PASSING-ON OF OVERCHARGES: WILL THE NATIONAL COURTS LEAD THE WAY FORWARD?

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1. INTRODUCTION

The Directive 2014/104/EU on antitrust damages (hereinafter referred to as "Damages Directive") seeks to help citizens and undertakings to claim compensation if they are victims of a breach of the EU Antitrust rules. Infringements cause concrete harm and the Directive sets out rules to ensure that anyone who has suffered harm caused by a breach of Articles 101 or 102 TFUE can effectively exercise the right to claim full compensation for that harm.

Antitrust law infringements causing an overcharge, i.e. a price increase, can harm not only the direct purchasers of the affected goods or services, but also those who afterwards purchased those goods or services. Quantifying the extent to which an overcharge has been passed on is part of a broader framework: the quantification of harm in competition law.

1.1 Quantification of harm

The legislator of the Damages Directive acknowledges that quantifying harm in competition law is a very fact-intensive process and may require the application of complex economic models. Insofar as this may be costly and taking into account difficulties in obtaining the data necessary to support damages actions, effective claims for compensation may be undermined.

Quantifying harm implies a counterfactual: it depends on a comparison between the situation that happened on the market with a conjectural scenario in which the infringement has not occurred. This exercise cannot therefore be fully accurate.

1 European Commission.


4 Articles 1 and 3.

5 Naturally, in some situations the quantification of harm can be relatively straightforward and involve simple techniques. See for instance the Commission Staff Working Document, Practical Guide – Quantifying Harm in Actions for Damages (...), pages 22 to 24.

6 Recital 45.

7 Recital 46.
Being fully aware of this complexity, the European Commission adopted a Communication on quantifying antitrust harm in damages actions as well as a more comprehensive and detailed Practical Guide.\(^8\)

1.2 Passing-on of overcharges

By the same token, the legislator has therefore called the European Commission to issue guidelines to facilitate the estimation of the share of pass-on.\(^9\) These guidelines should assist national courts, which, according to the Directive, are empowered to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available.\(^10\)


9 Recital 42 and Article 16.

10 Article 17(1).

2. The Framework of Rules on the Passing-on of Overcharges

The European Commission took into account that the lack of clear rules and guidance throughout the EU on the passing-on defence gives raise to uncertainty about the outcome of actions.\(^11\) If there are no clear rules, a potential claimant may therefore lack the incentive to seek compensation due to potentially high cost risk of an action.\(^12\)

As mentioned, antitrust law infringements causing an overcharge can harm not only the direct purchasers of the affected goods or services. An injured party may indeed reduce its actual loss by passing it on, entirely or in part, to its own purchasers at the next level of the supply or distribution chain. Therefore, the Damages Directive specifically established that compensation of harm can be claimed by

\(^{11}\) In the United States, case-law on damages for the breach of the antitrust rules is often deemed to be more developed than in other jurisdictions. That being said, only few cases addressed the quantification of passing-on. Under federal antitrust law, in principle, defendants are not allowed to invoke the passing-on defence against direct purchasers. On the other hand, indirect purchasers cannot claim damages on the basis that an overcharge has been passed on to them (see, for instance, Hanover Shoe Inc. v. United Show Machinery Corp, 392 U.S. 481 (1968) and Illinois Brick Co. v Illinois, 431 U.S. 720 (1977)). A large number of States have in the meantime however enacted state antitrust laws granting standing to indirect purchasers.

anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringement\textsuperscript{13}.

Victims of the infringements to the EU Antitrust rules are entitled to the right to full compensation. It covers the right to compensation for actual loss and for loss of profit, plus the payment of interest\textsuperscript{14}. The legislator also specifically sought avoiding overcompensation\textsuperscript{15}.

Therefore, faced with an action for damages, the defendant can invoke a passing-on defence. He carries however on his shoulders the burden to demonstrate that the overcharge was passed on\textsuperscript{16}. This is because unjust enrichment of purchasers who passed on the overcharge and undue multiple compensation for the illegal overcharge by the defendant should be avoided\textsuperscript{17}.

As regards in particular the right to compensation of indirect purchasers, remote purchasers (at, or near the end of the distribution chain) given their distance from the infringement may often find hard to adduce evidence of the existence and extent of passing-on along the distribution chain.

\textsuperscript{13} Article 12(1).
\textsuperscript{14} Article 3(2).
\textsuperscript{15} Articles 3 and 12(3), recital 13.
\textsuperscript{16} Article 13.

By way of illustration, one can consider that the raw material producers entered into a price-fix agreement. Insofar as in principle the wholesalers have a direct knowledge of the business of the manufacturers it tends to be easier for them to detect the infringement. In principle the manufacturers should be informed \textit{inter alia} about the market structure, competitors and competitive conditions of the upstream market. On the contrary, indirect purchasers may not know who is liable for the price increase. Also, in principle, the more complex the distribution chain, the harder it may be for each purchaser to know the cause of the overcharge.

The legislator established therefore a provision which seeks to improve the standing of indirect purchasers by introducing a rebuttable presumption of passing-on of the overcharge caused by the infringement. The indirect
purchaser has to demonstrate the fulfilment of three conditions:  

i) firstly, that an infringement has occurred;  

ii) secondly, that it resulted in an overcharge and  

iii) finally, that the indirect purchaser purchased goods or services that were the object of the infringement, or contain it or were derived from it.

If these three conditions are fulfilled, the indirect purchaser shall be deemed to have proven that a passing-on of the overcharge has occurred.

Naturally, the national courts have to decide yet on the extent to which the overcharge was passed-on to the indirect purchaser. This may not always be easy because inter alia passing-on claims often involve complex economic analysis. The efficiency of the enforcement process is indeed a concern and assisting national Courts will contribute to enhance the efficient and effective enforcement of the EU antitrust rules.

3. ASSISTING THE NATIONAL COURTS TO EFFECTIVELY AND EFFICIENTLY DEAL WITH PASSING-ON OF OVERCHARGES

Although, as above-described, the Damages Directive already provides increased legal certainty by establishing a clear legal framework on passing-on, quantification remains an issue that needs to be carefully assessed on a case-by-case basis. The legislator of the Damages Directive sought to ensure the full effectiveness of the compensatory principle. As the Court has held, the full effectiveness of the EU Antitrust rules would be jeopardized if any entities such as consumer associations, state bodies or trade associations and ii) opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action. Although the European Commission recommends that some form of collective redress should be available in all EU Member States to act against breaches of whatever EU rule, the Damages Directive does not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 TFEU (see recital 13).

See for instance Richard A. Posner and William M. Landes, "Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick", 46 University of Chicago Law Review 602 (1979), p. 615. As regards the efficient and effective enforcement of the EU antitrust rules, individuals and SMEs for instance may suffer scattered and relatively low-value damage. They may find too burdensome to bring an action for damages due to the costs, delays or risks involved, thereby remaining uncompensated. Besides, where a multitude of individual actions are brought in relation to the same infringement, procedural inefficiencies may arise, for claimants, defendants and the judicial system. Therefore the Commission in its White Paper on Damages Actions, page 4, suggested two mechanisms to address those issues: i) representative actions, which are brought by

18 Article 14(2).  
19 Article 12(5).  
20 See for instance Richard A. Posner and William M. Landes, "Should Indirect Purchasers Have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick", 46 University of Chicago Law Review 602 (1979), p. 615. As regards the efficient and effective enforcement of the EU antitrust rules, individuals and SMEs for instance may suffer scattered and relatively low-value damage. They may find too burdensome to bring an action for damages due to the costs, delays or risks involved, thereby remaining uncompensated. Besides, where a multitude of individual actions are brought in relation to the same infringement, procedural inefficiencies may arise, for claimants, defendants and the judicial system. Therefore the Commission in its White Paper on Damages Actions, page 4, suggested two mechanisms to address those issues: i) representative actions, which are brought by

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individual was not able to claim damages for the loss caused to him\textsuperscript{22}.

Member States are competent to define their own rules on quantifying harm, subject to the principles of effectiveness and equivalence. The Directive establishes that national courts have the competence to estimate the amount of the harm caused by an infringement of the EU Antitrust Rules. It also imposes an obligation on Member States to ensure that, where requested, national competition authorities may provide guidance on quantifying\textsuperscript{23}.

Furthermore, the legislator calls upon the European Commission to issue guidelines to facilitate the estimation of the passing-on. The guidelines are expected to be clear, simple and comprehensive, thereby allowing national courts to estimate the share of the overcharge passed on to indirect purchasers. They should be complementary to the quantification guide\textsuperscript{24}.

The European Commission is therefore expected to develop, to the greatest possible extent, a practically oriented framework with a view to providing national courts with a consistent but not excessively complex overview of the principal approaches/methods to estimate pass-on, the economic methods available and an understanding of why a specific approach may be more suitable than others, taking into account factors such as the competition conditions, data availability or type of infringements.

Against this backdrop, there are key elements where further guidance would be particularly welcome\textsuperscript{25}.

The relationship between price overcharge, pass-on effect and lost business effect should be described in different scenarios. A purchaser plaintiff may pass-on part of the overcharge to its own customers. In that case, a loss of sales may occur. Indeed, the demand would then typically decrease due to the prices increase. In sum, explanations and clarifications on the type of harm which can be suffered in a pass-on scenario by direct purchasers, indirect purchasers and end-consumers would be helpful.

Where a purchaser claims damages from the infringer and the latter raises a passing-on defence, a rather important issue to be addressed is the likelihood and magnitude of a pass-on. It is important that national judges are aware of the circumstances where and the extent to which pass-on is likely to occur.

Guidance should be provided on the key factors determining the pass-on rate namely on the demand, cost and competition conditions. For instance, a high inelasticity of consumer demand should in principle provide an

\textsuperscript{22} See for instance Case C-453/99, Courr\'ege Ltd v Bernard Crehan, paragraph 23; Joined Cases C-295/04 to C-298/04, Manfredi, paragraphs 61 and 95.

\textsuperscript{23} Article 17(3).

\textsuperscript{24} Recital 42.

\textsuperscript{25} The European Commission launched an invitation to tender for a study on the passing-on of overcharges (see http://ec.europa.eu/competition/calls/tenders_open.html). The study should assist the European Commission in drafting the Passing-on Guidelines. The European Commission also operates a program dedicated to the training of national judges in EU competition law.
incentive to pass on a price overcharge. One can take also as an example a highly competitive downstream market where by definition margins tend to be reduced. In this scenario, undertakings tend to have a low capacity to absorb the overcharge, having therefore to pass the overcharge to a greater extent than in markets where there is little competition.  

Of particular relevance is to equip national courts with the essential approaches to estimate the harm suffered by an indirect purchase to whom an overcharge has allegedly been passed on. National Judges need to have a clear framework on the available methods to estimate the pass-on rate, the overcharge suffered by an indirect purchaser and the loss of profit resulting from the lost business effect. It is essential to be able to acknowledge the upsides and downsides of the methods, the level of complexity, the data required or how often they are used in practice. Equally relevant is to provide national courts with presumptions, proxies and grounds for estimating the pass-on rate, the loss of profit or the overcharge. This is because a counterfactual is by definition hypothetical and can thus never be made with complete accuracy.

The differences and consequences stemming from an industry-wide pass-on and firm-specific pass-on should also be addressed. National courts would benefit from having an overall framework on the analysis of situations where cost changes affect one undertaking only and those where there is an industry-wide cost pass-on, taking into account different competitive scenarios such as monopolies, quantity-setting Cournot competition or price-setting Bertrand competition. Indeed, there are a number of scenarios where anticompetitive conducts do not necessarily impact all the undertakings in the complainant’s industry. By way of illustration, one can consider a cartel damage claim where a vertically integrated undertaking is competing downstream with the complainant. The former may have the incentive to charge only higher prices to its competitors in the downstream market, thereby gaining a competitive advantage. Also, competitors in the downstream market may consider purchasing the goods/services from suppliers which did not take part in a cartel.

In sum, if a cartel does not have an industry-wide impact, pass-on is typically likely to be more limited. This is because some competitors are not affected by the overcharge and will therefore be able to undercut.

Empirical examples and an overview and analysis of case-law concerning passing-on issues in EU and non-EU jurisdictions would


27 Recital 46.

28 See Commission Staff Working Document, Quantifying Harm (...), paragraph 169: “Where the direct customer of the infringing undertakings uses the cartelised goods to compete in a downstream market, it is likely that the direct customer will normally not be able to pass on this increase in cost (or only to a very limited degree) if his own competitors in that downstream market are not subject to the same or a similar overcharge”.

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certainly help national courts to estimate passing-on rates, loss of profit resulting from the lost business effect and other relevant passing-on issues.

It is also of major importance to assist national judges on how to make the best use of economic experts, how to evaluate economic expertise, what to do in case of conflicting expert reports, how to determine the relevance of an economic analysis for a particular case and in general how to identify that a counterfactual is coherent. Checklists and comparative tables addressing key aspects of various approaches and methods would be of particular interest. Indeed, the topic is often economically complex and typically judges are not economic experts.

In a nutshell, the European Commission should try to facilitate to the greatest possible extent the national courts ability to effectively and efficiently deal with passing-on issues. These and other elements would in essence better equip national courts to attain that goal.

4. CONCLUDING REMARKS

The Damages Directive sets out a framework to ensure that a victim of an EU Antitrust infringement can effectively exercise the right to claim full compensation for that harm. It will bring more antitrust damages actions before the national courts. The Directive specifically enshrines the existence of the passing-on defence. A defendant may consider arguing that the claimant passed on the whole or part of any overcharge resulting from the alleged infringement to its own customers. Naturally, defendants bear the burden of proving that any overcharge was passed on. Indirect purchasers will be eligible to claim damages on the basis that an overcharge was passed on to them by direct purchasers.

Quantifying the extent to which an overcharge has been passed on is part of a broader framework: the quantification of harm in competition law. Measuring harm may be difficult due to data requirements and the need to construct a counterfactual.

The Damages Directive calls upon the European Commission to issue guidelines to facilitate the estimation of the likelihood and extent of the pass-on. These guidelines should assist national judges to successfully deal with passing-on issues, thereby contributing to the ultimate goal of the Damages Directive: to help citizens and undertakings to be compensated if they are victims of infringements of the EU Antitrust rules. Against this background, in the years to come, the courts of the EU Member States are expected to play a crucial role. Will they lead the way forward?