163]

A different opinion is held by Harris and Sullivan, who argues that it is not that difficult to determine the amount that has been passed on. They are of the opinion that elasticities of the supply are very high in the long run and therefore the whole of the overcharge will be passed on. Furthermore, as regards the determining of the overcharge effects, the reply has been that all

[152] Professor Emeritus at Haas School of Business, UC Berkeley.
[153] Former Professor Emeritus at Southwestern Law School in Los Angeles.
[154] Harris and Sullivan (1979).
[155] See the *Illinois Brick* case, p. 746. The Court was however of the opinion that the indirect purchases are the better enforces regardless of this argument. See also the more recent article by Cengiz (2007), p. 12.
[156] Professor of Law at University of Iowa.
[157] Hovenkamp (1990), p. 1727.
[158] Harris and Sullivan (1979).
[159] Petrucci (2008), p. 36.
[160] The Antitrust Modernization Commission, Report and Recommendations, p. 273.
[161] Professor Emeritus of Law and Economics at University of Chicago Law School.
[162] Senior Lecturer in Law at University of Chicago Law School.
[163] Landes and Posner (University of Pennsylvania Law Review 1979), pp. 1274-1276. See also Landes and Posner (University of Chicago Law Review 1979).

antitrust findings are based on estimates of market conduct and prices and such an analysis is always complicated. The analysis is therefore neither more, nor less complicated as regards the passing-on-defence.[164] This argument was raised already in the *Illinois Brick* case wherein the dissenters were not convinced that the complexity in assessing and allocating damages in a passing-on case was of greater complexity than other antitrust issues.[165] Furthermore, Harris and Sullivan do not agree that indirect purchasers are indirectly compensated since it is unlikely that a damage reward or an expected value of such award will have any effect of the price charged by the direct purchasers.[166]

Another argument justifying denial of indirect purchaser standing in the *Illinois Brick* case is the risk multiple liability.[167] Multiple liability refers to the situation where the infringer, for the same infringement and the same harm caused, is liable for damages to both the direct and the indirect purchaser. This situation arise since the defendant may not limit his or her liability by invoking that the direct purchaser mitigated the loss he or she suffered by passing-on the overcharge further down the distribution chain. In the dissenting opinion held by Brennan J. in the case, this risk may however be avoided by procedural mechanisms, such as *res judicata* and other means which allows a judge to allocate the damage between the different purchasers in the same proceedings.[168] The issue of multiple liability may also be interpreted in a different way. The second meaning of multiple liability and damages refers to the situation when the harm is two-fold: direct purchasers may have suffered a loss in sales because of the higher prices to their customers and the indirect purchasers suffer a loss because of this overcharge. In such a case, both parties have suffered harm and there is no reason to deny either of them full compensation. The real problem is rather to quantify the harm suffered.[169] The argument of multiple liability as regards the passing-on-defence will be further discussed below.

4.2.4 State Law on Passing-on-defence and Standing of Indirect Purchasers

The judgements of the *Hanover Shoe* case and the *Illinois Brick* case caused an intense debate regarding the antitrust policy within the US. As a response to the ruling in the *Illinois Brick* case*,* several states adopted so-called *Illinois Brick* repealer statues.[170] The inherent conflict between the statues and the federal law raised issues of federalism and the application of the preemption doctrine. When applying the preemption doctrine, there is a presumption against preemption in areas traditionally regulated under state

[164] Petrucci (2008), p. 39.
[165] See the *Illinois Brick* case, pp. 758-760 (Brennan, J., dissenting).
[166] Harris and Sullivan (1979), pp. 299-301.
[167] See the *Illinois Brick* case, p. 720.
[168] *Ibid.,* p. 762.
[169] Petrucci (2008), pp. 36-37.
[170] Cengiz (2007), p. 19.

law.[171] Eventually, the Supreme Court in the *ARC America* case[172] clarified that the repealer statues of the *Illinois Brick* case were valid, *inter alia,* since the existence of a strong tradition of antitrust regulation at state level. The ruling of the Supreme Court implies that states may enact legislation allowing the passing-on-defence and indirect purchaser standing although denied under federal law.[173] Consequently, several states in the US recognise indirect purchaser standing.

One state adopting a repealer statue as a response to the *Illinois Brick* case was California. The state law of California hence allows standing of indirect purchasers. In a recent case from California Supreme Court, retail pharmacies sued drug manufactures for damages on the ground that the manufactures had fixed their prices on drugs in the US and thereby violated the Cartwright Act[174]. As a defence, the manufactures claimed that the pharmacies had not suffered any loss since they had passed on any alleged overcharge to their customers. The question of the case was therefore if also the passing-on-defence was permitted under the Cartwright Act. According to the Court, most indicated that the Legislature would prefer the adoption of the principle set in the *Hanover Shoe* case. Moreover it was held that an acceptance of the passing-on-defence would impede the antitrust enforcement and reduce incentives to sue for damages. The Court therefore ruled that the passing-on-defence is not available under California law.[175]

Since California law allows damages actions by indirect purchasers, an application of the rule stated in the *Hanover Shoe* case may give rise to prospect of duplicative recovery. In order to avoid such multiple recoveries, the Court held that when multiple levels of purchasers sue for damages and the damages must be allocated among the various levels of injured purchasers, the defendant may assert a pass on defence as needed to avoid duplication in the recovery of damages.[176]

4.3 Aspects on the US Law

Clearly, the US law favours the direct purchasers and their right to compensation.[177] The solution chosen in US federal antitrust law to leave consumers and other indirect purchasers without a possibility to recover damages for any harm suffered has been heavily criticised in the US. It has been held that the decision in the *Illinois Brick* case ignores the will of the Congress and bills in order to overrule the decision by federal statue have

[171] *Hillsborough County v. Automated Medical Laboratories Inc* 471 U.S. 707 (1985) and Cengiz (2007), p. 20.
[172] *California v. ARC America Corp* 490 U.S. 93 (1989).
[173] See case *California v. ARC America Corp* 490 U.S. 93 (1989).
[174] The Cartwright Act is the primary California state antitrust law.
[175] *Clayworth v. Pfizer* No S166435 Cal. 4th, 2010 WL 2721021, 12 July 2010.
[176] *Ibid.,* p. 37. For a further discussion about the case, see Nguyen, Sasse, McNary and Solh (2010). See also Lawfirm Sidley: California Litigation Update (2010), Shohet (2010) and Foley and Taggart (2011). All available at websites (see the bibliography below).
[177] *Illinois Brick Co v. Illinois*, p. 735. See also Komninos (2011), p. 456.

been introduced. The bills and other incentives have however not been successful and the *Illinois Brick* case is still US law (however many states allows indirect purchaser standing).[178] The most fundamental critic against the case is that if fails to compensate the real victims of antitrust violation.[179]

However, as stated above, the US states may adopt state law recognising the passing-on-defence and indirect purchaser standing. Since the widespread criticism of the judgement in the *Illinois Brick* case several states have chosen a different approach regarding the standing of indirect purchasers.[180] Many states allow direct, as well as indirect, purchasers to sue for damages under the state antitrust law.[181] As a consequence, direct purchasers often sue for damages in federal court and indirect purchasers often sue for damages in state court in order to recover compensation from the same antitrust infringement.[182] The private enforcement in the US has been described as a chaotic environment as regards the coexisting of the passing-on-defence and the standing of indirect purchasers. Not only does the federal law and state law differ, the standards of the different states varies as well.[183]

According to Landes and Posner the finding of the Court in the *Illinois Brick* case was necessary if the ruling in the *Hanover Shoe* case should be respected. The Court could not allow standing of the indirect purchasers without also allowing the defendants use of the passing-on-defence unless they were willing to accept multiple liability for the defendant. There are, Landes and Posner argues, only two possibilities in avoiding multiple damages. One is to overrule the *Hanover Shoe* case and allow the indirect purchasers to sue. The other is to preclude the indirect purchasers from suing and retain the rule established in the *Hanover Shoe* case. The *Illinois Brick* case is therefore to be seen as the mirror image of the *Hanover Shoe* case.[184]

As a consequence of the judgements in the *Hanover Shoe* case and the *Illinois Brick* case the direct purchasers may sue for the entire overcharge even if the cost is passed on to their customers. The direct purchasers may therefore obtain damages despite that no harm has been suffered. This situation is often referred to as the unjust enrichment of the direct purchaser

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[178] The Antitrust Modernization Commission, Report and Recommendations, pp. 268-269.
[179] Cavanagh (2004), pp. 23-24 and Gavil (2005), p. 565.
[180] See *inter alia* Strand (2010), pp. 9-10 and Petrucci (2008), p. 35.
[181] An Antitrust Modernization Commission was created in the US in order to examine if there is a need to modernise the US antitrust laws. In April 2007 the Commission presented their report and recommendations. According to the report, more than thirty-five states permit both indirect and direct purchasers to sue for damages under state law, see p. 269. The report in available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf, 7.11.2013.
[182] The Antitrust Modernization Commission, Report and Recommendations, p. 266.
[183] Cengiz (2007), p. 21.
[184] Landes and Posner (University of Chicago Law Review 1979), p. 603.

and will be further discussed in section 5.3.2.1 of this thesis. Since the ruling in the *Illinois Shoe* case it is clear that indirect purchasers are denied standing under US federal law. The denial of indirect purchaser standing is a direct consequence of the denial of the passing-on-defence – if defendants cannot claim that an overcharge is passed on, indirect purchasers likewise cannot claim a pass on ground for injury resulting from their purchase of an overcharged product because of an antitrust violation. In the ruling of the Court in the *Illinois Shoe* case it was held that this eliminates the risk of multiple liability. The validity of this argument will be discussed in section 5.3.2.2 of this thesis.

4.4 The Antitrust Modernization Commission in the US

In 2007, an Antitrust Modernization Commission published their Report and Recommendations for the future US antitrust law. The Report observes that several states have adopted legislation or case-law allowing both direct and indirect purchasers to sue for damages. As a result, direct and indirect purchasers frequently bring multiple and duplicative lawsuits in both federal courts and state courts. According to the Report, the duplicate and parallel lawsuits from the multiple proceedings concerning the same antitrust violation are very wasteful and impose a burden on both the judicial system and the parties. The conflict between federal antitrust law and state law has also entailed inconsistent recoveries and the risk of duplicative liability has increased. Furthermore, the conflict and inconsistency in law makes it difficult to achieve settlements, both between the parties and global.[185]

In order to achieve the best solution for the antitrust law in the US, the Report emphasises that the litigation by direct and indirect purchasers must become more effective and fair. Furthermore, the litigation should not result in duplicative liability or denial of compensation to persons who suffered harm. According to the Report, the litigation would have better prospects attain these goals if all direct and indirect purchasers were allowed to recover their actual damages under federal law. In addition, all claim arising from the same alleged antitrust infringement should be heard in one federal court.[186] To achieve this, the Antitrust Commission recommends the Congress to overrule the *Hanover Shoe* case and the *Illinois Brick* case.[187]

[185] The Antitrust Modernization Commission, Report and Recommendations, pp. 266 and 271.
[186] *Ibid.,* p. 275.
[187] *Ibid*., pp. 267 and 275.

5 The EU Solution on the Passing-on-defence

5.1 A Brief Introduction

The EU law does not provide legislation regarding the matter of passing-on-defence and indirect purchaser standing. However, as discussed above, some Member States have dealt with the issue within their national law.[188] Hence, in absence of EU legislation it has been for the domestic law of each Member State to address the issue as long as the EU principles established by the CJEU is respected.[189] As described above, the Commission introduced a Green Paper in 2005 in order to facilitate private litigation in competition cases in Europe. In the Paper, different solutions regarding the application of the passing-on-defence were discussed. In 2006 the CJEU delivered its ruling in the *Manfredi* case holding that *any individual* has a right to compensation under EU law. For reasons further explained below, it has been held that the only possibility for the Commission after the *Manfredi* ruling was the solution now chosen in the Proposed Directive.

5.2 The Passing-on-defence in the Green Paper

The Green Paper presented four options on how to handle the passing-on-defence and indirect purchaser standing. In summary, the Paper held that an application of the passing-on-defence is very complex and the analysis of its effects becomes even more difficult further down in the distribution chain. An allowance of the defence may also create conflicts between claimants at different levels of the distribution chain.[190] The Paper noticed that the CJEU had never closer analysed the passing-on-defence in its judgments. However, in the *Courage* case the Court stated that Community law does not prevent Member States from taking measures ensuring that the rights granted by Community law does not entail an unjust enrichment for the

[188] The issues have occurred in several Member States. The Polish law, for example, does not acknowledge the passing-on-defence or the notion of an ”indirect purhaser”, see Blanke and Nazzini (2012), pp. 567-615. In Hungaria, the Metropolitan Court of Appeal in 2012 ruled that the passing-on-defence is available under Hungarian law. See Ritter (2012) and case in Metropolitan Court of Appeal in Hungaria Case n° 14.Gf.40.521/2011/9, 14 March 2012.

[189] In the *Courage* case the CJEU stated that *”in absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law”* in accordance with the principles of effectiveness and equivalence, at para. 29.

[190] The Commission Staff Working Paper annex to the Green Paper (2005), para. 159.

individuals enjoying them.[191] In the ruling the Court referred to its previous case law wherein the passing-on-defence has been acknowledged in other fields of EU law.[192] The Commission however noticed that the case law of CJEU is limited to holding that EU law does not prevent national law that prohibits unjust enrichment. Thus, the case law of CJEU does not establish the existence of the passing-on-defence as a matter of EU law.[193]

The Paper stressed that the primary basis for the existence of a passing-on-defence is the prevention of an unjust enrichment of the claimant.[194] The Paper however pointed out that a passing-on of an overcharge does not necessarily entail an unjust enrichment of the claimant (the direct purchaser) since it may as well result in a reduced sale for the claimant as he or she has to raise the prices. Hence, a presumption that passing-on leads to an unjust enrichment would risk offending the EU principle of effectiveness.[195] The Paper concluded that there is no passing-on-defence in EU law, however there is an unjust enrichment defence which requires proof of passing-on and proof of no reduction in sales or other reduction in income.[196] Furthermore, the Commission emphasised that the existence of a passing-on-defence complicates and increases the complexity of damages claims and constitutes obstacles to private actions. It is argued that it would be significantly difficult to allocate and quantify damages between different claimants at different levels of the distribution chain if a passing-on-defence was recognised under EU law.[197] One problem with the defence is the difficulties of proof in proving a causal relationship between the harm caused by the infringement of competition law and the extent of the damages the indirect customer suffers.[198] In the annex to the Green Paper the Commission stated; *"a combination of the possibility for the defendant to rely on the passing on defence with the indirect purchaser actions would seriously restrict private actions"*.[199]

Regarding indirect purchaser standing, the Green Paper stressed that the CJEU has not taken any position on this matter however it has been argued that the *Courage* case entails that such a standing cannot be denied under EU law. According to the Paper there is much to suggest that both direct and indirect purchasers should have the right to claim damages, since a different solution would deprive those most likely to have suffered harm a remedy.

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[191] In the *Courage* case, at para. 30, the Court held that *"Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by the Community law does not entail the unjust enrichment of those who enjoy them"*. The Court repeated this statement in subsequent *Manfredi* case (at para. 94).
[192] The defence has been accepted under EU law in actions for the non-contractual liability of the Community and for the recovery of illegal charges levied by a Member State in breach of EU law, see the Commission Staff Working Paper annex to the Green Paper (2005), paras. 164 and 165.
[193] See the Commission Staff Working Paper annex to the Green Paper (2005), para. 168.
[194] *Ibid*., para. 169.
[195] *Ibid*., paras. 169 and 172.
[196] *Ibid*., para. 173.
[197] *Ibid*., para. 174.
[198] The Green Paper (2005), pp. 7-8.
[199] The Commission Staff Working Paper annex to the Green Paper (2005), p. 13.

However, the Paper also stressed that such a solution would create complexities, disincentives and higher transaction costs. Thus it is emphasised that in designing a system of private litigation based on competition law the main objective must be to obtain an efficient system and an effective enforcement of the competition rules. In an ideal world, such a system would be able to achieve both the objectives of deterrence and compensation to some degree. If such a system can be found, the Commission found no reason for why not even the indirect purchasers should be able to claim damages in antitrust cases. It is however, according to the Commission, likely that a trade-off between the interest of full recovery for those who have suffered harm because of a violation of competition law and efficiency is inevitable.[200]

Based on these arguments the Commission suggested that the determining factor should be the effective enforcement of EU law.[201] A limitation of rights conferred upon some individuals should be accepted if such limitation is necessary to ensure an effective system of safeguarding the enforcement of Articles 101 and 102. Rather than providing absolute protection of all rights it may therefore be necessary to decide which rights to favour in order to ensure an effective enforcement system of competition law.[202]

5.3 The Passing-on-defence in the White Paper

After the publication of the Green Paper the CJEU delivered its ruling in the *Manfredi* case. As explained above, the case provides any individual to claim compensation based on a violation of EU competition law.

In light of the Court's ruling in the *Manfredi* case wherein the compensatory principle and the availability of damages for all persons suffered harm were emphasised, the White Paper suggests that the passing-on-defence should be recognised under EU law. It is held in the Paper that denial of such defence can result in an unjust enrichment of claimants who have passed on an illegal overcharge. A defendant should therefore be able to rely on the defence against a claim for compensation, brought by a claimant who is not a final customer.[203] The burden of proving that such overcharge has passed on shall rest with the defendant. According to the Paper, the standard of proving that a passing-on has occurred should not be lower than the standard to which the claimant has to prove his or her damage.[204]

[200] See the Commission Staff Working Paper annex to the Green Paper (2005), paras. 177-180.
[201] *Ibid*., para. 180.
[202] *Ibid*., para. 180.
[203] The Commission Staff Working Paper (2008), paras. 208-214. See also the White Paper (2008), pp. 7-8.
[204] The Commission Staff Working Paper (2008), paras. 208-214.

The passing-on-defence can also be invoked by an indirect purchaser in order to show harm suffered.[205] Due to these indirect purchasers distance from the infringement, it has often been proven difficult to show that an overcharge has been passed on to the indirect purchasers through the distribution chain and that they have suffered harm. Therefore, in the Paper the Commission proposes that these indirect purchasers should be able to rely on a rebuttable presumption that the illegal overcharge was passed on to them in its entirely.[206]

In the public consultation of the Green Paper the respondents were of divergent views whether or not to allow the defence. The majority however were of the opinion that any unjust enrichment must be avoided (both for claimants and defendants). If prohibiting the passing-on-defence, direct purchasers may be awarded damages for harm that has not been suffered since the overcharge was passed on. In addition, the defendant risk paying damages also to the purchasers downstream the direct purchaser, if the former can show that harm has been suffered. In such cases, the liability of the defendant would lead to multiple recoveries. Several responders to the consultation of the Green Paper however consider such scenario to be highly theoretical and argued that recognition of the defence entails that direct purchasers are less likely to initiate an action for damages. Besides, it is more difficult for the indirect purchasers to prove the infringement and the harm it has caused and the defence may therefore lead to none being compensated at all.[207]

One of the main proposals in the White Paper is the broad rule of standing to sue for damages. The right to damages is recognised for all individuals harmed by an infringement of EU competition law. The proposal thereby entails that both direct and indirect purchasers and consumers can sue for damages based on competition law.[208] According to the Commission, the reference by the CJEU in the *Manfredi* case to any individual includes even indirect purchasers.[209]

A consequence of recognising the indirect purchaser standing is that purchasers at different levels in the distribution chain may claim damages based on the same infringement of competition law. If the defendant in such case fails in proving that an overcharge has been passed on, the court may

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[205] In the White Paper the Commission, as a metaphor, refers to the defendants invoking of the passing-on-defence as a shield in order to mitigate or escape a damages claim and a claimant other that the direct purchasers relying on the defence of overcharges as a sword in order to substantiate his damages claim against the defendant.
[206] The Commission Staff Working Paper (2008), paras. 215-220. See also the White Paper (2008), p. 8.
[207] See the Commission Staff Working Paper (2008), paras. 203-204.
[208] *Ibid.,* paras. 24-37.
[209] *Ibid.,* para. 37. In the *Manfredi* case, the CJEU stated that *"it follows that any individual can claim compensation for the harm suffered where there is a causal relationship between the harm and an agreement or practice prohibited under Article 81 EC"*, at para. 61. Even in the *Courage* case the CJEU stated that the possibility to claim damages should be open to *any individual,* at para. 26.

award the direct purchaser full compensation. However, if the defendant in a second litigation by the indirect purchasers fails to rebut the presumption that the illegal overcharge was passed on, also the indirect purchasers will be awarded full compensation. The defendant will then face multiple liability for the same overcharge. Contrary, if the defendant successfully invokes the passing-on-defence and rebuts the presumption invoked by the indirect purchaser, the infringer does not have to compensate anyone. To avoid such overcompensation or undercompensation, the Commission encourages the national courts to use all available mechanisms under national law and EU law.[210] Regarding the standing of indirect purchasers and damages based on EU competition law, the Commission states in the Staff Working Paper, annexed to the White Paper, that:

"The Commission […] does not intend to suggest any limitation on standing of anyone who can show a causal link between his harm and an infringement of Article 101 or 102".[211]

Furthermore, the Commission holds that:

"Any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an infringement of Article [101] and [102]. This principle also applies to indirect purchasers."[212]

Another important proposal as in regards to the exercise of passing-on-defence is the possibility to collective redress.[213] This subject is outside the scope of this thesis, however it is an important reform in relation to the indirect purchaser standing. Indirect purchasers are often small businesses and/or individual consumers whom suffer relatively small losses because of an infringement of competition law. These victims are also often deterred from bringing proceedings of damages as an individual claim because of the high costs, risks and uncertainties involved in such proceedings, etc. As a result, many victims of antitrust infringement remain uncompensated.[214] Furthermore, it has been held that the absence of mechanisms for collective claims in Europe has been one of the main reasons for the poor development of private antitrust enforcement.[215] The White Paper proposes two complementary mechanisms of collective redress: representative redress and collective actions.[216] Representative redress is brought by qualified entities, such as consumer associations and trade associations, on behalf of identified, or sometimes unidentified, victims. In collective actions victims expressly decide to combine their individual claims into one single action.[217] The so-called collective redress is considered to improve the possibility for

[210] The White Paper (2008), p. 8. See also the Commission Staff Working Paper (2008), paras. 221-225.
[211] The Commission Staff Working Paper (2008), para. 37.
[212] *Ibid.,* para. 37.
[213] *Ibid.,* paras. 208-214.
[214] The White Paper (2008), p. 4.
[215] Komninos (2011), p. 457.
[216] The White Paper (2008), p. 4.
[217] *Ibid.*

victims of antitrust infringement to obtain effective compensation.[218] In 2011 a public consultation regarding a coherent European approach to collective redress was completed.[219]

5.3.1 Comments on the White Paper

The White Paper generated a broad debate among stakeholders and several comments were submitted to the Commission. Overall, the stakeholders welcomed the Commission's endeavours in enabling antitrust damages actions. However, there were different opinions regarding the best measures to achieve this aim.[220] Regarding the subject of this thesis, the main comments are presented below.

The proposal of indirect purchaser standing did not give rise to many comments. Only eight of the commentators suggested a limitation of the standing of indirect purchasers.[221] As explained above, it has been held that the CJEU's ruling in the *Manfredi* case implies that no limitation of indirect purchaser standing in competition damages cases is possible under EU law. Some commentators however questioned the broad rule of standing advocated in the White Paper. These commentators held that it does not follow from the *Courage* and *Manfredi* cases that a particular group of claimants should be favoured in the private litigation of damage claims. Instead, the commentators considered it a question of evidence and causation. Hence, it would be more effective to introduce a procedure in national courts allowing all those harmed by the same competition infringement to bring claims. The claimants should then be compensated to the extent that they can prove their individual loss caused by the competition infringement (the causal relationship).[222]

The implementation of the passing-on-defence was generally supported by the commentators in the consultation of the White Paper.[223] One aspect addressed by consumer associations and other non-business responders was that the burden of proving that an overcharge has passed on should benefit the victims. A different solution was considered to make it possible for the infringer to take advantage of his or her illegal behaviour and retain the illegal overcharge. However, businesses and businesses associations

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[218] Press release MEMO/13/531, 11.6.2013.
[219] Public consultation *Towards a coherent European approach to collective redress*, see http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html, 17.12.2013.
[220] See the Proposal for Directive, p. 7.
[221] See the Commission Staff Working Document, Impact Assessment Report (2013), p. 56 at para. 155.
[222] See the comments of UK lawfirm Addleshaw Goddard Respons. See also the comments of the Association of European Competition Law Judges who considers that the indirect purchasers establishment of a passing-on of an overcharge is part of the general requirement of showing and proving a causal link between the infringement and the loss suffered.
[223] The Commission Staff Working Document, Impact Assessment Report (2013), p. 56 at para. 157 and p. 87.

questioned such facilitation in the burden of proof for the claimants because of the risk of multiple damages.[224] Several commentators observed the risk that the defendant will be subject to double liability since he or she may not be able to prove that a direct purchaser has passed on an overcharge, and neither is able to disprove passing-on downstream the distribution chain in a claim by an indirect purchaser.[225] The Commission has stressed that the risk of undercompensation to the claimant is considered more important than the risk of overcompensation in such situation.[226]

Moreover, it is held in the comments that the burden of proof upon the defendant may give the claimant double benefits. For example, when the claimant is both an indirect purchaser and a seller, the claimant would benefit of both the presumption that the entire overcharge was passed on to him or her, but also benefit from a presumption that the claimant did not pass on any of the overcharge to his or her customers. The latter benefit occurs since the passing-on-defence is the defendant's burden to prove.[227]

In order to avoid the risk of multiple compensation, some commentators suggested that a consolidation of cases would be preferable. Such solution would enable the direct and indirect purchasers to be heard in the same proceedings. Moreover, some commentators proposed that the first claimant should be awarded the entire amount of damages and the second claimant should thereafter sue the first in order to obtain his share.[228]

The Commission's proposal allows the indirect purchasers to rely on the rebuttable presumption that the entire overcharge has passed on to them. Many businesses and business associations have questioned this proposal since it is deemed to expose the defendants of a risk of double or multiple damages when both the direct and indirect purchasers claim compensation for the same infringement.[229] Besides, it is held that it will be difficult in practice for the defendant to rebut the presumption.[230] Moreover, several commentators raise concerns about introducing collective redress into EU law. These commentators question if the introduction of such US-style system would be for the best interest of the people and consumers in Europe and argue that such a system would be open to abuse, as the US example.[231]

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[224] *Ibid.,* p. 56 at para. 157.
[225] See the joint comments of the American Bar Association section of Antitrust law, section of International law and section of Business law, pp. 21-22.
[226] The Commission Staff Working Document, Impact Assessment Report (2013), p. 56 at para. 157.
[227] See the joint comments of the American Bar Association section of Antitrust law, section of International law and section of Business law, pp. 21-22. The presumption has also been criticised by the Association Française des Entreprises Privées (AFEP), p. 13 and by the UK lawfirm Allen & Overy lawfirm, pp. 7-8.
[228] The Commission Staff Working Document, Impact Assessment Report (2013), p. 87.
[229] *Ibid.,* p. 87.
[230] See the comments of the Association of European Competition Law Judges, pp. 2-3.
[231] The comments of the Board of Directors of the European chapter of the Association of Corporate Counsel (ACC Europe). See also the comments of UK lawfirm Addleshaw Goddard Response and the comments of British Retail Consortium (BRC). The BRC *"Opposes collective actions as a means of private enforcement on the grounds they could*

5.3.2 Aspects on the Consequences of the Passing-on-defence

Two main arguments are put forward by the Commission for recognising the passing-on-defence: claimants should not be unjustly enriched and defendants should not be liable for multiple damages.[232] These arguments, along with the indirect purchaser standing, are discussed below.

5.3.2.1 Unjust Enrichment

According to Firat Cengiz[233], the matters of unjust enrichment and passing-on-defence are derived from the fairness element.[234] Cengiz argues that a denial of the defence may entail that the direct purchaser receives compensation exceeding the actual harm suffered while the indirect purchasers suffers an "unjust enpoorment" since they are not compensated for their loss.[235] The justification of the passing-on-defence based on an argument of unjust enrichment implies two problems. The first is the one of evidence; it is difficult to decide the extent of a claimant's passing-on of an overcharge. According to Magnus Strand[236], it cannot be presumed that all overcharges are passed on downstream the distribution chain since the possibility of including the overcharge in the price depends on the elasticity of demand[237] on the market. Harris and Sullivan holds the same opinion and argues that passing-on of an overcharge to the indirect purchasers depends mainly on the elasticities of the demand and supply in the market.[238] Only in case of zero price elasticity on demand it is possible to pass on the overcharge without risking a drop of sale.[239] Moreover, it can never be guaranteed that a price increase is due to an overcharge since it may be caused by other circumstances.[240]

The second problem is whether or not a grant of damages exceeding the injury can be described as an unjust enrichment at all. Strand argues that the reluctance to the direct purchasers potential excess in damages implies that the infringer is allowed to keep the enrichment he or she gained through the infringement of competition law. Thus, the only unjust enrichment in such situation is the enrichment of the infringer. Strand is of the opinion that in cases where there is a risk that the claimant will obtain overcompensation at

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undermine enforcement by public authorities which is far more effective; could lead to 'fishing expeditions'; and could be detrimental to innocent businesses".

[232] Strand (2010), p. 14.

[233] Lecturer in law at Liverpool Law School.

[234] Cengiz (2007), p. 32.

[235] Verboven and van Dijk (2007), p. 3.

[236] Doctorial Candidate at the Faculty of Law at Uppsala University.

[237] A product's price elasticity of demand shows the percentage change in quantity demanded when the price increases by one percent. The price elasticity is almost always negative, thus when the price of a product increases the demand decrease.

[238] Harris and Sullivan (1979), p. 273.

[239] Nils Wahl (former professor at Stockholms University. Currently Advocate General at the European Court of Justice) is of a similar opinion and argues that a passing-on of an overcharge requires that at least a partial of the demand is inelastic, Wahl (2000), p. 309.

[240] Strand (2010), pp. 15-16.

the expense of the infringer, it is preferable to let the infringer bear the risk instead of the claimant. Such policy would serve the objective of deterrence as well as the objective of full compensation.[241] The Commission has taken a similar approach and stresses that overcompensation to victims of competition infringement is preferable to undercompensation.[242] Accordingly, there is no reason for such hesitation in rewarding the claimant compensation that may exceed the injury sustained to some extent.[243] Therefore, Strand argues that the discussion of unjust enrichment should not be about the claimant's enrichment; instead focus should be at preclude the infringer to be enriched by his own violation of competition law. In order to meet the objective of deterrence the system of private enforcement must address this matter since it otherwise may be an incentive to infringe the competition law.[244] The same opinion is held by Nils Wahl[245] who argues that such approach would best serve the interest of deterrence and efficiency.[246]Wahl questions why it should be unacceptable to award the claimant an unjust enrichment while acceptable to let the same enrichment retain with the infringer.[247] Wahl argues that overcompensation of the claimant to some extent is acceptable since it otherwise would be possible for the infringer to benefit from his or her own infringement of competition law.[248] Furthermore, the allowance of overcompensation must be viewed in relation to the investigation costs of allocating the overcharge that has been passed on among the different levels of the distribution chain. The argument of Wahl is that the passing-on-defence should be denied. This because only if the direct purchaser is able to obtain the entire amount of damages for the harm suffered, the objective of deterrence is met.[249] It must however be observed that the opinion of Wahl is held before the CJEU's judgment in the *Courage* and the *Manfredi* cases. In contrast to Wahl, Greg Olsen[250] argues that if the passing-on-defence is excluded the direct purchaser will be overcompensated and such approach would be contrary to the UK law.[251]

It may be argued that a direct purchaser suffers harm at the moment he pays an overcharge derived from a violation of competition law and subsequent actions in order to mitigate that harm should not be taken into consideration.

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[241] Strand (2010), pp. 15-17.
[242] The Commission Staff Working Document, Impact Assessment Report (2013), p. 56 at para. 157.
[243] In case C-192/95 *Comateb and Others v Directeur général des douanes and droits indirects* REG 1997 p. I-165 the Advocate General Tesauro in his opinion held that *"I do not in fact believe it can be right to describe as unjust enrichment the profit derived by an individual from the reimbursement of a charge unduly required and levied by the authorities."* at para. 21. See also Strand (2010), p. 17.
[244] Strand (2010), pp. 17-18. In Strand's opinion, a deterrent system of private enforcement of competition law must entail a "disenrichment" of the infringer.
[245] Former Professor at Stockholms University. Currently Advocate General at the CJEU.
[246] Wahl (2000), pp. 308-309 and 313. As stated above, it must however be noted that the arguments of Wahl is stated before the judgement in *Courage* and *Manfredi.*
[247] Wahl (2000), p. 309.
[248] *Ibid.,* pp. 308-309.
[249] *Ibid.,* p. 313.
[250] Partner at lawfirm Clifford Chance in London.
[251] Olsen (2005), p. 4.

In this view, the injury occurs already when a buyer pays the overcharge and a subsequent compensation for that overcharge does not constitute an unjust enrichment of that buyer.[252] This was the opinion of the US Supreme Court in the *Hanover Shoe* case. The Court held that a buyer facing an overcharge may (1) do nothing and thereby absorb the loss, (2) maintain his or her own price but take actions in order to increase the sale volume or to decrease other costs, or, (3) raise the price of the product. The Supreme Court held that *"At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower"*.[253] Consequently, a buyer under US law is entitled to damages in all these situations.

5.3.2.2 Multiple Damages and Liability

The second main argument in recognising the passing-on-defence is that defendants should not be liable for multiple damages. For reasons described above, the avoidance of multiple damages may be accomplished by either allowing the passing-on-defence and indirect purchaser standing (as the proposed EU solution) or by denying both the defence and the standing of indirect purchaser (as in US federal law). According to Strand, it is arguable if the solution chosen by the Commission in the White Paper and the Proposed Directive is as effective as the US solution in avoiding multiple damages. As explained above, there may be situations where the infringer is unsuccessful in litigation against both the direct purchaser and the indirect purchaser. In such situations full compensation is rewarded to both the direct purchaser and to the indirect purchaser. If the aim is to avoid multiple damages, the US solution may therefore be preferable to the solution by the Commission in the Proposed Directive.[254] It has however been held that denial of indirect purchaser standing is contrary to the EU law and especially the principle of direct effect.[255]

A different approach to the risk of multiple damages is advocated by Strand, who argues that the risk of multiple damages for the defendant should be embraced. Strand argues that such embracing approach would benefit the objective of deterrence and because of the requirement of causal relationship established in the *Manfredi* case, it is unlikely to create unpredictable quantities of claims based on the same violation of competition law.[256] According to Strand, the fear of multiple damages within the EU context is not justified as this fear is often based on experiences from the US legal system. The US example and caution on multiple damages must be seen in context of the automatic awarding of treble damages to all claimants in case of multiple liability for a defendant. Olsen is of the same opinion and argues that the exclusion of the passing-on-defence in the US law must be

[252] Strand (2010), pp. 16-18.
[253] See the *Hanover Shoe* case, para. 489.
[254] Strand (2010), pp. 18-19.
[255] This opinion is, among others, held by Greg Olsen (2005).
[256] Strand (2010), p. 19.

understood as a part of a system of treble damages.[257] Hence, it has been argued that the fear of awarding multiple damages in EU is excessive.[258]

Professors Theon van Dijk[259] and Frank Verboven[260] argue that there are some practical difficulties in implementing the passing-on-defence. Recognition of the passing-on-defence is often said to complicate the proceedings of damages claims and discourage such private damages claims based on competition law. Further, the passing-on-defence may be seen as an advantage of the defendant and a disadvantage for the claimant. The passing-on-defence implies that the direct purchaser has less incentive to bring a damage claim, however this reduced incentives is not compensated by an increased incentive of the indirect purchasers, due to the distance from the infringer and access to less information than the direct purchaser.[261] Regarding the risk of multiple liability for the defendants, van Dijk and Verboven argues that this risk may serve as a deterrence instrument, however it is more desirable to obtain the aim of deterrence by rewarding double or treble damages claims.[262]

5.3.2.3 The Standing of Indirect Purchasers

Along with recognising of the passing-on-defence comes the indirect purchaser standing. Above shows that admitting such standing is consistent with the EU law.[263] Petrucci argues that allowing indirect purchasers to sue is compatible with the principle of full compensation and compensatory justice: the infringer causing harm should give redress to the harmed victim.[264] Petrucci also argues that allowance of standing for indirect purchasers is consistent with the main objective of competition law – maximising of consumer welfare – and is thereby important from a policy perspective.[265] Effective competition litigation will also serve the reputation of competition law among the public and deter from involvement in anti-competitive practices. Further, from a fairness perspective, it is important that persons and undertakings that have suffered harm are compensated for their losses.[266] Some difficulties however arise when allowing indirect purchasers to sue for damages. One problem is to decide who is entitled to damages. As always, in order to obtain damages one must show that harm has occurred. Further, there must be a causal link between the harm suffered and the violation of competition law. Another difficulty is to quantify the harm suffered, i.e. the amount of the overcharge. This problem increases

[257] Olsen (2005), p. 4.
[258] Strand (2010), pp. 20-21.
[259] Chief Economist at the European Patent Office.
[260] Professor of Economics at the University of Leuven.
[261] van Dijk and Verboven (2010), p. 1.
[262] Verboven and van Dijk (2007).
[263] Already in the *Francovich* case the CJEU held that individuals within the EU has a right to obtain compensation for any harm suffered. In the *Courage* case the Court stated that persons who suffered a loss has a right to compensation and the *Manfredi* case clarified that any individual can claim compensation for harm suffered.
[264] Petrucci (2008), p. 33. The principle of full compensation is the main guiding principle in the White Paper of the Commission.
[265] Petrucci (2008), p. 33.
[266] Norton Rose, Michael Grenfell (2012).

further down in the distribution chain as a consequence of the increasing dilutive effect as the eventual harm suffered by each individual is small. Another complexity is that an overcharged product, deriving from an infringement of competition law, can be input or/and incorporated to another product or service. For obvious reasons this complicates the quantification of harm even more.[267]

There are also procedural aspects linked to the recognising of indirect purchaser standing, such as the risk, time and cost of bringing an action for damages. Richard Whish[268] and David Bailey[269] argues that there is a risk that no one will bother to sue for damages since the harm suffered by each person may be small. Furthermore, Whish and Bailey points out that there is a risk that the indirect purchasers neither have knowledge of the infringement, the harm suffered or that they are entitled to damages.[270] From a procedural aspect, the importance of harmonised procedural rules within the EU has been emphasised in order to minimise the risk of multiple proceedings based on the same violation of competition law.[271]

5.4 The Proposal for Directive COM(2013) 404

5.4.1 General Introduction to the Proposal for Directive COM(2013) 404

Since the modernisation in 2004, the Commission has repeatedly stated that the right to obtain damages for harm suffered due to an antitrust violation is one of the main instruments in achieving effective application of the EU antitrust law. However, to date very few damages claims are brought before the national courts and it is still difficult for individuals to obtain redress.[272] According to the Commission, this is due to shortcomings in the domestic legal frameworks of the Member States. Moreover, national rules in the Member States are widely diverging, implying varying results for the different jurisdictions. As a consequence, emerge of "hot spots" in the EU has occurred in countries considered to have more favourable rules, especially the UK, Germany and the Netherlands.[273]

To date, EU law does not provide any statutory rules on the issues of passing-on-defence and indirect purchaser standing. However, in June 2013

[267] See Whish and Bailey (2012), p. 300, Petrucci (2008), p. 34 and Norton Rose, Michael Grenfell (2012).
[268] Professor of Law at King's College in London.
[269] Senior Lecturer at King's College in London.
[270] Whish and Bailey (2012), p. 300.
[271] Cengiz (2007), pp. 5-6.
[272] Press release MEMO/13/531, 11.6.2013.
[273] Press release MEMO/13/531, 11.6.2013. See also the Proposal for Directive, p. 4.

the Commission issued a proposal for Directive on Antitrust Damages.[274] The Commission's "package" consists of a Directive, a communication on quantifying antitrust harm[275] and a recommendation on Collective Redress[276]. The main reason for adopting the package is to remove the obstacles that currently inhibit the award of compensation to victims of antitrust infringements. A directive is deemed to be the most appropriate instrument to remove the hurdles in the national law of the Member States since it permits the states to decide how to implement the proposals while respecting the legal tradition of each Member State.[277]

The Proposal for Directive has two main objectives: optimise the interaction between the public and the private enforcement and to ensure full compensation to victims of competition law infringements.[278] In order to maintain a genuinely European approach, the central role of the public enforcement is emphasised in the Proposed Directive. The Commission stresses that it is essential to guarantee effective protection of the public enforcement of the EU competition law and to ensure that the Commission and the NCA can maintain a policy of strong public enforcement. Further, it is held that deterrence is not a primary objective and the Commission seems to consider that the role of deterrence of anti-competitive practices should primarily rest with the public authorities and not with civil actions, although this is not straight expressed.[279] The Proposal for Directive also states that litigation in national courts should aim at compensation, not in more actions or extensive litigation. For this reason, the Commission in the Proposed Directive encourage consensual dispute resolution.[280]

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[274] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404 final, 11.6.2013 and Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401 final, 11.6.2013.

[275] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 and 102 of the Treaty on the Functioning of the European Union, OJ C 167, 13.6.2013, pp. 19-21 and the Commission Staff Working Document Practical Guide Quantifying Harm in Action for Damages Based on Breaches of the Article 101 and 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, 11.6.2013. The document accompanies the Communication on quantifying antitrust harm.

[276] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, 26.7.2013. The recommendation of Collective redress invites the Member States to introduce collective redress mechanisms. The Recommendation is non-binding and is to be seen as a complement to the Proposed Directive.

[277] See the Proposal for Directive, p. 12. Press release MEMO/13/531, 11.6.2013.

[278] The Proposal for Directive, pp. 3-4.

[279] The Commission Staff Working Document, Impact Assessment Report (2013), p. 39 at para. 109. See also the Proposal for Directive, pp. 3-4 and 12.

[280] Articles 17-18 in the Proposal for Directive. See also Calisti and Haasbeek (2013). A different opinion is held by Professors Kortmann and Wesseling (2013), pp. 5-9.

Since the Proposal for Directive was recently issued, not much has been written regarding it. It has however been held that the proposed measures are far-reaching in order to facilitate antitrust damages actions within the EU.[281] The Proposal for Directive has been submitted to the European Parliament and the Council and if adopted, Member States will have to implement the provisions of the Proposed Directive within two years.[282]

5.4.2 The Proposal for Directive on Passing-on-defence

The passing-on-defence is one example of diverging legislation which has led to an uneven enforcement in the different Member States regarding damages based on competition law. The *Manfredi* case is codified in Article 1 of the Proposed Directive and clarifies that anyone who has suffered harm because of an infringement of competition law has a right to full compensation.[283] Articles 12–15[284] regulate the passing-on-defence and the position of the indirect purchasers.

Article 12 of the Proposal for Directive implements the passing-on-defence into EU law. The Article clarifies that the burden of proving that an overcharge has been passed on shall rest with the defendant. In accordance with Article 12(2) a defendant cannot invoke the defence when the overcharge has been passed on to a person for whom it is "legally impossible" to claim compensation. Hence, the defence is not absolute but it is not defined under which circumstances it is "legally impossible" for a person to claim compensation. According to the preamble of the Proposed Directive, national rules of causality, including the rules of foreseeability and remoteness, may entail that individuals are legally unable to claim compensation in a certain case.[285] It is for the national courts in the Member States to assess in every specific case if the person, whom the overcharge allegedly was passed on to, is legally able to claim compensation and the national courts will therefore only assess the merits of the passing-on-defence when it is applicable.[286] The formulation of the Proposed Directive regarding this matter has been questioned and it has been held that it creates an uncertainty for the defendants since all Member States applies different rules and principles as regards to, for example, causality. As a consequence, the risk of forum shopping may increase. Furthermore, it has been held that it is unclear for which persons it is "legally impossible" to claim compensation since the indirect purchasers are given a legal standing. It has also been questioned why the limit of passing-on-defence only refers to legal barriers and not practical barriers.[287]

[281] Squire Sanders (2013). See also Kortmann and Wesseling (2013), p. 2.
[282] Press release MEMO/13/531, 11.6.2013.
[283] Article 1 in the Proposal for Directive.
[284] The Articles are enclosed in supplement A.
[285] The Proposal for Directive, preamble (30).
[286] The Proposal for Directive, preamble (30).
[287] Howard (2013), p. 4. See also Howard (Monckton Chambers) (2013), p. 8.

The indirect purchaser standing is recognised in Article 13. The burden of proving that an overcharge has been passed on shall rest with the indirect purchaser (the claimant). However, as held above, the indirect purchaser will be able to rest on a rebuttable presumption that a passing-on to him or her occurred. The indirect purchaser must show three conditions for the presumption to apply: (1) that the defendant has infringed the competition law, (2) that the infringement resulted in an overcharge for the direct purchaser of the defendant, and, (3) that the indirect purchaser purchased goods or services that were subject of the infringement, or that the goods or services derived from or contained the goods or services that were subject of the infringement. As regards the quantification of the passing-on, the Article holds that the national courts of the Member States are empowered to estimate the share of the overcharge that has been passed on.

Article 15 aims at eliminating the risk of multiple liability for the defendant, deriving from claims by different levels in the supply chain. In order to avoid inconsistent judgments within EU the Article aims at harmonising the assessment of the burden of proof among the Member States. The Article holds that the national courts shall take due account of actions related to the same infringement, but brought by different levels in the supply chain. Further, judgements resulting from such actions should be taken into account. Also Article 30 in Regulation No 1215/2012 contributes to avoid the risk of multiple proceedings within the EU by holding that "related actions" should be heard in the same proceeding. The actions are deemed to be related when so closely connected that it is expedient to hear the cases together in order to avoid the risk of irreconcilable judgments.

In absence of EU law, the national law of the Member States will govern the damages actions.[288] One aspect not dealt with in the Proposal for Directive is the notion of causal relationship between the infringement and harm suffered. The issue of causality concerns the exercise of the right to compensation and is governed by the national rules of the Member States, however the EU principles of effectiveness and equivalence must be observed.[289] Thus, it has been argued that the Member States are given a large amount of discretion after the implementation of the Proposed Directive, which creates a high degree of legal uncertainty.[290]

[288] The Proposal for Directive, preamble (10).
[289] The Proposal for Directive, preamble (10).
[290] Howard (Monckton Chambers) (2013), p. 10.

6 Analysis and Discussion

6.1 The Justifications for a Passing-on-defence

It has been held that an implementation of the passing-on-defence implies a trade-off between the interests of fairness, effectiveness and efficiency since these interests conflict by nature. The interest of fairness requires that all victims of illegal behaviour are able to recover. In my view however the justification theory put forward by the doctrine ignores an important aspect as regards the fairness element: the infringer's possibility to escape liability in an action for damages by a claimant. It can be argued that the interest of fairness requires, except from the possibility for victims to recover, that the infringer is held responsible for his or her harmful actions. The ability for the infringer to escape liability for harm that he or she has caused is in this view not in compliance with the interest of fairness since it constitutes an unjust enrichment of the infringer. Hence, it may be argued that the fairness element is twofold and requires not only that victims are able to recover but also that the infringer are not able to enrich on his or her illegal behaviour.

The recognition of a passing-on-defence may enhance the risk of an unjust enrichment of the infringer. For reasons described above, there is a risk that the indirect purchasers will not bring an action for damages when the passing-on-defence has been invoked by the infringer. The infringer may therefore escape liability to the extent that the passing-on-defence applies. This argument is based on the assumption that the direct purchasers are more effective enforcers than the indirect ones. It has been argued that in order to obtain the objective of deterrence, only the direct purchasers should have standing. The fairness interest however requires standing for all victims of competition law infringements. In my view, the interest of effectiveness aiming at deterrence of anti-competitive practices, does not necessarily conflict with the interest of fairness. Recognition of indirect purchaser standing may serve both the interests of fairness and the interest of effectiveness. A broad rule of standing aims at compensating all victims of an infringement. As is described above, it may also lead to multiply liability for the defendant. For obvious reason, such liability serves the interest of deterrence. This will however require that all victims entitled to compensation have effective procedural rules to rely on. In absence of such, there is a risk that the possibility to sue for damages will be impeded by procedural difficulties for the indirect purchasers, such as distance from the infringement, lack of information and difficulties in providing evidence. The system of private damages actions based on EU competition rules should therefore be complemented with procedural rules, making the private litigation effective, coherent and coordinated among the Member States. Such procedural rules would also serve the interest of efficiency since it mitigates the burdens on the judicial system.

The implementation of standing for indirect purchasers into EU law comes along with recognition of the passing-on-defence. The standing of indirect purchasers clearly serves the interest of fairness defined as full recovery for victims of competition law infringements. It the Commission succeeds in establishing effective procedural rules, it may also serve the second side of the fairness element and in some extent also the interest of deterrence and effectiveness. As shown above, the passing-on-defence is however not in compliance with the second side of the fairness element and the interest of deterrence and effectiveness since it allows the infringer to escape liability. Further, the interest of fairness and the ability for all victims to recover, conflicts with the interest of efficiency. This because recognition of standing for all victims implies an enhanced burden of the legal system. Such burden may however be mitigated by implementation of harmonised procedural rules as mentioned above.

Since a trade-off between the different interests discussed above seems necessarily, priority should be given to the interest considered as the most important. Hence, the crucial question is which elements the law should serve. There is however, depending on how the interests are defined, a risk that none of the interests will be completely fulfilled. In 2001, the CJEU ruled that any victim of competition infringement must be able to recover. Since, the Court has repeatedly stated that the right to compensation for victims of competition violations is a matter of EU law. The Commission has for over a decade strived for a facilitation of damages actions based on EU competition law and has stressed that the main objective of such actions is the effective exercise of the right for victims to obtain full compensation.[291] In the conflict between the elements justifying the passing-on-defence and indirect purchaser standing, it therefore seems like priority should be given to the interest of fairness. Such approach is consistent with the case law of the CJEU and the aim of the Commission, which requires compensation for all victims of competition law infringements. The recognition of indirect purchaser standing serves such approach. Hence, as will be further discussed below, the solution in the Proposed Directive seems to be the most suitable for the EU since it well serves the objective of full compensation. The Proposed Directive is also important from a policy perspective since it can be argued that the Proposed Directive is consistent with the overall objective of EU competition law: maximising of consumer welfare.

6.2 The Justifications of the Commission

As discussed above, the Commission has encouraged a private enforcement entailing private litigation and damages claims in national courts for several years. It seems however like the approach of the Commission has changed regarding which interests that should be decisive in the establishment of such private litigation system. The passing-on-defence and indirect

[291] As will be discussed below, there is however reason to believe that the objective of the Commission has been modified over time.

purchaser standing were introduced as a matter of EU competition law for the first time in the Green Paper. In my opinion, there is reason to believe that the solution now implemented in the Proposal for Directive was not the solution that the Commission had in mind when published the Green Paper. In the Green Paper, the predominant focus aimed at efficiency and deterrence, however in the Proposed Directive the main focus aims at compensation and optimising the interaction between the public and private enforcement. The landmark *Manfredi* case in 2005 has probably influenced the approach of the Commission in several aspects. One may question if the Court's ruling in the *Manfredi* case is to be regarded as a response to the Commission's position in the Green Paper, wherein an effective enforcement was considered more important than absolute protection of the rights provided to individuals by the Treaty. There is much to suggest that the Commission did not consider the interest of fairness and the principle of full compensation to be as important as the objective of deterrence and effectiveness at the time of issuing of the Green Paper. In contrast, the Commission in the White Paper published after the ruling in the *Manfredi* case, emphasises that the guiding principle must be the objective of full compensation. It seems like the Commission hereby makes a clear policy choice and puts the objective of compensation above the interest of efficiency and effectiveness. Furthermore, the Commission in the White Paper makes a policy choice as regards the expressed worries among several stakeholders for excessive US litigation style in Europe. By emphasising the prominent role of public enforcement and a genuine European approach, the Commission rejects the fear of such US litigation style.

According to the Commission, the White Paper includes measures and proposals that are rooted in the European legal culture and traditions. In my opinion, this statement of the Commission may however be questioned since the passing-on-defence has not been recognised as a matter of EU law within the field of competition law. The passing-on-defence and indirect purchaser standing appears not to be "rooted" in the European legal culture. This since neither the EU law provides legislation regarding the area, nor has the CJEU ruled on the subject. Moreover, some Member States recognise the defence in their national law, however several Member States has not taken the defence into closer consideration. It may therefore be argued that the passing-on-defence is a rather foreign matter in both EU law and the national law of the Member States. A question of interest is thus why the Commission addressed the issue in the Green Paper in the first place. To me, it seems like the Commission, in absence of a EU practice and a general widespread application of the defence in the Member States, was inspired of the US antitrust law and their application of the defence.

It has been argued that the Commission had no choice but allowing indirect purchaser standing because of the Court's ruling in the *Manfredi* case. In my opinion, it is questionable if the case law of the CJEU requires recognition of standing for indirect purchasers. As expressed in the comments to the White Paper, the *Manfredi* case just establish the rule of individuals right to compensation when harm has been suffered. Indeed, this is just a reflection

of the general principle that any person claiming damages must prove that he or she has suffered a loss. It does not follow from the case that a specific group of claimants should be favoured in legislation as now is proposed in the Proposal for Directive. Instead, it follows that the prospects of a successful damages claim is a question of proving harm and a causal relationship. The implementation of the passing-on-defence and indirect purchaser standing must however be seen in relation to the purpose of the Proposed Directive: facilitating damages actions based on EU competition law. In my opinion, a solution based on general principles of causation would not have been enough to achieve this aim, nor the objective of full compensation. This since such solution would not facilitate damages actions for claimants downstream in the distribution chain (e.g. consumers). If the possibility to recover was due solely to the establishment of a causal relationship, these claimants would still have difficulties in obtaining damages because of their distance from the infringer. The allowance of indirect purchaser standing will therefore most likely facilitate damages claims within the EU. The introduction of a legal standing for indirect purchasers will also serve the objective of full compensation of the Commission as well as the overall objective of consumer welfare within the EU.

The Commission in the White Paper held that the principle established in the *Manfredi* case applies also to the indirect purchasers. This statement indicates that a requirement of causation for the indirect purchasers still applies. In my opinion, the implementation of the passing-on-defence and indirect purchaser standing is not desirable, nor necessary, if the indirect purchasers still must show a causal relationship in order to obtain damages. In accordance with the Proposed Directive, it is "legally impossible" for some persons to claim compensation due to national rules of causality. It can be argued that this provision does not refer to the indirect purchasers since they have been given legal standing and also the presumption that the overcharge has been passed on to them to rely on. Further, it would seem impractical if the intention of the Commission is to facilitate damages claims for the indirect purchasers but these still have to show causality. The statement of the Commission presented above however suggests that this issue has to be solved by the national courts in a near future.

Another question is if an implementation of indirect purchaser standing also requires recognition of the passing-on-defence. The US example, with a parallel application of federal law denying defendants to invoke the passing-on-defence and state law allowing indirect purchasers to sue for damages, shows that one of the measures should not be allowed without recognising of the other. The US example of multiple and duplicative lawsuits and liability, burdening the judicial system, has been described as a chaotic environment and should, according to my opinion, be raised as example of a poor solution. Even though it is my opinion that the passing-on-defence and indirect purchaser standing should be seen as mirror images of each other, it may be argued that there are other solutions, neither discussed by the Commission in the Proposal for Directive nor in their preparatory work. The

allowance of standing of both direct and indirect purchasers may be complemented with other measures than the passing-on-defence in order to avoid duplicative compensation, e.g. *res judicata*. Such measure would prevent multiple liability for the same damage and the same infringement. The solution of direct and indirect purchasers as joint creditors and the issuing of TPN in Germany can be raised as another example. In my opinion, it is notable that the Commission has not presented any other solutions or reason about other options in their preparatory work, leading to the Proposed Directive.

6.3 The US Law

When examining and comparing the US antitrust law with the EU competition law, it is clear that different interests and elements justifies the use of the passing-on-defence in the legal systems. In US law, the direct purchasers are clearly favoured. The denial of passing-on-defence and indirect purchaser standing in US federal antitrust law implies that direct purchasers can obtain damages for the entire overcharge by the infringer, regardless of the fact that hole or part of that overcharge have been passed on to the indirect purchasers. The justification for denial of both the passing-on-defence and indirect purchaser standing is the interest of effectiveness. Both the *Hanover Shoe* case and the *Illinois Brick* case stresses that the interests of effectiveness and deterrence require that only the direct purchasers have standing. It is argued that such solution will imply that the antitrust laws are enforced more effectively by concentrating the full recovery for the overcharge in the direct purchasers.

The US approach of effectiveness mainly is in notion of deterrence. The imposing of criminal penalties along with the imprisonment for violation of the US antitrust law clearly demonstrates the aim of deterrence. Another aspect suggesting that the US law primarily aims at deterrence of anti-competitive behaviour is the automatically reward of treble damages in antitrust cases. An interesting aspect that should be noticed is the statement of the Commission, inspired by the US, that an implementation of double damages into EU law should be considered. However not implemented in the Proposal for Directive, the statement demonstrates the Commission's earlier approach regarding the role of private litigation in EU competition law. It also supports my finding that the Commission has changed approach during the decade wherein the implementation of private damages claims has been encouraged. Their approach has changed from focus on deterrence, effectiveness and efficiency, to stressing the aim of full compensation.

The rulings in the US cases clearly show that the interest of effectiveness and deterrence is regarded as the most important and that the fairness interest has to stand back in the US law. However, as stated above, there is another perspective of the interest of fairness as well: the infringer should not gain on his or her illegal behaviour. This interest goes hand in hand with the interest of deterrence. According to my opinion, the US law most likely fulfil this aspect of the fairness interest since it is often argued that the direct

purchasers are the most effective enforcers. Hence, due to the exclusive enforcement of the direct purchasers it is likely that the infringer will be liable for damages for harm caused by the infringement. However, as raised by the Court in the *Illinois Brick* case, the argument that the direct purchasers are the most effective enforcers may be questioned. There is reason to believe that the direct purchasers in practice are very reluctant in suing a contractor. For example, it would most likely be costly, both in time and money to end a business relationship with a supplier and find a new one. This since the company may have had the same supplier for years and thereof adjusted its operations after that supplier. Hence, there is reason to believe that indirect purchasers may have an equal, if not in some cases greater, interest in suing for damages, however practical aspects such as barriers of information and evidence may complicate the actions of indirect purchasers. The establishment of procedural rules may also imply that indirect purchasers are given an enhanced incentive to sue. The possibility of collective redress implemented by the Proposed Directive into EU law is one example of such procedural measure.

The comparison between US antitrust law and EU competition law shows that the laws serves different objectives and interests. The overall objective of EU competition law aims at economic and consumer welfare. The private litigation of EU competition rules aims at compensation. The allowance of indirect purchaser standing well serves these objectives. Furthermore, the EU competition law is mainly enforced through public enforcement and the absence of private litigation and private damages claims is palpable. In contrast to EU competition law, the US antitrust law is mainly based on litigation and private damages actions. The element of fairness in allowing all injured compensation is ignored under US law. In practice, consumers are typically indirect purchasers and it may therefore be argued that the protection of consumer welfare is not pleased within the US.

So, what can the EU learn from the US? According to my opinion, the most important lesson for the EU is that in recognising the passing-on-defence, the indirect purchaser standing should also be acknowledged. It is of great importance that the measures implemented in EU law are complemented by harmonised procedure rules, minimising the risk of multiple damages claims by different claimants in different Member States regarding the same infringement. The US as an example characterised of wasteful proceedings, multiple damages claims, divergence in judgements and inconsistent recoveries is definitely not a desirable development for the EU.

6.4 The Arguments of Passing-on-defence

6.4.1 The Argument of Unjust Enrichment

The argument of unjust enrichment is two-fold. At one hand, there is the unjust enrichment of the direct purchaser if he or she is awarded damages for harm that has been passed on. On the other hand, there is the unjust

enrichment of the infringer, occurring if the infringer eludes liability for harm that he or she has caused. The issue of unjust enrichment is complex since the fear of enriching the claimant may, on the contrary, lead to an enrichment of the infringer. Hence, it seems like a trade-off is inevitable – what is preferable, an unjust enrichment of the direct purchaser or of the infringer? Recognition of the passing-on-defence entails that the direct purchaser has to stand the risk of being undercompensated, while the infringer is enriched. A denial of the defence however implies a risk of overcompensating the direct purchaser. It therefore seems like the issue is one of risk allocation and whom that should bear the risk.

If the risk is allocated to the direct purchaser, it may be argued that the burden of that purchaser is dual. Initially, the direct purchaser may suffer harm because of an infringement of competition law and, secondly, the same bears the risk not being able to achieve compensation for the harm suffered. The fact that a purchaser has suffered harm does not entail that he or she is able to prove that harm has been suffered in a subsequent damages action in a court. A direct purchaser, who is not able to prove that he or she has suffered harm and hence is entitled to damages, seems to bear a comprehensive burden. If not successful in the action for damages, the purchaser is not only unable to recover but also left with the legal costs and the costs in time for bringing proceedings. Contrariwise, the relief of the infringer seems dual, first the infringer gains from his or her infringement of competition law and then he or she is able to benefit from the infringement by not being liable for damages for harm that the infringer has caused.

As held by Strand and according to my opinion, there is too much focus on preventing the direct purchaser from making an unjust enrichment. To me, it seems like the infringer is the one really making the unjust enrichment, benefitting from his or her own infringement of competition law. Placing the risk with the infringer also seems to serve the interest of deterrence. As stated above, this is a question on risk allocation. Should the claimant or the infringer bear the risk? In my opinion the answer is clear – why should an already harmed claimant also bear the risk of not getting compensated to the benefit of the infringer? In such cases, excess in damages to the claimant is preferable. Again, a trade-off must be made – one must be favoured at the expense of the other. The real matter is how the interests of the claimant and the infringer should be balanced against each other. The Proposal for Directive clarifies that the Commission considers the interest of the direct purchaser be less important then the interest of the infringer since the latter is allowed to invoke the passing-on-defence. The approach of the Commission must however be seen in relation to the discussion above and the *Manfredi* case, which gives the Commission limited discretion concerning the indirect purchaser standing. The burden of proof for showing that the passing-on-defence applies is in the Proposed Directive placed with the infringer, implying that the risk of the claimant is mitigated.

Another aspect of the argument of unjust enrichment is the question of when an injury occurs. Initially, the view held by Strand and also the Supreme

Court in US appears to be justified – regardless of the response in acting of the direct purchasers or subsequent circumstances, the purchaser should be entitled to damages. However this is not in line with regular tort law since in tort law a person is only entitled to damages if he or she can show that harm actually has been suffered. Further, he or she must be able to prove the presence of a causal relationship between the action and the harm suffered. Consequently, one is not entitled to damages just because an incident occurs since other circumstances must be present and shown in evidence. Furthermore, the reasoning of the Supreme Court and Strand seems to be inconsistent with the duty of the claimant (the injured party) to mitigate the loss and damage suffered, which is a legal principle incorporated in several Member States' legal systems. To complicate the scenario further, in competition cases it is common that the buyer (the claimant, the direct purchaser or the indirect purchaser) does not have knowledge of an infringement occurring and the resulting overcharge. In such case, no duty of mitigate loss can exist.

Moreover, an aspect of the argument of unjust enrichment is the more practical one in deciding how much of an overcharge that has been passed on. In this aspect, the Proposal for Directive must be said to advocate a well-balanced solution, placing the burden of proving that the overcharge has been passed on, on the infringer. In contrast to France that has chosen the opposite solution in their legal system, the solution in the Proposed Directive is preferable. The French solution places a double burden on the claimant, making it difficult for the claimant to obtain damages and risks offending the EU principle of effectiveness.

As is held above, Strand is of the opinion that there may be an incentive to infringe competition law if the infringers are not disenriched. Further, Strand argues that in order to meet the objective of deterrence the private enforcement must address this issue. Even though I consider that the infringer should be disenriched, Strand seems to overlook that the public enforcement by the Commission and the NCA aims at complementing the private enforcement by the national courts. Public sanctions are available under the public enforcement and the Commission and the NCA are entitled to impose fines on infringers of competition law. Thereby, it may be argued that any incentive to violate competition law is deterred by the complementary public enforcement. The crucial question is therefore which roles the private and the public enforcement should play within the competition system. This matter will be further discussed below.

6.4.2 The Argument of Multiple Damages and Liability

The main argument in recognising the passing-on-defence is that infringers should not be liable for multiple damages. The Proposed Directive implies that both direct and indirect purchasers can claim damages based on the same infringement. If the infringer is unsuccessful in litigation against both the direct purchaser and the indirect purchaser, the infringer will be liable of

multiple damages. Hence, it has been held that the Proposed Directive may not be the most effective solution if the main objective is to avoid multiple damages. In such case, the US solution denying both the passing-on-defence and indirect purchaser standing may be preferable. The US solution is however not possible within the EU since the EU law requires that anyone who has suffered harm because of an infringement of EU law can obtain full compensation for that harm. A solution like the one in the US law would thus require an overruling of the *Courage* and the *Manfredi* cases. Besides, it would oppose the main objective of full compensation emphasised by the Commission. Regarding the US law, Landes and Posner in 1979 argued that there is only two ways in avoiding multiple damages: overrule the *Hanover Shoe* case and allow both the passing-on-defence and indirect purchaser standing, or exclude both measures. Since 1979, several repealer statues have been issued in the US states, allowing indirect purchasers to sue. Hence, it seems like Landes and Posner could not predict that the current solution in US also would lead to multiple damages and liability.

When recognising both the passing-on-defence and the indirect purchaser standing, the risk of multiple liability for the infringer is depending on the burden of proof. The Proposal for Directive places the burden of proving that an overcharge has been passed on, on the infringer. In addition, the indirect purchasers can rely on a rebuttable presumption that an overcharge has passed on. The Proposed Directive increases the risk of multiple liability of the infringer since the infringer may neither be able to fulfil the burden of proof, nor rebut the presumption. The actual burden put upon the infringer depends on the strength in evidence required to fulfil the burden of proof and to rebut the presumption. It is too early to comment and assess if the burden of proof is justified since it is due to the application of the national courts of the Member States. In the interest of consistency between judgments within the EU, Article 15 in the Proposed Directive aims at harmonising the assessment of the burden of proof among the Member States. Article 30 in Regulation No 1215/2012 will also contribute to avoiding duplicative and multiple liability (*lis pendens*) from related actions in the different Member States. Despite these Articles, I believe that there is a risk of diverging judgements within the EU since the national courts of the Member States may assess the burden of proof for the defendant differently. There is also reason to believe that these provisions will be insufficient to avoid such multiple liability of the infringer as is explained above. Article 30 in Regulation No 1215/2012 aims at preventing irreconcilable judgments, however there is much to suggest that a diverse assessment in the burden of proof will not be considered as irreconcilable. Since Article 15 in the Proposed Directive only requires the Member States to take “due account” to related actions and judgements, this provision is more to be seen as a guiding principle. It will probably be difficult to apply in practice since it does not set any material requirements upon the national courts. However, the Member States ability to request a preliminary ruling of the CJEU as regards the burden of proof may provide clarity as regards the legal position.

The rebuttable presumption for the indirect purchasers to rely on implies that the defendants are exposed for a bigger risk of multiple liability since they may not be able to prove that an overcharge has passed, nor rebut the presumption. As is seems, it will be relatively easy for an indirect purchaser to show that a passing-on to him or her occurred (i.e. fulfil the presumption). Since most actions for damages in competition cases will be so-called follow on cases, meaning that the Commission or the NCA already have acted on the infringement in their role of public enforcement, the first condition showing that the defendant has committed an infringement of competition law will be easy to show. The second condition, showing that the infringement resulted in an overcharge for the direct purchaser of the defendant, is most likely also met easily since most infringements of competition law inevitable implies an overcharge for the direct purchaser. If the infringer were not able to take an overcharge of the direct purchaser, there would be no reason/incentive for him or her to infringe the law. Lastly, the indirect purchaser shall show that he or she purchased goods or services subject or derived from the infringement. If already shown that an infringement occurred, this last condition will probably not be difficult for the indirect purchaser to fulfill.

Clearly, it will most likely be easy for the indirect purchaser to show that a passing-on of an overcharge has occurred. However, it is unclear how comprehensive the burden of proof for the infringer to rebut the presumption will be. It has been held that the presumption favouring the indirect purchasers will be significantly difficult for the defendant to rebut in practice. According to my opinion, this burden should not be too great since such legal solution would increase the risk of multiple liability of the infringer. However, it should neither be set to low since that would risk the full effectiveness of the EU law. If it is too easy for the infringer to rebut the presumption it will, in practice, be difficult for the indirect purchasers to obtain compensation. As discussed above, the strength in the burden of proof will be a question of risk allocation and which party that should bear the risk. In my opinion and for reasons described above, this risk should rest with the infringer. Such solution will also serve the aim of deterrence of anti-competitive behavior.

It can be questioned if the risk of multiple liability even should be taken into consideration. There is reason to believe that this risk in many cases is limited since the indirect purchasers often is positioned far from the infringer in the distribution chain and lacks information about the infringement and its impact on the indirect purchaser. In my opinion, the main aim of the Proposed Directive is not to prevent multiple liability of the infringer. I consider that the risk of multiple liability for the infringer is regarded as less important than the possibility for all harmed individuals to obtain compensation. The current solution in the Proposed Directive enhances the risk of multiple liability compare to other solutions, such as the one chosen in US federal antitrust law. Also the burden of proof placed on the defendant and the rebuttable presumption for the indirect purchaser to rely on, enhances the risk of multiple liability for the infringer. In my

opinion, the Commission has done a correct balance between the interest of the infringers and the interest of the victims regarding this matter. In accordance with the argument of Strand, the Commission seems to embrace the risk of multiple liability. Such approach serves the interest of deterrence. As discussed above, EU competition law does not provide double or treble damages, as is the case in the US. Bearing this in mind, a risk for multiple damages in the EU context should be acceptable.

6.5 The Roles of Public and Private Enforcement

To me, the most important query as regards the implementation of the passing-on-defence and the elements justifying such implementation, is which purpose the private enforcement should serve in the context of EU competition law. As is held above, it is argued among the doctrine that the private enforcement of competition law should aim also at deterrence and not only at compensation. According to my opinion, the role and aim of the private enforcement must be discussed in relation to the public enforcement because of the interaction between them.

When designing a litigation system based on competition law within the EU, the ultimate question will be which role the public enforcement of the Commission and NCA will have on one hand, and which role the private enforcement of individuals bringing damages actions in the national courts should play on the other hand in the EU system. In EU, public enforcement has traditionally been the main enforcement. Imposing fines on undertakings infringing the competition law is the main measure used by the Commission and the NCA in their public enforcement. Under public enforcement, victims of competition infringements cannot obtain compensation since the imposed fines accrues the public. The EU public enforcement thereof only aims at serving the interests of effectiveness and deterrence. The private enforcement should therefore be used complementary to serve other interests, in order to fulfil as many interests as possible. To obtain an effective system of enforcement, it is of my opinion that the private enforcement of EU competition law should aim at compensation for victims. The objective of compensation and the interest of fairness cannot be served by the public enforcement. Hence, since the system of public and private enforcement should complement each other, too much focus should not be given to the objective of deterrence regarding the private damages actions based on competition law. Instead, the discussion should concern how the public enforcement can obtain the objective of deterrence. The objective of full compensation should be the decisive for the creation of private damages actions since the only way to obtain compensation for victims is through the private enforcement.

If the reasoning above should be valid, the public enforcement must be effective in order to serve the interest of deterrence to the fullest. The public

enforcement must have access to effective tools in order to reveal infringements of competition law and the fines must be high enough to deter from infringements. In my opinion, the Commission and the NCA should seek to maintain a strong public enforcement and continue to develop tools in the pursuit of achieving a more effective system. If the public enforcement maintains its strong position in the enforcement system, the private enforcement can primarily aim at serving the purpose of compensation. Furthermore, if the Commission is successful in the promotion of private damages actions, liability for damages will be rule rather than exception. In such case, the private enforcement would most likely also serve the aim of deterrence.

Within the US the private enforcement and private litigation, automatically awarding victims of competition law infringements treble damages, clearly serves the aim of deterrence. Private parties by litigation mainly enforce the competition law and accordingly the public enforcement in the US does not have such prominent role as within the EU. In EU, deterrence features like double or treble damages are conspicuously absent in the private enforcement regime. Further, the private enforcement is considered as a complement to the public enforcement and it is with this in mind that the matter of enforcement of EU competition law shall be faced. Since the strong tradition of public enforcement within the EU, the damages awarded must be proportional to the public sanctions.

It is my opinion that the objective of deterrence should rest with the public enforcement and that the fairness and compensation interests should be regarded as the most important for the private enforcement to fulfil. Recognition of the passing-on-defence and indirect purchaser standing well serves the fairness interest and objective of full compensation since it provides all victims standing in a damages action based on an infringement of competition law. Furthermore, it serves the overall EU objective of consumer welfare. In my opinion, the private enforcement and the implemented measures in the Proposed Directive should not strive at obtain the objectives of effectiveness and deterrence – these interests should be served by the public enforcement. When possible, the public and private enforcement should be combined and aiming at complementing each other. There may be scenarios when the objective of full compensation is fulfilled and the aim of deterrence could be met to some extent at the same time. In such case, the private enforcement should aim at fulfilling both. However, achieving the objective of deterrence should never be on behalf of the aim of full compensation.

7 Conclusions

Initially, three questions were asked and these will now be answered. My first question is if the proposed EU law on passing-on-defence and indirect purchaser standing are founded on the same justifications and values as the US law on the same matters. If the answer to this question is no, my supplementary question is which distinguishing features that can be found in the different jurisdictions. My conclusion is that the passing-on-defence in US law and in EU law is clearly based on different values and justifications. The justifications for denial of both the passing-on-defence and indirect purchaser standing in the US antitrust law are the interests of effectiveness and deterrence. Traditionally, the US antitrust law has had a more economic approach than its European counterpart. Contrary, in EU law the justification for allowing both the passing-on-defence and indirect purchaser standing is the interest of fairness. In EU competition law the overall objective aims at economic and consumer welfare and the EU law is thereby more consumer and social orientated than its US counterpart. It is clear that the main objective of the Proposed Directive and the private litigation of the EU competition rules aims at compensation, not litigation. The EU law on passing-on-defence and indirect purchaser standing allows all victims of competition law infringements to recover and the EU principle of full compensation requires recognition of standing for all claimants suffered harm. Hence, the US solution had not been possible to implement into EU law since such approach is contrary to the fundamental objectives and values of EU law. The features distinguishing the US law from the EU law are the exclusive enforcement of the direct purchasers, the litigation culture, the award of treble damages and the penalties for violations of the antitrust law. All these instruments serve the interests of deterrence and effectiveness in the US system.

My second question regards the implemented measures compatibility with the objective by the Commission of full compensation and the overall objective of consumer welfare. My initial conclusion is that the passing-on-defence and indirect purchaser standing must necessarily stand together. The rulings in the *Courage* and the *Manfredi* cases imply that standing cannot be denied to a specific group of claimants under EU law. The indirect purchaser standing clearly serves the objective of full compensation since it allows all claimants to bring an action for damages. Hence, the chosen solution recognising both passing-on-defence and indirect purchaser standing is in accordance with the principle of full compensation stated by the Commission. The argument that the *Manfredi* case requires recognising of indirect purchaser standing is in my opinion incorrect. The only thing required according to the *Manfredi* case is that all individuals who have suffered harm should be able to obtain damages if a causal relationship applies. Since the Commission already in the Green Paper decided to either recognise the passing-on-defence in legislation or explicitly deny the defence, the now chosen solution of recognising both the passing-on-

defence and indirect purchaser standing is the only option that is consistent with EU law according to the initial conclusion. Recognising of indirect purchasers standing will facilitate the possibility for victims distant from the infringer, such as consumers, to obtain compensation in order to recover from a violation of competition law. Such approach serves the overall objective of consumer welfare of EU competition law as well as the main objective of the private enforcement of damages actions for breach of EU competition law: full compensation. If not given standing, the requirement of causal relationship established in the *Manfredi* case would apply, making it difficult in practice for consumers and purchasers downstream the distribution chain to obtain compensation. Moreover, the burden of proof placed on the infringer and the rebuttable presumption for the indirect purchasers to rely on, serves both the objective of full compensation and consumer welfare since such solution facilitates damages claims for all claimants. A different solution would risk offending the EU principle of full effectiveness since, in practice, it would be a significant task for the claimant to obtain compensation. The implementation of the passing-on-defence implies that the damage for which compensation can be required will be spread and distributed among a larger group of victims, each of them probably less incentive to sue. Hence, the establishment of an effective system for the indirect purchasers to claim damages and the harmonisation of procedural rules will be of great importance. This in order to mitigate the potential dilution effect that otherwise would curb the objective of consumer welfare.

My third question concerns the objective of the Commission of optimising the interaction between the public and the private enforcement. This stated objective evokes the question of which roles the public enforcement and the private enforcement respectively should play regarding the implementation of passing-on-defence in order to achieve this objective. My conclusion is that the private enforcement mainly should serve the interest of fairness and compensation for victims of competition infringements. An effective system of private damages actions based on EU competition law will also serve the aim of deterrence to some extent, since the fear of infringers for liability of damages. Concerning the public enforcement, my conclusion is that such should solely aim at deterrence and effectiveness since the public enforcement never can serve the objective of compensation. In my opinion, the passing-on-defence and indirect purchaser standing will under these conditions serve the aim of optimising the interaction between the public and the private enforcement, where the latter complement the former and, to the extent possible, also serve the objectives of effectiveness and deterrence.

Supplement A

CHAPTER IV
PASSING-ON OF OVERCHARGES

Article 12
Passing-on defence

1. Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement. The burden of proving that the overcharge was passed on shall rest with the defendant.

2. Insofar as the overcharge has been passed on to persons at the next level of the supply chain for whom it is legally impossible to claim compensation for their harm, the defendant shall not be able to invoke the defence referred to in the preceding paragraph.

Article 13
Indirect purchasers

1. Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether — or to what degree — an overcharge was passed on to the claimant, the burden of proving the existence and scope of such pass-on shall rest with the claimant.

2. In the situation referred to in paragraph 1 of this Article, the indirect purchaser shall be deemed to have proven that a passing-on to him occurred where he has shown that:
   (a) the defendant has committed an infringement of competition law;
   (b) the infringement resulted in an overcharge for the direct purchaser of the defendant; and
   (c) he purchased the goods or services that were the subject of the infringement, or purchased goods or services derived from or containing the goods or services that were the subject of the infringement.

   Member States shall ensure that the court has the power to estimate which share of that overcharge was passed on.

   This paragraph shall be without prejudice to the infringer's right to show that the overcharge was not, or not entirely, passed on to the indirect purchaser.

Article 14

Loss of profits and infringement at supply level

1. The rules laid down in this Chapter shall be without prejudice to the right of an injured party to claim compensation for loss of profits.

2. Member States shall ensure that the rules laid down in this Chapter apply accordingly where the infringement of competition law relates to supply to the infringing undertaking.

Article 15

Actions for damages by claimants from different levels in the supply chain

1. Member States shall ensure that, in assessing whether the burden of proof resulting from the application of Article 13 is satisfied, national courts seized of an action for damages take due account of
   (a) actions for damages that are related to the same infringement of competition law, but are brought by claimants from other levels in the supply chain; or
   (b) judgments resulting from such actions.

2. This Article shall be without prejudice to the rights and obligations of national courts under Article 30 of Regulation (EU) No 1215/2012.

Bibliography

EU Legislation

The Treaty of Paris establishing the European Coal and Steel Community (ECSC) (1951).

The Treaty of Rome establishing the European Economic Community (EEC) (1957).

The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (TFEU) (2007).

Consolidated version of the Treaty on European Union - Protocol (No 27) on the internal market and competition (2008).

The Treaty on European Union (TEU) (2010).

Council Regulations

Council Regulation No 17 1962: First Regulation implementing Article 85 and 86 of the Treaty.

Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

Commission Regulation No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty.

Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

US Legislation

The Constitution of United States (1788).

The Sherman Antitrust Act 15 U.S.C. (1890).

The Clayton Act 15 U.S.C. (1914).

The Federal Trade Commission Act 15 U.S.C. (1914).

German Legislation

The ”Gesetz gegen Wettbewerbsbeschränkungen” (GWB).

California State law

The Cartwright Act Cal. Bus. & Prof. Code §§ 16700-16770.

Documents from the Commission

Notice on Co-operation between National Courts and the Commission in Applying Articles 85 and 86 of the EEC Treaty OJ C/39/6 [1993].

Commission White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty COM(1999) 101 final, 28.04.1999.

Commission Green Paper Damages actions for breach of the EC antitrust rules COM(2005) 672 final, 19.12.2005.

Commission Staff Working Paper annex to the Green Paper COM(2005) 672 final, 19.12.2005.

Commission White Paper on Damages Actions for Breach of the EC Antitrust Rules COM(2008) 165 final, 2.4.2008.

Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules SEC(2008) 404, 2.4.2008.

Impact Assessment Study Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios, Final Report for the European Commission, 30.5.2005.

Commission Staff Working Document, Impact Assessment Report Damages actions for breach of the EU antitrust rules - Accompanying the proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union SWD(2013) 203 final, 11.6.2013.

Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union COM(2013) 404 final, 11.6.2013.

Other Documents

The Antitrust Modernization Commission, Report and Recommendations, April 2007. Available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf, 15.12.2013.

The BIS-consultation of the Department for Business, Innovation & Skills in the UK: BIS-consultation *Private Actions in Competition Law: a consultation on options for reform* April 2012. Available at http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/Consultations/consultation-private-actions-in-competition-law?cat=open, 4.11.2013.

The Department for Business, Innovation & Skills *Private Actions in Competition Law: A consultation on options for reform – government response* January 2013. Available at https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform, 4.11.2013.

Press Releases

Press Release: *Commission launches consultations on facilitating damages claims for breaches of EU competition law* IP/05/1634, 20 December 2005.

Press Release: *European Commission Green Paper on damages actions for breach of EC Treaty antitrust rules – frequently asked questions* MEMO/05/489, 20 December 2005.

Press Release: *Frequently Asked Questions: Commission proposes legislation to facilitate damage claims by victims of antitrust violations* MEMO/13/531, 11 June 2013.

Comments on the White Paper on Damages Actions

Comments of Addleshaw Goddard Response, available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/adgo_en.pdf, 13.11.2013.

Comments of Allen & Overy lawfirm, available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/alov_en.pdf, 13.11.2013.

Joint comments of the American Bar Association section of Antitrust law, section of International law and section of Business law, available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/aba_en.pdf, 13.11.2013.

Comments of the Association of European Competition Law Judges, available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/judges_en.pdf, 13.11.2013.

Comments of Association Française des Entreprises Privées (AFEP), available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/afep_en.pdf, 13.11.2013.

Comments of the Board of Directors of the European chapter of the Association of Corporate Counsel (ACC Europe), available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/acc_en.pdf, 13.11.2013.

Comments of British Retail Consortium (BRC), available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/brc_en.pdf, 13.11.2013.

Comments of the Business Europe (the Confederation of European Business), available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/busineu_en.pdf, 13.11.2013.

Comments of the Central Chamber of Commerce of Finland, available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/cfin_en.pdf, 13.11.2013.

Comments of Freshfields Bruckhaus Deringer LLP, available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/fresh_en.pdf, 13.11.2013.

Literature

Blanke, Gordon and Nazzini, Renato *International Competition Litigation. A Multi-jurisdictional Handbook* Kluwer Law International 2012.

Bogdan, Michael *Komparativ Rättskunskap* Second Edition, Norstedts Juridik 2003.

Craig, Paul and de Búrca, Gráinne *EU Law, Text, Cases and Materials* Fifth Edition, Oxford University Press 2011.

Goyder, Joanna and Albors-Llorens Albertins *Goyder´s EC Competition Law* Fifth Edition, Oxford University Press 2009.

Hettne, Jörgen *EU-rättslig metod – Teori och genomslag i svensk rättstillämpning* Second Edition, Norstedts Juridik 2011.

Jones, Alison and Sufrin, Brenda *EU Competition Law* Fourth Edition, Oxford University Press 2011.

Jones, Clifford, A. *Private Enforcement of Antitrust Law in the EU, UK and US* Oxford University Press 1999.

Kerse, Chris and Khan, Nicholas *EU Antitrust Procedure* Sixth Edition, Sweet & Maxwell 2012.

Komninos, Assimakis P. *EC Private Antitrust Enforcement – Decentralised Application of EC Competition Law by National Courts* Oxford/Portland 2008.

Vande Walle, Simon *Private Antitrust Litigation in the European Union and Japan – A comparative perspective* Maklu Publishers 2013.

Wahl, Nils *Konkurrensskada – skadeståndsansvar vid överträdelse av EG:s konkurrensregler och den svenska konkurrenslagen* Elanders Gotab Stockholm 2000.

Whish, Richard and Bailey, David *Competition Law* Seventh Edition, Oxford University Press 2012.

Articles

Becker, Rainer, Bessot, Nicolas and De Smijter, Eddy (all at DG Competition in Brussels) *The European Commission issues white paper on damages actions for breach of the EC antitrust rules* e-Competitions No 36357, Kluwer Law International, 2008.

Calisti, Daniele and Haasbeek, Luke *The Proposal for Directive on Antitrust Damages Actions: The European Commission Sets the Stage for Private Enforcement in the European Union* Competition Policy International, Volume 8, Number 1, 2013.

Cavanagh, Edward D. *Illinois Brick: A Look Back and a Look Ahead* 17 Loyola Consumer Law Review 1, 19, 2004.

Cengiz, Firat *Passing-On Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: what can the EC learn from the US?* ESRC Centre for Competition Policy and School of Law, University of East Anglia, 2007.

Gavil, Andrew I. *Antitrust Remedy Wars Episode I: Illinois Brick from Inside the Supreme Court* 79 Sankt Johns Law Review Vol. 59, p. 553, 2005.

Harris, Robert G. and Sullivan, Lawrence A. *Passing on the Monopoly Overcharge* 128 University of Pennsylvania Law Review 269, 1979.

Hovenkamp, Herbert *The Indirect-Purchaser Rule and Cost-Plus Sale* 103 Harvard Law Review 1717, 1990.

Howard, Anneli *Too little, too late? The European Commission´s Legislative Proposals on Antitrust Damages Actions* Journal of European Competition Law & Practice, Volume 4, Issue 6, December 2013.

Komninos, Assimakis P. *Private enforcement: An overview of EU and national case law* e-Competitions No. 44442 Institute of Competition Law, 2012.

Komninos, Assimakis P. in Gordon Blanke and Philip Landolt (eds) *EU and US Antitrust Arbitration: A Handbook for Practitioners* Kluwer Law International, pp. 433-487, 2011.

Komninos, Assimakis P. *The EU White Paper for damages actions: A first appraisal* Concurrences N° 2-2008, pp. 84-92, 2008.

Kortmann, Jeroen and Wesseling, Rein *Two Concerns Regarding the European Draft Directive On Antitrust Damage Actions* Competition Policy International (CPI), CPI Antitrust Chronicle, August 2013 (1). Available at http://www.stibbe.com/upload/11e5ad1100140beb86bcf02f1e.pdf, 18.11.2013.

Landes, William M. and Posner, Richard A. *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick* 46 University of Chicago Law Review 602, 1979.

Landes, William M. and Posner, Richard A. *The Economics of Passing On: A Reply to and Sullivan Discussion* 128 University of Pennsylvania Law Review 1274, 1979.

Olsen, Greg *Compensation and deterrence? The passing on defence and the future direction of UK private proceedings* published in Competition Law Insight – Antitrust law and policy in a global market, 10 May 2005.

Petrucci, Carlo *The Issues of the Passing-on Defence and Indirect Purchasers´ Standing in European Competition Law* (2008) 1 ECLR pp. 33-42, 2008.

Ritter, Eszter *The Hungarian Metropolitan Court of Appeal rejects follow-on damages claim on the basis of the passing-on defence* e-Competitions, No. 48224, © e-Competitions – Institute of Competition Law, 2012.

Thomas, Stefan *Damage claims under the revised German Act against restraints of competition (§ 33 Gesetz gegen Wettbewerbsbeschrankungen)* 1 July 2005, e-Competitions, No. 12706, 2005.

Van Dijk, Theon and Verboven, Frank *Implementing the Passing-on Defence in Cartel Damages Actions* Global Competition Litigation Review, Volume 3, Issue 3/2010, pp. 98-105, 2010.

Van Gerven, Walter *Private Enforcement of EC Competition Rules* Paper presented at the Joint IBA and European Commission Conference on Antitrust Reform in Europe: A year in Practice, Brussels 2005.

Websites

Foley, Danielle and Taggart, Matthew *Clayworth v. Pfizer and the Curious Case of the Pass-On Defense* Antitrust, Vol. 26, No. 1, Fall 2011 by the American Bar Association. Available at http://www.venable.com/files/Publication/5c915ba2-ba82-4eb4-a81f-b367344aa9bb/Preview/PublicationAttachment/53af62c2-c432-485f-b6fe-bc7db293d766/Fall11-Antitrust.pdf, 7.11.2013.

Howard, Anneli *The Draft Directive on Competition Law Damages – what does it mean for infringers and victims?* Published at Monckton Chambers website (2013). Available at http://www.monckton.com/docs/library/AH%20Article%20Final.pdf, 15.12.2013.

Lawfirm Sidley Austin LLP: California Litigation Update *Clayworth v. Pfizer: California Supreme Court Rejects "Pass-On" Defense* at 14 July 2010. Available at http://www.sidley.com/california_litigation_update_071410/, 7.11.2013.

Nguyen, Beatrice, Sasse, Daniel, McNary Robert and Solh, Chahira *California Supreme Court rejects "pass-on" defense for antitrust damages*. Published by lawfirm Crowell & Moring at 13 July 2010. Available at http://www.crowell.com/NewsEvents/AlertsNewsletters/all/California-Supreme-Court-Rejects-Pass-on-Defense-for-Antitrust-Damages#.UntzgyilDZ0, 7.11.2013.

Norton Rose Fulbright (editor Michael Grenfell, Partner) *Competition litigation – Should the "passing-on" defence be recognised? France and UK try to grapple with a key issue when cartel victims sue for damages,* Competition World: a global survey of recent competition and antitrust law developments with practical relevance, July 2012. Available at

http://www.nortonrosefulbright.com/knowledge/publications/68799/competition-world-a-global-survey-of-recent-competition-and-antitrust-law-developments-with-practical-relevance#section4, 15.12.2013.

Sheehan, Duncan *An Argument Against a Specific Statutory Passing On Defence in Private Enforcement* posted on the ESRC Centre for Competition Policy blog at University of East Anglia at 3rd July 2012. Available at http://competitionpolicy.wordpress.com/2012/07/03/an-argument-against-a-specific-statutory-passing-on-defence-in-private-enforcement/, 4.11.2013.

Shohet, Jeffrey *California Supreme Court rejects "pass-on" defense in antitrust cases* published at Antitrust Alert by DLA Piper law firm at 19 July 2010. Available at http://www.dlapiper.com/california-supreme-court-rejects-pass-on-defense-in-antitrust-cases/, 15.12.2013.

Squire Sanders *European Commission Issues New Proposals on Antitrust Damages Claims* (2013). Available at Squire Sanders website: http://www.squiresanders.com/files/Publication/be92fe71-4766-40bb-b607-2c628e656230/Presentation/PublicationAttachment/fa8e750a-1e7a-40b5-872b-2e5252c00ef4/European-Commission-Issues-New-Proposals-on-Antitrust-Damages-Claims.pdf, 14.12.2013.

Verboven, Frank and van Dijk, Theon *Designing the rules for private enforcement of EU competition law* published at voxeu website: http://www.voxeu.org/article/ec-competition-law-private-enforcement in 24 July 2007, available at 27.11.2013.

Whelan, Peter *The Passing-on Defence Should be Recognised in Legislation* posted on the ESRC Centre for Competition Policy blog at University of East Anglia at 29th May 2012. Available at http://competitionpolicy.wordpress.com/2012/05/29/the-passing-on-defence-should-be-recognised-in-legislation/, 15.12.2013.

Reports

Ashurts, *Study on the conditions of claims for damages in case of infringement of EC competition rules*. Available at the Commission's website: http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf, 28.10.2013.

Speeches

Speech of French President M. Nicolas Sarkozy at post-EU Council press conference, Brussels 23 June 2007. Available at http://www.ambafrance-uk.org/President-Sarkozy-s-post-EU, 15.12.2013.

Links

The United States Department of Justice; http://www.justice.gov/atr/about/antitrust-laws.html

The Washington State Office of the Attorney General: http://www.atg.wa.gov/antitrustguide.aspx#.UqCCsCilDZ0

The US Federal Trade Commission: http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws

Table of Cases

EU Case Law

The General Court

T-31/99 *ABB Asea Brown Boveri v. Commission* REG 2002 p. II-1881.

T-42/07 *Dow Chemical and Others v. Commission* REU 2011 p. II-4531.

T-38/07 *Shell Petroleum and Others v. Commission* REU 2011 p. II-4383.

The European Court of Justice

C-6/60 *Humblet v. Belgian State* 1960 p. 1125.

C-26/62 *Van Gend en Loos v. Administratie der Belastingen* REG 1963 p. 3.

C-6/64 *Costa v. E.N.E.L.* REG 1964 p. 1141.

C-127/73 *BRT v. SABAM* REG 1974 p. 51.

C-283/81 *CILFIT mot Ministero della Sanità* REG 1982 p. 3515.

C-234/89 *Delimitis v. Henninger Bräu* REG 1991 p. I-935

C-6/90 *Francovich and Bonifaci v. Italy* REG 1991 p. I-5357.

C-46/93 *Brasserie du pêcheur v. Bundesrepublik Deutschland and The Queen / Secretary of State for Transport, ex parte Factortame and Others* (joined cases C-46/93 and C-48/93) REG 1996 p. I 1029.

C-192/95 *Comateb and Others v Directeur général des douanes and droits indirects* REG 1997 p. I-165

C-126/97 *Eco Swiss* REG 1999 p. I-3055.

C-453/99 *Courage and Crehan* REG 2001 p. I-6297.

C-295/04 *Manfredi* REG 2006 p. I-6619.

C-52/09 *TeliaSonera* REU 2011 p. I-527.

C-199/11 *Otis and Others* 6 November 2012.

C-499/11 *Dow Chemical and Others v. Commission* 18 July 2013.

US Federal Case Law

Gibbons v. Ogden 22 U.S. 1 1894.

Hanover Shoe v. United Shoe Machinery 392 U.S. 481 (1968).

Illinois Brick Co v. Illinois 431 U.S. 720 (1977).

Hillsborough County v. Automated Medical Laboratories Inc 471 U.S. 707 (1985).

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

California Case Law

Clayworth v. Pfizer No S166435 Cal. 4th, 2010 WL 2721021, 12 July 2010.

French Case Law

France Commercial Court of Nanterre 11 May 2006 No RG 2004F02643 *Arkopharma v. Roche et Hoffman* (*La Roche* case).

Court of Cassation 15 June 2010 No 09-15.816 *Doux Aliments v. Ajinomoto Eurolysine.*

German Case Law

German Supreme Court of 28 June 2011, KZR 75/10 (The *Carbonless Paper Cartel* case).

Hungarian Case Law

Metropolitan Court of Appeal in Hungaria Case n° 14.Gf.40.521/2011/9, 14 March 2012.