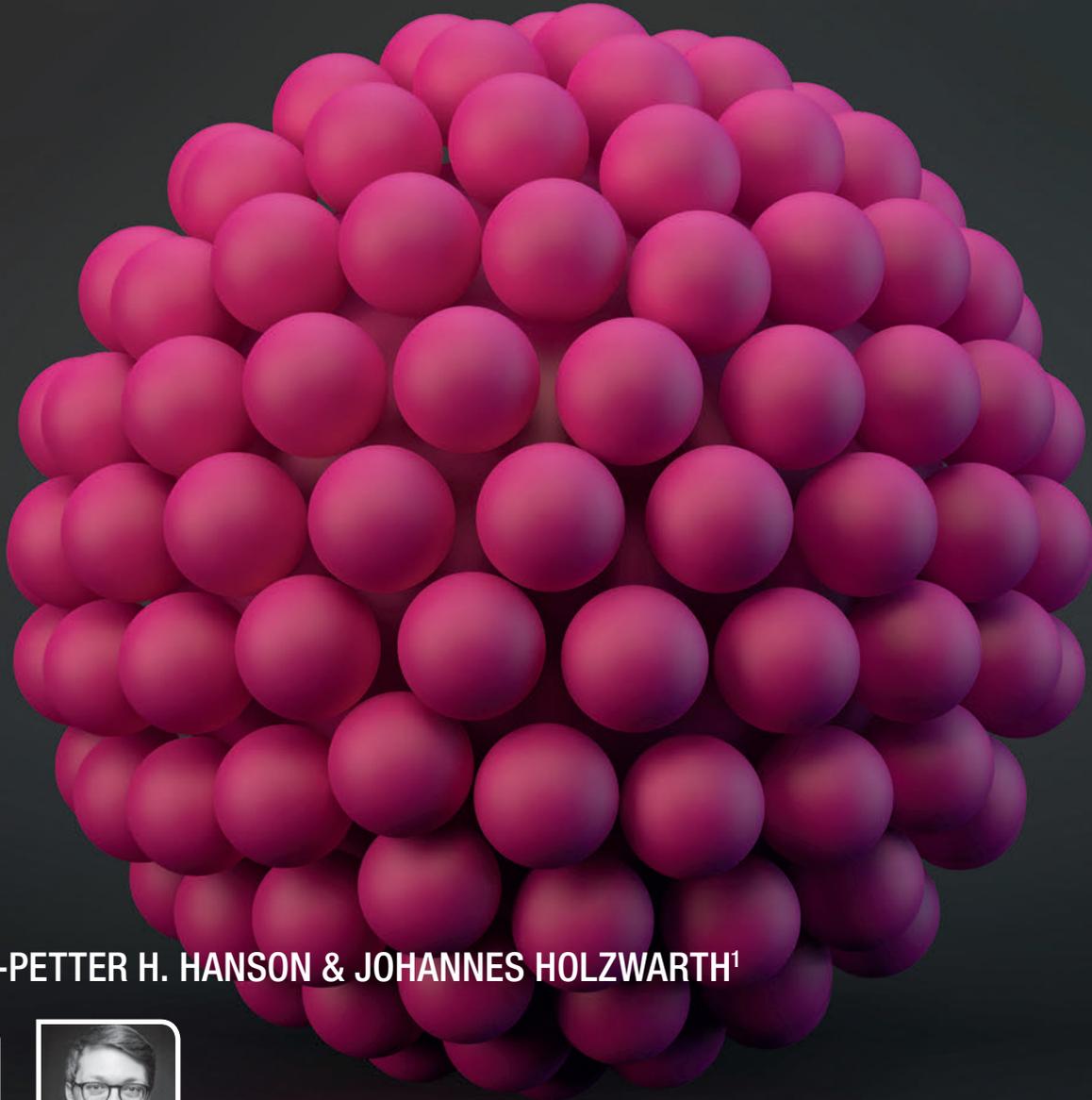


DISCOVERING NEW SPHERES OF ANTITRUST DAMAGES QUANTIFICATION: THE EUROPEAN COMMISSION, NATIONAL COURTS, AND GUIDELINES ON PASSING-ON



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I. TAKE-OFF: THE EUROPEAN APPROACH TO PRIVATE ENFORCEMENT

In Europe, private enforcement of competition law is gaining more and more momentum. This is particularly true now that all of the EU Member States have measures in place to implement the major piece of European legislation in this respect: the Directive on Antitrust Damages Actions (“the Directive”).² The Directive sets a minimum standard and had to be implemented across the EU by the end of 2016. It pursues two goals.³ First, it intends to strike the right balance between public and private enforcement and, second, to make it easier for victims of competition law infringements to receive compensation for the harm they suffered. The second goal relates inter alia to one of the practical challenges for claimants and an issue that national courts increasingly have to deal with: the quantification of antitrust harm.⁴

Private enforcement of EU competition law is still a relatively new phenomenon. It essentially emerged in the two famous judgements of the Court of Justice of the EU (“CJEU”) at the beginning of this century, namely in *Courage v. Crehan* (2001) and *Manfredi* (2006),⁵ and reached a first peak when the Directive was adopted.⁶ When developing private enforcement in Europe, EU lawmakers could often benefit from the experience in other jurisdictions with a longstanding tradition of private enforcement such as the United States, where private parties have enforced antitrust rules, most prominently those of the Sherman Act of 1890,⁷ for a long time.

However, in relation to awarding damages for antitrust infringements, the European and US models chose paths which differ in two respects. Firstly and more generally, the European model is compensatory in

² Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5.12.2014, pp. 1-19. Although the Damages Directive has not yet been implemented in the whole European Economic Area (“EEA,” including the EFTA States Norway, Iceland, and Lichtenstein), private enforcement in the EFTA States is also on the rise. In May 2018, the EFTA Court made it clear that also under the EEA agreement, anyone harmed by a violation of EEA competition law has the right to claim damages, see *Fjarsipti hf. v. Siminn hf* [2017] case E-6/17.

³ For an overview of the Directive and the intentions behind it, see Daniele Calisti & Luke Haasbeek, *The Directive on Antitrust Damages Actions and Its role in the Future Enforcement of the EU Antitrust Rules*, 1(8) CPI ANTITRUST CHRONICLE (2015).

⁴ For an overview of cases, see Jean-François Laborde, *Cartel damages claims in Europe: How courts have assessed overcharges (edition 2017)*, November 2017, Concurrences Review N° 4-2017, Art. N° 84981.

⁵ *Courage Ltd. and Bernhard Crehan*, Case C-453/99, ECLI:EU:C:2001:465; *Manfredi and Others*, Case C-295/04, ECLI:EU:C:2006:461.

⁶ A more comprehensive assessment of the actual impact of the Directive is likely to take more time, particularly because in many cases national courts may still have to apply pre-Directive rules pursuant to the temporal application of the national laws implementing the Directive.

⁷ Sherman Antitrust Act 1890, originally 15 U.S.C. §7, revised by the Clayton Antitrust Act of 1914, now 15 U.S.C. §15.

nature. This means that private enforcement of EU competition law aims at compensating – no more and no less. In the European system deterrence is only a side effect. This also means that, unlike in the United States, claimants seeking compensation for infringements of EU competition law may not receive multiple or punitive damages. Secondly, more specifically and following from its compensatory nature, private enforcement of EU competition law supports the concept of passing-on of overcharges.

The general support of passing-on in the Directive contrasts with rather longstanding case law of the Supreme Court of the United States (“SCOTUS”) rejecting passing-on arguments. In *Hanover Shoe Inc. v. United Shoe Machinery Co* (1968)⁸ the SCOTUS rejected the passing-on defense and in *Illinois Brick Co. v. Illinois* (1977)⁹ it denied indirect purchaser standing in antitrust damages actions on the basis of passing-on. However, in response to this case law, many jurisdictions in the United States have adopted laws to allow indirect purchasers to seek damages under state law, and in 2007 the Antitrust Modernization Commission recommended that Congress overrule the two Supreme Court judgments mentioned above.¹⁰ Finally, *Pepper v. Apple, Inc*, a case currently pending before the SCOTUS,¹¹ has put the topic back on the court’s agenda.

Should the United States end up following the European model in relation to passing-on, this may lead to a new situation in the evolution of private antitrust enforcement: a situation in which U.S. antitrust law may refer to a more experienced European counterpart, at least on this specific topic. Against this background, the following sections address selected questions of passing-on in relation to private enforcement of EU competition law.

II. A CLEAR VIEW: WHAT’S PASSING-ON, WHAT’S IN THE DIRECTIVE

Passing-on and its effects are probably best described by reference to a simplified example, such as the following, which also uses the terms of the Directive:

Firm A (*the infringer*) agreed with its competitors to fix prices for flour and, on the basis of this agreement, increased prices for the flour it supplied to firm B (*the direct purchaser*). Firm B used the flour to bake breads and, because of the price increase for flour (*the overcharge*), increased the price for the bread it sold to firm C (*the indirect purchaser*).

In this example, firm B passed the overcharge on to firm C. If, in response to this price effect, firm C also purchased fewer breads, the passing-on also had a volume effect.

The Directive allows an infringer to invoke passing-on as a “shield” against the claim of direct or an indirect purchasers arguing that they passed on the overcharge. It also allows indirect purchasers to use passing-on as a “sword” to receive compensation from the infringer for the harm they suffered when an overcharge is passed on to them.

To tackle the practical difficulties of damages quantification, the Damages Directive introduced a number of rules, including the general presumption that “cartels cause harm” (Article 17(2) of the Directive) and the specific presumption that, if an indirect purchaser can establish certain conditions, “a passing-on” occurred (Article 14(2) of the Directive). It also required the Commission to issue passing-on guidelines. The consultation on a draft (“Draft Passing-on Guidelines”)¹² ended in October 2018, with plans for a final version to be adopted in 2019. However, it is important to note that these guidelines are only intended to give practical guidance. The mandate stipulated in Article 16 of the Directive does not empower the Commission to alter existing rules or establish new ones in these guidelines. For example, even if the Commission saw, *quod non* at this stage, the need to introduce a legal presumption of passing-on in a “shield” scenario or, conversely, remove the presumption of passing-on in “sword” scenarios, it would not be empowered to do so by such means.¹³ In the guidelines the Commission could at most provide its own legal interpretation of the Directive. As regards the passing-on related rules this interpretation is not always clear cut.

8 392 U.S. 481 (1968).

9 431 U.S. 720 (1977).

10 Antitrust Modernization Commission, Report and Recommendations, April 2007, https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

11 Docket No. 17-204, petition for a writ of certiorari granted on June 18, 2018, see 138 S.Ct. 2647 (2018).

12 Available at http://ec.europa.eu/competition/consultations/2018_cartel_overcharges/20181807_en.pdf.

13 Of course, the adoption of guidelines does not prejudice the introduction of new rules at a later stage.

For example, the presumptions in the Directive, namely Article 14(2) and 17(1) of the Directive, do not distinguish between price and volume effects (see the explicit wording quoted above). Therefore, it could be argued that they must cover both. To support this argument one could refer to the Directive's goal of removing practical obstacles for seeking full-compensation and the link between price effects and volume effects, i.e. the rather high likelihood of volume effects whenever there are passing-on related price effects. Such an interpretation of the Directive would help direct and indirect purchasers when they claim loss of profit due to a volume effect, in particular when the infringer has successfully demonstrated a full or partial passing-on. However, there seem to be at least equally valid counter-arguments. Other parts of the relevant Articles refer explicitly to "price increases" (Article 14(1) of the Directive) or the "overcharge" (last sentence of Article 14(2) of the Directive). The presumption of volume effects for the benefit of direct and indirect purchasers may also be at odds with the wording of Article 13 of the Directive. This Article stipulates that the "burden of proving that the overcharge was passed on shall be on the defendant." Arguably, it would go beyond the scope of this burden of proof if the infringer was required to show the *absence* of any volume effects.¹⁴

III. FINDING THE RIGHT DIRECTION: COMPENSATION, ESTIMATION, QUANTIFICATION

The compensatory nature of private enforcement of EU competition law requires that the victim of an antitrust infringement can effectively seek full compensation. Building on the case law of the CJEU, Article 3(2) of the Directive makes clear that a victim under EU competition law must be placed in the position in which it would have been absent the infringement, covering actual loss, loss of profit, and interest. For economists called upon to quantify antitrust harm involving passing-on, this means building a counterfactual and taking into account price as well as volume effects. However, full compensation does not equal perfect accuracy. The Directive stipulates that national judges must have the power to estimate – generally, the amount of harm (Article 17(1) of the Directive) but also more specifically, the share of any overcharge that was passed on (Article 12(5) of the Directive).

The Directive does not include a definition of this power to estimate but, as referred to in paragraph 39 of the Draft Passing-on Guidelines, it envisages that national courts "base their assessment firstly on the information reasonably available and secondly strive for an approximation of the amount or share of passing-on which is plausible." In any case, as explicitly mentioned in the Directive, national courts must estimate in accordance with national procedures and, as also referred to in the Draft Passing-on Guidelines, some jurisdictions have already an established practice of estimating damages.

The United Kingdom is one of them. Its rather old case law includes a catchy, yet quite apt concept of the power to estimate. In *Watson Laidlaw & Co. Ltd. v. Pott Cassels & Williamson* [1914] the House of Lords held that "[t]he restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe."¹⁵ Later, UK courts have applied the practice of the broad axe to antitrust damages claims,¹⁶ and more recently, in *Asda Stores Ltd. v. Mastercard Inc.* Popplewell J nicely summarized this "pragmatic approach,"¹⁷ referring also to the European Commission's Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union ("Practical Guide").¹⁸

As regards passing-on, however, it is noteworthy that there seems to be a tendency to apply the principle of the broad axe exclusively in "sword" scenarios. In *Sainsbury's Supermarkets Ltd. v. Mastercard Inc.* the Court of Appeals argued that "[t]here is no scope for the application of any such principle where the burden lies on the defendant to establish a pass-on of the unlawful overcharge in order to reduce the amount recoverable by the claimant."¹⁹ It remains to be seen whether this argument is compatible with the Directive. One could argue it is not because Article 12(5) of the Directive introduces such power without any distinction between the two scenarios in which it can be used, i.e. as a shield (Article 13 of the Directive) or as a sword (Article 14 of the Directive). Moreover, if the power to estimate was intended to apply only in sword scenarios, one would have expected it in Article 14 of the Directive.

¹⁴ Such requirement was essentially part of the passing-on test in relation to German law prior to the implementation of the Directive, see Bundesgerichtshof, judgement of June 28, 2011, KZR 75/10 – ORWI at 69.

¹⁵ 1914 S.C. (H.L.) 18 at 29-30.

¹⁶ See e.g. *Devenish Nutrition Ltd. v. Sanofi-Aventis SA* [2008] EWCA Civ 1086 at 110.

¹⁷ [2017] EWHC 93 (Comm) 4 C.M.L.R. 32.

¹⁸ June 11, 2013, SWD(2013) 205.

¹⁹ [2018] EWCA Civ 1536 at 647.

Although a court's power to estimate in this context is a purely legal concept, there are several reasons why economics plays a key role when courts quantify the total harm in practice. Firstly, a basic understanding of the economic theory of passing-on may be helpful for judges as it may assist them when making decisions in relation to the disclosure of data or information by assessing its potential relevance for the specific case at an early stage of the litigation. Furthermore, economic theory can also form a basis for discerning the credibility and reliability of different economic methods underpinning the link between an overcharge and the passing-on of it, as put forward by the parties.

Secondly, the construction of a counterfactual scenario to determine an overcharge usually involves economic methods. The concept of assessing a counterfactual is obviously not a distinctive phenomenon only applied to private enforcement of competition law. It lies at the heart of most antitrust analyses.²⁰ Hence, national courts dealing with the application of European competition law probably know the concept as such quite well.²¹

In practice, however, the construction of a counterfactual in the context of damages actions differs from the analysis in public enforcement of competition law. In a damages action it is necessary to show the actual effects of the initial overcharge on a certain level of the supply chain, while it may be sufficient for competition authorities to show only potential effects. Therefore, the estimation of harm in private enforcement may require quantification of the effects of the overcharge based on available information and data regarding the development of prices, volumes and profit margins. The choice of economic methods for quantifying these effects may depend on whether a certain method or technique meets the standard of proof required under national law. In a specific case, it may be sufficient to prove the degree of passing-on based on direct qualitative evidence, such as documents produced by the direct or indirect purchaser as well as witness statements on whether the overcharge has been passed-on.

However, the use of quantitative methods will often increase the degree of accuracy of an estimate, and a court may consider it necessary to combine such evidence with evidence of more qualitative nature in order to quantify the passing-on effects.²² In this context it is worth noting that the concept of estimating the overcharge and the passing-on related price effect are similar. Both scenarios may involve comparing the price actually paid by a customer with the price that would have prevailed absent the initial infringement. Hence, national courts or the parties in a damages case may employ quantitative methods when estimating the passing-on effects similar to those used when estimating the overcharge. In the Practical Guide and in the Draft Passing-on Guidelines these methods are referred to as “comparator-based” methods.

One way to implement these quantitative methods is to use regression analyses. Although such analyses may appear sophisticated and require a large amount of data, national courts have shown their ability and willingness to deal with the probative value of such statistical evidence in cases where damages have been awarded.²³ In this context, they have also referred to the European Commission's Practical Guide, stating that its explanations of regressions and statistical significance “draws together the various threads extremely clearly.”²⁴ In the Draft Passing-on Guidelines the Commission elaborates further on the use of these types of methods in relation to passing-on.

20 For recent examples involving counterfactual analysis in EU Competition law, see Andrea Amelio, Thomas Buettner, Cyril Hariton, Gábor Koltay, Penelope Papandropoulos, Geza Sapi, Tommaso Valletti, *Recent Developments at DG Competition: 2017/2018*, Rev Ind Organ. 2018; 53(4): 653–679.

21 It is noteworthy that approximately one third of the EU Member States have specialized courts or chambers dealing with enforcement of competition law.

22 This is also in line with the approach adopted by competition authorities when they assess evidence in merger and many antitrust cases. Furthermore, it is important that parties submitting evidence of quantitative nature carefully describe relevant assumptions imbedded in the analysis. This could be seen as one of the best practices for the submission of economic evidence in the context of private enforcement. In the context of public enforcement the European Commission's DG COMP has set them out in the *Best practices for the submission of economic evidence and data collection in cases concerning the application of Article 101 and 102 TFEU and in merger cases*, http://ec.europa.eu/competition/antitrust/legislation/best_practices_submission_en.pdf.

23 See Liam Colley, Burak Darbaz & David Vincent, *Britned v ABB: the probative value of statistical evidence in cartel damages cases* (November 2018), https://emarketing.alixpartners.com/rs/emsimages/2018/Pubs/FAS/AP_BritNed_ABB_Cartel_Damages_Cases_Nov_2018.pdf.

24 *Britned Development Ltd. v. ABB AB* [2018] EWHC 2616 (Ch) at 309. Eventually, the court did not rely on a statistical model when estimating the harm but a rather novel approach taking into account “baked in efficiencies” and “cartel related cost savings.” Both the claimant and the defendant have appealed the decision.

IV. AT DIFFERENT PACE: ECONOMIC AND LEGAL CAUSATION

Passing-on can lead to complex situations, certainly more complex than the flour and bread example, mentioned at the beginning of this article for the purpose of describing the basics of passing-on. In practice, it may relate to sophisticated products or services, involve multiple suppliers, affect a great number of purchasers, including end consumers, and even concern more than one antitrust infringement. This complexity appears to be one of the factors leading to the question whether there is a difference between economic and legal causation.

In the United Kingdom, the Competition Appeal Tribunal (“CAT”) has given an affirmative answer. In *Sainsbury’s Supermarkets Ltd. v. Mastercard Inc.*,²⁵ it acknowledged that, from an economic point of view, passing-on may be defined more widely. However, by reference to legal reasons, i.e. the risk of an absence of liability and the effective application of EU competition law, the CAT considered it necessary to introduce a restriction to the passing-on defense. Inter alia, it held that the infringer must show the existence of another class of claimants to whom the overcharge was passed on.²⁶ According to the CAT, this restriction would be particularly relevant when the overcharge is passed on and scattered among many purchasers, which are unlikely to claim damages for the relatively insignificant harm they have suffered individually.²⁷

Sainsbury’s Supermarkets Ltd. v. Mastercard Inc. is in line with trends in the Netherlands and Germany. There, courts argued that legal restrictions to passing-on may be introduced on the basis of a normative approach possible under the national rules on causation.²⁸ These courts made similar legal arguments with regard to the situation of scattered harm, namely the lack of incentives to bring small value claims and, consequently, the *de facto* relief of the infringer to compensate for harm caused by it, additionally highlighting that in such a situation the indirect purchasers may also lack evidence to bring a claim.²⁹ These issues of scattered harm are amplified when there is no effective system of collective redress.

While national rules may limit the finding of causation,³⁰ it remains to be seen whether a restriction of the passing-on defense in case of scattered harm is in line with the Directive if it *a priori* excludes the passing-on defense. On the one hand, it is true that, according to the explicit wording of Articles 12(1) and 15(1) of the Directive, the “absence of liability of the infringer” must be avoided. Further, national courts seem to have suggested that this goal may be achieved by, at first glance, overcompensating the claimant that has passed on the overcharge to a great number of indirect purchasers, as this claimant may also eventually pass on the benefits of the damages award to such purchasers.³¹ Therefore, at second glance, in the long run the result may not necessarily contradict the compensatory nature of private enforcement of EU competition law. However, if such a scenario involves profit maximizing firms operating in a market, it may be necessary to assume that the firm would take into account in its contemporary pricing decisions a lump sum payment received as compensation for losses many years ago. At best, such an assumption is not uncontroversial.

On the other hand, Article 3(3) of the Directive clearly states that “full compensation [. . .] shall not lead to overcompensation.” Article 15(1) of the Directive makes clear that multiple liability must be avoided when claimants from different levels in the supply chain file damages actions. This goal would be put at risk when, contrary to a court’s prediction, indirect purchasers indeed brought low value claims against the infringer. To avoid multiple liability of the infringer in such a scenario, one could require these indirect purchasers to revert to the claimant that has been overcompensated due to the restriction of the passing-on defense. However, such a requirement may not be in line with the fundamental principle of private enforcement of EU competition law according to which any individual must have standing to seek compensation for harm suffered as a result of an infringement of EU competition law.³²

25 [2016] CAT 11 at 484.

26 See Cento Veljanovski, *The Law and Economics of Pass-On in Price Fixing Cases* E.C.L.R. 2017, 38(5), 209-218; as explained there, the “economic concept” of passing-on is not necessarily different from the “legal concept.”

27 The CAT requires the defendant to show the existence of a class of claimants to whom the overcharge has been passed on.

28 *Voordeelstoerekening* under Dutch law; *Vorteilsausgleich* under German law.

29 Hoge Raad, judgment of July 8, 2016, ECLI:NL:HR:2016:1483 – *TenneT v. ABB* at 4.4.3; Landgericht Dortmund, judgment of June 27, 2018 – 8 O 13/17 (Kart) at 169-171.

30 Indeed, there is a great variety of rules on causation at national level. Following the judgement of the CJEU in *Kone* it seems clear that, in the absence of EU law, such rules can apply, provided they comply with the principle of effectiveness and equivalence, see *Kone AG, Otis GmbH, Schindler Aufzüge und Fahrtreppen GmbH, Schindler Liegenschaftsverwaltung GmbH, ThyssenKrupp Aufzüge GmbH v. ÖBB-Infrastruktur AG*, Case C-557/12, ECLI:EU:C:2014:1317.

31 See Rechtbank Gelderland, judgment of June 10, 2015, ECLI:NL:RBGEL:2015:3713 – *TenneT v. Alstom*.

32 See *Courage Ltd. and Bernhard Crehan* at 26 and *Manfredi and Others* at 60, both *supra* note 7 as well as Article 1(1) and 3(1) of the Directive.

Therefore, a more nuanced approach to passing-on in case of scattered harm may be appropriate, i.e. one that is case specific, taking into account the evidence that the infringer has put forward for substantiating the passing-on defense and assessing it in accordance with national procedural rules.³³ The national court could draw upon economic evidence, qualitative or quantitative, for the assessment of evidence on passing-on. This approach would not only align economic and legal causation, it would also embrace the compensatory nature of private enforcement in Europe.³⁴

Such a more nuanced approach to passing-on may also replace other rather bold arguments in relation to passing-on made by courts in Germany. For example, in a case before the Landgericht Dortmund, the defendants (two manufacturers of trucks) raised the passing-on defense submitting that the direct purchaser (a transport company) had passed on the overcharge to the indirect purchasers (various customers demanding services from the transport company).³⁵ The Landgericht Dortmund rejected the submission stating inter alia that, in order for passing-on to be successful, it is necessary that the market on which the indirect purchaser operates is “consistent” with the market on which the infringement was committed. More specifically, the court reasoned that the infringements of competition law in the market for trucks would lead to harm only to direct customers, suggesting that trucks are not a relevant input for the indirect customer. This reasoning seems to be based exclusively on a legal approach rejecting passing-on in cases where the cartelized product is ultimately further processed and sold as new products on another market. It is difficult to reconcile with economics because, in principle, any direct purchaser may find it profitable to pass on cost increases to indirect purchasers.

Therefore, a case specific approach might indeed be more suitable, i.e. an approach that does not *a priori*, for legal reasons, restrict the passing-on defenses but rather allows national courts to consider the plausibility of the defendant's submission, the availability of relevant evidence and ultimately the power to estimate. Indeed, in accordance with the procedure law of the respective Member State, the parties to the proceedings may put forward a variety of evidence that the national court may find useful to estimate passing-on effects. Among the evidence for shedding light on the likelihood of a passing-on are insights from economic theory, internal documents providing information on the relevance of certain input costs for the direct purchaser's pricing decisions, information on prices, and other relevant factors in the market where the direct purchaser operates, or in comparable markets. Of course, it may well be that, based on the circumstances of a given case, it is not possible under national law to prove a passing-on effect. However, irrespective of the outcome, it is the more nuanced and case specific approach which counts, embracing the compensatory nature of private enforcement of EU competition law.

³³ See corresponding appellate court judgments in this respect, Oberlandesgericht Düsseldorf, judgment of August 22, 2018, VI-U(Kart) 1/17, ECLI:DE:OLGD:2018:0822.U.KART2.17.00 at 125-139 and Oberlandesgericht München, judgment of March 8, 2018, U 3497/16 Kart, ECLI:DE:OLGMUEN:2018:0308.U3497.16KART.0A at 79-82 as well as Landgericht Nürnberg-Fürth, judgment of October 11, 2018, 19 O 8786/15.

³⁴ For different views concerning passing-on in this respect, particularly the requirements in light of the principle of full compensation and the role of economics in damages actions, see Pedro Caro De Sousa, *EU and national approaches to passing on and causation in competition damages cases: A doctrine in search of balance*, (2018) 55 C.M.L.R., 1751-1784.

³⁵ Landgericht Dortmund, judgment of June 27, 2018, 8 O 13/17 (Kart); for similar cases and arguments see Landgericht Hannover, judgment of December 18, 2017 - 18 O 8/17 at 59-65; Landgericht Stuttgart, judgment of November 12, 2018, 45 O 6/17 at 55-61.

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