

## The Principle of Passing on in EU Competition Law in the Aftermath of the Damages Directive

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**Abstract:** Passing on is a key factor to define the *locus standi* of the claimant in damages claims in national courts. In particular, the concept legitimizes the legal standing of the indirect customer in case the direct purchaser transferred the damage to the indirect customer. Secondly, it can be relied by the defendant in case the direct customer ‘passed on’ the damage to its customers and thus it did not suffer any harm to have legal standing (i.e. passing on defence). Passing on can be considered a general principle of EU law, elaborated by the Court of Justice jurisprudence in relation to the restitution of unlawful charges and later extended to other EU policies. The article looks at the application of the principle of passing on in EU competition law, in the light of case law of the Court of Justice, soft law adopted by the EU Commission and the Damages Directive. In particular, the article assesses the application of the principle of passing on in four EU Member States (i.e. Germany, France, Italy and UK), analysing for each jurisdiction the national case law on passing on and the on-going transposition process of the Damages Directive. The aim of the article is to assess whether the concept of passing on had already been recognized by national case law in the selected jurisdictions before the Damages Directive and thus to evaluate the ‘added value’ of EU *acquis* on passing on in the legal systems of the selected jurisdictions.

**Résumé:** La répercussion du surcoût est un facteur clé pour définir le *locus standi* du plaignant dans les réclamations de dommages et intérêts devant les tribunaux nationaux. En particulier, le concept légitimise l’intérêt à agir du client indirect au cas où l’acheteur direct répercute le dommage sur le client indirect. Deuxièmement, il peut être invoqué par le défendeur au cas où le client direct “répercute” le dommage sur ses clients et donc n’a pas subi de préjudice pour être fondé à agir (c.à d. répercussion du surcoût). La répercussion peut être considérée comme un principe général en droit de l’UE, élaboré par la jurisprudence de la Cour de Justice en matière de dédommagement pour préjudice subi illégalement et étendu plus tard à d’autres politiques européennes. L’article étudie l’application du principe de répercussion en droit européen de la concurrence, à la lumière de la jurisprudence de la Cour de Justice, du droit non contraignant de la Commission de l’UE et de la Directive relative aux dommages et intérêts. En particulier, l’article analyse l’application du principe de la répercussion dans quatre États membres (Allemagne, France, Italie et Royaume Uni), étudiant pour chaque pays la jurisprudence nationale en matière de répercussion et le processus de transposition en cours de la Directive sur les dommages et intérêts. L’objectif du présent

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article est de rechercher si le concept de répercussion a déjà été reconnu, avant la Directive sur les dommages et intérêts, par la jurisprudence nationale dans les pays choisis et donc d'évaluer la "valeur ajoutée" de l'acquis communautaire de la répercussion dans les systèmes juridiques des pays sélectionnés.

**Mots-clés** Intérêt à agir; Application par les particuliers du droit européen de la concurrence; Actions en dommages et intérêts pour infraction aux règles de la concurrence; Répercussion du surcoût; Intérêt à agir du client indirect; Directive sur les dommages et intérêts.

**Zusammenfassung:** Passing on ist ein Schlüsselfaktor für die Definition des locus standi des Klägers bei Schadensersatzklagen vor nationalen Gerichten. Insbesondere legitimiert dieses Konzept die Klagebefugnis eines indirekten Abnehmers für den Fall, dass der direkte Abnehmer einer Sache den Schadensersatzanspruch an den indirekten Abnehmer abtritt. Des Weiteren kann hierauf vom Beklagten für den Fall, dass der direkte Abnehmer den Schaden an seine Kunden "weitergegeben" hat ("passed on") und daher selber keinen Schaden – als Voraussetzung für eine Klagebefugnis – erlitten hat, vertraut werden (passing on defence). Passing on kann als Grundprinzip des europäischen Rechts verstanden werden, das von der Rechtsprechung des EuGH im Rahmen der Zurückweisung unzulässiger Klagen entwickelt und später auf andere EU-Vorschriften ausgedehnt wurde. Der Beitrag betrachtet die Anwendung des Prinzips von passing on im EU-Wettbewerbsrecht im Lichte der Rechtsprechung des EuGH, des von der EU-Kommission eingeführten soft laws und der Richtlinie (2014/104/EU) für Schadensersatzklagen bei Kartellrechtsverstößen. Insbesondere untersucht der Beitrag die Anwendung dieses Prinzips in vier EU-Mitgliedsstaaten (Deutschland, Frankreich, Italien und UK) indem für jede Rechtsordnung die nationale Rechtsprechung zu passing on und der laufende Umsetzungsprozess der Richtlinie analysiert wird. Ziel des Beitrages ist es herauszuarbeiten, ob das Konzept von passing on in der nationalen Rechtsprechung der ausgewählten Rechtsordnungen schon vor der Umsetzung der Richtlinie anerkannt wurde, und damit den "Mehrwert" von EU-acquis zu passing on in den Rechtsordnungen der gewählten Länder zu evaluieren.

**Key words:** Legal standing, Private enforcement of EU competition law, Antitrust damage actions, Passing on defence, Legal standing of the indirect customer, Damages Directive

## 1. Introduction: Legal Standing and Passing On

1. The concept of *locus standi* refers to the capacity of the claimant to bring an action in court.<sup>1</sup> Both civil and common law jurisdictions recognize the *locus standing* as the first procedural step required to start a civil claim.<sup>2</sup> In order to

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1 European Parliament, *Standing up for Your Right(s) in Europe*, 15 August 2012, PE 462.478, [www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2012/462478/IPOL-JURI\\_ET\(2012\)462478\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/JOIN/2012/462478/IPOL-JURI_ET(2012)462478_EN.pdf), p 13.

2 The study conducted in 2012 by the European Parliament on the *locus standi* in the EU Member States concluded that there is no common definition in the EU Member States concerning the expression 'civil claim'. The latter is usually defined in a negative manner, including the court actions which do not fall within the scope of either criminal or administrative law. Broadly

have legal standing, the claimant has to satisfy two cumulative conditions: it has to be the ‘holder of the rights’ allegedly breached by the defendant and it should have a ‘direct personal interest’ to bring the action in court.<sup>3</sup>

In the field of EU competition law, the Court of Justice of the European Union (CJEU) has broadly interpreted the concept of ‘right holder’: both final consumers, direct customers and competitors enjoy the right to undistorted competition in the market.<sup>4</sup> On the other hand, the ‘direct personal interest’ condition is often harder to satisfy in competition law in comparison to other EU policies.<sup>5</sup> In particular, an indirect customer has a direct personal interest to bring a damages action in a civil court only if he proves that the direct customer increased the price of its products due to the upstream competition law infringement, by thus ‘passing on’ the price overcharge to the indirect customer.

2. Passing on is a concept well accepted in the economic theory; it refers to the situation where the damage caused by an illegal conduct is transferred to the next level of the production chain.<sup>6</sup> As pointed out by Carpagnano, passing on should be considered as a ‘neutral phenomenon’<sup>7</sup>: the direct customer has a legitimate interest to transfer the price overcharge, by increasing the price of its products sold to its customers; the question thus concerns the rate of passing on, rather than the legitimacy of such conduct. In terms of *locus standi*, passing on has two implications: like in the example above it can be relied by the indirect customer to justify its *locus standi*;

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speaking, civil claims refer to disputes between individuals, which do not involve any criminal sanction (European Parliament, *Standing up for Your Right(s) in Europe*, p 53).

3 European Parliament, *Standing up for Your Right(s) in Europe*, p13.

4 In *Courage v. Crehan*, the ECJ ruled that Community law is also intended to give rise to rights which become part of their legal assets. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions. ECJ 20 September 2011, *Courage Ltd v. Bernard Crehan*, EU:C:2001:465, curia.europa.eu/juris/documents.jsf?num=C-453/99, para. 19.

5 In intellectual property (IP) law, for instance, the issue of passing on does not arise. As recognized by Art. 4 of the IP Enforcement Directive, the holder of IP rights has a right and a direct interest to bring an action to court against the infringer of its IP rights, and thus it is presumed to have *locus standi*. When the IP rights are transferred, however, legal standing is also transferred to all other persons authorized to use those rights (i.e. licencees). Therefore, in case of licensing agreement the licensee, rather than the licensor, will have the right to start an action against the IP infringer (Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights, data.europa.eu/eli/dir/2004/48/corrigendum/2004-06-02/oj, Art. 4).

6 M. HELLWIG, ‘Private Damage Claims and the Passing-On Defense in Horizontal Price-Fixing Cases: An Economist’s Perspective’, Working Paper of the Max Planck Institute for Collective Goods, 2006/22, www.coll.mpg.de/pdf\_dat/2006\_22online.pdf/, p 1.

7 M. CARPAGNANO, ‘Le Difese dell’ Impresa Convenuta ed il Passing-On’, in Pace (ed.), *Dizionario Sistematico del Diritto della Concorrenza* (Napoli: Jovene Editore 2013), p 300.

alternatively, it can be relied as a ‘defence’ by the competition law infringer.<sup>8</sup> During the preliminary phase of the dispute, in fact, the defendant can contest the *locus standi* of the direct customer, claiming that the latter fully ‘passed on’ the price overcharge to its customers and thus it did not suffer any loss. Therefore, the estimation of the degree of passing on has important consequences on the *locus standi* of the claimant.

Due to the complexities in its estimation, the US Supreme Court has pragmatically excluded the application of the passing on in US antitrust law since the 1970s.<sup>9</sup> In contrast, in Europe the CJEU has recognized that ‘any individual’ in principle has legal standing, if he proves to have suffered loss caused by a breach of EU competition rules.<sup>10</sup> EU Commission soft law<sup>11</sup> and the Damages Directive have later confirmed the ‘all-inclusive’ approach followed by the CJEU in terms of *locus standi*.<sup>12</sup>

3. The present article analyses the concept of passing on, focussing on damages actions for breaches of EU competition rules. In particular, section 2 discusses the EU *acquis* on passing on, including CJEU case law, EU Commission soft law and the provisions in the Damages Directive on this subject and it argues that passing on can be considered as a general principle of EU law. Section 3, on the other hand, analyses the application of passing on in four EU Member States: Germany, France, Italy and UK have been selected as case studies. These jurisdictions are the ‘largest economies’ within the Union and thus they represent the main jurisdictions where one would expect the largest number of cases of private enforcement of EU competition law. Nevertheless, the different national procedural rules create different incentives

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- 8 M. STRAND, *The Defence of Passing On*. Upsala Faculty of Law, Working paper 2010:5, katalog.uu.se/profile/?id=N8-958.
- 9 In 1968, the US Supreme Court excluded the existence of passing on defence in US antitrust law in *Hannover Shoe*. In the judgment, the Court ruled that it would be too difficult to estimate what share of the price overcharge had been transferred by the direct to the indirect customer. Fe years later, in *Illinois Brick* the US Supreme Court excluded a priori the legal standing of indirect customers in antitrust actions, arguing that granting legal standing to indirect customers would increase the risk of multiple liability for the antitrust infringement. Therefore, the enforcement of antitrust law is ... is better served by holding direct purchasers to be injured to the full extent of the overcharge paid to them than by attempting to apportion the overcharge among all that may have absorbed a part of it. US Supreme Court, *Hanover Shoe v. United Shoe Machinery*, 17 June 1968. 392 U.S. 481. [supreme.justia.com/cases/federal/us/392/481/](http://supreme.justia.com/cases/federal/us/392/481/). US Supreme Court, *Illinois Brick Co. v. Illinois*, 9 June 1977, 76 U.S. 404. [supreme.justia.com/cases/federal/us/431/720/](http://supreme.justia.com/cases/federal/us/431/720/).
- 10 ECJ 13 July 2006, *Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA*, EU:C:2006:461, <http://curia.europa.eu/juris/documents.jsf?num=C-295/04> para. 60.
- 11 Commission Staff Working Paper, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*. Brussels, 2 April 2008, SEC(2008) 404, para. 27. <http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html> (last visited 25 July 2017).
- 12 Directive 2014/104/EU 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, [data.europa.eu/eli/dir/2014/104/oj](http://data.europa.eu/eli/dir/2014/104/oj), Art. 12.

for claimants to bring a damage action in court; as further discussed below in section 3 while private enforcement of competition law is rather developed in UK and Germany, this is not the case in Italy and France. Therefore, the differences among national procedural rules make worth a comparison among different jurisdictions. The UK has been included in the comparative study although on 29 March 2017 the British Government triggered the application of Article 50 TEU, by thus starting the process of ‘Brexit’. On 9 March 2017, in fact, the British Parliament enacted the law implementing the Damages Directive, which also transposes the provisions of the Directive concerning passing on.<sup>13</sup> For each selected jurisdiction the article analyses the national case law concerning passing on in antitrust disputes, as well as the current status of implementation of the Damages Directive.

The aim of the article is to analyse whether and to what extent the concept of passing on had already been recognized by national case law in the selected jurisdictions and thus to assess the ‘added value’ of EU *acquis* on passing on in the legal systems of the selected jurisdictions. The article focuses on the implication of passing on in relation to the legal standing of the claimant in damages actions for breaches of EU competition law. On the other hand, the relevance of passing on in the process of damage quantification remains outside the scope of the current article.

The article is relevant in view of the end of the implementation period of the Damages Directive,<sup>14</sup> as well as in the light of the study recently published by RBB Economics on behalf of DG Competition in relation to the estimation of passing on.<sup>15</sup> The present article contributes to the existing literature on this topic due to its comparative approach<sup>16</sup>; contributing in particular to the limited number of

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- 13 The Claims in Respect of Loss or Damage Arising from Competition Infringements (Competition Act 1998 and Other Enactments) Regulations 2017, SI 2017/385, enacted on 9 March 2017, [www.legislation.gov.uk/ukdsi/2017/9780111152805](http://www.legislation.gov.uk/ukdsi/2017/9780111152805).
- 14 Under Art. 22 of the Damages Directive, Directive had to be transposed by 26 December 2016. However, at the time of writing only few EU Member States have fully complied with their duty. The European Commission keeps an updated table concerning the status of the implementation of the Directive at the national level at: [ec.europa.eu/competition/antitrust/actionsdamages/directive\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html).
- 15 RBB Economics, *Study on the Passing on of Overcharges*, October 2016, [ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf](http://ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf).
- 16 The existing literature on passing on in competition law has mostly compared the EU and US approach in relation to passing on in competition law, focussing on ECJ case law and the Damages Directive, rather than discussing passing on at the national level. See, for instance:
- M. STRAND, *The Passing-on Problem in Damages and Restitution Under EU Law* (Cheltenham: Edward Elgar Publishing 2017).
  - A. EKLUND, ‘Indirect Purchasers - Is There Anything New in the Directive? An Introductory Overview of the Current and Future Status of Indirect Purchasers in the EU’, in M. Bergström, M. Iacovides, M. Strand (eds), *Harmonising EU Competition Litigation. The New Directive and Beyond* (Oxford: Hart Publishing 2016) p 261.

studies conducted so far on the implementation of the Damages Directive at the national level.<sup>17</sup>

## 2. Passing on as General Principle of EU Law

### 2.1. Recognition of Passing on in CJEU Jurisprudence

4. The principle of passing on has its origins in the CJEU jurisprudence concerning the repayment of unlawful levies and custom duties charged by the EU Member States in breach of EU law. In *San Giorgio*,<sup>18</sup> the Court recognized that a trader had the right to claim the repayment of the unlawful taxes paid. However, the Member State was exempted from the repayment if the trader had transferred the unlawful charge ‘to other persons’. For example, the trader increased the price of the products sold to final consumers – i.e. the Member State could rely on passing defence to avoid the reimbursement of the charge.<sup>19</sup> On the other hand, the final consumer could claim the repayment of the unlawful tax either from the trader or from the Member State – i.e. recognition of the legal standing of final consumers.<sup>20</sup>

According to the Court, ‘to repay the trader the amount of the charge already received from the purchaser would be tantamount to paying him twice

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- M. STRAND, ‘Indirect Purchasers, Passing-On and the New Directive on Competition Law Damages’, 10. *European Competition Journal* 2014(2), pp 361-386.
  - S. PARLAK, ‘Passing-on Defence and Indirect Purchaser Standing: Should the Passing-on Defence Be Rejected Now the Indirect Purchaser Has Standing After *Manfredi* and the White Paper of the European Commission?’, 33. *World Competition* 2010, p 31.
  - V. VERBOVEN & T. VAN DIJK, ‘Cartel Damages Claims and the Passing on Defence’, 57. *Journal of Industrial Economics* 2009, p 457.
  - F. CENGİZ, *Passing-on Defense and Indirect Purchaser Standing in Actions for Damages Against the Violations of Competition Law: What Can the EC Learn from the US?* CCP Working Paper 2007-21, [competitionpolicy.ac.uk/. . . /CCP±Working±Paper±07-21.pdf](http://competitionpolicy.ac.uk/. . . /CCP±Working±Paper±07-21.pdf).

One of the few examples of comparative study on trends in private enforcement of EU competition law in different EU Member States is represented by B. Rodger (ed.), *Comparative Private Enforcement and Collective Redress Across the EU* (The Hague: Kluwer Law International 2014).

17 See, in particular:

- K. LESKINEN, ‘Recent Developments on the Antitrust Damages Directive – Some Controversial and Unresolved Implementation Issues’, 9. *Global Competition Litigation Review* 2016, p 121.
- A.S. CHONÉ-GRIMALDI ET AL., ‘La Transposition de la Directive 2014/104/UE Relative aux Actions en Dommages et Intérêts pour Violation du Droit des Pratiques Anticoncurrentielles’, 2. *Concurrences* 2015, p 11.

18 ECJ 9 November 1983, *Amministrazione delle Finanze dello Stato v. SpA San Giorgio*, EU: C:1983:318, <http://curia.europa.eu/juris/documents.jsf?num=C-199/82>, para. 12.

19 ECJ 14 January 1997, *Société Comateb and others v. Directeur général des douanes et droits indirects*, EU:C:1997:12, <http://curia.europa.eu/juris/documents.jsf?num=C-192/95>, para. 21.

20 Case C-192/95, *Comateb*, para. 24.

over, which may be described as unjust enrichment.’<sup>21</sup> The Court thus introduced the concept of passing on in order to prevent the unjust enrichment of the trader.<sup>22</sup> However, in its later jurisprudence the CJEU stressed that the concept of passing on should also be applied by national courts in the context of damage actions started by the harmed trader against the Member State, which restricted trader’s profits via the unlawful tax.<sup>23</sup> Therefore, the concept of passing on has the same objective for the CJEU both in unjust enrichment and in compensation actions: passing on ensures that the claimant receives the appropriate restitution/compensation in comparison to the unjust enrichment/damage effectively suffered.

5. Passing on can be considered a general principle of EU law, which has been recognized by Court jurisprudence in different EU policies. For instance, in *Aer Lingus*<sup>24</sup> and *Ryanair*<sup>25</sup> the General Court (GC) ruled that the EU Commission, in calculating the amount of unlawful State aid to be recovered, had to take into consideration whether the aid beneficiary had transferred part of the subsidy received to his customers. In *Courage v. Crehan* and *Manfredi*, the Court of Justice recognized for the first time the principle of passing on in relation to damage actions for breaches of EU competition law. In particular, in the two rulings the Court recognized that ‘any individual’ could claim compensation for a loss caused by a breach of EU competition rules,<sup>26</sup> as long as there was a causal link between the suffered loss and the infringement of Articles 101–102 TFEU.<sup>27</sup> Interestingly, in these judgments the CJEU neither explicitly mentioned the concept of passing on, nor its previous case law on unlawful charges. The Court rather referred to the traditional idea that the EU was a ‘new legal order’ in public international law, which imposed rights and obligations on ‘individuals’ besides Member States.<sup>28</sup> Therefore, a final consumer

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21 Case C-192/95, *Comateb*, para. 22.

22 The prevention of unjust enrichment is a legal remedy common to the traditions of most EU Member States. It refers to the situation where the defendant has gained a benefit that was not supposed to receive (e.g. the defendant receives remuneration for a service not provided). Restitution, rather than compensation, is the remedy that characterizes unjust enrichment. Unlike damage compensation, the claimant does not have to prove the fault of the defendant to receive the restitution of the unjust enrichment.

ECJ 16 May 2013, *Alakor Gabonatermelő és Forgalmazó Kft. v. Nemzeti Adó- és Vámhivatal Észak-alföldi Regionális Adó Főigazgatósága*, EU:C:2013:315, <http://curia.europa.eu/juris/documents.jsf?num=C-191/12>, para. 25.

23 ECJ 27 February 1980, *Just v. Danish Ministry for Fiscal Affairs*, EU:C:1980:57, <http://curia.europa.eu/juris/documents.jsf?num=C-68/79>, paras 26–27.

24 GC 5 February 2015, *Aer Lingus v. Commission*, EU:T:2015:78, [curia.europa.eu/juris/documents.jsf?num=T-473/12](http://curia.europa.eu/juris/documents.jsf?num=T-473/12), para. 103.

25 GC 5 February 2015, *Ryanair v. Commission*, EU:T:2015:73, [curia.europa.eu/juris/documents.jsf?num=T-500/12](http://curia.europa.eu/juris/documents.jsf?num=T-500/12), para. 119.

26 Case C-453/99, *Courage v. Crehan*, para. 26.

27 Case C-295/04, *Manfredi*, para. 61.

28 Case C-453/99, *Courage v. Crehan*, para. 19.

had *locus standi* if the loss had been transferred throughout the production chain. The Court thus indirectly recognized the concept of passing on to ensure that every EU citizen had an appropriate remedy against the breach of his right to undistorted competition within the EU internal market, rather than to prevent the unjust enrichment of the direct customer.

6. The position of the EU Commission *vis á vis* passing on has evolved over time. In its 2005 Green Paper, the Commission emphasized that passing on was difficult to estimate.<sup>29</sup> Influenced by the restrictive approach followed by the US Supreme Court, the Commission concluded in the Green Paper that ‘there is no passing on defence in Community law’.<sup>30</sup> Following the CJEU ruling in *Manfredi*, however, the Commission radically changed its view, recognizing in the 2008 White Paper both the passing on defence and the standing of indirect customers.<sup>31</sup>

## 2.2. *The Burden of Proof*

7. One important issue in relation to passing on concerns the division of the burden of proof between claimant and defendant; in other words, who has to prove that the price overcharge has been transferred throughout the production chain. Neither in *Courage v. Crehan* nor in *Manfredi* the Court clarified this point in relation to EU competition law. On the other hand, in its jurisprudence on unlawful charges the CJEU pointed out that the rules concerning the burden of proof should be left to the national procedural autonomy.<sup>32</sup> Nevertheless, in *Les Fils* the CJEU stressed that the Member States could not adopt procedural rules ‘which placed the burden of proof entirely on the trader’.<sup>33</sup> According to the Court, it would be ‘too burdensome’ for the trader to prove that the unlawful tax had not been transferred

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29 According to the opinion initially expressed by the EU Commission in the 2005 Green Paper, ‘It does not appear possible to construct a model which accurately identifies, at reasonable cost, the harm suffered by players at different levels of the production chain’ (Commission Staff Working Paper, *Annex to the Green Paper, Damages Actions for Breach of EC Antitrust Rules*. Brussels, 9 December 2005, eur-lex.europa.eu/legal-content/ALL/?uri=COM:2005:0672:FIN, para. 161.

30 Commission Staff Working Paper, *Annex to the Green Paper*, para. 161.

31 European Commission, *Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules*. Brussels, 2 April 2008, eur-lex.europa.eu/legal-content/ALL/?uri=COM:2008:0165:FIN, paras 33-37.

32 ECJ 17 July 1997, *GT-Link A/S v. De Danske Statsbaner*, EU:C:1997:376, <http://curia.europa.eu/juris/documents.jsf?num=C-242/95>, paras 23-25.

33 In *Les Fils*, the ECJ ruled that ‘a Member State is not entitled to adopt provisions which make the repayment of charges levied contrary to Community law conditional upon the production of proof that those charges have not been passed on to the purchasers of the products ... and to place the burden of adducing such negative proof entirely on the natural or legal persons claiming repayment’ (ECJ 11 November 1986, *SA Les Fils de Jules Bianco and J. Girard Fils SA v. Directeur Général des douanes et droits indirects*, EU:C:1988:97, <http://curia.europa.eu/juris/documents.jsf?num=C-331/85>, para. 13).

to final consumers<sup>34</sup>; the Court thus ‘reversed’ the burden of proof between the parties. If we transferred the message of the Court to EU competition law, we would conclude that the burden of proof should also be reversed in relation to passing on defence: it would be up to the producer breaching EU competition rules to prove that the price overcharge has been transferred downstream, rather than to the direct customer to show that it did not transfer the price overcharge to his customers. On the other hand, in the CJEU jurisprudence there is no sign that the burden of proof concerning passing on should also be reversed for indirect customers; on the basis of national procedural rules, it would be up to the final consumers to prove that they have paid the price overcharge and thus they have a ‘direct personal interest’ to bring an action to court.

8. In order to stimulate private enforcement of EU competition law, the Damages Directive reverses the burden of proof both in relation to passing on defence and introduces presumptions concerning the legal standing of the indirect customer. Article 13, in fact, states that ‘the burden of proving that the overcharge was passed on shall be on the defendant’ - i.e. the producer breaching EU competition rules. Furthermore, Article 14 introduces a presumption that the damage was passed on to the indirect customer when three cumulative conditions are satisfied:

- (1) The defendant (i.e. the producer) breached EU competition rules;
- (2) The infringement resulted in a price overcharge for the direct customer;
- (3) The indirect customer ‘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.’

Among the three cumulative criteria, the last condition is the most far reaching one in comparison to the previous CJEU case law. In particular, it establishes a presumption that final consumers have legal standing if they purchase products which ‘contain’ goods/services subject to the infringement. The final consumers will only be able to receive compensation in relation to fraction of the price overcharge included in the final product purchased, thus leading in most of the cases to insignificant compensation for the loss suffered. However, Article 14 broadly extends the legal standing of indirect customers and thus it represents one of the major added values of the Damages Directive in comparison to the pre-existing EU *acquis* on passing on. The presumption that the indirect customer has legal standing is rebuttable<sup>35</sup>: the defendant can prove that the price overcharge

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34 Case C-331/85, *Les Fils de Jules Bianco*, para. 13.

35 Damages Directive, Art. 14(2).

has not been transferred downstream. Nevertheless, it seems unlikely that the defendant will be able to satisfy such high burden of proof in practice.

### 2.3. *Estimating Passing On*

9. A key issue in this field concerns the estimation of the degree of passing on among the different levels of the production chain. As pointed out by the Court in *Comateb*, ‘it cannot be generally assumed that the charge is actually passed on in every case. The actual passing on of such taxes, either in whole or in part, depends on various factors in each commercial transaction which distinguish it from other transactions in other contexts.’<sup>36</sup> In competition law, several economic factors should be taken in consideration in estimating the degree of passing on. For instance, if the direct customer operates in a highly competitive market while the indirect customer has a strong buyer power, it is unlikely that the price overcharge will be transferred downstream.<sup>37</sup> In such a case, the direct customer is likely to internalize the damage, thus becoming the only party to have legal standing in a potential compensation action against the producer. In addition, the value of the goods/service subject to the price overcharge within the overall production costs has also an impact on the degree of passing on: if the goods/service represent only a small fraction of the overall production costs of the final product, the direct customer is unlikely to increase the price of the final product and thus to transfer the damage to the indirect customers.<sup>38</sup>

10. As mentioned in the introduction, such complexities led the US Supreme Court to reject the overall concept of passing on in US antitrust law.<sup>39</sup> On the contrary, according to the CJEU such estimation is not impossible; it should be conducted by national courts on a case by case.<sup>40</sup> Similarly, the Damages Directive emphasizes that the national courts should have ‘the power to estimate, in accordance with national procedures, the share of any overcharge that was passed on’.<sup>41</sup> In addition, the Directive encourages national courts to estimate the degree of passing on taking in consideration the assessment of other courts in parallel proceedings concerning the same competition law infringement,<sup>42</sup> as well as ‘relevant information in the public domain resulting from the public enforcement of competition law’. For instance, if a National Competition Authority (NCA)

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36 Case C-192/95, *Comateb*, para. 25.

37 RBB Economics, *Study on the Passing on of Overcharges*, p 30.

38 *Ibid.*, p 31.

39 For a detailed analysis of the position of the US Supreme Court, see D. BERGER & R. BERNSTEIN, ‘An Analytical Framework for Antitrust Standing’, 86. *Yale Law Journal* 1987, p 809.

40 In *Comateb*, the ECJ ruled that ‘it is for the national courts to determine, in the light of the facts in each case, whether the burden of the charge has been transferred in whole or in part by the trader to other persons’ (Case C-192/95, *Comateb*, para. 23).

41 Damages Directive, Art. 12(5).

42 *Ibid.*, Art. 15(1)(a).

estimated the degree of passing on in its decision sanctioning a cartel, the findings of the authority could be relied by a national civil court in a follow-on damage compensation action. The Directive allows national courts to ask NCAs to intervene in the damage compensation proceedings as *amicus curiae*, in order to provide advise concerning damage quantification.<sup>43</sup> It is still unclear whether this new possibility will be relied in practice by national courts and whether the NCAs will positively answer to such invitation. However, in inviting the NCA to intervene in the proceedings, the national court will probably ask the NCA to provide an estimation of the degree of passing on, due to its close link with damage estimation. Finally, under Article 16 Damages Directive the EU Commission ‘shall issue guidelines’ addressed to national courts on how to estimate the degree of passing on. Similarly to the Practical Guide on damage quantification published by the EU Commission in 2013,<sup>44</sup> the guidelines on passing on will not be binding for national courts.<sup>45</sup> However, they will represent an authoritative instrument that national judges are likely to consult during the court proceedings. The study published in October 2016 by RBB Economics on behalf of DG Competition is likely to represent the departing point of the guidelines that the EU Commission will publish on this topic in the near future.<sup>46</sup>

11. A final issue related to the estimation of passing on concerns the loss of profits suffered by the direct customers as a consequence of the passing on. On the one hand, the direct customer benefits from the passing on since it can transfer the damage downstream. On the other hand, in transferring the price overcharge the direct customer is likely to reduce its sales, since the final customers are likely to switch to other suppliers – i.e. volume effect. As recognized by the CJEU in *Weber Wine* in relation to passing on of unlawful charges, in estimating the degree of passing on the national court has also to consider the ‘fall in the volumes of the

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43 *Ibid.*, Art. 17(3).

44 Commission Staff Working Document, *Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*. Strasbourg, 11 June 2013, SWD(2013) 205, [ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_en.html](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_en.html).

45 In *Expedia*, the ECJ ruled that the guidelines adopted by the EU Commission in competition law might be ‘taken into account’ by the NCAs, but they are not binding. The same conclusion could be achieved in relation to the guidelines addressed by the EU Commission to national courts (ECJ 13 December 2012, *Expedia Inc. v. Autorité de la concurrence and Others*, EU:C:2012:795, <http://curia.europa.eu/juris/documents.jsf?num=C-226/11>, para. 31).

46 The legal disclaimer included in the report points out that the study was prepared by RBB Economics, acting as external consultants of DG Competition. The views expressed in the study thus do not reflect the official position of the EU Commission. However, the report also indicates that the ‘study is aimed to assist the Commission’ in the preparation of the guidelines on passing, as provided under Art. 16 Damages Directive (RBB Economics, *Study on the Passing on of Overcharges*, legal disclaimer at p 1).

sales' of the trader.<sup>47</sup> In order to estimate the effective degree of passing on, therefore, the volume effect has to be deducted from the value of passing on of the price overcharge.<sup>48</sup>

12. The estimation of the degree of passing on and volume effect requires a complex economic analysis; civil courts often do not have experience in carrying out this type of analysis. The estimation of the passing on thus requires an increasing reliance on external economic experts, who are likely to increasingly intervene in the future in cases of private enforcement of competition law. Economic experts will not only intervene in the final phase of the proceedings to quantify the damage; they will also intervene during the preliminary phase of the proceedings, in order to estimate the degree of passing on and thus helping the national judge to decide on the *locus standi* of the claimant.<sup>49</sup>

### 3. Case Studies

#### 3.1. Germany

13. During the past years, the number of cases of private enforcement of EU competition law has steadily increased in German courts, although the latter still represent only the 'peak of the iceberg' since most of the disputes are settled during the pre-litigation stage.<sup>50</sup> As pointed out by an empirical study carried out by Peyer few years ago, most of the cases are stand-alone claims related to abuse of dominance, rather than follow-on claims concerning cartels/anti-competitive agreements.<sup>51</sup> In addition, the remedies usually requested by the claimants are temporary/permanent injunctions and declarations that the existing contract between the claimant and the defendant is null and void, rather than seeking damages.<sup>52</sup> Finally, direct rather than indirect customers have started most of the civil actions in German courts.<sup>53</sup> Against this background, passing on has had limited practical significance in private enforcement of competition law in

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47 ECJ 2 October 2003, *Weber's Wine World Handels-GmbH and Others v. Abgabenberufungskommission Wien*, EU:C:2003:533, curia.europa.eu/juris/documents.jsf?num=C-147/01, paras 99-100.

48 RBB Economics, *Study on the Passing on of Overcharges*, pp 11-12.

49 *Ibid.*, p 168.

50 For instance, according to the data collected by Peyer for the period 2005-2007, 368 proceedings in German courts involved private enforcement of EU and national competition law. According to the author, such numbers contradict the general view that private enforcement of competition law is underdeveloped in all EU Member States.

S. PEYER, 'Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence', 8. *Journal of Competition Law and Economics* 2012, p (331) at 338.

51 S. PEYER, *Journal of Competition Law and Economics* 2012, p (331) at 342.

52 *Ibid.*, p 349.

53 *Ibid.*, p 344.

German courts. Nevertheless, as discussed in the following paragraphs, the legal standing of indirect customers has been highly debated in the jurisprudence of the German courts during the past years.

14. Under section 823 German Civil Code (*Bürgerliches Gesetzbuch* - BGB), a person is obliged to pay compensation for having ‘intentionally or negligently’ damaged another party.<sup>54</sup> Furthermore, ‘the same liability holds for someone who violates a law aimed to protect another party’.<sup>55</sup> Therefore, under German tort law the applicant has legal standing if he belongs to the group of persons entitled to damages due to a violation of the ‘protective law’.<sup>56</sup> In its landmark judgment in *BMW Import*, the German Federal Court of Justice (*Bundesgerichtshof* - BGH) clarified for the first time that Article 101 TFEU should ‘also be considered a protective law within the meaning of section 823(2) BGB’.<sup>57</sup> In its ruling, the BGH referred to the CJEU judgment in *SABAM*<sup>58</sup> to recognize the right to damage compensation for violation of EU and national competition law.<sup>59</sup> However, the BGH did not clarify whether indirect customers also had a right to damage compensation for a breach of competition law and thus whether passing on was recognized.

15. The 7th amendment of the Act against Restrictions of Competition (i.e. *Gesetz gegen Wettbewerbsbeschränkungen* - GWB) introduced in section 33 a specific legal basis for injunctions and damage claims arising from a violation of Articles 101–102 TFEU and the corresponding national competition law.<sup>60</sup> Since its introduction in 2005, section 33 GWB has replaced section 823(2) BGB as legal basis for damage claims resulting from breaches of competition law.<sup>61</sup> The latter provision, nevertheless, did not initially clarify the issue of the claimant’s legal standing. Due to the lack of clarification on the issue of passing on by section 33, a

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54 Official translation in English of the German Civil Code is available at [www.gesetze-im-internet.de/englisch\\_bgb/index.html](http://www.gesetze-im-internet.de/englisch_bgb/index.html)

55 § 823(2) BGB.

56 C. ANDRELANG, ‘Damages for the Infringement of Art. 81 EC BY Cartel Agreements According to Sec. 33(3) GWB’, 30. *World Competition* 2007, p (573) at 577.

57 *Bundesgerichtshof* 23 October 1979, KZR 21/78 (*BMW Imports*), para. 17, [www.jurion.de/urteile/bgh/1979-10-23/kzr-21\\_78/](http://www.jurion.de/urteile/bgh/1979-10-23/kzr-21_78/) (last visited 25 July 2017).

58 In *SABAM*, the ECJ recognized for the first time that EU competition rules could be object of private enforcement in national civil courts due to the horizontal direct effect of Arts 101–102 TFEU (ECJ 27 March 1974, *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v. SV SABAM and NV Fonior*, EU:C:1974:25, <http://curia.europa.eu/juris/documents.jsf?num=C-127/73>).

59 BGH 23 October 1979, *BMW Import*, para. 17.

60 For an overview of the main changes introduced by the 7th amendment to the GWB, see A. KLEES, ‘Breaking the Habits: The German Competition Law After the 7th Amendment to the Act Against Restraints of Competition (GWB)’, 7. *German Law Journal* 2004, p 399.

61 Official English translation of the GWB is available at [www.gesetze-im-internet.de/englisch\\_gwb/englisch\\_gwb.html](http://www.gesetze-im-internet.de/englisch_gwb/englisch_gwb.html).

number of first instance and appeal courts rejected the legal standing of the indirect customer<sup>62</sup>: in order to avoid multiple liability for the competition law infringer, a number of German courts claimed that only direct customers enjoyed the right to damage compensation.

16. Only in 2011 the German Federal Court of Justice recognized the standing of indirect customers in its seminal ruling in *ORWI*.<sup>63</sup> For a number of years, ORWI had purchased self-copying paper from R. GmbH, a producer involved in the carbonless paper cartel sanctioned in 2001 by the EU Commission.<sup>64</sup> In particular, ORWI purchased the paper from a wholesaler, a subsidiary fully controlled by R.<sup>65</sup> In *ORWI*, the BGH recognized that ‘the category of persons entitled to claim for infringement of Article 101 TFEU is not limited to the immediate direct customers of the cartel members’<sup>66</sup> In the ruling, the BGH referred to *Manfredi* and *Courage v. Crehan* case law of the CJEU to justify its decision.<sup>67</sup> In addition, it pointed out that indirect customers should have legal standing since direct customers usually had limited incentive to commence damages proceedings: they would pass on the cartel-caused price-overcharge downstream and continue the business relationship with the infringer, rather than starting a court claim.<sup>68</sup> In order to assess the degree of passing on, the German courts had to undertake a case-by-case analysis, considering a variety of factors, such as ‘the price elasticity of supply and demand, the duration of the infringement and the level of competition’.<sup>69</sup> The BGH pointed out that the determination of the nexus of causality in damage claims was a matter of national procedural autonomy.<sup>70</sup> Consequently, in accordance with general principles of German tort law, the indirect customer bore the burden of proof regarding the presence of passing on to justify his legal standing.<sup>71</sup> The BGH concluded that ORWI had legal standing since it could be presumed that R. had fully passed the price overcharge to ORWI via its subsidiary.<sup>72</sup>

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62 For instance, following the EU Commission 2001 Decision sanctioning the vitamins cartel, a German producer of baby-food started follow-on damage claims at the courts of Dortmund, Mainz and Mannheim. However, the *Landgericht* of Mainz and Mannheim rejected the claims, since the claimant was not a direct customer of the cartel producers, and thus it was not the direct target of the cartel entitled to claim damage compensation.

C. ANDRELANG, 30. *World Competition* 2007, p (573) at 579.

63 *Bundesgerichtshof* 28 June 2011, KZR 75/10 (*ORWI*), <http://lexetius.com/2011, 5540> (last visited 25 July 2017).

64 *Ibid.*, paras. 1-3.

65 *Ibid.*, para. 3.

66 *Ibid.*, para. 11.

67 *Ibid.*, paras 15-17.

68 *Ibid.*, paras 29-32.

69 *Ibid.*, para. 47.

70 *Ibid.*, para. 34.

71 *Ibid.*, para. 44.

72 *Ibid.*, para. 41.

17. In *ORWI*, the BGH recognized the concept of passing on. Although the case concerned the legal standing of the indirect customer, the ruling could be applied *mutatis mutandis* to the recognition of passing on defence. However, unlike the CJEU case law and the Damages Directive discussed in section 2, the BGH did not introduce any presumption of passing on: in accordance with general principles of German tort law, it was up to the claimant to prove that the infringer had fully passed on the price overcharge downstream. In *ORWI*, the subsidiary relationship between the competition law infringer and the direct customer created a presumption that the price overcharge had been fully transferred to the claimant. However, in later rulings a number of German courts have rejected the standing of the indirect customer, since the latter could not provide sufficient evidence that the direct customer had passed on the damage downstream.<sup>73</sup> For instance, Düsseldorf First Instance Court in 2015 rejected the standing of the claimant in a follow-on claim connected to the car glass cartel.<sup>74</sup> Interestingly, the Court referred in its ruling to the presumption of the legal standing of indirect customers introduced by Article 13 of the Damages Directive.<sup>75</sup> However, as the Damages Directive had not yet been transposed into law in Germany, the Court relied on *ORWI* case law.<sup>76</sup> In the end, the Court rejected the legal standing of the indirect customer without appointing any economic expert to assess the degree of passing on.<sup>77</sup>

18. Germany has completed the process of implementation of the Damages Directive in June 2017. The Directive has been transposed in Germany in the context of the 9th amendment to the Act against Restriction of Competition (*Gesetzes gegen Wettbewerbsbeschränkungen*, GWB).<sup>78</sup> In particular, section 33(c) GWB transposes the provisions of the Damages Directive concerning passing on defence and standing of the indirect customer. However, as recently noticed by Kersting,<sup>79</sup> while Article 14(2) Damages Directive excludes the presumption of legal standing of the indirect customer if ‘the defendant can demonstrate ... that the overcharge was not, or was not entirely, passed on to the indirect purchaser’, section 3(c)(3) points out that the court might

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73 V. SOYEZ, ‘Germany: Follow-on Actions – It Is Not Easy After All’, 9. *Global Competition Litigation Review* 2016, p 24.

74 Judgement of the Landgericht Dusseldorf 19 November 2015, 14d O 4/14, [openjur.de/u/866517.html](http://openjur.de/u/866517.html) (last visited 25 July 2017).

75 V. SOYEZ, *Global Competition Litigation Review* 2016, para. 210.

76 *Ibid.*, para. 211.

77 V. SOYEZ, ‘Germany: Insurance Companies Fail to Prove Passing-on’, 9. *Global Competition Litigation Review* 2015, p 1.

78 The consolidated version of the GWB after the 9th amendments has been published on 8 June 2017 the German Official Journal (*Bundesgesetzblatt*), [www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&jumpTo=bgbl117s1416.pdf/](http://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl117s1416.pdf/).

79 C. KERSTING, ‘Transposition of the Antitrust Damages Directive into German Law’, in B. Rodger, M.S. Ferro & F. Marcos (eds), *The EU Antitrust Damages Directive: Transposition in the Member States* (Oxford University Press 2017), p 21, draft at [ssrn.com/abstract=2998586](http://ssrn.com/abstract=2998586).

decide that the presumption of legal standing of the indirect customer does not apply because the price overcharge has not been fully passed on. German legislator has thus emphasized the discretion of the German courts in assessing the passing on. In view of the traditional sceptical approach of German courts *vis a vis* the concept of passing on, such discretion that might be used to narrow down the scope of application of this presumption. Secondly, it remains to be seen how the German courts will apply the presumptions of passing on included the Damages Directive and quantify the degree of passing on in accordance with German procedural rules and *ORWI* case law,<sup>80</sup> which does not recognize any presumption of legal standing for the indirect customer.

### 3.2. France

19. Unlike Germany, in France there is no specific legal basis concerning damage claims for violations of competition law: the general legal basis for tort liability is also applicable in competition law cases.<sup>81</sup> Article 1382 of the French Civil Code requires the claimant to prove a fault on the side of the defendant, quantifying the loss and showing the existence of a causal link between fault behaviour and suffered loss.<sup>82</sup> On the other hand, Article 1382 does not provide any *a priori* limitation on the scope of the protected rights and interests that can generate compensation for loss.<sup>83</sup> The lack of a specific legal basis and the restrictive approach followed by the French courts in awarding damages are generally considered the main reasons behind the limited number of cases of private enforcement of competition law in France.<sup>84</sup> Although the French legislator has introduced a system of specialized courts to hear damages claims<sup>85</sup> and a class actions system has been available in France since 2014,<sup>86</sup> the

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- 80 In relation the challenges faced by German courts in relation to economic analysis issues in cases of private enforcement of competition law, see H.W. FRIEDERISZICK & L.H. RÖLLER, 'Quantification of Harm in Damages Actions for Antitrust Infringements: Insights from German Cartel Cases', 6. *Journal of Competition Law and Economics* 2010, p 595.
- 81 A. ARAMIS, 'France', in B. Adkins & S. Beighton (eds), *Private Antitrust Litigation* (London: Thomson Reuters 2016), p 83.
- 82 Unofficial translation of the French Civil Code is available at [www.legifrance.gouv.fr/content/download/1950/13681/version/3/.../Code\\_22.pdf](http://www.legifrance.gouv.fr/content/download/1950/13681/version/3/.../Code_22.pdf).
- 83 A. ARAMIS, in *Private Antitrust Litigation*, p 83.
- 84 N. LENOIR ET AL., 'France: Private Antitrust Litigation', *Global Competition Review*, 14 July 2015, [globalcompetitionreview.com/chapter/1066808/france-private-antitrust-litigation](http://globalcompetitionreview.com/chapter/1066808/france-private-antitrust-litigation).
- 85 The Decree 2005-1756 granted to 16 French commercial courts exclusive jurisdiction to hear private enforcement cases in intellectual property and competition law. Appeals against the rulings of the first instance courts are heard by Paris Court of Appeal and then by the French Supreme Court (Decree 2005-1756 of 30 December 2005, JUSB0510760D, available at: [www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006053067](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006053067)).
- 86 The Law Hamon introduced in 2014 a class action mechanism based on an opt-in system. The victims have to join the class action, which later needs certification by the competent court (Law 2014-344 of 17 March 2014, EFIX1307316L, available at: [www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028738036](http://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000028738036)).

number of publicly known damages claims for violations of competition law is still rather limited in the country.<sup>87</sup>

20. The French Supreme Court (i.e. *Cour de Cassation*) recognized the passing on defence for the first time in competition law in the *Doux Aliments* case.<sup>88</sup> The latter was a French producer of animal feed, which had purchased synthetic lysine from Ajinomoto Eurolysine for a number of years.<sup>89</sup> Following the EU Commission decision sanctioning Ajinomoto due to its involvement in the lysine cartel,<sup>90</sup> Doux Aliments and other French producers of animal feed started parallel follow-on damage actions in French courts. In its 2010 judgment, the *Cour de Cassation* annulled the previous ruling of the Paris Court of Appeal, since the latter had not analysed whether *Doux Aliments* had passed the price overcharge on downstream. In this way, the French Supreme Court implicitly recognized the passing on defence.<sup>91</sup>

In 2012, the French Supreme Court returned to the issue of the passing on defence in *Le Gouessant*, a parallel follow-on damage case involving Ajinomoto as defendant.<sup>92</sup> In the judgment, the *Cour de Cassation* recognized that ‘the burden of proof of a defence normally lies on the defendant in the action invoking it’<sup>93</sup>; however, ‘since proof of the harm falls on the party invoking it’, *Le Gouessant* had failed to show that it did not pass on the price overcharge downstream.<sup>94</sup> In other words, the claimant had to show that passing on had not taken place in order to justify his legal standing in the proceedings. The approach followed by the *Cour de Cassation* in *Le Gouessant* radically differs from the CJEU ruling in *Le Fils* and Article 12 Damages Directive discussed in section 2.<sup>95</sup> The latter provision, in fact, places the burden of proof concerning passing on defence on the defendant, rather than on the claimant.

In the context of the court proceedings following the 2010 *Doux Aliments* judgment, the claimant asked Paris Court of Appeal to request a preliminary ruling from the CJEU concerning the burden of proof in passing on defence.<sup>96</sup> However,

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87 For an overview of the recent cases, see M. THILL-TAYARA, ‘France’, in I. Knable Gotts (ed.), *The Private Competition Enforcement Review* (London: Law Business Research Ltd, 4th edn 2011), p 108.

88 Cour de cassation (France) 15 June 2010, 09-15816, [www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000022371861](http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000022371861).

89 *Ibid.*

90 EU Commission press release, *Commission fines ADM, Ajinomoto, others in lysine cartel*. Brussels, 7 June 2010, IP/00/589, [europa.eu/rapid/press-release\\_IP-00-589\\_en.htm](http://europa.eu/rapid/press-release_IP-00-589_en.htm) (last visited 25 July 2017).

91 Cour d’appel de Paris 27 February 2014, 10/18285, *Doux Aliments*, [www.doctrine.fr/d/CA/Paris/2014/R739C8460D9653C8E1609](http://www.doctrine.fr/d/CA/Paris/2014/R739C8460D9653C8E1609).

92 Cour de Cassation 15 May 2012, 11-18495, *Le Gouessant*, [www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000025899026](http://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000025899026).

93 *Le Gouessant*, para. 2.

94 *Ibid.*, para. 4.

95 C-331/85, *Le Fils de Jules Bianco*.

96 Cour d’appel de Paris 27 February 2014, *Doux Aliments*, p 5.

the Court of Appeal rejected the request, claiming that the French Supreme Court had already clarified the issue in *Le Gouessant*.<sup>97</sup> After having analysed the findings of the economic experts appointed by the parties, the Court of Appeal ruled that *Doux Aliments* had not passed on the price overcharge. In particular, the Court observed that synthetic lysine represented only 1% of the production costs faced by *Doux Aliments* and the industry of animal feed was characterized by high degree of competition and by strong buyer power from the side of large distributors.<sup>98</sup> Therefore, Ajinomoto could not rely on the passing on defence to exclude *Doux Aliments* legal standing.

21. In March 2017, the French Government adopted a legislative decree and an administrative order to implement the Damages Directive,<sup>99</sup> which amend certain articles of the French *Code de Commerce*. In particular, the new Article 481(3)-(6) of the Commerce Code transpose Articles 12-14 Damages Directive.<sup>100</sup> Overruling the previous case law of the French Supreme Court, the new provisions point out that the defendant has the burden of proof to show the passing on of the damage.<sup>101</sup> However, contrary to the Damages Directive, the legislation includes a presumption that the direct customer usually does not transfer the price overcharge downstream.<sup>102</sup> In other words, the legislation includes a presumption that passing on usually does not take place, unless the defendant proves it. It is doubtful whether the presumption included in the French legislation complies with the Damages Directive, which considers the passing on effect has an ordinary business practice. Therefore, even after the implementation of the Damages Directive, the issue of the passing on defence remains controversial in France. Passing on is likely to be one of the most controversial issues that French courts will have to assess in the near future.

### 3.3. Italy

22. Similarly to the case of France, private enforcement of competition law is less common in Italy in comparison to Germany and UK. Besides traditional problems

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97 *Ibid.*, p 9.

98 *Ibid.*, p 11.

99 Legislative Decree 2017/305 adopted by the French Ministry of Justice on 9 March 2017; Administrative Order 2017/303 adopted by the French Ministry of Justice on 9 March 2017, both at: [www.alinea-avocats.eu/publication-de-lordonnance-et-du-decret-precisant-les-conditions-des-actions-en-dommages-et-interets-du-fait-des-pratiques-anticoncurrentielles-loi-sapin-2-transposition-de-la-directive-n/](http://www.alinea-avocats.eu/publication-de-lordonnance-et-du-decret-precisant-les-conditions-des-actions-en-dommages-et-interets-du-fait-des-pratiques-anticoncurrentielles-loi-sapin-2-transposition-de-la-directive-n/) (last visited 25 July 2017).

100 Art. 481(3)-(6) French *Code de Commerce*, as amended by Art. 3 of the Administrative Order 2017/303, updated text at: [www.legifrance.gouv.fr/affichCode.do;jsessionid=FFD3AB9E57944C60C3E86FB4AADC6E4E.tpdila14v\\_3?idSectionTA=LEGISCTA000034161972&cidTexte=LEGITEXT000005634379](http://www.legifrance.gouv.fr/affichCode.do;jsessionid=FFD3AB9E57944C60C3E86FB4AADC6E4E.tpdila14v_3?idSectionTA=LEGISCTA000034161972&cidTexte=LEGITEXT000005634379).

101 *Code de Commerce*, Art. 481(4).

102 ‘The direct or indirect customer ... is presumed not to have transferred the price overcharge to its clients, unless proof of such partial or full transfer is put forward by the defendant, responsible for the anti-competitive conduct’ (*Code de Commerce*, Art. 481(4)).

affecting most of the continental European countries, such as the courts inability to calculate the antitrust damage and limitations in the disclosure of evidence, private enforcement of antitrust law has also been affected by the ‘labyrinth of the Italian courts’ having jurisdiction in competition law civil claims.<sup>103</sup> The original version of Article 33 Law 287/1990 (i.e. Italian competition law), in fact, provided that the Courts of Appeal had jurisdiction to hear cases of private enforcement of ‘national’ competition law.<sup>104</sup> On the other hand, in accordance with the ordinary rules of civil procedure, either the First Instance Courts or the Small Claim Judges (i.e. *Giudice di Pace*) had jurisdiction to hear claims involving breaches of Articles 101-102 TFEU.<sup>105</sup> The Italian competition law was adopted in 1990, before *Courage* and *Manfredi* case law and before the decentralization of EU competition law brought by Reg.1/2003; at the time when national courts had limited jurisdiction to rule on cases involving Articles 101-102 TFEU.<sup>106</sup> Article 33 was later amended<sup>107</sup>: in particular, the recent Italian law implementing the Damages Directive grants exclusive jurisdiction in cases of private enforcement of national and EU competition law to specialized chambers of the First Instance Courts of Milan, Rome and Naples; the latter become *de facto* specialized competition law tribunals.<sup>108</sup>

23. Article 33 Italian Competition Law defines the court jurisdiction to hear cases of private enforcement of competition law, but it does not include a specific legal basis in terms of liability. Article 2043 Italian Civil Code (i.e. the general legal basis for tort liability) is thus applicable to cases of private enforcement of competition law<sup>109</sup>: the latter provision requires the claimant to prove the ‘fault’ or ‘negligence’ by the defendant, the damage estimation and the nexus of causality. Although Article 2043 does not limit the legal standing of the claimant to specific categories of individuals that have a right of damage compensation, for a number of years the Italian Supreme

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103 S. Rosso, ‘Ways to Promote Workable Private Antitrust Enforcement in Italy’, 32. *World Competition* 2009, p 306.

104 Law n. 287 adop of 10 October 1990, official English translation: [www.agcm.it/en/competition/competition-legislation/1727-law-no-287-of-october-10th-1990.html](http://www.agcm.it/en/competition/competition-legislation/1727-law-no-287-of-october-10th-1990.html).

105 S. Rosso, 32. *World Competition* 2009, p 306.

106 *Ibid.*, p 306.

107 In 2012, Art. 33 Law 287/1990 was amended in order to unify the court jurisdictions in cases of private enforcement of national and EU competition law. In particular, Art. 2(3)(d) of the Legislative Decree 1/2012 granted to specialized chambers of the First Instance Tribunals to hear private enforcement cases concerning IP and competition law. See Legislative Decree 1/2012, adopted on 24 January 2012, published on the Italian Official Journal n. 71 on 24 March 2012, in Italian language at: [www.astrid-online.it/mercato/liberalizz/materiali/liberalizz/attiparla/archivio/xvi-legislatura/9C4CA048-B851-47B8-8EDC-E292856FCB54.html](http://www.astrid-online.it/mercato/liberalizz/materiali/liberalizz/attiparla/archivio/xvi-legislatura/9C4CA048-B851-47B8-8EDC-E292856FCB54.html) (last visited 25. July 2017).

108 Legislative Decree n. 3, published on the Italian Official Journal on 19 January 2017. Art. 18, in Italian language at: [www.gazzettaufficiale.it/eli/id/2017/01/19/17G00010/sg](http://www.gazzettaufficiale.it/eli/id/2017/01/19/17G00010/sg) (last visited 25 July 2017).

109 [www.brocardi.it/codice-civile/libro-quarto/titolo-ix/art2043.html](http://www.brocardi.it/codice-civile/libro-quarto/titolo-ix/art2043.html) (last visited 25 July 2017).

Court (*Corte di Cassazione*) limited the legal standing of final consumers in cases involving private enforcement of competition law. In particular, in its 1999 ruling in *Montanari*, the Supreme Court pointed out that ‘Art. 101-102 TFEU had the objective to safeguard free competition among undertakings’.<sup>110</sup> As a consequence, only undertakings could rely on Articles 101-102 TFEU and the corresponding national provisions, by thus *de facto* excluding *a priori* the legal standing of final consumers in antitrust cases. Only in 2005 the Italian Supreme Court modified its restrictive approach concerning the legal standing of final consumers in *Ricciardelli*.<sup>111</sup> Following the decision of the Italian NCA sanctioning the car insurance premium cartel, Mr Ricciardelli and several harmed consumers started damage compensation actions in front of a number of *Giudici di Pace*; the well-known CJEU ruling in *Manfredi* originates from one of these follow-on actions. In *Ricciardelli*, the Italian Supreme Court recognized that ‘the Italian competition law does not only safeguard business operators, but all market players’.<sup>112</sup> Therefore, Mr Ricciardelli had legal standing since he had suffered the price overcharge due to involvement of his insurance company in the cartel.

24. Similarly to Manfredi, Mr Ricciardelli was a direct customer. Therefore, in *Ricciardelli* the Italian Supreme Court recognized the legal standing of final consumers in cases of private enforcement of competition law, but it did not discuss the issue of passing on. The latter has been recognized by the jurisprudence of the lower civil courts in Italy. In particular, in *Indaba v. Juventus* the Court of Appeal of Turin recognized the passing on defence, by ruling that ‘the party who had passed on the damage to third parties as well as to final consumers did not have legal standing’.<sup>113</sup> Similarly, in *Unimar v. Geasar* the Court of Appeal of Cagliari excluded the legal standing of the claimant, since he had passed the damage to its customers.<sup>114</sup> Similarly to the approach followed by the French Supreme Court in *Le Gouessant*, in their rulings the Courts of Appeal have placed the burden of proof of passing on defence on the claimant, rather than on the defendant breaching competition rules.<sup>115</sup> However, since the Italian Supreme Court has never been

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110 *Corte di Cassazione*, n. 1811, 4 March 1999, *Montanari*, [www.cortedicassazione.it/corte-di-cassazione/it/archivio\\_storico.page](http://www.cortedicassazione.it/corte-di-cassazione/it/archivio_storico.page) (last visited 25 July 2017).

111 *Corte di Cassazione*, n. 2207, 4 February 2005, *Ricciardelli*, [www.cortedicassazione.it/corte-di-cassazione/it/archivio\\_storico.page](http://www.cortedicassazione.it/corte-di-cassazione/it/archivio_storico.page) (last visited 25 July 2017). A comment on the ruling is available in A. PALMIERI et AL., ‘L’Antitrust per il Benessere (e il Risarcimento del Danno) dei Consumatori’, 128. *Il Foro Italiano* 2005, p 1013.

112 A. PALMIERI, 128. *Il Foro Italiano* 2005, p 1013.

113 Corte di Appello di Torino, *Indaba v. Juventus*, 6 July 2000, [www.distretto.torino.giustizia.it/default.aspx](http://www.distretto.torino.giustizia.it/default.aspx) (last visited 25 July 2017).

114 Corte di Appello di Cagliari, *Unimare v. Geasar*, 23 January 1999, [www.giustizia.sardegna.it/circondario.aspx?pnl=6](http://www.giustizia.sardegna.it/circondario.aspx?pnl=6) (last visited 25 July 2017).

115 G. PULEIO, ‘Il Risarcimento del Danno Antitrust alla Luce della Direttiva 2014/104/UE’, 3. *Responsabilità Civile e Previdenza* 2016, p 1082.

asked to rule on this issue, we do not know the position of the *Corte di Cassazione* in relation to the issue of the burden of proof of passing on.

25. Italy has recently adopted the Legislative Decree implementing the Damages Directive. In particular, Articles 10–12 of the legislation implements the provisions of the Damages Directive reverting the burden of proof in relation to passing on defence and introducing presumptions in relation to the legal standing of indirect customers.<sup>116</sup> It remains to be seen how the new provisions will be enforced by the Italian courts, in view of the previous case law of the Italian Supreme Court and the Courts of Appeal on this issue.

### 3.4. *United Kingdom*

26. In view of the large number of cases litigated in British courts and the benign procedural and substantive provisions of the applicable law, United Kingdom is generally considered the most developed jurisdiction in Europe in terms of private enforcement of competition law.<sup>117</sup> A number of reasons explain the larger number of cases of publicly known private enforcement in UK in comparison to rest of Europe: the broader rules concerning the disclosure of evidence during the court proceedings, the case management powers of the British judges and the existence of a specialized competition law tribunal (i.e. Competition Appeal Tribunal – CAT) are among the reasons usually put forward to explain the greater relevance of private enforcement of competition law in UK in comparison to the rest of the continent.<sup>118</sup> The possible further development of private enforcement in UK is currently uncertain: on the one hand, the 2015 Consumer Rights Act has increased the incentives for claimants to start a damage compensation case in UK by introducing opt-out class actions, the possibility of collective settlements and extending CAT jurisdiction to stand-alone claims.<sup>119</sup> On the other hand, by establishing a level playing field among the EU Member States in terms of minimum common procedural rules, the

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116 Legislative Decree 3/2017, Arts 10–12.

117 For instance, a study carried out few years ago by Barry Rodger identified 41 cases of private enforcement of UK and EU competition law in British courts between 2005 and 2008. Such number has increased to 80 in the period 2009–2012, and it is now expected to be even higher.

B. RODGER, ‘Competition Law Litigation in the UK Courts: A Study of All Cases 2005–2008’, 2. *Global Competition Litigation Review* 2009, p 93.

B. RODGER, ‘Competition Law Litigation in the UK Courts: A Study of All Cases 2009–2012’, 6. *Global Competition Litigation Review* 2013, pp 55–67.

118 B. RODGER, ‘Private Enforcement of Competition Law, the Hidden Story Part II: Competition Litigation Settlements in the UK, 2008–2012’, 8. *Global Competition Litigation Review* 2015, p 89–108.

119 B. McGRATH, ‘The Consumer Rights Act 2015: Full Steam Ahead for Collective Proceedings?’, 9. *Global Competition Litigation Review* 2016, p 15.

Damages Directive has decreased the incentives for claimants to start damage actions in UK.<sup>120</sup> Furthermore, Brexit might undermine the incentives for claimants to bring cross-border cases in UK and to later ask the mutual recognition of the UK court ruling in other EU Member States.<sup>121</sup>

27. While civil law jurisdictions usually include an ‘open’ definition of civil liability (e.g. France and Italy), English common law is characterized by a system of ‘nominate torts’. In order to succeed in his claim, the claimant has to prove that the defendant breached a ‘statutory duty’; the breach has caused a damage linked to the breach of the statutory duty; thirdly, the legislation created a right of action for the claimant.<sup>122</sup> In 1984, UK House of Lords recognized for the first time in *Garden Cottage Foods v. Milk Marketing Board* that the breach of Articles 101-102 TFEU represented a breach of statutory duty, thus opening the door to private enforcement of EU competition law in UK.<sup>123</sup> Similarly, the third condition of tort liability has been broadly interpreted by UK courts in relation to the standing of indirect customers in competition law cases: due to the broad language of the UK Competition Act in relation to the categories of individuals protected by the law, UK courts have not introduced any *a priori* limitation *vis a vis* the *locus standi* of indirect customers.<sup>124</sup> The legal standing of the indirect customers have been analysed by UK courts in terms of causation between the breach of statutory duty and the harm suffered by the claimant, rather than in terms of passing on of the damage throughout the production chain.<sup>125</sup>

28. UK Competition Appeal Tribunal has explicitly recognized passing on in UK competition law only recently, in its 2016 judgment in *Sainsbury’s Supermarkets v. MasterCard*.<sup>126</sup> The case was a follow-on action started after 2007 EU Commission decision sanctioning the Multilateral Interchange Fee

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120 J. KWAN, ‘The Damages Directive: End of England’s Emminence?’, 36. *E.C.L. Rev.* 2015, pp 455-462.

121 J. KWAN, 36. *E.C.L. Rev.* 2015, p 455.

122 N. BÜCAN GUTTA, *The Enforcement of EU Competition Rules by Civil Law* (MaAntwerpen: Maklu 2014), p 86.

123 For an analysis of the case, see J.S. DAVIDSON, ‘Actions for Damages in the English Courts for Breach of EEC Competition Law’, 34. *The International and Comparative Law Quarterly* 1985, p 178.

124 N. BÜCAN GUTTA, *The Enforcement of EU Competition Rules by Civil Law*, p 95.

125 For instance, in *Emerald v. British Airways* the EW Court of Appeal rejected the class action started by Emerald on behalf of direct and indirect customers, since the latter did not have the ‘same legal interest’ in the action. However, the Court did not analyse the degree of passing on: EWCA 18 November 2010, Case A3/2009/1003, *Emerald Supplies Limited v. British Airways* (2010) EWCA Civ. 1284, <http://www.bailii.org/ew/cases/EWCA/Civ/2010/1284.html/>.

126 CAT 14 July 2016, Case 1241/5/7/15, *Sainsbury’s Supermarkets v. MasterCard* (2016) CAT 11, [www.catribunal.org.uk/237-9006/1241-5-7-15-T-Sainsburys-Supermarkets-Ltd.html](http://www.catribunal.org.uk/237-9006/1241-5-7-15-T-Sainsburys-Supermarkets-Ltd.html) (last visited 25 July 2017).

(MIF) imposed by MasterCard on merchant banks.<sup>127</sup> Merchant banks later transferred MIF to retailers, like Sainsbury; the latter was thus an indirect customer in the case.<sup>128</sup> During the proceedings, MasterCard relied on the passing on defence, arguing that Sainsbury had passed on the damage caused by the payment of the MIFs to the final consumers via the increase of its retail prices.<sup>129</sup> In the ruling, CAT recognized the concept of passing on, referring to *Courage v. Crehan* as well as the CJEU jurisprudence concerning the repayment of unlawful charges.<sup>130</sup> The Tribunal pointed out that ‘English law recognizes overcharge claims by indirect purchasers ... From this, it follows that there must be a pass-on defence. Absent such a defence, a defendant guilty of overcharge would be liable to compensate directly and indirectly overcharged purchasers many times over, which would be entirely contrary to the principle of compensatory damages’.<sup>131</sup> However, CAT adopted a restrictive approach *vis a vis* the application of the passing on defence. In order to invoke passing on of the damage, the defendant had to prove that:

- (1) The price overcharge increased the prices applied by the direct customer to its clients; not only the costs faced by the direct customer<sup>132</sup>;
- (2) The increase of prices was ‘causally connected’ to the price overcharge<sup>133</sup>;
- (3) The defendant had to identify the categories of indirect customers to whom the price overcharge had been transferred.<sup>134</sup>

MasterCard failed to prove that Sainsbury had increased its retail prices only because of the MIF; therefore, the passing on defence was rejected.<sup>135</sup>

Similarly to the Damages Directive, in *Sainsbury* the CAT pointed out that the defendant faced the burden of proof to rely on the passing on defence. However, the Tribunal introduced rather restrictive criteria, which introduced a high burden of proof to show the existence of passing on. In *Sainsbury*, the Tribunal criticized the legal presumptions concerning passing on included in the Damages Directive, claiming that ‘there is a danger in presuming pass on of costs to indirect purchasers, because of the risk that any potential claim becomes either

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127 [ec.europa.eu/competition/sectors/financial\\_services/enforcement\\_en.html](http://ec.europa.eu/competition/sectors/financial_services/enforcement_en.html) (last visited 25 July 2017).

128 *Sainsbury’s Supermarkets v. MasterCard*, para. 13.

129 *Ibid.*, para. 17(5)(i).

130 *Ibid.*, paras 479–480.

131 *Ibid.*, para. 484(1)(2).

132 *Ibid.*, para. 484(4)(i).

133 *Ibid.*, para. 484(4)(ii).

134 *Ibid.*, para. 484(5).

135 *Ibid.*, para. 485.

so fragmented or else so impossible to prove'.<sup>136</sup> The criteria introduced by CAT in *Sainsbury* go beyond the provisions of the Damages Directive on and thus they are not in breach of the Directive. However, it is doubtful whether the restrictive approach followed by CAT in *Sainsbury* complies with the 'spirit' of the Damages Directive, which aims at incentivizing the reliance of the passing on defence in national court proceedings.

29. As mentioned in the introduction, in spite of the pending negotiations on Brexit, the UK implemented the Damages Directive in March 2017.<sup>137</sup> Departing from the view that the Damages Directive mostly reflects well established legal principles under English law, UK Government has opted for a 'light touch approach' in the implementation of the Directive<sup>138</sup>: the legislation adopted in March 2017 amends the 1998 Competition Act and the 2002 Enterprise Act only in relation to the provisions of the Directive that were not either previously present in UK Code of Civil Procedure or recognized by the national courts case law. In relation to the issue of passing on, UK Government pointed out in the public consultation on the implementation of the Damages Directive that CAT had already recognized the concept of passing on in *Sainsbury*.<sup>139</sup> Therefore, the new act only includes provisions concerning the reverse burden of proof of passing on defence and the presumption of legal standing of indirect customers.<sup>140</sup> However, it remains to be seen how such rules will be enforced by UK courts; in particular, it remains to be seen how CAT will enforce the new rules in view of the 'scepticism' expressed in *Sainsbury* in relation to the introduction of any presumption of passing on.

#### 4. Conclusions: The Principle of Passing on in the Country Case Studies

30. Passing on can be considered a general principle of EU law, elaborated by CJEU case law in relation to the restitution of unlawful charges and later extended to other EU policies, including EU competition law. The Damages Directive has codified the CJEU case law concerning passing on, introducing important innovations in terms of reverse burden of proof in relation to the passing on defence and presumptions concerning the legal standing of the indirect customers. Finally, the study recently published by RBB Economics on behalf of DG Competition

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136 *Ibid.*, para. 484(4).

137 Claims in Respect of Loss or Damage Arising from Competition Infringements (2017).

138 UK Department for Business, Energy and Industrial Strategy, *Competition Policy. Damages for Breaches of Competition Law – Government Response to Public Consultation*. December 2016, para. 4, [www.gov.uk/government/consultations/damages-for-breaches-of-competition-law-implementing-the-eu-directive](http://www.gov.uk/government/consultations/damages-for-breaches-of-competition-law-implementing-the-eu-directive).

139 UK Department for Business, Public Consultation (2016), para. 93.

140 Claims in Respect of Loss or Damage Arising from Competition Infringements (2017), Sec. 8 and 10.

concerning the quantification of passing on represents the basis for the guidelines that the EU Commission is expected to adopt in the near future on this subject.<sup>141</sup>

31. In the four EU Member States selected as case studies, passing on was already recognized by the jurisprudence of national courts before the implementation of the Damages Directive. In particular, the concept of passing on has been recognized either by the case law of Supreme Courts (e.g. *ORWI* in Germany; *Le Gouessant* and *Doux Aliments* in France) or specialized competition law tribunals (e.g. *Sainsbury* in UK) or appeal civil courts (e.g. *Indaba* and *Unimar* in Italy). The courts of the selected jurisdictions have often recognized the concept of passing on by referring to the CJEU rulings in *Courage v. Crehan* and *Manfredi*. However, national courts have followed a different rationale in comparison to the case law of the Court of Justice: rather than referring of the principle of effective enforcement of EU competition law, national courts have recognized passing on since it reflects the compensatory nature of civil damage actions; passing on thus reflects the Latin principle *compensatio lucri cum damno*. From this perspective, it is not surprising that the case law of the US Supreme Court has not influenced the courts of the selected jurisdictions. The ‘pragmatic approach’ of the US Supreme Court has not convinced national courts of the EU Member States: although estimating the degree of passing on represents a complex exercise for national courts, passing on should be recognized in view of the compensatory nature of damage claims in Europe.

32. The burden of proof in relation to passing on represents the issue where the national courts of the selected jurisdictions have followed the most diverging approaches in comparison to the EU *acquis* discussed in section 2. In particular, a number of national courts have rejected the reverse burden of proof in relation to passing on defence (e.g. *Le Gouessant* in France; *Indaba* and *Unimar* in Italy), arguing that it is up to the claimant (i.e. the direct customer) to prove that it has not passed the price overcharge downstream, rather than to the defendant (i.e. the manufacturer breaching EU competition rules). In addition, a number of national courts have expressed scepticism *vis á vis* the introduction of legal presumptions concerning passing on, which facilitate the legal standing of the indirect customer (e.g. *ORWI* in Germany; *Sainsbury* in UK). Such presumptions, in fact, increase the risk of multiple unmerited claims, creating a risk of over-compensation of the damage. From this point of view, the provisions of the Damages Directive on the burden of proof represent an important innovation in comparison to the existing national case law. Articles 12–14 Damages Directive, in fact, harmonize the diverging approaches previously followed by national courts in relation to the burden of proof.

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141 Under Art. 16 Damages Directive, the EU Commission is expected to issue guidelines addressed to national courts on the methods to quantify the degree of passing on in damage cases.

33. The EU Member States selected as case studies have all recently completed the process of implementation of the Damages Directive.. In every jurisdiction, the national legislation transposing the Damages Directive includes provisions that ‘copy-paste’ Articles 12-14 of the Damages Directive. Even UK, in spite of the ‘light-touch’ implementation approach proposed by the British Government, has included in the act implementing the Damages Directive a number of provisions that reflect the content of Articles 12-14.<sup>142</sup> Nevertheless, it remains to be seen how the new provisions will be applied by national courts in concrete cases, in the light of the previous national case law concerning the burden of proof in passing on.

34. A second open question concerns the role of economic experts in the estimation of the degree of passing on. After the publication of the EU Commission Practical Guide in 2013, national courts have increasingly relied on economics expertise in the contest of competition law damage cases.<sup>143</sup> On the other hand, the issue of legal standing of the claimant is usually assessed by the court, without relying on the advice of external experts. The provisions of the Damages Directive on passing on are likely to change this scenario: the increasing number of cases in which passing on will be invoked will probably encourage national courts to involve external experts in estimating the degree of passing on. In particular, national courts will assess the findings of the external experts on the basis of the EU Commission guidelines on the estimation of passing on; soft law instrument that the EU Commission is expected to adopt in the near future on the basis of the study published in October 2016 by RBB Economics on behalf of DG Competition.

35. A number of authors have criticized the limited added value of the Damages Directive in comparison to the existing CJEU jurisprudence and national case law. In particular, Peyer has pointed out that the provisions of the Directive concerning passing on might even discourage antitrust damage claims in Europe.<sup>144</sup> Passing on, in fact, discourages direct customers to start a damage action in a national court.<sup>145</sup> On the other hand, indirect customers usually suffer ‘relatively low individual losses’ and thus they do not have any incentive to sue.<sup>146</sup> As argued by Jones, the US approach to ‘concentrate anti-trust claims in the hands of those most likely to sue’ seems more efficient solution to encourage the development of private enforcement of competition

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142 Claims in Respect of Loss or Damage Arising from Competition Infringements (2017), Sec. 8 and 10.

143 EU Commission Practical Guide (2013).

144 S. PEYER, *Compensation and the Damages Directive*. CCP Working Paper 15-10, [ssrn.com/abstract=2654187](https://ssrn.com/abstract=2654187).

145 S. PEYER *Compensation and the Damages Directive*, p25.

146 S. PEYER *Compensation and the Damages Directive*, p25.

law in Europe.<sup>147</sup> The current article has analysed the Damages Directive not in terms of its contribution to private enforcement of competition law in Europe, but rather in view of its role in the contest of the progressive harmonization of national procedural rules. From this point of view, the Directive represents with the relevant CJEU case law and the soft law adopted by the EU Commission the ‘embryo’ of a growing EU *acquis* of civil procedure, which limits the disparities among national legal systems and creates a level playing field across Europe.

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147 A. JONES, ‘Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US’, in M. Bergström, M. Iacovides, & M. Strand (eds), *Harmonising EU Competition Litigation: the New Directive and Beyond* (Oxford: Hart Publishing, 2016), Ch. 2.

