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## EU Private Competition Law Enforcement:

Rethinking the Impact of the Passing-on Defence and Indirect Purchaser Standing

JAEM01 Master Thesis

European Business Law  
15 higher education credits

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Term: Spring 2015

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## Summary

The recently adopted EU Directive on Antitrust Damages Actions is aimed at facilitating and boosting private competition law enforcement. As such, the Directive incorporates different measures that aim to remove the main obstacles that claimants face when bringing actions to courts. The Directive also tries to strike the balance between private and public enforcement and thus, consists of measures that protect the efficient public enforcement through leniency programs.

The core of this thesis analyzes the issues regarding the passing-on defence, indirect purchaser standing and their possibilities to get compensated using a collective redress mechanism. It is oftentimes the case that direct purchaser passes on the overcharge of a cartelized product further down the supply chain. Thus, the ones that are actually being harmed by an unlawful conduct are indirect purchasers and ultimately the end users. Consequently, the Directive provides for the passing-on defence – a defence an infringer can invoke before the court arguing that the claimant did not suffer any harm as it has passed on the overcharge to its customers. Further, as indirect purchasers are oftentimes incapable of proving their loss, the Directive stipulates a rebuttable presumption in favour of indirect purchasers. Unfortunately, the EU has not come forward with any binding nor attractive collective redress mechanism that indirect purchasers could benefit from.

This thesis argues that the solution proposed regarding the passing-on defence is not satisfying the main aim of the Directive, facilitating private competition law enforcement, and is largely based on a misconception that granting the passing-on defence is the only way to be compatible with the EU legal culture and traditions. This thesis also argues that the presumption in favour of indirect purchasers does facilitate the burden on indirect purchasers, but it would be of little help in real life as indirect purchasers would still face considerable obstacles when bringing damages actions, such as proving the causal link and their individual harm for example. Further, this thesis suggests that in addition to limiting the passing-on defence and granting indirect purchasers the widest possible standing, indirect purchasers should also be able to rely on an opt-out collective redress mechanism.

Ultimately, this thesis argues that the EU should choose full compensation over undercompensation. It is herein admitted that there may be some minimal risk as for

overcompensation, but that this appears to be highly unlikely in the EU and that the risk of overcompensation is offset by the risk of undercompensation.

## Abbreviations

Commission – The European Commission

Directive – Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

ECJ – The European Court of Justice

EU – The European Union

NCA – National Competition Authority

TFEU – Treaty on the Functioning of the European Union

U.S – The United States of America

# 1. Introduction

In 2008, the EU Commission came out with its analysis on the impact of infringements of competition rules in the EU. According to its data, violations of Article 101 and 102 TFEU (prohibition of agreements and practices that distort competition and prohibition of abuse of dominance respectively) have an immense negative effect on the internal market, competition itself and the victims of infringements. The Commission's Impact Assessment accompanying the White Paper<sup>1</sup> brought out:

“The total annual cost for hardcore cartels in the EU can be estimated to range from approximately €25 billion (on the most conservative assumptions) to approximately €69 billion (on the least conservative). Expressed as a proportion of the EU's gross domestic product, the negative consumer welfare impact of all these hardcore cartels is estimated as ranging from 0.23% to 0.62% of the EU's GDP in 2007, which does not include the harm caused by abusive practices and infringements of Article 81<sup>2</sup> other than hardcore cartels. To illustrate the harm created by cartels and thus the potential benefits of enhanced private enforcement differently: if more effective compensation mechanisms were to lead to a reduction of hardcore cartels by, for example, 5%, the negative consumer welfare impact would be reduced by €1.25 to €3.45 billion”.<sup>3</sup>

The above-quoted document and the Commission's actions in general regarding EU private competition law enforcement were largely influenced by an extensive study<sup>4</sup> (the Ashurst study) of private competition law enforcement in the Member States. The (in)famous first sentence of the Ashurst study states 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”.<sup>5</sup> This study was published more than ten years ago, in 2004.

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<sup>1</sup> White Paper on Damages Actions for Breach of the EC Antitrust Rules, 2008, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0165&from=EN>

<sup>2</sup> As for clarification, former Articles 81 and 82 refer to Articles 101 and 102 TFEU respectively.

<sup>3</sup> Commission Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact Assessment, 2008, p 14-15, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008SC0404&from=EN>

<sup>4</sup> Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Study on the conditions of claims for damages in case of infringement of EC competition rules, Ashurst study, 2004, available at [http://ec.europa.eu/competition/antitrust/actionsdamages/comparative\\_report\\_clean\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf)

<sup>5</sup> Ibid, p 1

Regardless of the fact that according to the latest studies there are more claiming and payments of compensation for the competition law infringements in damages actions,<sup>6</sup> the harm to society remains immense. Also, irrespective of the fact that in some Member States of the EU, such as the UK, private litigation of competition law damages claims is quite developed, in many Member States, such as Estonia for example, bringing competition law damages claims is almost non-existent.<sup>7</sup>

Thus, in order to avoid forum-shopping, make the internal market of the EU more competitive, compensate the ones who have suffered harm caused by a competition law infringement and complement EU public competition law enforcement, a Directive<sup>8</sup> that seeks to facilitate competition law damages actions was introduced in November 2013.

The aim of the Directive is to compensate all victims that have suffered harm due to a competition law infringement. In order to do so, it establishes ways to remove practical obstacles that many victims face when bringing damages claims to court. In addition to that, it aims to balance the interaction between private and public competition law enforcement, so that one would not jeopardize the other and both could effectively co-exist.

In a broad sense, the Directive introduces the following measures:

- facilitating the access to evidence, however, claimants will need to be able to sufficiently describe the evidence and the courts will need to make sure that the disclosure is proportionate (Articles 5-7);
- a final decision of a national competition authority will prove before the court of the same Member State that the infringement occurred, a final decision of a NCA will constitute at least *prima facie* evidence before another Member State court (Article 9);

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<sup>6</sup> Barry Rodger, *Competition Law Comparative Enforcement and Collective Redress across the EU*, Wolters Kluwer, 2014, p 258

<sup>7</sup> Project "Comparative Private Enforcement and Consumer Redress in the EU", led by Professor Barry Rodger, *Comparative competition law private enforcement and consumer redress in the EU 1999-2009*, National Report of Estonia by Dr. Karin Sein, p 1, available at <http://www.clcpecreu.co.uk/pdf/final/Estonia-%20Executive%20Summary.pdf>

<sup>8</sup> Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, O.J. 2014, L 349/1, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN>



- victims will have at least five years to bring damages actions so that they would have sufficient time to bring actions (Article 10);
- an infringer can invoke the passing-on defence and there is a rebuttable presumption that indirect purchasers suffered some level of overcharge harm (Articles 12-14);
- victims are entitled to full compensation that includes both actual loss and loss of profit plus interests (Article 3);
- there is a rebuttable presumption that cartels do cause harm (Article 17);
- the Directive establishes joint and several liability, so that any infringer is liable for the whole harm caused (Article 11).<sup>9</sup>

The core of this thesis is regarding the passing-on defence and indirect purchaser standing. It is oftentimes the case that direct purchasers pass on some of the overcharge caused by a cartel to their customers further down the supply chain.<sup>10</sup> Accordingly, an infringer should be able to reduce the compensation paid to direct purchasers by the amount the overcharge was passed on to indirect purchasers. Consequently, indirect purchasers should be able to claim compensation for the amount the overcharge was passed on to them. However, as indirect purchasers are not in the best position to bring damages actions as they are often relatively small and distant from the infringement, some sort of incentive should be present to make sure that any individual could claim damages for competition law infringements.

Essentially, this thesis will analyze whether the solutions proposed by the Directive regarding the passing-on of overcharges will be compatible with one of the main objectives of the Directive – to facilitate private competition law enforcement. In addition to that, the aim of the thesis is also to analyze whether the solutions proposed in the Directive regarding the passing-on of overcharges were based on legitimate arguments. Also, it will be analyzed whether the current collective redress mechanism is effective and whether indirect purchasers could benefit from a more attractive redress mechanism. Ultimately, the thesis will answer whether the impact of the passing-on defence and indirect purchaser standing should be reconsidered.

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<sup>9</sup> DG Competition website, Actions for Damages, Directive on Antitrust Damages, available at [http://ec.europa.eu/competition/antitrust/actionsdamages/directive\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html)

<sup>10</sup> David Ashton and David Henry, Competition Damages Actions in the EU, Edward Elgar publishing, 2013, p 37

The thesis will touch upon the concepts of the passing-on defence and indirect purchaser standing which together form the concept of the passing-on of overcharges (section 2). It will first study the experience of the U.S. in *Hanover Shoe* and *Illinois Brick*. The U.S. antitrust system is known to be the most "mature regime" in the field of competition law.<sup>11</sup> Thus, examining the U.S. experience is vital as their competition law private litigation can give a very useful insight into how things should be done in the EU.

Next it will explore the history and rationale of passing-on defence and indirect purchaser standing in the EU (section 3). After developing an understanding of the passing-on of overcharges concept, the thesis will continue analyzing the core part of this research – the options and solutions proposed within the process of drafting of the Directive and eventually the final provisions of the Directive and the arguments they are founded upon (section 4).

In the last chapter, this thesis will analyze how likely the overcompensation and unjust enrichment by direct and indirect purchasers is in case the passing-on defence is limited and indirect purchaser standing widened. It will also analyze which would be the best collective redress mechanism that indirect purchasers could benefit from in order to ensure a full compensation of any victim (section 5). The analysis is conducted in two ways. First, it will be examined whether in light of the U.S. experience, overcompensation in the EU would be likely. Second, it will examine whether the collective redress mechanism available under EU law would make overcompensation and unjust enrichment by the direct and indirect purchasers likely and whether the EU should introduce a more attractive collective redress mechanism.

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<sup>11</sup> Ibid, p 1

## 2. Passing-on of overcharges concept

In order to scrutinize the passing-on of overcharges provisions in the Directive, it is essential to get an overall understanding of the passing-on defence and indirect purchaser standing concepts. To do so, the U.S. experience and the European approach to these concepts are being studied. As a preliminary matter, it is important to note that the passing-on of overcharges within this thesis shall comprise of the notion of the passing-on defence as well as the passing-on offence, i.e. indirect purchasers' standing. Thus, this thesis will cover the concept of the passing-on of overcharges from the perspective of the defendant (passing-on defence) and from the perspective of the indirect purchaser standing (passing-on offence).<sup>12</sup>

### 2.1. Overview in the U.S.

Private competition law enforcement has been evolving in the U.S. since the coming into force of the Sherman Act in 1890. More precisely, § 4 of the Clayton Act provides for damages actions and refers to the infringements of §§ 1 and 2 of the Sherman Act. Given the development of the U.S. in the field of competition law is greater compared to the rest of the world,<sup>13</sup> it is only appropriate to study its experience and take it into account when talking about the EU private competition law enforcement. However, it is nevertheless important to understand that there exist some material differences between those two legal cultures and that not everything can easily be compared.

For instance, the U.S. antitrust system provides for treble damages that serve the deterrent purpose as the government resources are oftentimes limited.<sup>14</sup> The EU, however, emphasizes the need to “preserve strong public enforcement” and highlights that the guiding principle in the EU antitrust system is the full compensation of the victims. Albeit, it nevertheless notes that an effective private competition law enforcement inherently serves the deterrent purpose as well.<sup>15</sup> Thus, broadly speaking, the U.S. system relies heavily on private enforcement compared to the EU where private

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<sup>12</sup> Also, as for clarification, the terms “antitrust” and “competition” are used interchangeably.

<sup>13</sup> Ibid, p 1

<sup>14</sup> Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damages Actions for Breaches of EU Antitrust Rules, April 2006, p 27, available at [http://ec.europa.eu/competition/antitrust/actionsdamages/files\\_green\\_paper\\_comments/aba.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/aba.pdf)

<sup>15</sup> White Paper on Damages Actions for Breach of the EC Antitrust Rules, 2008, p 3

enforcement is seen, and perhaps too strictly perceived, as a complementary mechanism next to public enforcement.

Advancing from an overall U.S. antitrust background to the core subject of this thesis, the passing-on defence and indirect purchaser standing have been decided by the U.S. Supreme Court in the judgments *Hanover Shoe, Inc v United Shoe Machinery, Corp*<sup>16</sup> and *Illinois Brick Co v Illinois*<sup>17</sup> respectively.

### 2.1.1. Hanover Shoe

The *Hanover Shoe* case concerned a manufacturer of shoes (Hanover) and a manufacturer and distributor of shoe machinery (United). Hanover claimed first that United had monopolized the shoe machinery industry which was against the law, and second that the practice of leasing the shoe machinery and refusal of selling it had also been unlawful. Thus, Hanover claimed it should be entitled to the price difference it had paid more due to the fact that it could not buy the machinery but had to lease it during the relevant period.<sup>18</sup> As for the defence, United claimed that Hanover had not suffered any loss as it had passed on the overcharge to its customers.<sup>19</sup>

The U.S. Supreme Court held that the infringer of competition law cannot escape liability by claiming that the direct purchaser did not suffer any damage as it passed on an overcharge to its own customers. The Supreme Court brought out three main policy arguments in order to support its judgment and prohibit the passing-on defence:

- the economic analysis and calculating the passing-on “would normally prove insurmountable”;<sup>20</sup>
- allowing the passing-on defence would ultimately lead to fewer direct purchasers to claim damages as it complicates the claim; and

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<sup>16</sup> [1968] 392 U.S. 481

<sup>17</sup> [1977] 431 U.S. 720

<sup>18</sup> [1968] 392 U.S. 481, p 483-484

<sup>19</sup> *Ibid*, p 488

<sup>20</sup> *Ibid*, p 493

- allowing the passing-on defence would amount to the unjust enrichment of infringers as the number of damages claims would decrease.<sup>21</sup>

### 2.1.2. Illinois Brick

The *Illinois Brick* case concerned the State of Illinois and 700 local governmental entities (Respondents) and concrete block manufacturers (Defendants). The Respondents sold the goods to masonry contractors, which in turn sold the goods to general contractors, from which Respondents as indirect purchasers purchased the concrete block in the form of masonry structures. The Respondents claimed that the Defendants had been involved in an unlawful price-fixing conspiracy. The Defendants argued that only direct purchasers could sue for the alleged overcharge.<sup>22</sup>

The U.S. Supreme Court held that if the *Hanover Shoe* case prohibited the using of the passing-on defence, then the law should also prohibit the use of the passing-on offense by indirect purchasers. The Supreme Court brought out the following:

- allowing offensive use of passing-on without giving the other party a chance of using it defensively “would create a serious risk of multiple liability for defendants”;
- the uncertainties and difficulties in analyzing the overcharge between different levels of distribution chain would further complicate the claims;
- the deterrence objective would be best served when only direct purchasers can bring actions; and
- that allowing the offensive use of passing-on would be inconsistent with the *Hanover Shoe*.<sup>23</sup>

However, it is interesting to note that contrary to the *Hanover Shoe* case where no dissent was made regarding the prohibition of the passing-on defence, the dissenting opinion in *Illinois Brick* by Mr. Justice Brennan claims that “the unavailability of a pass-on theory to a defendant should not necessarily preclude its use by plaintiffs seeking treble damages against that defendant”.<sup>24</sup>

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<sup>21</sup> Ibid, p 494

<sup>22</sup> [1977] 431 U.S. 720, p 726-727

<sup>23</sup> Ibid, p 731-732, 736

<sup>24</sup> Ibid, p 729-730

Mr. Justice Brennan suggested that “There are sound reasons for treating offensive and defensive passing-on cases differently”. He explained:

“There is no danger in this case, for example, as there was in *Hanover Shoe*, that the defendant will escape liability and frustrate the objectives of the treble-damages action. Rather, the same policies of insuring the continued effectiveness of the treble-damages action and preventing wrongdoers from retaining the spoils of their misdeeds favor allowing indirect purchasers to prove that overcharges were passed on to them. *Hanover Shoe* thus can and should be limited to cases of defensive assertion of the passing-on defense to antitrust liability, where direct and indirect purchasers are not parties in the same action.”<sup>25</sup>

In addition, Mr. Justice Blackmun complemented the dissenting opinion by arguing:

“The Court feels that it must be ‘consistent’ in its application of pass-on. That, for me, is a wooden approach, and it is entirely inadequate when considered in the light of the objectives of the Sherman and Clayton Acts”.<sup>26</sup>

### 2.1.3. Post *Hanover Shoe* and *Illinois Brick*

It seems that the majority approves the prohibition of passing-on defence established in the *Hanover Shoe*. However, there has been constant criticism following the prohibition of indirect purchaser standing in *Illinois Brick*. This led to many states to enact statutes that would allow indirect purchaser standing which, in turn, raised a question as to the legitimacy of those statutes.

Consequently, the U.S. Supreme Court held in *California v Arc America Corp* that “*Illinois Brick* was a decision construing the federal antitrust laws, not a decision defining the interrelationship between the federal and state antitrust laws. The congressional purposes on which *Illinois Brick* was based provide no support for a finding that state indirect purchaser statutes are pre-empted by federal law”.<sup>27</sup>

Subsequently, this led to even more states enacting laws allowing indirect purchaser standing. Today, approximately two-thirds of the U.S. states provide for indirect purchaser standing at the

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<sup>25</sup> Ibid, Mr. Justice Brennan, dissenting

<sup>26</sup> Ibid, Mr. Justice Blackmun, dissenting

<sup>27</sup> [1989] 490 U.S. 93, p 105-106

state level. It ultimately results in a system where most of the direct purchasers file their damages claims in federal courts. However, most indirect purchasers file their damages claims in state courts.<sup>28</sup> Thus, indirect purchasers can recover damages even if direct purchasers recovered for the same overcharge at the federal level in parallel proceedings. Such system of uncoordinated litigation has been condemned by some stakeholders as it may result in legal uncertainty and duplicative damages awards.<sup>29</sup>

In order to remedy the aforementioned issue, the American Bar Association Antitrust Law Section published an interesting report which aimed at balancing the interests of the stakeholders recognized by the Supreme Court.<sup>30</sup> The report is suggesting an option that would maximize deterrence and provide compensation while at the same time it would avoid inconsistent results and duplicative recoveries. The report is supposed to stand for a “compromise proposal without endorsing one side or the other.”<sup>31</sup> The report suggests that indirect purchasers would be entitled to claim damages under federal law, thus overturning *Illinois Brick*.<sup>32</sup> The passing-on defence would nevertheless remain prohibited, thus *Hanover Shoe* would not be overturned.

However, others argue that according to the statistics, the amount of damages actions brought by direct purchasers has been showing a sharp increase, compared to the damages claims brought by indirect purchasers that has not been showing almost any variation. Consequently, the effect of the damages claims brought by indirect purchasers in the U.S. tend to have a minimal effect to the private antitrust litigation. Thus, the data studied is suggesting that the *Illinois Brick* repealer statutes play a very small role in compensating victims and that the so-called free riding by indirect purchasers is minimal.<sup>33</sup>

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<sup>28</sup> Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules, April 2006, p 38-30

<sup>29</sup> Ibid, p 32

<sup>30</sup> American Bar Association Section of Antitrust Law Report on Remedies, 2004, available at [http://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/report\\_remediesreportcouncil.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/report_remediesreportcouncil.authcheckdam.pdf)

<sup>31</sup> Ibid, p 2

<sup>32</sup> Ibid, p 3

<sup>33</sup> Andrew S. Gehring, The power of the purchaser: the effect on indirect purchaser damages suits on deterring antitrust violations, New York University Journal of Law & Liberty, 2010, p 245-246, available at [http://www.law.nyu.edu/sites/default/files/ECM\\_PRO\\_065898.pdf](http://www.law.nyu.edu/sites/default/files/ECM_PRO_065898.pdf)

To conclude, indirect purchaser standing and to some extent also the passing-on defence remain a passionately debated subject in the antitrust community in the U.S. The *status quo* is that both the passing-on defence and offence are prohibited at the federal level. As indirect purchaser standing is not prohibited at the state level, it inevitably results in practical issues such as contradictory judgments for example. However, it seems to the author that there is a misconception regarding the dynamics between the passing-on defence and indirect purchaser standing. Namely, as has been persuasively brought out by the dissenting judges in *Illinois Brick* and the American Bar Association Antitrust Section, prohibiting the passing-on defence does not automatically mean that indirect purchaser standing should be prohibited. On the contrary, there are sound legal and economic arguments that could allow the prohibition of passing-on defence and permitting of indirect purchaser standing to co-exist.

## 2.2. Overview in the EU

The passing-on of overcharges regarding the passing-on defence has not been strictly decided by the European Court of Justice and remains a debated topic within the EU. However, the ECJ has conclusively ruled in the milestone cases of *Courage*,<sup>34</sup> *Manfredi*,<sup>35</sup> *Pfleiderer*<sup>36</sup> and *Kone*<sup>37</sup> that *any individual* can claim damages for the loss caused to them. Thus, it can be said that compared to the U.S. system where the passing-on defence was first decided in *Hanover Shoe* which led to the decision not to allow indirect purchaser standing in *Illinois Brick*, the EU has decided to first settle the issue regarding indirect purchaser standing.

### 2.2.1. The passing-on defence in the EU

The passing-on defence in the EU has not yet been decided in competition law cases. However, the ECJ has on several occasions touched upon that issue in other fields. The ECJ has brought out the following:

“As that exception is a restriction on a subjective right derived from Community legal order, it must be interpreted restrictively, taking account in particular of the fact that passing on a charge

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<sup>34</sup> *Courage and Crehan*, C-453/99, ECLI:EU:C:2001:465, para 26

<sup>35</sup> *Manfredi*, C-295/04, ECLI:EU:C:2006:461, para 60

<sup>36</sup> *Pfleiderer*, C-360/09, ECLI:EU:C:2011:389, para 28

<sup>37</sup> *Kone and Others*, C-557/12, ECLI:EU:C:2014:1317, para 33



to the consumer does not necessarily neutralize the economic effects of the tax on the taxable person”.<sup>38</sup>

Further, the Advocate General Tesauro has stated:

“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. More especially, I do not believe that the State, which itself has actually obtained unjust enrichment by levying – for years, even – an unlawful charge, may then specifically rely on a principle of that kind to refuse to repay the sums unduly paid.”<sup>39</sup>

The passing-on defence in tax law cases can be easily compared to the passing-on defence cases in competition law cases. “There is no reason to protect the perpetrator of a serious competition law violation who has for some time enjoyed anti-competitive gains, to the detriment of the victim of the anti-competitive practice, just because the surcharge may have been passed on.”<sup>40</sup>

In addition, in the *Hans Just*<sup>41</sup> case, the ECJ analyzed the importance of taking into account the loss of profit due to the unlawfully levied tax. It stated:

“There is nothing therefore, from the point of view of Community law, to prevent national courts from taking account in accordance with their national law of the fact that it has been possible for charges unduly levied to be incorporated in the prices of the undertaking liable for the charge and to be passed on to the purchasers. It is equally compatible with the principles of Community law for courts before which claims for recovery of repayments are brought to take into consideration, in accordance with their national law, the damage which an importer may have suffered because the effect of the discriminatory or protective tax provisions was to restrict the volume of imports from other Member States.”<sup>42</sup>

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<sup>38</sup> *Weber's Wine World and Others*, C-147/01, ECLI:EU:C:2003:533, para 95

<sup>39</sup> *Comateb and Others*, C-192/95, ECLI:EU:C:1996:258, para 21

<sup>40</sup> Assimakis P Komninos, *EC Private Antitrust Enforcement*, Hart Publishing, 2008, p 200-201

<sup>41</sup> *Hans Just I/S v Danish Ministry for Fiscal Affairs*, C-68/79, ECLI:EU:C:1980:57

<sup>42</sup> *Ibid*, para 26

However, in *Courage and Crehan*, the ECJ has stated that “the Court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them”.<sup>43</sup>

Further, it is interesting to note that there are situations where the defendant’s burden to demonstrate the existence and extent of the passing-on of overcharges would be impossible to surpass. This would be the case for the burden of proof established in *San Giorgio*,<sup>44</sup> where the ECJ held that a national provision that required to put the burden of proof on the claimant to demonstrate that it was not possible to the claimant to pass on the overcharge to the end-consumers, would be incompatible with the EU law as it would make it excessively difficult to the claimant to secure compensation. Thus, it might be the case that the burden of proof shifts from the defendant to the claimant as the defendant has showed to some extent that the overcharge was passed on. It would then be the claimant’s turn to present some contradictory evidence. However, as according to the *San Giorgio* case it is not obliged to do so, the passing on defence would be “nugatory in practice”.<sup>45</sup>

Thus, based on the abovementioned case law, regardless of the fact that the ECJ in theory permits mechanisms such as the passing-on defence, it is nevertheless not widely accepted under the EU law and should not have a broad interpretation.

### 2.2.2. Indirect Purchaser Standing in the EU

Indirect purchaser standing has been repeatedly affirmed by the ECJ. In *Courage and Crehan*, the ECJ stated:

“The full effectiveness of Article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk if it were not open to *any individual* to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition”.<sup>46</sup>

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<sup>43</sup> *Courage and Crehan*, C-453/99, ECLI:EU:C:2001:465, para 30

<sup>44</sup> *Amministrazione delle Finanze dello Stato v SpA San Giorgio*, C-199/82, ECLI:EU:C:1983:318

<sup>45</sup> David Ashton and David Henry, *Competition Damages Actions in the EU*, Elgar Competition Law and Practice, 2013, p 53

<sup>46</sup> *Courage and Crehan*, C-453/99, ECLI:EU:C:2001:465, para 26

In addition, the ECJ has also decided the “umbrella pricing” issue in *Kone and Others* and went even further to specify:

“The full effectiveness of Article 101 TFEU would be put at risk if the right of *any individual* to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets”.<sup>47</sup>

Therefore, it can be stated that according to the settled case law, the ECJ has ensured an extensive standing for the competition law cases, expanding it even to the “umbrella pricing” cases. Granting the right to claim damages to any individual who has suffered harm caused by competition law infringement also goes in line with the overall compensatory principle prevailing in the EU private competition law enforcement. Moreover, as the TFEU is commonly referred to as a constitutional instrument which grants rights to its citizens,<sup>48</sup> it is understandable why the ECJ does not want to limit the standing in cases of the infringement of articles 101 and 102 TFEU. A broad standing, however, does not unfortunately constitute an incentive *per se* for indirect purchasers to bring claims as they oftentimes face numerous obstacles and legal uncertainty regarding the positive outcome of their case.

### 3. Passing-on of overcharges in the Directive

The following chapter will analyze the passing-on defence and indirect purchaser standing options and solutions beginning with the options set out in the Green Paper<sup>49</sup> and ending with the solutions stipulated in the Directive. The chapter also argues that some arguments regarding the allowance of the passing-on defence and indirect purchaser standing are based on misconceptions.

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<sup>47</sup> *Kone and Others*, C-557/12, ECLI:EU:C:2014:1317, para 33

<sup>48</sup> Opinion 1/91, ECLI:EU:C:1991:490, para 21; and *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, C-26/62, ECLI:EU:C:1963:1, p 12

<sup>49</sup> Green Paper, Damages actions for breach of the EC antitrust rules, Brussels, 2005, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0672&from=EN>

### 3.1. Passing-on of overcharges options in the Green Paper

The Green Paper suggested four options regarding the passing-on of overcharges issue:

- The passing-on defence is allowed and both direct and indirect purchasers can sue the infringer (option 21);
- The passing-on defence is excluded and only direct purchasers can sue the infringer (option 22);
- The passing-on defence is excluded and both direct and indirect purchasers can sue the infringer (option 23);
- A two-step procedure, in which the passing-on defence is excluded, the infringer can be sued by any victim and, in a second step, the overcharge is distributed between all the parties who have suffered a loss (option 24).<sup>50</sup>

The Green Paper brought out in a rather simplistic way the main advantages and disadvantages of each option. As for the option 21, direct purchasers might not be able to recover damages as the infringer can use the passing-on defence and indirect purchasers might fail showing that the overcharge has been passed on to them. As for the option 22, direct purchasers will benefit from the fact that the infringer cannot invoke the passing-on defence. As for the option 23, the actions would be less burdensome for the claimant as the passing-on defence is prohibited, however, defendants might face the risk of paying multiple damages for both direct and indirect purchasers. As for the option 24, it would be technically difficult but could enhance fair compensation for all victims.<sup>51</sup>

Following an intensive public discussion period, different stakeholders expressed their opinions regarding the possible solution to the passing-on of the overcharges issue. The comments were indeed very diverse. For example, there were stakeholders suggesting that the passing-on defence should be excluded and indirect purchaser standing granted in case direct purchaser do not bring claims;<sup>52</sup> there were stakeholders suggesting that both direct and indirect purchasers should be

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<sup>50</sup> Ibid, p 8

<sup>51</sup> Ibid, p 8

<sup>52</sup> Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law On the DG Competition Green Paper of December 2005 on Damages actions for breach of the EC Antitrust rules, p 2, available at [http://ec.europa.eu/competition/antitrust/actionsdamages/files\\_green\\_paper\\_comments/max\\_planck\\_institut.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/max_planck_institut.pdf)

allowed to sue the infringer and that the passing-on defence should be allowed regardless of the fact that it may “constitute a significant disincentive” to the commencement of claims by direct purchasers.<sup>53</sup>

Many conclusions regarding the passing-on of overcharges issue have been done under the impression that the primary objective of the damages claims in the EU is compensation and not imposing financial penalties.<sup>54</sup> As such, the legal cultures are very different in the U.S. and in the EU: treble damages have long been available in the U.S., compared to the EU where granting double damages, let alone treble damages, is commonly not accepted.<sup>55</sup> In fear of duplicative damages, many stakeholders wish to allow for the passing-on defence, arguing that the compensatory nature of the competition law private enforcement insists on making the passing-on defence available.

However, the author finds that perhaps the concept of compensatory objective should have a broader definition. Indeed, as also brought out by the American Appellate judge Mr. F. Easterbrook, a way of thinking about multiple damages could also be as a means of compensating for infringements that will not be detected.<sup>56</sup> In addition, possible double damages in case the passing-on defence is prohibited and indirect purchaser standing allowed does not exclude the compensatory objective of competition law private enforcement. On the contrary, it would only ensure that compensating the victims is present. Indeed, for example, let’s take a situation where a successful claimant can recover three times the compensatory damages compared to their actual damages. As such, the aims of both deterrence and compensation will ultimately be served.<sup>57</sup>

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<sup>53</sup> Submission to the European Commission in Response to its Green Paper on Damages Actions for Breach of the EC Antitrust Rules, Submitted on behalf of the Competition Law Forum of the British Institute of International and Comparative Law, 2006, p 15-16, available at

[http://ec.europa.eu/competition/antitrust/actionsdamages/files\\_green\\_paper\\_comments/clf.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/clf.pdf)

<sup>54</sup> For example, International Bar Association Antitrust Committee Working Group on Private Antitrust Litigation in Europe Submission Regarding the European Commission’s Green Paper on Damages Actions for Breach of the EC Antitrust Rules, p 18, available at

[http://ec.europa.eu/competition/antitrust/actionsdamages/files\\_green\\_paper\\_comments/iba.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/iba.pdf)

<sup>55</sup> Comments of the Section of Antitrust Law and the Section of International Law of the American Bar Association in Response to the Request for Public Comment of the Commission of the European Communities On Damage Actions for Breaches of EU Antitrust Rules, 2006, p 65, available at

[http://ec.europa.eu/competition/antitrust/actionsdamages/files\\_green\\_paper\\_comments/aba.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/aba.pdf)

<sup>56</sup> F. Easterbrook, Detrebling Antitrust Damages, 28 J.L. Econ, 1985, p 445

<sup>57</sup> Zygimantas Juska, Obstacles in European Competition Law Enforcement: A Potential Solution from Collective Redress, European Journal of Legal Studies, vol 7 no 1, p 138, available at <http://www.ejls.eu/15/184UK.htm>

Also, it must be noted that the objectives of deterrence and compensation do not necessarily need to be incompatible with one another and can be overlapping in some cases.<sup>58</sup> As such, the Commission itself has brought out that an effective private competition law enforcement inherently serves the deterrent objective as well.<sup>59</sup> However when examining the views put forward by the Commission in the later stages, it can be learnt that deterrence as a policy aim “has dropped out completely, being replaced by “optimising” the relationship between public and private enforcement”.<sup>60</sup> This is so most probably due to the fact that the objective of deterrence is most commonly associated with giving an exclusive standing to direct purchasers only.<sup>61</sup> Yet, this does not necessarily have to be the case in the EU.

Thus, it may be that many stakeholders and the Commission itself were in favour of allowing the passing-on defence on a slightly stiff presumption that allowing it would be the only way to be compatible with the EU legal culture and granting indirect purchaser standing. Though, the ECJ has stated that granting exemplary and punitive damages is not conflicting with the EU legal culture.<sup>62</sup> As can also be seen from the previous paragraphs, the objectives of compensation and deterrence can effectively co-exist.

### 3.2. Passing-on of overcharges solution in the White Paper

The White Paper states that the solutions brought out in it “consist of balanced measures that are rooted in the European legal culture and traditions”. It adds that the private antitrust enforcement framework is based on “a genuine European approach”.<sup>63</sup> What this “genuine European approach” is remains problematic and unexplained in the White Paper.

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<sup>58</sup> David Ashton and David Henry, *Competition Damages Actions in the EU*, Edward Elgar publishing, 2013, p 38

<sup>59</sup> White Paper on Damages Actions for Breach of the EC Antitrust Rules, 2008, p 3

<sup>60</sup> David Ashton and David Henry, *Competition Damages Actions in the EU*, Edward Elgar publishing, 2013, p 130 footnote 14

<sup>61</sup> *Ibid*, p 38

<sup>62</sup> *Manfredi*, C-295/04, ECLI:EU:C:2006:461, para 99. However, double damages may conflict with the *ne bis in idem* principle. “The principle of *ne bis in idem* prohibits the same person from being sanctioned more than once for the same unlawful conduct in order to protect one and the same legal interest. The application of that principle is subject to three cumulative conditions: the identity of the facts, the unity of offender and the unity of legal interest.” *Archer Daniels Midland v Commission*, T-329/01, ECLI:EU:T:2006:268, para 290. It should be noted that as for the third condition, in order to establish the infringement of the principle, it should be affirmed that a possible fine and a possible double damages award serve the same interest, the deterrence interest.

<sup>63</sup> White Paper on Damages Actions for Breach of the EC Antitrust Rules, 2008, p 3

According to the White Paper, there were two common arguments against the prohibition of the passing-on defence: first, it would lead to the unjust enrichment of direct purchasers who did not suffer harm as they passed on the overcharges; and second, the infringer would suffer from double damages in cases where both direct and indirect purchasers will recover damages for the same overcharge. However, the ones suggesting that the passing-on defence should be prohibited, claimed that the aforementioned theory is “purely theoretical” and contended that allowing the passing-on defence would serve as a disincentive for direct purchasers to bring claims. In addition, as indirect purchasers face difficulties in proving the infringement and how it relates to the damage, the passing-on defence could lead to a situation where no one is being compensated.<sup>64</sup>

The White Paper concludes that “the defendant in an antitrust damages case should be entitled to rely on the passing-on defence against a claim for compensation of the overcharge, brought by a claimant who is not a final consumer;” and that indirect purchasers would be entitled to bring claims and “would be able to rely on the rebuttable presumption that the illegal overcharge was passed on in its entirety down to his level”.<sup>65</sup>

### 3.3. Passing-on defence exception

Before giving an overview of the passing-on of the overcharges chapter in the Directive, it would be very interesting to touch upon a caveat brought out in the final proposal of the Directive.<sup>66</sup> Namely, the proposed Directive stipulates that “Insofar as the overcharge has been passed on to persons at the next level of the supply chain for whom it is legally impossible to claim compensation for their harm, the defendant shall not be able to invoke the defence referred to in the preceding paragraph”.<sup>67</sup>

The rationale behind this exception is that in some cases, indirect purchasers would face legal impossibility to prove the causal link between the infringement and the harm they suffered. As such, the Directive is not intended to regulate the rules on causality of the Member States. Indeed,

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<sup>64</sup> Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, 2008, p 63

<sup>65</sup> Ibid, p 65-67

<sup>66</sup> 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, 2013, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF>

<sup>67</sup> Ibid, p 37

it has been argued that as a matter of procedural autonomy, the EU depends on its Member States as for the remedies and judicial protection of the rights granted by the EU. Consequently, it should be only fair that for example in the case of the Directive, the rules on causality will not be harmonized. However, it shall be noted that harmonizing certain conditions relating to the remedies in the private competition law enforcement under Articles 101 and 102 TFEU “need not be seen as a major legal revolution”. Harmonizing the remedies would only make clear the rights that must in any event arise from Article 101 and 102 TFEU. As such, harmonizing the rules on causality, for example, do not conflict with the principle of the autonomy of Member States in matters of remedies and procedure.<sup>68</sup> Also, the fulfilment of the conditions regarding causation “play a predominant role in regulating the damages claims” in competition law due to for instance complex market structures.<sup>69</sup> Thus, the rules governing causality should have been harmonized as well.

As a result of not harmonizing the rules on causality, it might be the case that in some Member States, the rules on causality (for example the rules on remoteness and foreseeability) would deprive the indirect purchaser of recovery. Thus, the exception makes sense and is perfectly fair. However, this exception would fundamentally conflict with the settled case law of the ECJ – the ECJ has consistently held that *any individual* can claim damages for the harm it has suffered.<sup>70</sup> Depriving *a priori* someone from the standing would not be consistent with what has been decided and accepted on the EU level.

Probably as a result of realizing that the concept of such exception would indeed be very much in conflict with the *acquis*, the exception has simply been erased from the Directive. It must be noted that the rules on the causality will still rest in the domain of national law of the Member States. It is highly unlikely, though, that a simple eradication of a provision would also exclude the actual risk of having “persons at the next level of the supply chain for whom it is legally impossible to claim compensation for their harm”. Also, if an indirect purchaser fails to bring an action due to the causality requirements, an infringer would nevertheless be able to invoke the passing-on

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<sup>68</sup> David Ashton and David Henry, *Competition Damages Actions in the EU*, Edward Elgar publishing, 2013, p 11, 15

<sup>69</sup> Ioannis Lianos, *Causal Uncertainty and Damages Claims for the Infringement of Competition Law in Europe*, CLES Research Paper Series 2/2015, p 2, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2564329](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2564329)

<sup>70</sup> For example, *Courage and Crehan*, C-453/99, ECLI:EU:C:2001:465, para 26



defence. As such, deleting this exception is even more harmful to the efficient private competition law enforcement as it makes the use of the passing-on defence more disposable and without restrictions.

### 3.4. Overview of the relevant provisions in the Directive

The Directive acknowledges a wide concept of both indirect purchaser standing and the passing-on defence.

It codifies both in several recitals and Article 3 a wide concept for standing:

“The right to compensation is recognised for any natural or legal person – consumers, undertakings and public authorities alike – irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether or not there has been a prior finding of an infringement by a competition authority.”

Thus, indirect purchaser standing shall certainly be covered by that broad definition.

Article 13 provides for the passing-on defence and stipulates:

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

It is interesting to note that the general fear of overcompensation mirrors back from the Directive. For example, it has been written in Article 12(2) that “To avoid overcompensation, Member States shall lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level.” One may argue, on the other side, that the Directive seeks to strike the balance between overcompensation and undercompensation, saying that the Directive, for example in its recital 4, also requires each Member State to ensure the effective exercise for the right to compensation. However, as the Directive does not mention the concept of undercompensation, and specifically entails the concept of overcompensation, it is rather clear that the EU is more afraid of overcompensation rather than

undercompensation. Also, on a purely ethical and moral viewpoint, the fact that the infringers are favored to the victims as a result of enacting provisions that explicitly aim to prevent overcompensation and not enacting provision that explicitly aim to prevent undercompensation, is rather unfair.

As for indirect purchasers and their burden of proof it has been argued that “because the scenario according to which the defendant is unjustly enriched is more likely than the one where he would face multiple liability, the Commission considers it appropriate to ease the claimant’s burden of proving the passing-on and its extent”<sup>71</sup>.

Therefore, the Directive stipulates in Article 14 that the burden of proving the existence and scope of the passing-on of overcharge to the claimant shall rest with the claimant and stipulates a presumption in favour of claimants. It is oftentimes the case that the ones not in direct contact with the infringer find it, for example due to the information asymmetry, especially difficult to bring sufficient evidence in court. However, if the overcharge has been passed on to indirect purchasers, then they are the ones who are actually suffering the harm. In order to alleviate claimants’ burden of proof, a rebuttable presumption has been established that the overcharge has been passed on to indirect purchasers.

The Directive establishes the following presumption:

“The indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that:

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

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<sup>71</sup> Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, 2008, p 66

(c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.”

This presumption is clearly meant to facilitate the burden put on indirect purchasers. Indeed, if it is a follow-on action, if a court has already ruled on the existence of the overcharge on the direct purchaser, and if the product is not the “purchased goods or services derived from or containing them”, then the presumption does a lot to facilitate indirect purchaser actions.<sup>72</sup> However, indirect purchaser would still face considerable obstacles as the three cumulative conditions brought out in the previous sentence are frequently not fulfilled. Also, indirect purchasers would face further obstacles such as for example proving the size of its individual damage and the requirement of causality which will be further discussed in the following chapter.

#### 4. Issues faced in applying passing-on of overcharges

This chapter brings out the main issues that will be likely faced by direct purchasers, indirect purchasers and the national courts when applying the relevant provisions of the Directive to the passing-on defence and indirect purchaser standing.

##### 4.1. Issues faced by direct purchasers

There are several obstacles to be faced by direct purchasers in case the national courts are going to easily accept the passing-on defence invoked by the infringer. Perhaps the biggest issue would be the disincentive to bring claims as allowing the passing-on defence would inevitably reduce the amount of compensation paid to the claimant and make litigation more complex and time-consuming. Indeed, “a successful passing on defence will operate to reduce liability, and thus constitute an obstacle to private enforcement”.<sup>73</sup>

Further, it has been argued that “A rebuttable presumption that price overcharges were fully passed on to end purchasers would reduce the total number of claims brought by direct customers”.<sup>74</sup> This

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<sup>72</sup> Grant Stirling, Private damages actions under EU competition law: an analysis of standing to sue for indirect purchasers and proving loss, 2014, p 8,9, available at <http://www.uaces.org/documents/papers/1401/stirling.pdf>

<sup>73</sup> Denis Waelbroeck, Donald Slater and Gil Even-Shoshan, Study on the conditions of claims for damages in case of infringement of EC competition rules, Ashurst study, 2004, p 110

<sup>74</sup> Erdem Büyüksagis, Standing and Passing-on in the New EU Directive on Antitrust Damages Actions, SZW/RSDA 1/2015, p 20, available at <http://ssrn.com/abstract=2577898>

is due to the fact that it remains unclear how the presumption that price overcharge was fully passed on to end purchasers would be ignored in cases brought by direct purchasers. Therefore, this presumption is likely to have a negative impact on the effective private enforcement of competition law and would be inconsistent with the objective to facilitate damages actions.

In addition, it might be the case that the infringer would successfully invoke the passing-on defence as a consequence of which a direct purchaser would fail to get compensated for its actual loss. Nevertheless, direct purchaser could still prove that it has suffered loss of profits. The Directive recognizes two types of losses, the actual loss and loss of profits – *damnum emergens* and *lucrum cessans* respectively. Article 12(3) of the Directive stipulates that “This Chapter shall be without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.”

However, the concept of loss of profits is very much underdeveloped in the Directive. It has been argued that:

“In order to reinvigorate this head of damage, the Commission could have for instance linked pass-on with a rebuttable presumption on loss of profits – something that is economically conclusive. If the passing-on defence of an infringer is successful, this implies that it was possible to properly quantify the pass-on from the direct purchaser to the indirect purchaser. This typically also implies that there is a quantity effect.”<sup>75</sup>

Thus, such rebuttable presumption would have made the litigation a lot more efficient and also ensured that the victims would be compensated.

What is more, many national competition authorities as well as the European Commission itself are likely to highlight the consumer benefits that their actions will bring about. Consequently, oftentimes they will add a statement in their decision that the competition law infringement ultimately affected the end consumers as it was possible to pass on the overcharge. However, such

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<sup>75</sup> Frank P. Maier-Rigaud, Toward a European Directive on Damages Actions, 2014, *Journal of Competition Law and Economics*, p 6, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2296843](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2296843)

statements would have a negative impact for the claimants who bring damages actions and are not the end consumers as it would indicate that only the end consumer is the one who suffered harm.<sup>76</sup>

For example, in a damages actions claim in France following a decision by the European Commission, a French court denied claimant a compensation as the claimant could not prove that it was impossible to pass on the overcharge and because the Commission's decision and press communication indicated that the direct purchasers could pass on the overcharge.<sup>77</sup> The judgment explicitly brings out that the 5 December 2001 Commission's press communication states that the final consumers suffered harm as they had to pay more for the product and would have paid less if there had not been any infringement.<sup>78</sup> It is unclear, though, whether the Commission's statement is a general opinion or did it actually mean that the end consumers were the only ones to suffer harm. However, as the Directive holds a view that the overcharge is generally passed on down the supply chain, such statements by the NCAs and the Commission would likely occur and mislead the courts.

To conclude, the existence itself and a broad interpretation of the passing-on defence works as a disincentive for direct purchasers to bring damages actions which consequently makes private competition law enforcement less efficient and also contradicts with the objective of the Directive – to facilitate damages actions.

#### 4.2. Issues faced by indirect purchasers

As for the issues faced by indirect purchasers, one of the main obstacles they face is proving of the existence and scope of the passing-on of overcharges. This is due to the fact that they are very remote from the infringement itself and the fact that it is extremely difficult for the end-user to analyze the scope of pass-on using a statistical study.<sup>79</sup> “An inability to prove the existence as well

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<sup>76</sup> Passing game: the ongoing debate about pass-on in damages actions, Oxera Agenda, 2014, p 3, available at <http://www.oxera.com/Latest-Thinking/Agenda/2014/Passing-game-the-ongoing-debate-about-pass-on-in-d.aspx>

<sup>77</sup> Tribunal de Commerce de Nanterre, Les Laboratoires Arkopharma v Roche and Hoffmann La Roche, 2006, available at [http://ec.europa.eu/competition/antitrust/national\\_courts/court\\_2007\\_21\\_fr.pdf](http://ec.europa.eu/competition/antitrust/national_courts/court_2007_21_fr.pdf)

<sup>78</sup> Ibid, p 15

<sup>79</sup> Commission Staff Working Paper, Annex to the Green Paper on Damages action for breach of the EC antitrust rules, 2005, p 46, available at [http://ec.europa.eu/competition/antitrust/actionsdamages/sp\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/sp_en.pdf)

as the extent of the illegal passing-on of the overcharge implies that the end-consumer will not be compensated”.<sup>80</sup>

In order to alleviate indirect purchaser’s burden, the EU Council as well as the European Law Institute suggested a rebuttable presumption in favour of the indirect purchaser standing. The EU Council suggested a provision stating that:

“Member States shall ensure that where an indirect purchaser claims compensation in relation to an infringement which led to an overcharge, a passing-on of overcharge having an impact on the price of the goods or services he purchased shall be deemed to have been proven, provided that these are the same goods or services that were subject to the infringement, or goods or services derived from or containing the goods or services that were the subject of the infringement”.<sup>81</sup>

Similarly, the European Law Institute suggested a provision stipulating that:

“Where an indirect purchaser claims compensation with regard to an infringement leading to overcharge, a passing-on of overcharge impacting the price of the goods or services purchased shall be deemed to have been proven, provided that these are the same goods or services that were subject to the infringement, or goods or services derived from or containing the goods or services that were the subject of the infringement”.<sup>82</sup>

It should be pointed out that this presumption would have been the case only with follow-on actions. Indirect purchasers would have, thus, still faced considerable burden in stand-alone actions.

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<sup>80</sup> Erdem Büyüksagis, New perspectives on misuse of market power: How should the effects-based approach complement the existing normative solution?, SZW/RSDA 1/2013, p 67, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2275882](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2275882)

<sup>81</sup> Council of the European Union, 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 - Adoption of the general approach, 2013, p 43, available at <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2015983%202013%20INIT>

<sup>82</sup> European Law Institute, Statement of the European Law Institute on Collective Redress and Competition Damages Claims, 2014, p 79, available at [http://www.europeanlawinstitute.eu/fileadmin/user\\_upload/p\\_eli/Projects/S-5-2014\\_Statement\\_on\\_Collective\\_Redress\\_and\\_Competition\\_Damages\\_Claims.pdf](http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Projects/S-5-2014_Statement_on_Collective_Redress_and_Competition_Damages_Claims.pdf)

However, such presumption never made it to the final Directive. Instead, we can nevertheless find a rebuttable presumption in favour of indirect purchaser in Article 14 of the Directive, which according to some commentators “does not seem realistic”.<sup>83</sup>

For instance, Article 14(2) states that the presumption in favour of indirect purchaser is conditional to the proving that the defendant has committed an infringement of competition law. However, should it not be a follow-on case, an indirect purchaser would not be in a suitable position to submit evidence needed to prove the infringement. The necessary evidence is oftentimes exclusively in the possession of the defendant or third parties and indirect purchasers might not be aware of such evidence.<sup>84</sup>

Further, such presumption is said to be limited as it is only facilitating the burden of proof regarding the passing-on and its extent.<sup>85</sup> Therefore, “indirect purchasers would still have to bear the burden to substantiate and prove a claim, especially the amount of their individual damage, as well as the lack of evidence regarding this”.<sup>86</sup> Indirect purchasers would also need to prove the existence of the initial overcharge and the size of their damage. Thus, they would have to demonstrate to what extent the overcharge caused them harm. For example, “particularly where in the course of the production/distribution chain the overcharged good or service was used to produce other goods or services, the claimant would still have to indicate the degree to which the goods or services it purchased incorporate the defendant’s overcharged good or service, in order to show its harm”.<sup>87</sup>

In addition, it has been argued that *Manfredi* allows for national causality rules to deny in some circumstances indirect purchaser standing. “It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or

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<sup>83</sup> Erdem Büyüksagis, Standing and Passing-on in the New EU Directive on Antitrust Damages Actions, SZW/RSDA 1/2015, p 20. Referring to European Law Institute, Statement of the European Law Institute on Collective Redress and Competition Damages Claims, 2014, p 80

<sup>84</sup> Ibid, p 20

<sup>85</sup> Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, 2008, p 67

<sup>86</sup> Erdem Büyüksagis, Standing and Passing-on in the New EU Directive on Antitrust Damages Actions, SZW/RSDA 1/2015, p 20-21

<sup>87</sup> Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, 2008, p 67

practice prohibited under Article 81 EC”.<sup>88</sup> “Given that the Court emphasised the requirement of causality, the finding of the Court does not exclude national provisions or case law that lead to barring damages actions brought by certain indirect purchasers for reasons of remoteness”.<sup>89</sup> Also, when establishing the causal link, “it is necessary to examine the existence of damage and the assessment of that damage in the light of the normal course of events and real probabilities, not theoretical ones.”<sup>90</sup> However, oftentimes indirect purchasers would not be in a position to establish such causal link.

Moreover, unfortunately the Directive does not specify nor give any instructions for Member States to modify their tort law rules on causality. Nevertheless, it should not be forgotten that Article 101 and 102 TFEU create obligations and rights that must be respected. It has been argued that “harmonisation of certain conditions relating to remedies in actions for the enforcement of EU law is no more than a necessary consequence of the fact that the Treaty creates in one way or another obligations and rights for individuals and Member States” and is not, thus, conflicting with the principle of procedural and remedial autonomy of the Member States.<sup>91</sup>

Nonetheless, the Directive highlights that those rules shall be consistent with the principles of effectiveness and efficiency. Thus, in theory, there should not be any national rules prohibiting standing for indirect purchasers for the reasons of remoteness and unforeseeability. It is unlikely, though, that for example in a cartelized product case that has been processed into another product, it would be possible to prove the passing-on as there are numerous factors that influence the pricing at the downstream level. In such cases, the causality between the infringement and the passing-on can only rarely be established.<sup>92</sup>

In addition, such scenario has been discreetly presented by the drafters of the Directive as well. By proposing a provision stipulating that “insofar as the overcharge has been passed on to persons at the next level of the supply chain for whom it is legally impossible to claim compensation for their harm, the defendant shall not be able to invoke the defence referred to in the preceding paragraph”,

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<sup>88</sup> *Manfredi*, C-295/04, ECLI:EU:C:2006:461, para 61

<sup>89</sup> Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, 2008, p 15

<sup>90</sup> *Pitsiorlas v Council*, T-3/00 and T-337/04, ECLI:EU:T:2007:357, para 300

<sup>91</sup> David Ashton and David Henry, *Competition Damages Actions in the EU*, Edward Elgar publishing, 2013, p 11

<sup>92</sup> Erdem Büyüksagis, *Standing and Passing-on in the New EU Directive on Antitrust Damages Actions*, SZW/RSDA 1/2015, p 20



they obviously accept that the national rules on causality can, in some circumstances, deprive an indirect purchaser of the right to claim damages. Again, a simple eradication of that provision does not eradicate the issue itself. The Directive should have stipulated the rules on causality requirements as well. As such, it would have ensured that indirect purchasers would not fail due to the requirements of causality since those requirements “play a predominant role”<sup>93</sup> when bringing damages actions. Further, it would have also enhanced the efficiency objective of the Directive as the likely references to the ECJ regarding the compatibility of a national rule with the principles of effectiveness and efficiency would not be the case.

To conclude, indirect purchasers will likely face many great obstacles when bringing damages claims such as proving the scope and extent of the overcharge passed on to them, the causal relationship between the infringement and harm suffered, proving the infringement itself in stand-alone cases and their individual harm.

#### 4.3. Issues faced by the courts

When compared to other kinds of civil actions, the courts are already facing very difficult tasks when it comes to damages actions in competition law cases – the judges will need to analyze complex economic issues such as defining the relevant market, whether the alleged conduct negatively impacts the market and the consumers, what is the size of the damage etc. Needless to say, those issues are oftentimes extremely sophisticated so that even the experts in the field of economics struggle with the right answers, let alone the judges who are supposed to be the experts in the field of law. In addition, the fact that most of the Member States do not have a specialist competition law tribunal or court does not facilitate the problem either.<sup>94</sup>

Adding another task to the courts, letting the defendant use the passing-on defence, would excessively burden the courts and seriously undermine the damages actions litigation in general. As already stated by the U.S. Supreme Court in the *Hanover Shoe* case, the economic analysis and calculating the passing-on “would normally prove insurmountable”.<sup>95</sup>

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<sup>93</sup> Ioannis Lianos, Causal Uncertainty and Damages Claims for the Infringement of Competition Law in Europe, CLES Research Paper Series 2/2015, p 2

<sup>94</sup> Barry Rodger, Competition Law Comparative Private Enforcement and Collective Redress Across the EU, Wolters Kluwer, 2014, p 24-32

<sup>95</sup> [1968] 392 U.S 481, p 493

Indeed, for example, it is generally accepted that a pass-on of the overcharges assessment should start with an assessment of competition on the relevant market – the more competitive the market, the more likely that the overcharge is passed on in its entirety. This is so due to the fact that on a competitive market, prices are comparative to the costs and if costs change, so do prices. However, the different methods to calculate the overcharge are oftentimes not accurate and can only be presumed. For example, “price-setting practices, such as cost-plus pricing, usually suggest higher rates of pass-on; price pointing suggests lower rates. Cost increases that are small relative to the price of the final product might be associated with full or zero pass-on, depending on the facts of the case.”<sup>96</sup> In addition, cost-based analysis often fails to take into account the fact that the market might be oligopolistic and thus, the above-normal profits are not abnormal.<sup>97</sup> Further, it may be the case that certain groups are not affected by the overcharge due to their bargaining power and consequently, there exist no correlation between prices between different groups of buyers. This might exclude the possibility to measure average prices and constitutes another obstacle to the assessment of overcharges.<sup>98</sup> Also, it would be almost impossible to make sure, especially in cross-border cases, how much of the overcharge has been absorbed by each distribution level.<sup>99</sup>

These were only a fraction of examples that materially complicate the assessment and calculation of overcharges. At the end of the day, in most cases the calculation of the overcharge would be based on an empirical estimation. Getting the accurate data from all the relevant parties to the case would be almost impossible. Thus, it can be concluded that even today, the passing-on defence would amount to an “insurmountable task” for the courts to analyze and should not be easily allowed to be used by the defendant.

Further, as the Directive does not specify the rules governing causality, it does not only cause issues for indirect purchasers but obviously likewise to the courts. Ultimately, it is up to the

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<sup>96</sup> Advancing economics in business, Passing game: the ongoing debate about pass-on in damages actions, Oxera Agenda, 2014, p 4, available at <http://www.oxera.com/Latest-Thinking/Agenda/2014/Passing-game-the-ongoing-debate-about-pass-on-in-d.aspx>

<sup>97</sup> Bruce E. Stangle, Calculating Cartel Overcharges, 2009, p 16, available at [http://www.analysisgroup.com/uploadedFiles/News\\_and\\_Events/News/Fordham\\_Stangle\\_Calculating\\_Cartel\\_Overcharges.pdf](http://www.analysisgroup.com/uploadedFiles/News_and_Events/News/Fordham_Stangle_Calculating_Cartel_Overcharges.pdf)

<sup>98</sup> Emily Clark, Mat Hughes and David Wirth, Study on the conditions of claims for damages in case of infringement of EC competition rules, Analysis of economic models for the calculation of damages, Ashurst 2004, p 18, available at [http://ec.europa.eu/competition/antitrust/actionsdamages/economic\\_clean\\_en.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/economic_clean_en.pdf)

<sup>99</sup> Erdem Büyüksagis, Standing and Passing-on in the New EU Directive on Antitrust Damages Actions, SZW/RSDA 1/2015, p 19

national courts to make sure that the principle of effectiveness and efficiency are being respected and followed. It may lead to a likely scenario where national courts are obliged to turn to the ECJ for a reference for a preliminary ruling regarding the compatibility of a national provision governing the rules on causality and the principle of effectiveness and efficiency. Indeed, it has been argued that “It is to be expected that the requirement of a causal link will give rise to extensive litigation both as regards the question whether the national rules comply with the principle of effectiveness and as regards proof of the existence of a causal link”.<sup>100</sup> Those likely scenarios would consequently make the litigation more time-consuming, costly and uncertain which is definitely not facilitating the effective EU private competition law enforcement.

Also, it might be the case that establishing who the direct and indirect purchasers actually are remains speculative or impossible to make sure. This can be due to some very complex market structures and sophisticated supply chains consisting of many layers.<sup>101</sup> An example of such issue can be illustrated by the U.S. case *Warren General Hospital v Amgen*.<sup>102</sup> The U.S. Court of Appeals Third Circuit held that Warren General Hospital was not a direct purchaser as it obtained the products from a wholesaler and not from Amgen. The Court of Appeals found this regardless of the fact that Warren General Hospital concluded the contract directly with Amgen and communication regarding any issue with the products were held between Warren General Hospital and Amgen.<sup>103</sup> Thus, it might be the case that a seemingly direct purchaser is nevertheless an indirect purchaser and vice versa.

In conclusion, the courts will face many practical issues regarding the passing-on defence and indirect purchaser standing such as calculating the overcharge and its pass-on, rules on causality and distinguishing who the direct and indirect purchaser are. All this is negatively affecting efficient private competition law enforcement. Thus, the author is of the opinion that the courts should not easily grant the passing-on defence while granting a wide standing for indirect

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<sup>100</sup> Caroline Cauffman and Niels Philipsen, Who does what in competition law: harmonizing the rules on damages for infringements of the EU competition rules? Maastricht University, 2014, p 32, available at: <http://ssrn.com/abstract=2520381>

<sup>101</sup> David Ashton and David Henry, Competition Damages Actions in the EU, Edward Elgar publishing, 2013, p 39

<sup>102</sup> *Warren General Hospital v Amgen*, 643 F.3d 77 (3rd Cir 2011)

<sup>103</sup> *Ibid*, p 88

purchasers. This would inevitably raise the doubts as for overcompensation which will be next analyzed in the following section.

## 5. Likelihood of overcompensation and unjust enrichment by direct and indirect purchasers

Many stakeholders have expressed their views following the launch of the Green Paper that not allowing the passing-on defence and granting indirect purchaser standing would lead to overcompensation and unjust enrichment of both direct and indirect purchasers. The proponents of the passing-on defence contend that the passing-on defence is essential as it would avoid a situation where a direct purchaser who passed on the overcharge would be compensated for the harm it did not suffer. In addition, the stakeholders contend that it would lead to a multiple liability of a defendant if a direct purchaser will get compensation for the harm it did not suffer and in addition to that, an indirect purchaser would also be able to claim damages for the harm it suffered as an end- or intermediary consumer.<sup>104</sup> Based on the experience of the U.S. damages claims and the absence of an efficient collective redress mechanism in the EU, the author will argue that overcompensation of the claimant in the EU is unlikely. And thus, the EU should limit the use of the passing-on defence and should grant indirect purchasers compensation to the greatest possible extent.

### 5.1. Experience of the U.S.

Based on a study<sup>105</sup> conducted by the director of the American Antitrust Institute, a professor and a former practicing lawyer Mr. Robert H Lande and Professor Joshua Davis, and data<sup>106</sup> collected from all antitrust cases in the State of New York from years 2000-2008, and comparing it with the situation in the EU, overcompensation of claimants in damages actions in the EU is highly unlikely.<sup>107</sup>

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<sup>104</sup> Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, 2008, p 61

<sup>105</sup> Joshua P. Davis, Robert H. Lande, Defying Conventional Wisdom: The Case For Private Antitrust Enforcement, 48 Georgia Law Review, 2013, available at [http://papers.ssrn.com/sol3/papers.cfm?Abstract\\_id=2217051](http://papers.ssrn.com/sol3/papers.cfm?Abstract_id=2217051)

<sup>106</sup> Andrew S. Gehring, The power of the purchaser: the effect on indirect purchaser damages suits on deterring antitrust violations, New York University Journal of Law & Liberty, 2010

<sup>107</sup> Robert H. Lande, The Proposed Damages Directive: The Real Lessons from the United States, 2014, available at <http://ssrn.com/abstract=2418257>

First, it shall be noted that contrary to a general misconception that the competition law damages actions contain a large number of frivolous claims, are meritless and amount to extortion, most cases in the U.S. do have merit and contain an illegal conduct by the defendant. Indeed, 88% of the 60 cases that had been studied were at least partly founded.<sup>108</sup>

Moreover, 47 cases out of 60 large U.S. cases the study analyzed were opt-out class actions that were also subject to contingency fees. It is argued that prohibiting contingency fees “severely restricts the ability of most consumer-plaintiffs to recover” as most consumers would not have the money to bring actions. Further, those 47 cases were recovered in the amount of \$33.8-\$35.8 billion by private plaintiffs.<sup>109</sup> Therefore, as the Directive does not provide for neither the opt-out class action nor contingency fees, most victims will remain uncompensated and overcompensation is again highly unlikely.

In addition, based on the experience of the U.S., indirect purchasers are almost always undercompensated. Indirect purchasers face difficulties in bringing the necessary evidence and proving their individual damage. The study argues that “if the U.S. experience is a guide, the relatively modest payments that will be made to indirect victims won't cause the sum of payments to direct and indirect purchasers to exceed 100 percent of the overcharges”.<sup>110</sup> In addition, the antitrust cases studied in the State of New York suggest that the rate at which indirect purchasers bring claims to the courts is *de minimis*.<sup>111</sup> Thus, based on the statistics, the possibility of overcompensation is marginal and double liability of the defendant is almost always excluded.

Further, perhaps the most persuasive argument is that even in the U.S. where treble damages are awarded, overcompensation is not likely. It has been argued that:

“The U.S. ‘treble damages’ remedy usually yields settlements of less than 50 percent of actual damages. If this ratio were to apply to European private cases under the proposed Directive, European victims would be expected to recover on average significantly less than 50 percent of actual damages. Even in the cases where some victims additionally recover under the laws of

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<sup>108</sup> Ibid, p 5

<sup>109</sup> Ibid, p 6

<sup>110</sup> Ibid, p 7

<sup>111</sup> Andrew S. Gehring, The power of the purchaser: the effect on indirect purchaser damages suits on deterring antitrust violations, New York University Journal of Law & Liberty, 2010, p 246

individual European nations, their total compensation is likely to be far less than the actual harm they suffered.”<sup>112</sup>

There is absolutely nothing to indicate that overcompensation would be the case in the EU, it is very likely however, that the victims in the EU will remain considerably undercompensated.

Also, another point to support the view that overcompensation would not be the case in the EU and that there would not be as much private litigation in the EU lies in the ratio between public and private enforcement. Private enforcement outweighs public enforcement in the U.S. in a 10:1 ratio whereas in the EU, private litigation normally follows to a decision of a NCA or the Commission.<sup>113</sup> As public enforcement relies heavily on leniency programs in the EU, potential private litigants may not wish to bring actions as they may realize that due to the protection of leniency applicants, they might not have access to the necessary evidence to support and prove their claims.

Yet another interesting argument is that even in the U.S., regardless of the possible sanctions and obligation to pay compensation, collusion mostly in the form of a cartel “remains a rational business strategy”.<sup>114</sup> The study showed that the U.S. cartel sanctions are only 9-21 per cent of what they should be in order to avoid cartelization. Thus, public and private sanctions combined are not leading to over-deterrence in the U.S. It would be highly unlikely that it would lead to over-deterrence in the EU, especially considering the fact that overcompensation in the EU is even less likely than in the U.S and that the EU Commission is not involved in public sanctioning in most of the Article 101 and 102 cases.<sup>115</sup>

The bottom line is that there are views that the U.S. private antitrust enforcement has not achieved a moderation in the enforcement system<sup>116</sup> and has led to “overexpansion of the antitrust laws and

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<sup>112</sup> Robert H. Lande, *The Proposed Damages Directive: The Real Lessons from the United States*, 2014, p 8

<sup>113</sup> Mihail Danov, Florian Becker, Paul Beaumont, *Cross-Border EU Competition Law Actions*, Hart Publishing 2013, p 54

<sup>114</sup> Robert H. Lande, *The Proposed Damages Directive: The Real Lessons from the United States*, 2014, p 10

<sup>115</sup> According to the Swedish Competition Authority, from May 2004 – December 2013, 84% of the Article 101 and 102 TFEU cases are solved by national competition authorities and only 16% by the EU Commission

<sup>116</sup> Comments on the Commission’s Green Paper on damages actions for breach of the EC antitrust rules on behalf of the Pharmaceutical Research and Manufacturers of America (Pharma) and the European Federation of Pharmaceutical Industries and Associations (EFPIA), 2006, p 8, available at

[http://ec.europa.eu/competition/antitrust/actionsdamages/files\\_green\\_paper\\_comments/phrma.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/files_green_paper_comments/phrma.pdf)

their increasing use to retard rather than promote competition”.<sup>117</sup> However, these views are not supported by statistical data but rather encompass general statements.<sup>118</sup> It should also be noted that the risk of overcompensation in the EU has not yet been studied<sup>119</sup> and all presumptions that it would take place in the EU are speculative at their best.

To conclude, based on the aforementioned arguments from the experience of the U.S. antitrust law, overcompensation of claimants in the EU is highly unlikely. To the contrary, most of the claimants in the EU will remain largely undercompensated or will not get compensated at all.

## 5.2. Absence of an efficient collective redress mechanism in the EU

The Green Paper found that for practical reasons, it is extremely hard and unlikely, if not impossible, for end consumers and purchasers to bring damages actions as their individual damage is oftentimes so small that the cost and efforts of damages claims would not outweigh the potential compensation received. In addition to protecting consumer interests, collective redress mechanisms could also be used to consolidate smaller claims that would save both time and money. To alleviate the issue, the Green Paper proposed that a solution could be found in introducing collective redress mechanisms.<sup>120</sup>

Two options for collective redress mechanisms were thus proposed:

- “A cause of action for consumer associations without depriving individual consumers of bringing an action. Consideration should be given to issues such as standing (a possible registration or authorisation system), the distribution of damages (whether damages go to the association itself or to its members), and the quantification of damages (damages awarded to the association could be calculated on the basis of the illegal gain of the

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<sup>117</sup> Richard A. Posner, *Antitrust Law: An Economic Perspective*, 1976, p 35

<sup>118</sup> For instance, Comments on the Commission’s Green Paper on damages actions for breach of the EC antitrust rules on behalf of the Pharmaceutical Research and Manufacturers of America (Pharma) and the European Federation of Pharmaceutical Industries and Associations (EFPIA), 2006, p 8 only brings out that “a number of procedural rules provide substantial incentives for private plaintiffs to pursue even unmeritorious cases” without actually proving that unmeritorious claims have been the case.

<sup>119</sup> Philip Lowe, Mel Marquis, *European Competition Law Annual 2011: Integrating Public and Private Enforcement. Implications for Courts and Agencies*, Hart Publishing 2014, p 439

<sup>120</sup> Green Paper, *Damages actions for breach of the EC antitrust rules*, Brussels, 2005, p 8

defendant, whereas damages awarded to the members are calculated on the basis of the individual damage suffered)” (Option 25);

- “A special provision for collective action by groups of purchasers other than final consumers” (Option 26).<sup>121</sup>

Following a public consultation period, many stakeholders opposed to the idea of collective redress in the EU. The main arguments being that it would be a financial burden to the society and not that surprisingly, the fact that infringers would potentially face multiple liability. Thus, yet again, the fear of multiple recoveries from infringers seems to be prevailing.

However, the ones supporting some sort of collective redress mechanism brought out that collective redress is necessary “in order to reduce the difference between the costs of the action and the often small value of the damage individually suffered”. It could be concluded from the public consultations that some form of collective redress is supported by the majority, however it should be designed so that unmeritorious claims would not be possible.<sup>122</sup> Why would unmeritorious claims avalanche after introducing a collective redress mechanism remains a mystery. To the contrary, for instance, the introduction of opt-out mechanisms in Portugal and the Netherlands is not reported to have led to excesses in damages claims.<sup>123</sup>

The White Paper proposed for two solutions:

- “Representative actions, which are brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims. These entities are either (i) officially designated in advance or (ii) certified on an ad hoc basis by a Member State for a particular antitrust infringement to bring an action on behalf of some or all of their members; and
- Opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action”.<sup>124</sup>

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<sup>121</sup> Ibid, p 9

<sup>122</sup> Ibid, p 14

<sup>123</sup> Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, 2008, p 17

<sup>124</sup> White Paper on Damages Actions for Breach of the EC Antitrust Rules, 2008, p 4



However, recital 13 of the Directive specifically states that “this Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU”. Instead, the Commission adopted “Common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law”.<sup>125</sup> Paragraph 4 of which reads that “The Member States should designate representative entities to bring representative actions on the basis of clearly defined conditions of eligibility”. Unfortunately, this instrument is non-binding for Member States and it does not provide for an opt-out collective redress mechanism.

The reason why no opt-out mechanisms were adopted is probably that opt-in mechanisms are “more similar to traditional litigation, and would therefore be more easily implemented at national level”.<sup>126</sup> However, this argument is questionable as it has been argued that the “U.S. style” class action itself is a rather alien concept in the EU and thus not very traditional.<sup>127</sup>

In addition, it has been brought out that introducing an opt-out collective redress mechanism would limit claimants’ freedom to informed decisions and it would conflict with the objective of collective redress – distributing compensations to the victims – as the parties are not identified.<sup>128</sup> The latter argument is, according to some, “rather bizarre”<sup>129</sup> as it is commonly known that a notice procedure precedes the action and there is a possibility for victims to be identified.

But all in all, the opt-out collective redress mechanism already does exist in some Member States (for example the UK, Denmark, the Netherlands and Portugal) and thus, it is unfair to exclude the opt-out mechanism as “it is as much part of this European experience as any other model”.<sup>130</sup> Dr. Andreangeli sharply points out that it is time for a reality check as opt-out class actions are not the enemy of fairness in the European legal traditions and that it is time to rethink the European

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<sup>125</sup> 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, O.J. 2013, L 201/60, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=en>

<sup>126</sup> Commission Staff Working Document, Accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules, Impact Assessment, 2008, p 21

<sup>127</sup> Barry Rodger, *Competition Law Comparative Private Enforcement and Collective Redress Across the EU*, Wolters Kluwer, 2014, p 190

<sup>128</sup> W. Eyskens and N. Kaluma, *The International Comparative Legal Guide to: Class and Group Actions in 2012*, Global Legal Group, 2012, Chapter 4 para 3.4

<sup>129</sup> Barry Rodger, *Competition Law Comparative Private Enforcement and Collective Redress Across the EU*, Wolters Kluwer, 2014, p 161

<sup>130</sup> *Ibid*, p 191

established wisdom as regards class certification in competition and other mass torts. Indeed, rejecting the opt-out mechanism would result in inconsistency with the trends and developments of several Member States to introduce opt-out mechanisms.<sup>131</sup>

Further, even in a highly unlikely situation where all Member States decide to act by the recommendation and introduce the collective opt-in class action mechanism, overcompensation would still not be the case. For example, 47 out of 60 large U.S private litigation cases that were studied were opt-out collective actions. Opt-in class action, however, “typically recover damages for only a tiny percentage of victims”.<sup>132</sup>

Thus, it could be contended that the lack of a binding opt-out class action mechanism in the EU will make overcompensation of the claimants simply not possible. Quite the opposite, it is highly likely that most victims will not be compensated at all. In order to alleviate this issue and make sure that at least the victims that have the will to bring actions, opt-out collective action mechanism should be introduced. “Indeed, there is every reason to give the instruments to European private market participants which will enable them to act effectively against market power that harms European consumers.”<sup>133</sup>

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In conclusion to this section, it can be contend that according to the aforementioned arguments, namely the U.S. experience and the lack of an attractive collective redress mechanism in the EU, overcompensation of claimants cannot prevail over undercompensation. Also, “it must be borne in mind that a trade-off exists between a higher chance of full compensation and a risk of overcompensation, but that the latter risk is offset by the risk of undercompensation resulting from the lack of action or from the absence of appropriate substantive and procedural rules governing damages actions”.<sup>134</sup> Thus, it is only appropriate to broaden the standing for indirect purchasers

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<sup>131</sup> Ibid, p 247-253

<sup>132</sup> Robert H. Lande, *The Proposed Damages Directive: The Real Lessons from the United States*, 2014, p 6

<sup>133</sup> Albert A. Foer, Jonathan W. Cuneo, *The International Handbook on Private Enforcement of Competition Law*, Edward Elgar Publishing, 2010, p 295

<sup>134</sup> Philip Lowe, Mel Marquis, *European Competition Law Annual 2011: Integrating Public and Private Enforcement. Implications for Courts and Agencies*, Hart Publishing 2014, p 447

and limit the use of the passing-on defence while also introducing an EU-wide opt-out collective redress mechanism.

## 6. Conclusion

This thesis argued that the passing-on of overcharges chapter in the Directive does not serve one of the main objectives of the Directive – facilitating competition law damages actions in the EU. It also found that many of the arguments brought by the proponents of allowing the passing-on defence are based on misconceptions. Most of them are based on the fear of overcompensation. Overcompensating, however, as suggested in this thesis, remains highly unlikely in damages actions, and even if it does occur in a rare case scenario, its risk is offset by the risk of undercompensation.

It has been demonstrated that easily allowing the use of the passing-on defence for the defendants would seriously undermine the efficiency of damages actions. It would mainly serve as a disincentive for direct purchasers as it would inevitably reduce the compensation paid to them, but it would also excessively complicate the claims and unnecessarily lengthen the proceedings.

Further, the Directive grants wide standing for indirect purchasers. However, it has been entertainingly stated that “Merely granting standing to indirect purchasers according to the general rules of liability does not create enough of an incentive for them to bring a damages claim, just like the simple right to marry does not create enough of an incentive to get married”.<sup>135</sup> Though, the presumption in favour of indirect purchasers in the Directive does ease the burden of proof on indirect purchasers in rare situations where the three preconditions (it is a follow-on action, a court has already ruled on the existence of the overcharge on the direct purchaser, and the product is not the “purchased goods or services derived from or containing them”) are fulfilled. However, compensating indirect purchasers would still be minimal as first and foremost, indirect purchasers would often find themselves in an impossible position to present evidence and prove their individual damage and the link between the infringement and the harm they suffered.

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<sup>135</sup> Erdem Büyüksagis, *Standing and Passing-on in the New EU Directive on Antitrust Damages Actions*, SZW/RSDA 1/2015, p 24

The thesis concluded in the last chapter that even if passing-on defence is widely accepted, overcompensation is unlikely. Likewise, even the broadest indirect purchaser standing would not result in overcompensation as there are no attractive collective redress mechanisms available under the EU law. As such, the impact of the passing-on defence and indirect purchaser standing should be rethought.

As a consequence, the thesis suggests that in order to avoid undercompensation and not compensating at all, passing-on defence should not be widely accepted and indirect purchasers should be granted compensation in the greatest possible way while at the same time, the EU should consider introducing an opt-out collective redress mechanism. At the end of the day, the EU should put more emphasis on protecting the victims of the infringements instead of protecting the infringers who have caused harm to the individuals and the society in general. “Justice is a core value of the EU Member States societies and victims of competition law have been waiting too long for that justice. They are still waiting.”<sup>136</sup> They are looking forward to an attractive collective redress mechanism, just compensation for any victim and limitations on the passing-on defence.

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<sup>136</sup> Neelie Kroes, European Commissioner for Competition Policy, Collective Redress – delivering justice for victims, ALDE Conference, European Parliament, 2009, Speech/09/88 of 4 March 2009, available at [http://europa.eu/rapid/press-release\\_SPEECH-09-88\\_en.htm?locale=en](http://europa.eu/rapid/press-release_SPEECH-09-88_en.htm?locale=en)

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