Indirect Purchasers’ Right to Damages and the Defence of Passing On

A Study of EU Law Prior to and After the Directive on Actions for Damages for Infringements of Competition Law

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# Table of contents

List of abbreviations.......................................................... 4

1 Introduction.............................................................................. 6
   1.1 The subject......................................................................... 6
   1.2 The purpose......................................................................... 7
   1.3 Method and material............................................................. 8
   1.4 Scope and delimitations ....................................................... 9
   1.5 Outline ............................................................................ 10

2 Background............................................................................. 11
   2.1 Goals of competition law and enforcement of EU rules on competition .......... 11
   2.2 The difference between private enforcement and public enforcement .......... 11
   2.3 Offensive and defensive use of passing on .................................. 13

3 Experiences from the United States........................................... 15
   3.1 Rejection of the defence of passing on – *Hanover Shoe* ........................................ 15
   3.2 Rejection of indirect purchasers’ right to damages – *Illinois Brick* ..................... 16
   3.3 Critique of the United States’ solution .............................................. 18

4 The situation in the EU – The road towards a new Directive ............ 19
   4.1 Legal principles..................................................................... 20
      4.1.1 The principle of national procedural autonomy .......................................... 20
      4.1.2 The principle of effective judicial protection .............................................. 21
   4.2 Development in case law .......................................................... 23
      4.2.1 The development of an EU right to damages for indirect purchasers .......... 23
      4.2.2 The development of a defence of passing on .......................................... 29
   4.3 The development towards a new Directive ....................................... 32
      4.3.1 The Ashurst Report – An analysis of the legal situations in the Member States .... 32
      4.3.2 The Green Paper – Different options for rules on passing on ....................... 33
      4.3.3 The Green Paper – Promoting the use of defensive and offensive passing on ...... 34
   4.4 The adoption of the new Directive ............................................. 36
      4.4.1 From the Commission’s proposal to the final adoption of the Directive .......... 36
      4.4.2 The structure and the general principles of the Directive ............................ 37

5 Analysis.................................................................................... 38
   5.1 The Directive’s effect on indirect purchasers and the defence of passing on ...... 38
      5.1.1 The use of the defence of passing on ......................................................... 39
      5.1.2 The limits to indirect purchasers’ access to court ...................................... 41
5.1.3 The burden and standard of proof of offensive and defensive of passing on ........ 43
5.1.4 The condition of causation.............................................................................. 45
5.1.5 The balance between indirect purchasers and infringers .............................. 46

5.2 Policy interests motivating the solution chosen in the Directive ...................... 47
  5.2.1 Compensatory justice v. Deterrence ............................................................ 48
  5.2.2 Unjust enrichment v. Deterrence .................................................................. 51
  5.2.3 Procedural fairness v. Judicial efficiency ...................................................... 53
  5.2.4 Was the solution chosen in the Directive preferable? ................................. 54

6 Conclusion ........................................................................................................... 55

Bibliography ........................................................................................................... 57
List of abbreviations

<table>
<thead>
<tr>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Ashurst Report</strong></td>
<td>Ashurst Report, ‘Study on the conditions of claims for damages in case of infringement of EC competition rules’, Comparative Report</td>
</tr>
<tr>
<td><strong>CJEU</strong></td>
<td>European Court of Justice</td>
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<td><strong>ECHR</strong></td>
<td>European Convention on Human Rights</td>
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<tr>
<td><strong>EU</strong></td>
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<tr>
<td><strong>Green Paper</strong></td>
<td>Commission of the European Communities, ‘Green Paper on Damage Actions for Breach of EC Antitrust Rules’</td>
</tr>
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<td><strong>TEU</strong></td>
<td>Treaty of the European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>White Paper</td>
<td>Commission of the European Communities, ‘White paper on Damage Actions for Breach of EC Antitrust Rules’</td>
</tr>
</tbody>
</table>
1 Introduction

1.1 The subject

In the European Union (EU) rules of competition law may either be enforced by actions of the European Commission and national competition authorities of the Member States, so called public enforcement, or by private civil actions, so called private enforcement.1 Private enforcement can take the shape of different civil remedies, such as nullity and award of damages.2 The right of any individual to claim damages for harm suffered due to infringements of EU competition law has been established in case law of the European Court of Justice (CJEU).3 In order to facilitate effective exercise of this right, a new directive 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 (the Directive)4 was adopted in November 2014.

Two of the issues addressed in the Directive are the issues of the legal treatment of indirect purchasers and the defence of passing on. These two issues arise from situations where harm in the form of actual loss has resulted from an infringement of competition law due to a price difference between what was actually paid for a good or service by the direct purchaser of the infringer, and what would have been paid if the infringement had not taken place, a so called overcharge.5 When a direct purchaser has paid an overcharge for a product due to a competition law infringement that purchaser has suffered harm. However, the direct purchaser may reduce his actual loss caused by the overcharge by passing the overcharge on to purchasers further down in the supply chain, so called indirect purchasers of the infringer.6

The issue of the defence of passing on relates to the question of whether an infringer of competition law should be allowed to use the fact that the overcharge was

3 See Case C-453/99 Courage Ltd v Crehan and Joined Cases C-295/04–298/04 Manfredi v. Lloyd Adriatico Assicurazion SpA.
5 See the Directive, Article 2(20).
6 Ibid., recital 39 and Article 2(24).
passed on by the claimant, and that the claimant therefore did not suffer any actual loss, as a defence against a claim for damages.\(^7\) Closely connected to the issue of the defence of passing on is the issue of *indirect purchasers’ right to damages*, which may sometimes be referred to as ‘offensive passing on’.\(^8\) This issue concerns the question of whether it should be allowed for an indirect purchaser, to whom the overcharge was passed on, to sue the infringer of competition law for damages, even though he did not have any direct contact with the infringer. There has been great debate regarding how these issues should be dealt with in EU law.\(^9\) The solution finally chosen by the EU legislator was to require Member States to allow both indirect purchasers’ right to damages and the defence of passing on.\(^10\)

### 1.2 The purpose

This paper examines the issues of indirect purchasers’ right to damages and the defence of passing on and how they were dealt with in EU law prior to the adoption of the Directive and how they are dealt with after the adoption of the Directive. The *purpose* of this paper is to analyse the solution to the issues of indirect purchasers’ right to damages and the defence of passing on chosen in the Directive.

To achieve the purpose stated above, two main matters are analysed. First the material rules of the Directive on this subject are examined in order to analyse whether the Directive alters EU law in this area. Furthermore, it is analysed whether the adoption of the Directive strengthens the position of indirect purchasers and/or the possibility for infringers to defend themselves using the defence of passing on, or if it is merely a codification of case law. This part of the analysis thus focuses on the material content of relevant provisions of the Directive. Second, the choice to require Member States to allow both indirect purchasers’ right to damages and the defence of passing on is analysed. Different policy interests considered when constructing the provisions of the

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\(^10\) See further the Directive, Chapter IV.
Directive are analysed and weighed against each other. This part of the analysis mainly examines the notions of indirect purchasers’ access to damages and the defence of passing on and does not analyse the material content of the provisions of the Directive in depth.

1.3 Method and material

The legal method applied in this paper is a legal dogmatic method. There is no fixed consensus regarding what a traditional legal dogmatic method involves and there are few legal scholars that have attempted to present a precise meaning of the definition of such a method. However, a dogmatic legal method may generally include the interpretation of applicable law, in accordance with the hierarchy of norms of the different sources of law, and a systematically preformed analysis of the law.

The hierarchy of norms in EU law consists of the constituent Treaties and the Charter of Rights, general principles of EU law, legislative acts such as the Directive, delegated acts, and implementing acts. Case law of the CJEU and the opinions of legal scholars are also sources of law that must be taken into consideration. EU documents drafted prior to the adoption of the Directive, such as reports, green papers, white papers and proposals, are not included in the hierarchy of norms listed above and have no legal value per se. However, these documents may still contribute to a greater understanding of the EU legislator’s intentions with the new Directive and will therefore be examined.

Beside relevant EU legislation and official EU documents drafted prior to the adoption of the Directive, the material used for the purpose of this paper includes case law. Case law of the CJEU often plays an important role in developing legal rules. Therefore, emphasis will be placed on analysing CJEU judgments. Furthermore, the paper discusses case law from the United States that concern issues regarding indirect purchasers’ right to damages and the defence of passing on as these issues have been dealt with differently in the legal systems of the United States compared to the EU. This gives the reader a more clear view on how this may be regulated and how different

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11 Sandström, M, The Concept of Legal Dogmatics Revisited, p. 133.
13 Craig, P & de Búrca, G, EU Law: Text, cases and materials, p. 103.
ranking of different policy interests may result in different legal solutions to the issues on passing on. Moreover, the opinions of legal scholars will be discussed.

1.4 Scope and delimitations

This paper analyses EU law and its rules concerning indirect purchasers and the defence of passing on, and compares EU law prior to and after the adoption of the Directive. The choice to focus on these two issues, and not just one of them, is motivated by the fact that they are inextricably linked to each other. Indirect purchasers may use arguments of passing on offensively in order to claim damages from infringers of competition law while the defence of passing on concerns infringers’ defensive use of such arguments. Furthermore, these two issues are dealt with jointly, in the same Chapter of the new Directive. As the focus of the paper is on indirect purchasers and the defence of passing on, merely the rules of EU law and the provisions of the Directive relevant to this matter will be analysed. Issues regarding e.g. disclosure of evidence, limitation periods and joint and several liability will therefore not be examined, even though they are addressed in the Directive.

Rules on quantification of harm and on estimation of the share of the overcharge passed on to the indirect purchasers will not be analysed in this paper even though these rules are relevant for indirect purchasers and the defence of passing on. These issues are mostly regulated by non-binding EU law. Such non-binding law, or soft law, does not change the legal rules of the Member States and does not affect the rights and obligations of Member States or individuals under EU law. This paper focuses on binding EU law and therefore non-binding EU law on quantification of harm will not be examined.

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14 See the Directive, Chapter IV.
15 See Article 288 TFEU. Non-binding law on these issues may be found in the Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union [2013] OJ C167/19 and; Commission Staff Working Document – Practical Guide on quantifying harm in actions for damages based on breaches of Art 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205. The Commission shall furthermore issue Guidelines for national courts on how to estimate the share of the overcharge passed on to the indirect purchaser according to the Directive, Article 16.
16 See e.g. Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union OJ C 167/19, para. 12.
Legislation and case law from national courts of the Member States will not be examined in depth as that goes beyond the scope of the paper. Instead focus is on the rules of EU law, prior to the Directive, in the form of case law, and after the adoption of the Directive, in the form of legal provisions in the Directive.

1.5 Outline

The paper begins with a description of the background of the subject in section 2. This section discusses the goals of competition law and competition law enforcement, the differences between private enforcement and public enforcement, and present the issues of indirect purchasers’ right to damages and the defence of passing on. Section 3 deals with the experiences of these issues in the United States by analysing case law from the Supreme Court of the United States, and discussing certain critique that has been directed towards this case law.

Further on, section 4 first examines the legal situation in the EU in this field. First, relevant legal principles are examined. Second, relevant case law from the CJEU on indirect purchasers’ right to damages and the defence of passing on is discussed. Finally, the legislative process leading up to the adoption of the new Directive is examined. When the term ‘legislative process’ is used here, it does not merely refer to the ordinary legislative procedure defined in Article 294 TFEU but also to reports and papers predating the proposal for a directive on this matter.

Finally, section 5 examines the solution on this matter chosen in the Directive. First, the material provisions of the Directive are examined to analyse whether the Directive has altered and/or strengthened the position of indirect purchasers and/or the possibility for infringers to defend themselves using the defence of passing on in EU law, or if it is merely a codification of case law. Second, the choice to grant indirect purchasers the right to damages and the defence of passing on is analysed. This part of the analysis examines different policy interest behind the solution chosen in the Directive and weighs them against each other. Furthermore, it is analysed which policy interest was given priority in the chosen solution and whether the choice to prioritise that particular policy interest was preferable.
2 Background

2.1 Goals of competition law and enforcement of EU rules on competition

The public interest that is the ultimate underlying interest of EU competition law and competition law enforcement is the protection of the competitive process. The rules of competition law aim to facilitate that goods and services may be provided at high quality to low prices. However, EU competition law also aims to guarantee that consumers are ensured a fair share of the economic benefits that result from a market with an effective competitive process, or in other words to ensure consumer welfare.17

In order to achieve the overriding aims of competition law, effective competition law enforcement is required. Three main objectives of enforcement of EU competition law may be identified. Firstly, there is an injunctive objective. This aims to end the infringement of competition law and may entail negative measures, such as an order to the infringer to abstain from the anticompetitive behaviour in question, and positive measures to make the anticompetitive behaviour cease in the future. Secondly, there is a restorative or compensatory objective. This aims to remedy harm caused to someone due to someone else’s infringement of competition rules. Finally there is a punitive and deterring objective which aims at punishing the infringer of competition law and also at deterring the infringer from further infringements.18

2.2 The difference between private enforcement and public enforcement

Without an effective way of enforcing EU competition law the objectives that the EU competition rules serve would not be achieved. Articles 101 and 102 TFEU are a matter of public policy and they need to be applied effectively throughout the EU to safeguard

the competition on the internal market and make sure that competition is not distorted.\textsuperscript{19} EU competition law can be enforced by actions of the Commission and national competition authorities of the Member States, so called public enforcement, or by private civil actions, so called private enforcement. Private enforcement may inter alia allow victims to use civil law remedies against infringers of competition law to obtain corrective justice.\textsuperscript{20}

What sets public and private enforcement apart is the way the enforcement is administrated, which actor conducts the act of enforcement, and what remedies may be applied to the alleged infringement of the competition rules. Private enforcement is carried out by private parties in national courts, and thus has the form of a horizontal relation. Public enforcement on the other hand is conducted by public authorities, such as the European Commission, national competition authorities or national courts. The remedies in cases of public enforcement are administrative sanctions, such as fines or penalties, or other sanctions that are made available by national law. The remedies that may be used in cases of private enforcement are civil remedies, such as nullity and award of damages, and the objective is to compensate the party harmed due to the infringement of competition law.\textsuperscript{21} This paper will only examine private enforcement in the form of awards of damages as that is what the Directive concerns.

Public enforcement has traditionally been the main way of enforcing EU competition law and competition authorities have been the ones applying these rules and controlling the observance of these rules, both on an EU level and on a national level.\textsuperscript{22} In the past, antitrust litigation brought by private parties has been relatively uncommon throughout the EU.\textsuperscript{23} After the adoption of Council Regulation (EC) No 1/2003 on the implementing of the rules of competition laid down in Articles 101 and 102 TFEU (Regulation (EC) No 1/2003),\textsuperscript{24} the responsibility for public enforcement shifted from the Commission as the national competition authorities were made


\textsuperscript{22} Gerber, D J, Private enforcement of competition law: a comparative perspective, p. 446.


responsible for this enforcement as well. This enabled the Commission to dedicate more focus to uncovering the most harmful infringements of EU competition law. The devolution of enforcement powers from an EU level to a national level that this reform brought about is also considered to have paved the way for private enforcement of EU competition law.\(^{25}\)

It has been argued that private enforcement of competition law is not desirable from an economic and policy perspective and that it should be rejected even as a complement to public enforcement.\(^{26}\) However, it is now accepted amongst the majority of scholars that private enforcement is an important part of an effective enforcement system of EU competition law.\(^{27}\)

### 2.3 Offensive and defensive use of passing on

Normally a claimant who has suffered harm due to the actions of someone else claims damages from a defendant that he has had direct contact with. However, in competition law cases, it is not certain that the person who has suffered harm due to the infringement of competition law has had any direct contact with the infringer. The harm may take the form of an overcharge which may be passed on from a direct purchaser to an indirect purchaser of the infringer.\(^{28}\) It is very common for products to pass through a supply chain before they may be acquired by a final consumer. If infringements of anticompetitive behaviour, such as a cartel formation or an abuse of dominant position, takes place on some level of this supply chain all purchasers below this level may be effected, including the final consumer.

In a simple example of a supply chain, the chain consists of manufacturer, a retailer and a final consumer. The manufacturer in this example is involved in a price fixing cartel and has due to this infringement of antitrust law been able to raise the


\(^{26}\) See e.g. Wils, W P J., *Should Private Antitrust Enforcement Be Encouraged in Europe?*, pp. 473–488.


prices of the products produced by him. When the manufacturer sells his products to the retailer, the retailer must pay for the overcharge that is the result of the manufacturer’s engagement in the anticompetitive behaviour in question. The retailer is thus faced with three choices when selling his product to the final consumer. First, he may pass on the overcharge entirely to the final consumer by increasing the price to which he sells the goods with the entire amount of the overcharge. Second, he may pass on a part of the overcharge to the final consumer and absorb the remaining part of the overcharge himself. Finally, the retailer may not increase his retail price to the final consumer at all and absorb the entire overcharge.\textsuperscript{29}

Inextricably linked to the question of whether to allow infringers of competition law to defend themselves by arguing that the claimant has passed on the harm, is the question of whether to grant indirect purchasers the right to damages. If indirect purchasers are given this right, claimants may claim damages from someone whom they have not had any direct contact with in the supply chain because there was one or more purchasers between them in the chain.

Passing on may thus be used either as a shield or as a sword. When passing on is used as a sword, or in other words when passing on is used offensively, indirect purchasers sue infringers of competition law for damages claiming that the increase in price caused by the infringement has passed on from the direct purchaser to the indirect purchaser himself.\textsuperscript{30} When passing on is used as a shield, or in other words when passing on is used defensively, infringers of competition law that have been sued for damages by a claimant, will attempt to escape liability by showing that the claimant passed on the overcharge to someone further down the supply chain and thus did not suffer actual loss.\textsuperscript{31} If defensive use of passing on is allowed, the infringer will not be held liable in damages if he manages to prove that the overcharge has passed on.\textsuperscript{32}

\textsuperscript{29}Cengiz, F, \textit{Passing-On Defence and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: what can the EC learn from the US?}, pp. 6–7.
\textsuperscript{30}Petrucci, C, \textit{The issue of passing-on defence and indirect purchasers’ standing in European competition law}, p. 34.
\textsuperscript{31}Ibid.
3 Experiences from the United States

In the United States, private enforcement of competition law is the supreme mechanism used to prevent antitrust violations besides the public enforcement by public enforcement agencies. The Clayton Act, particularly Section 4, provides the main rules for private enforcement, stating that any person who is injured by an antitrust violation may bring an action for treble damages to recover losses that are a direct result from an infringement of the antitrust rules. Treble damages means that the judge shall triple the amount of the actual financial losses suffered. This is provided for by certain statutes of the United States, inter alia Section 4 of the Clayton Act.

It is clear from the rulings of the United States Supreme Court in Hanover Shoe and Illinois Brick that federal American competition law does not grant indirect purchasers a right to damages nor does it allow the defence of passing on. This solution is assumed to promote the deterrence function of damages, but it is a clear departure from the compensatory function of damages. In other words it can be said the United States has chosen to put effectiveness and efficiency ahead of fairness when it comes to private enforcement of competition rules. This section discusses the judgments in Hanover Shoe and Illinois Brick and the critique that has been directed towards them and the effects that they lead to.

3.1 Rejection of the defence of passing on – Hanover Shoe

In Hanover Shoe the shoe manufacturer Hanover Shoe brought an action for treble damages against a manufacturer of shoe-making machines called United Shoe Machinery Corp (United). Hanover Shoe claimed that United’s policy of constructing machines and leasing them out but refusing to sell them, which had already been condemned to constitute unlawful monopolisation, had harmed Hanover Shoe by

increasing their costs for manufacturing shoes as they had been overcharged by United. United attempted to defend themselves from these claims by arguing that Hanover Shoe had passed the overcharge on to their customers and thus had not suffered any actual loss. The Supreme Court however, rejected this defence.\(^{37}\)

The Supreme Court considered that it was excessively difficult to establish passing on of overcharge and stated that since establishing the applicability of the defence of passing would necessitate “a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable”.\(^{38}\) Furthermore, the Supreme Court found that if the passing on defence was allowed, indirect purchasers should have a right to damages as the harm would have been passed on to them. These final consumers would have merely a tiny stake in a lawsuit, and very little interest in attempting a class action. As a consequence, infringers of antitrust laws would reap the rewards of their illegal conduct as no one would be available to bring suit against them. Treble damage actions, which may be awarded in antitrust cases, would in that case be substantially reduced in effectiveness.\(^{39}\) The Supreme Court therefore rejected the defence of passing on in federal American competition law.

\[3.2\] Rejection of indirect purchasers’ right to damages – *Illinois Brick*

In *Illinois Brick*, the State of Illinois and 700 local governmental entities (the Claimants) had brought a treble damages action claiming that certain concrete block manufacturers (the Defendants) had engaged in an illegal price-fixing conspiracy. The Defendants did not sell their goods directly to the Claimants. Instead, the Claimants were purchasers further down in the supply chain. Therefore, the case concerned a claim for damages from indirect purchasers.\(^{40}\) In this case, the Supreme Court was thus faced with the question of passing on once again. This time however, passing on was used as an offense, and not as a defence, which was the case in *Hanover Shoe*.

\(^{38}\) Ibid., pp. 481–494.
\(^{39}\) Ibid.
The Claimants requested damages claiming that the alleged illegal overcharge had been passed on from the direct consumers to them. The Defendants however, claimed that indirect purchasers had no standing. The Supreme Court stated that, having asserted that passing on may not in general be used as a defence by an infringer of antitrust law, it now had to be decided whether the offensive use of passing on was to be allowed.\(^{41}\) The Supreme Court agreed with the Defendants and rejected the claim that the Claimants, as indirect purchasers, should have a right to damages.\(^{42}\)

The Supreme Court initially found that allowing the offensive use of passing on but not the defensive use would create a serious risk of multiple liability for defendants.\(^{43}\) The legal system could therefore not preclude the defensive use of passing on while allowing the offensive use of it.\(^{44}\) The Supreme Court was thus left with two choices, either they had to overrule Hanover Shoe, or at least narrowly limit it to its facts, or they had to preclude claimants from seeking to recover damages by using passing on offensively.\(^{45}\)

In its judgment the Supreme Court considered that *stare decisis* was of great importance in the area of statutory construction.\(^{46}\) Furthermore, the Supreme Court noted that allowing the offensive use of passing on “would add whole new dimensions of complexity to treble damages suits, and seriously undermine their effectiveness”.\(^{47}\) Furthermore, indirect purchasers were not considered as likely as direct purchasers to recover damages caused by the infringement. It would therefore, according to the Supreme Court, undermine both effectiveness of the deterrent effect of private enforcement of competition rules and judicial efficiency to allow offensive, and defensive, passing on.\(^{48}\) For these reasons the Supreme Court chose to reject the claims of the Claimants and to bar offensive use of passing on, or in other words indirect purchasers’ right to damages.\(^{49}\)


\(^{42}\) Ibid., p. 736.

\(^{43}\) Ibid., p. 730.

\(^{44}\) Ibid., pp. 730–736.

\(^{45}\) Ibid., p. 736.

\(^{46}\) Ibid., p. 736.

\(^{47}\) Ibid., p. 737.

\(^{48}\) Ibid., p. 737–738.

\(^{49}\) Ibid., p. 721.
3.3 Critique of the United States’ solution

The judgments in *Hanover Shoe* and *Illinois Brick* create symmetry regarding the use of passing on as a shield and as a sword. Together the two judgments bar the use of defensive and offensive passing on, or in other words indirect purchasers’ right to damages and the defence of passing on, at the level of federal law. This legal solution clearly promotes effectiveness as it promotes deterrence of competition law infringements. Furthermore they promote judicial efficiency as the use of passing on complicates competition law proceedings. These judgments reduce enforcement costs and litigation costs, as there is no need to determine whether and indirect purchaser has been harmed by an infringement and as there is no need to calculate damages that may or may not have been passed on through a long complicated supply chain. The solution chosen by the United States’ Supreme Court thus has its advantages in the form of promoting effectiveness and efficiency.

However, the refusal to grant indirect purchasers the right to damages in American federal law has been subject to criticism due to the fact that it does not always lead to fair results as it denies consumers the possibility to be compensated for harm they have suffered due to infringements of competition rules. Moreover, there is an apprehension that direct purchasers may have a reduced incentive to sue infringers for damages when they have the opportunity to pass on a large quantity or the whole of their damages further down the supply chain. Direct purchasers may furthermore be reluctant to sue the infringers as they do not wish to unsettle long-term business relations. It may be preferable for direct purchasers to obtain business relations similar to the business relations of their competitors than to decrease competitive prices on their market. In some cases, direct purchasers may profit more from e.g. a cartel above them in the supply chain, than they would profit from suing the infringer for damages. In such cases the system of only granting direct purchasers a right to damages may effectively silence the only party who has the power to sue the infringer. *Illinois Brick* may enable collusion through such an ‘Illinois Wall’ between the infringer of competition law and the direct purchasers of the infringer on one hand and indirect

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purchasers of the infringer and final consumers further down in the supply chain on the other hand.\textsuperscript{53}

In the United States, indirect purchasers have however sought compensation for harm under compensation statutes of the different states.\textsuperscript{54} In \textit{California v ARC America Corp},\textsuperscript{55} the Supreme Court of the United States held that single states were allowed to enact statutes that allowed indirect purchasers to claim and obtain damages.\textsuperscript{56} After the Supreme Court granted the states the opportunity to enact state legislation that allowed indirect purchasers to claim damages for infringements of competition law, many states have chosen to use this possibility and enact such legislation.\textsuperscript{57} This legal order has naturally fragmented the legal system of the United States as different rules apply in the state courts than in the federal courts.

The fragmentation of the judicial system in the United States in this area imposes a heavy burden upon the enforcement system. Furthermore, it results in forum shopping and races to court as claimants and defendants try to get their case tried in the court, either federal or state, most favourable for their interests. This situation entails a risk of over-deterrence as the increased likeliness of litigation may interfere with efficient behaviour on the market.\textsuperscript{58}

4 The situation in the EU – The road towards a new Directive

The legal development in the EU of the use of passing on offensively and defensively, or in other words indirect purchasers’ right to damages and the defence of passing on, has been different from the legal development in the United States. Behind the new Directive lies a long road of judicial and legislative developments. This section

\textsuperscript{54} Ibid., p. 403.
\textsuperscript{55} \textit{California v ARC America Corp} [1989] 490 US 93.
\textsuperscript{56} Ibid., pp. 100–106.
examines the European legal development regarding indirect purchasers’ right to damages and the defence of passing on that finally led up to the inclusion of provisions on this matter in the new Directive. First, legal principles of EU law which have shaped the legal development in this field are discussed in subsection 4.1. Second, subsection 4.2 examines the legal development in the case law of the CJEU in this area. Finally, the move towards developing the new Directive, with focus on the development of its provisions concerning indirect purchasers’ right to damages and the defence of passing on are examined in subsection 4.3.

4.1 Legal principles

4.1.1 The principle of national procedural autonomy

Article 101 and Article 102 TFEU are directly effective and must, according to the principle of direct effect, be applied by national courts. When a claimant invokes his rights of EU law before a national court the general principle applicable is the principle of national procedural autonomy. This principle was established in Rewe-Zentralfinanz. The principle entails that, in absence of EU rules, it is for the domestic legal system of each Member State to designate which courts have jurisdiction and to decide the procedural conditions that govern actions at law intended to guarantee the protection of rights which citizens of the Member States have from the direct effect of Union law.

The principle of national procedural autonomy includes two limiting conditions, namely equivalence and effectiveness. Equivalence means that the judicial or legislative treatment of claims that are based on national law may not be less favourable than the treatment of claims based on EU law. Effectiveness prohibits Member States from

59 Jones, A, & Sufrin, B, EU Competition Law : Text, Cases, and Materials, p. 1083. See also Case 127/73 BRT v. SABAM, para. 16.
60 Case 33/76 Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland.
61 Ibid., para. 5.
making the enforcement of rights conferred by EU law impossible or excessively difficult.\footnote{See Case 33/76, \textit{Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland}, para. 5. See also e.g. Case 45/76 \textit{Comet BV v. Produktschap voor Siergewassen}, para. 13. The requirement of effectiveness was extended from including only cases where it was merely impossible to exercise the right to also including cases where it was excessively difficult to exercise the right in \textit{Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and the Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others}, para. 83.}

EU initially did not require, in \textit{Rewe-Handelsgesellschaft}, that national courts created new remedies beside the ones already provided for in national legislation to observe Union law.\footnote{Case 158/80, \textit{Rewe-Handelsgesellschaft}, para. 44.} However, in \textit{Factortame I}\footnote{Case C-213/89 \textit{R v. Secretary of State for Transport, ex p Factortame Ltd.}} the Court of Justice ruled that in certain cases national law was required to provide for a specific type of remedy for the violations of EU law.\footnote{Ibid., paras. 19–21.} Thus, in cases where national procedural rules make it impossible or excessively difficult to exercise a right conferred by EU law the national court must go further than the principle of equivalence and may be required to make a certain procedure or remedy available in accordance with the principle of effectiveness. The principle of national procedural autonomy was thus limited through the judgment in \textit{Factortame I}.

4.1.2 \textbf{The principle of effective judicial protection}

The principle of national procedural autonomy may need to be balanced against other principles of EU law. One of these principles is the \textit{principle of effective judicial protection}.ootnote{See also Article 47 of the Charter of Fundamental Rights which establishes the right to an effective remedy and a fair trial.} The \textit{principle of effective judicial protection} has been developed through the case law of the CJEU. Traditionally the CJEU has derived the principle, including a right of access to court, from the Member States’ common constitutional traditions and from Article 6 and 13 of the European Convention on Human Rights (ECHR).\footnote{Strand, M, \textit{Indirect Purchasers, Passing-on and the New Directive on Competition Law Damages}, p. 368.} The interplay between the principle of national procedural autonomy and the principle of effective judicial protection means that national courts are required to balance the

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\item making the enforcement of rights conferred by EU law impossible or excessively difficult.\footnote{See Case 33/76, \textit{Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland}, para. 5. See also e.g. Case 45/76 \textit{Comet BV v. Produktschap voor Siergewassen}, para. 13. The requirement of effectiveness was extended from including only cases where it was merely impossible to exercise the right to also including cases where it was excessively difficult to exercise the right in \textit{Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and the Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others}, para. 83.}
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requirements of effective judicial protection against the application of legitimate national remedial and procedural rules.68

The principle of effective judicial protection includes three requirements which are of particular interest for this paper. First, the principle of effective judicial protection includes the right to access to court. The effective application of EU law and the effective protection of rights of individuals granted by EU law sometimes require limitations to the principle of national procedural autonomy in order to serve the principle of effective judicial protection.69 This applies for both natural persons70 and for legal persons71.

Second, the principle includes the right to full compensation. This right was laid down in Marshall72 where it was established that where financial compensation is the measure adopted in order to achieve the objectives of EU law, it must be adequate. This means that it must enable the loss and damages that were actually sustained as a result of the infringement of EU law to be made good in full in accordance with the national rules applicable in the particular situation.73

Finally, the principle includes a requirement for Member States to make certain remedies available in cases where this is called upon to satisfy the principle of effectiveness. This was, as mentioned earlier in the subsection 4.1.1, established in Factortame I where the CJEU ruled that in certain cases national law was required to provide for a specific type of remedy for the violations of EU law.74

The principle of effective judicial protection, and especially the requirements of access to court, full compensation and providing necessary remedies seem to have been very important in the development of the new Directive and the provisions therein regarding indirect purchasers’ right to damages and the defence of passing on.

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68 Craig, D & de Bürca, G, EU Law, Text, Cases, and Materials, p. 231.
70 Case 222/86 UNECTEF v. Heylens.
71 Case C-279/09 DEB v. Bundesrepublik Deutschland.
72 Case C-271/91 Marshall v. Southampton and South-West Hampshire Area Health Authority (No 2).
73 Ibid., para. 26.
74 Case C-213/89 R v. Secretary of State for Transport, ex p Factortame Ltd, paras. 19–21.
4.2 Development in case law

The questions regarding indirect purchasers’ right to damages and the use of the defence of passing on have been dealt with in the case law of the CJEU. This subsection discusses the development of the case law further. Subsection 4.2.1 examines the development in case law regarding indirect purchasers’ right to damages and discuss the debate between legal scholars on how the limits to indirect purchasers’ right to damages should be interpreted. Subsection 4.2.2 discusses the case law concerning the defence of passing on.

4.2.1 The development of an EU right to damages for indirect purchasers

The CJEU established that there is a right to reparation for private parties in Francovich. However, Francovich concerned state liability and not liability of private parties who had infringed EU rules. The question of who should be able to sue for damages caused by infringements of what is now Article 101 TFEU was dealt with in Factortame III. In this case the CJEU ruled that if a right conferred by EU law upon which individuals may rely before a national court is infringed, individuals have the right to reparation for the damages sustained due to the infringement of that right. However, it was only in Courage that the CJEU established a freestanding right for any individual to claim damages for an infringement of EU competition law before a national court. It was later confirmed that this right extended to indirect purchasers in Manfredi.

75 Joined Cases C-6/90 and 9/90 Andrea Francovich, Danila Bonifici and Others v. Italy.
77 Ibid.
78 Case C-453/99 Courage Ltd v. Crehan.
79 Joined Cases C-295/04–298/04 Manfredi v. Lloyd Adriatico Assicurazion SpA.
4.2.1.1  Courage

The question of an EU right to damages was raised in Courage. In this case the CJEU explicitly approved the right to damages for harm suffered due to an infringement of EU law for any individual. The case concerned the British citizen Bernard Crehan, an owner of an English public house (PUB), who had entered into an agreement with his tenant Intrepreneur Estate Ltd (IEL) that he would buy all the beer sold at his PUB exclusively from Courage Ltd (Courage). Mr Crehan’s business later failed as he was not able to compete with the independent PUBs who were free to by their supply of beer from different suppliers to a lower cost as they were not bound by the same ‘beer tie’ as Mr Crehan. When Courage claimed payment for unpaid beer, Mr Crehan made a counterclaim, alleging that the ‘beer tie’ agreement was contrary to EU competition law and thus prohibited under what is now Article 101 TFEU. However, under English law a party to an illegal agreement is not allowed to claim damages from the other party. Even if Mr Crehan’s claim that the agreement between him and Courage infringed EU competition law was upheld, he would not be able to obtain damages according to English law.

The British court stopped the proceedings in the case and asked for a preliminary ruling. They asked whether a party to a contract that was liable to restrict or distort competition could rely on the breach of what is now Article 101 TFEU before a national court to obtain relief from the other contracting party. In particular, the national court wanted to know whether that party could claim and obtain compensation for loss which he claims to result from his being subject to a contractual clause which is contrary to what is now Article 101 TFEU and whether, therefore, EU law precludes a rule of national law which does not give a person the right to rely on his own illegal actions to claim and obtain damages.

The CJEU emphasised the importance of Article 101(1) TFEU for the functioning of the internal market and the significance of the horizontal direct effect of Article 101 TFEU. The CJEU then concluded that any individual may rely on a breach of Article

80 Case C-453/99 Courage Ltd v. Crehan.
81 Ibid., para 26.
82 Ibid., para 3-15.
83 Ibid., para 17.
101(1) TFEU before a national court even where that person is a party to a contract that may restrict or distort competition within the meaning of that provision. The CJEU furthermore held that the full effectiveness of Article 101 TFEU and, particularly, the practical effect of the prohibition in Article 101(1) TFEU would be put at risk if any individual could not claim damages for harm suffered due to a contract or by conduct liable to restrict or distort competition. The CJEU did not specify the exact limits for a bar to such actions for damages but merely stated that there should not be any absolute bar to an action for damages for harm suffered due to an infringement of competition law being brought by a party.

The Court did establish the right to claim damages for any individual in Courage. However, the case concerned a direct purchaser and therefore the limits of the concept of *any individual* and whether the concept could be extended to include indirect purchasers remained unclear.

### 4.2.1.2 Manfredi

After the ruling in *Courage*, the question remained whether the right of any individual to claim damages for harm suffered due to an infringement of EU law extended to indirect purchasers and consumers. In *Manfredi* the CJEU confirmed that this was the case.

The case of *Manfredi* concerned Italian insurance companies who had conspired together and infringed EU competition law. The infringement of the competition law provision had resulted in higher prices for auto insurance premiums. The Italian competition authority had established that an infringement of competition law had taken place and had initiated proceedings in an Italian national court, alleging that the defendant companies had tied the selling of separate products and exchanged information between competition undertakings. In the case, the Italian court found that it was clear that the infringement that the companies had taken part in had harmed final consumers. The harm suffered was due to the fact that payment for a civil liability auto

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86 Ibid., para. 26.
87 Ibid., para. 28.
89 Ibid., operative part para. 2.
90 Ibid., para. 7.
insurance premium was on average 20% higher than what it would have been if the competition rules had not been infringed.  

The Italian court was uncertain of whether the Italian legal provisions relevant in this matter complied with EU law and therefore halted the proceedings for a preliminary reference to the CJEU. One of the questions referred was whether Article 101 TFEU was to be interpreted as meaning that it gives third parties, who has a relevant legal interest, the right to rely on the invalidity of an agreement or of a practice that is prohibited by this provision of EU competition law and claim damages for the harm suffered if there is a causal relationship between the infringement and the harm. In other words, the CJEU was asked whether individuals who were indirect purchasers should be allowed to claim damages for harm they had suffered due to an unlawful overcharge that had been passed on to them from the direct purchaser.

The CJEU answered this question in the affirmative and thus confirmed the judgment in Courage and further clarified that concept of the right to damages of any individual by stating that “any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement on practice prohibited under [Article 101 TFEU]”. The CJEU thus granted indirect purchasers a right to damages if there was harm suffered, a violation of a competition law rule, and a causal link between the harm suffered and the violation in question.

The CJEU furthermore laid down that the principle of national procedural autonomy applied in this situation. In the absence of EU rules governing this matter, it is for the legal system of the Member States to designate the courts’ and tribunals’ jurisdiction and to lay down the detailed procedural rules that govern actions for ensuring rights which individuals derive directly from EU law. This is subject to the conditions that such rules may not be less favorable than those governing similar national actions, the principle of equivalence, and that they do not render it practically impossible or excessively difficult to exercise the rights conferred by EU law, the principle of effectiveness.

92 Ibid., para. 20.
93 Ibid., para. 61.
94 Ibid.
How broadly should the concept of ‘any individual’ be interpreted?

Prior to the adoption of the Directive, the case law of the CJEU established that any individual could claim compensation for harm they had suffered if there was a causal relationship between the harm in question and an agreement on a practice that was prohibited under Article 101 TFEU.\(^95\) In other words, indirect purchasers could claim damages if there was harm suffered, a violation of a competition law rule, and a causal link between the harm suffered and the violation in question.\(^96\) Even though the CJEU seemed to establish certain limits for when indirect purchasers should be able to claim damages, the interpretation of the rules established remained debated. The question of how broadly the rule established in *Manfredi* should be interpreted thus remained and there has been debate among legal scholars on this matter. The substantial right of indirect purchasers to claim damages for harm suffered due to infringements of competition law may be limited e.g. by restrictions to when indirect purchasers are granted access to court.

Komninos supports the notion that the concept of any individual is a broad concept. Komninos makes a distinction between the existence and the exercise of the right to damages for harm suffered due to competition law infringements.\(^97\) The conditions relating to the existence of the right are called ‘executive conditions’ and the conditions relating to the exercise of this right are called ‘constitutive conditions’.\(^98\) Komninos argues, it is clear that the CJEU, in *Manfredi*, defined the conditions for the entitlement to exercise this right, in other words the ‘constitutive conditions’, in a broad manner.\(^99\) Komninos argues that the CJEU laid down a broad rule in *Manfredi*, and that national rules that laid down more restrictive conditions on granting indirect purchasers the right to claim damages are contrary to EU competition law.\(^100\)

Milutinović however, argues that some limitations to indirect purchasers’ right to damages are necessary.\(^101\) Milutinović, stresses that the concept *any individual* includes a broad range of different parties who may not reasonably have an unlimited access to

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\(^{95}\) Joined Cases C-295/04–298/04 *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, para. 61.

\(^{96}\) Ibid., para. 61.


\(^{98}\) Ibid.

\(^{99}\) Ibid., p. 175.

\(^{100}\) Ibid.

court for bringing actions for damages. Therefore it may not be concluded from the use of the term ‘any individual’ in *Courage* and *Manfredi* that indirect purchasers’ have been given unlimited standing. Uncertain or unduly generous rules of access to court may expose defendants to levels of liability that are overly prejudicial. As public awareness of competition law and of private enforcement of these rules grow, a diversity of litigants could arise. This will reflect the vast and sometimes unforeseeable effects that anticompetitive conduct may have on the economy. According to Milutinović, it would therefore be “most useful, if not downright indispensable, to have precise rules as to where the liability of the infringer stops”.103

Strand recognises that the CJEU established a right for any individual to claim damages for harm suffered due to an infringement of EU law in *Manfredi*. However, Strand claims that this does not mean that any individual should automatically be granted standing to enforce competition law under any circumstances. The requirement that an action should be available does not by necessity mean that an action must always be heard by the court. For example, Strand argues, an action may be time barred. Thus, Strand concludes that it is necessary to specify the conditions for when an action by an indirect purchaser should have access to court.104 To illustrate this, Strand refers to *Otis*.105 Strand emphasises that the CJEU in this case first established that the claimant in question had a right to damages for harm suffered due to an infringement of EU law and only after this continued to examine if a limitation of the claimants standing was compatible with EU law.106 Therefore, Strand argues, a strict interpretation of case law from the union courts favour Milutinović’s view suggesting that “until expressly awarded access to court by the [CJEU] or the EU legislator, indirect purchasers cannot be certain that EU law guarantees them such access.”107

I agree with Milutinović that indirect purchasers’ standing and the rule established in *Manfredi* need limitations and should not be interpreted too broadly. It is submitted, in accordance with the arguments of Strand, that standing should not automatically be granted to any indirect purchaser under any circumstances merely because a right to

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105 Case C-199/11 Europese Gemeenschap v. Otis NV and Others.
107 Ibid., p. 373.
damages exists. Somewhere a line must be drawn in order not to overwhelm the judicial system. In spite of the debate on the broadness of the rule established in Manfredi, such a line could not be clearly distinguished in EU law prior to the adoption of the Directive.

The uncertainty regarding how to interpret the rule established in Manfredi is problematic. If a claimant does not know whether or not he will be granted access to court, he may be excessively hesitant in the enforcement of his rights. Equally, on the other hand, uncertain or unduly generous rules regarding access to court could expose defendants to excessively prejudicial levels of liability. Prior to the adoption of the Directive, standing was thus an urgent and vital issue which required resolution at an EU level.108

4.2.2 The development of a defence of passing on

Prior to the adoption of the Directive there was no specific case from the Union courts concerning the use of the defence of passing on in competition law. However, in other areas of EU law there are cases dealing with similar issues. In several proceedings that concerned unlawful taxes and administrative charges the CJEU touched upon the issue of the defensive use of passing on.109 In these cases the CJEU seemed to accept the possibility for the defendant to use the principle of unjust enrichment as a defence against claims for damages. The defendants sought, by invoking this principle, to avoid repaying administrative charges and taxes that had been collected unlawfully and the overcharge of which the plaintiffs had passed on to the final consumers.110 It was thus established in case law from the CJEU that invoking the principle of unjust enrichment as a defence, claiming that the award of damages to the plaintiff would result in unjust enrichment as the plaintiff had passed on the overcharge caused by the infringement of EU law, was compatible with EU law.111

109 See e.g. Case 68/79 Hans Just I/S v. Danish Ministry of Fiscal Affairs; Case 130/79 Express Dairy v. IBAP; Case 238/78 Ireks-Arkady v. Council and Commission; Joined Cases C-192/95 to C-218/95 Comateb and Others v. Directeur general des douanes et droits indirects.
111 Petrucci, C, The issues of the passing-on defence and indirect purchasers’ standing in European competition law, p. 39.
One case that is relevant in this matter is *Just*. The case concerned the Danish wine importer Hans Just I/S (Just) who had been levied charges contrary to EU law by the Danish tax authority. Just sought repayment of these charges. The Danish tax authority however, argued that according to Danish law the charges would be presumed to have passed on to the consumer.

Just argued that the Danish rules did not allow him to make use of his right to recover these illegally levied charges as this was made practically impossible or at least excessively difficult. Therefore, Just argued, applying the Danish rules regarding the presumption of passing on was contrary to the principle of effectiveness. The CJEU however, stated that the protection of rights ensured in the matter by EU law does not require an order for the recovery of charges that were made improperly to be granted in circumstances which would involve the unjust enrichment of the entitled person. Therefore, there was nothing in EU law that prevented national courts from taking account of the fact that it was possible for charges unduly levied to be incorporated in the prices of the infringer of EU law and to be passed on to the purchasers. The CJEU in other words, recognised that the national court could take into account that the charges had passed on and that awarding damages to a plaintiff that had passed charges on might result in unjust enrichment.

In *San Giorgio*, a case concerning tax law, the CJEU established that the burden of proof should rest with the party alleging that the illegal charges were passed on to third parties and that the plaintiff therefore was not harmed. The CJEU established that any requirement of proof with the effect that it becomes virtually impossible or excessively difficult to receive repayment of charges levied contrary to EU law is incompatible with EU law. This is the case particularly where presumptions or rules of evidence place the burden of establishing that the charges levied contrary to EU law were not passed on, on the party claiming damages due to the infringement of EU law.

Later, in the tax law case *Weber*, the CJEU however set up certain conditions for the acceptance of the defensive use of passing on. First the Court emphasised that

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112 Case 68/79 *Hans Just I/S v. Danish Ministry of Fiscal Affairs*.
113 Ibid., para. 19.
114 Ibid., para. 18.
115 Ibid., para. 26.
116 Case 199/82 *Amministrazione delle finanze dello Stato v. San Giorgio Spa*.
117 Ibid., para 14.
118 Case C-147/01 *Weber’s Wine World Handels GmbH v. Abgabenberufungskommission Wien*.
according to the case law, there is only one exception to the obligation to repay the illegal charges and that is when the repayment would result in unjust enrichment as the plaintiff had passed on the charge. Further, if the burden of the charge only passed on in part, the national authorities must repay the amount that did not pass on. The CJEU stated that as this exception is a restriction on a right derived from EU law it needs to be interpreted restrictively. That the passing on of a charge is taken into consideration does not by necessity neutralize the negative economic effects of the charge. In Weber the CJEU thus seemed to narrow the possibilities for the use of the defence of passing on in national law, at least in the area or tax law.

It might be possible to draw conclusions from these cases to competition law. However, it is submitted that such conclusions must be drawn with caution. The CJEU seems to acknowledge that a defence based on the notion of passing on may be used, at least on the grounds of the principle of unjust enrichment. However, these cases do not require the Member States to make such a defence available to defendants.

The legal situation regarding the use of the passing on defence in EU case law prior to the adoption of the Directive may be summarised according to the following. Charges imposed contrary to EU law give rise to an EU right to repayment. This right however, does not hinder the national laws of the Member States, especially provisions that concern unjust enrichment, from providing for a defence based on the concept of passing on of the charges, based on the grounds of the principle of unjust enrichment. However, such a defence must be applied in a restrictive manner and the burden of proof should rest with the party alleging that the illegal charges were passed on to third parties and that the plaintiff therefore was not harmed.

119 Case C-147/01 Weber’s Wine World Handels GmbH v. Abgabenberufungskommission Wien, para. 94. To this effect the CJEU refered to, in particular, joined Cases C-192/95 to C-218/95 Comateb and Others v. Directeur general des douanes et droits indirects, paras. 27 and 28.
120 Case C-147/01 Weber’s Wine World Handels GmbH v. Abgabenberufungskommission Wien, para. 95.
4.3 The development towards a new Directive

4.3.1 The Ashurst Report – An analysis of the legal situations in the Member States

Even though Courage and Manfredi established that private individuals could claim damages for infringements of EU law in civil proceedings the cases had modest effects in the Member States.\(^\text{122}\) Despite these rulings, private parties were still faced with different procedural obstacles when attempting to utilise their established right to compensation for infringements of EU competition law. The Commission therefore commenced an analysis of the different situations regarding the possibilities for private parties to claim damages for harm suffered due to infringement of EU competition law. In this analysis, questions regarding indirect purchasers’ right to damages and the defence of passing on were discussed. The analysis resulted in an extensive study on the conditions of claims for damages in case of infringement of EU competition rules (the Ashurst Report).\(^\text{123}\)

The Ashurst Report concluded that when it came to the different situations regarding the possibilities for private parties to claim damages for harm suffered due to infringement of EU antitrust law, the situation in the EU was “one of astonishing diversity and total under development”.\(^\text{124}\) The Ashurst Report found that it was theoretically possible for individuals to bring claims in the Member States. However, there was a lack of clarity on this point regarding how causality was to be proved in cases concerning passing on which made the practical possibilities of indirect purchasers’ claims questionable.\(^\text{125}\) Furthermore, even though it had been established that the use of passing on defence was not contrary to EU law, it was not accepted to the same extent in all Member States. Instead the treatment of this issue varied widely between different states. Some Member States allowed the use of the defence of passing on in their legal systems while it has been hypothesized in other Member States that the

\(^{122}\) Lidgard, H, Konkurrensrättsligt skadestånd, p. 33.
\(^{124}\) Ibid., p. 1.
\(^{125}\) Ibid., p. 10.
use of the defence of passing on would not be allowed. These discrepancies between the national rules of the Member States could be maintained as EU law did not require Member States to allow or not allow the use of the defence of passing on.

4.3.2 The Green Paper – Different options for rules on passing on

Following the conclusions made in the Ashurst Report, the Commission published a Green Paper on Damage Actions for Breach of EC Antitrust Rules (the Green Paper). Two of the main issues considered in the Green Paper were the defence of passing on and indirect purchasers’ right to damages. The Green Paper questioned whether there should be rules concerning the admissibility and the operation of the defence of passing on and whether the indirect purchaser should have a right to damages.

Four different options for rules on passing on where considered in the Green Paper. The first option was that both direct and indirect purchasers’ right to damages and the defence of passing on should be allowed. This option entailed the risk that a direct purchaser would not be successful in claiming damages since the infringer would be able to use the defence of passing on and that indirect purchasers would not succeed either due to the fact that they may be unable to prove if and to what extent that the damages were passed on from the direct purchaser and further down the supply chain.

The second option was that neither indirect purchasers’ right to damages nor the defence of passing on should be allowed. Thus, only direct purchasers would have a right to damages, similarly to the system of American federal law. This option would put direct purchasers in a better position since the challenges associated with the defence of passing on would not burden the proceedings.

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126 Milutinović, V. The ‘right to Damages’ under EU Competition Law: from Courage v. Crehan to the White Paper and beyond, p 212. The question has been answered in the positive in Denmark, Germany, Italy and the Netherlands, see the Ashurst Report p. 79. In the Netherlands the question was answered in the positive in Case 200.126.185 ABB BV v. Tenne TSO BV. In Cyprus it has been thought that the courts would not accept this defence, see the Ashurst Report, p. 79. In Sweden the defence of passing on was rejected in Case RÅ 2002 ref 108 Asfood Private Label AB v. Staten Folkhälsoinstitut concerning tax law. 127 Commission of the European Communities, ‘Green Paper on Damage Actions for Breach of EC Antitrust Rules’ SEC(2005) 1732 (the Green Paper). 128 Ibid., pp. 7–8. 129 Ibid. 130 Ibid., p. 8. 131 Ibid. 132 Ibid.
The third option was that the direct and indirect purchasers’ right to damages would be allowed while the defence of passing on would not be allowed. The exclusion of the defence of passing on would leave litigations less burdensome for claimants. This option entails that both direct purchasers and indirect purchasers may claim damages and there is no means of defence for the defendant to show that these damages had been passed on. Therefore this option would include a risk of defendants being forced to pay multiple damages.  

The fourth option considered was a two-step procedure. In such a two-step procedure the passing on defence would be excluded while both direct and indirect purchasers would be granted the right to damages. In the second step of this procedure the overcharge would be distributed between all parties who had suffered damages due to the infringement of EU competition law. This option faced great technical difficulties but did however have the advantage of providing a fair compensation for all infringement victims.

4.3.3 The Green Paper – Promoting the use of defensive and offensive passing on

Following the Green Paper the Commission published its White Paper on Damage Actions for Breach of EC Antitrust Rules (the White Paper) in 2008. In this White Paper the Commission presented its view on which of the four options considered in the Green Paper that it considered most preferable. The Commission argued in favour of a solution like the one presented in the first option in the Green Paper, namely to grant indirect purchasers the right to damages and to allow the defence of passing on. The first and foremost guiding principle of the White Paper was full compensation.

Regarding the defence of passing on the Commission stressed the compensatory principle and that any injured party should be able to claim and obtain damages if they could show a sufficient causal link between the infringement and the harm suffered. Against that background, the Commission considered that infringers of competition law

134 Ibid.
136 Ibid., p. 3.
should be allowed to invoke the defence of passing on. If the infringer was denied the use of this defence it could lead to unjust enrichment of purchasers who could claim and obtain damages even though they had in fact passed the damage on. The standard of proof for the defence of passing on should not be lower than the standard of proof imposed on claimants for proving the damage suffered due to the infringement.\textsuperscript{137}

In the White Paper the Commission welcomed the confirmation that the concept of \textit{any individual} established in \textit{Courage} and developed in \textit{Manfredi} should extend to indirect purchasers and that indirect purchasers should have the right to damages.\textsuperscript{138} The Commission considered that difficulties could arise if an indirect purchaser used passing on offensively to show harm suffered due to an infringement of competition law. These difficulties could arise due to the fact that purchasers at the end of the supply chain or near the end of the supply chain are often the ones that are harmed most by competition law infringements. However, due to their distance from the infringer indirect purchasers and final consumers may find it particularly difficult to prove the existence and extent of passing on sufficiently. This is especially true if the supply chain is long and/or complex.\textsuperscript{139}

If indirect purchasers and final consumers are not able to produce proof that the overcharge has passed on to them, they will not obtain compensation from the infringer. The infringer however, who may have successfully used the defence of passing on against a claimant further up in the supply chain, would then escape liability in damages completely.\textsuperscript{140} To lighten the burden of proof of the victims the Commission proposed that indirect purchasers should be able to rely on a rebuttable presumption that the overcharge had passed on in its entirety.\textsuperscript{141}

\textsuperscript{137} The White Paper, pp. 7–8.
\textsuperscript{138} Ibid., p. 4.
\textsuperscript{139} Ibid., p. 8.
\textsuperscript{140} Ibid., p. 8.
\textsuperscript{141} Ibid., p. 8.
4.4 The adoption of the new Directive

4.4.1 From the Commission’s proposal to the final adoption of the Directive

After the adoption of the White Paper, many awaited a directive on damage actions for breaches of EU competition law. On 11 June 2013 the Commission adopted a proposal for a Directive on antitrust damages actions for breaches of EU competition law (the Commission Proposal). The first main objective of the Commission Proposal was to optimise the interaction between private and public enforcement and to make sure that the Commission and national competition authorities could maintain a resilient public enforcement, while infringement victims could retrieve damages for the harm they had suffered due to infringements of competition law. The second main objective was to guarantee that victims of infringements of EU competition law could claim and obtain compensation for harm suffered in an effective way.

Less than a year after the Commission Proposal, on 17 April 2014, the European Parliament adopted a text of a directive on antitrust damages actions which was agreed between the European Parliament and the Council during the ordinary legislative procedure. This agreed text was described as “a finely-tuned compromise that goes to the limits of the flexibility of the co-legislators”. The agreed text of the Directive was finally adopted on 10 November 2014 by the Council.

The Directive marked two firsts. It was the first legislation from the EU regarding the private enforcement of competition law. Secondly, it was the first legislation regarding competition law from the EU that had been adopted by means of the ordinary

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142 See e.g. Editorial Comments, “One Bird in the Hand...” The Directive on damages actions for breach of the competition rules, p. 1333; see also Editorial Comments, A little more action please! The White paper on damages actions for breach of the EC antitrust rules, p. 609.
144 The Commission Proposal, p. 4.
145 Ibid., p. 4.
146 See Amendments by the European Parliament to the Commission Proposal.
148 Press release by the European Commission, IP/14/1580.
legislative procedure with the European Parliament’s full involvement.\textsuperscript{149} The Directive does not attempt to harmonize all national rules and procedures that relate to private enforcement. Instead the Directive deals with only one element in the private enforcement system, that is actions for damages.\textsuperscript{150} Issues of controversy, e.g. fault requirements, harmonized rules concerning collective redress and legal costs, where excluded from the scope of the Commission Proposal and later also from the adopted Directive.\textsuperscript{151}

\textbf{4.4.2 The structure and the general principles of the Directive}

The Directive begins with Chapter I, an introductory chapter laying down the scope of the Directive and establishing important definitions. After the introductory chapter the Directive is divided into seven additional chapters, Chapter II-VII. For the purpose of this paper only provisions of Chapter I regarding the subject-matter and scope of the Directive and Chapter IV regarding passing on of overcharges will be dealt with further.

The objectives of the Directive are to establish rules regarding actions for damages for infringements of EU competition law to ensure the full effect of Articles 101 and 102 TFEU, and to ensure that the internal market functions properly for undertakings and consumers.\textsuperscript{152} The Directive sets out rules that are needed to ensure that anyone who has suffered harm due to an infringement of competition law by an undertaking or by an association of undertakings may exercise the right to claim full compensation in an effective manner for the harm suffered from the infringing undertaking or association.\textsuperscript{153}

The guiding principle of the directive is the right to full compensation. This right is explicitly laid down in Article 3(1)-(3) of the Directive stating that Member States shall guarantee that any natural or legal person who has suffered harm due to an infringement of competition law may claim and obtain full compensation for the harm suffered. Full compensation should put the person who has suffered harm in the position

\textsuperscript{149} Alumunia, J, \textit{Antitrust litigation – The way ahead, MLex seminar: Damages Litigation: A new frontier for Europe}, 2014, SPEECH/14/713.

\textsuperscript{150} Editorial comments, \textit{“one Bird in the Hand…” The Directive on damages actions for breach of the competition rules”}, p. 1338.

\textsuperscript{151} Ibid.

\textsuperscript{152} The Directive, recital 54.

\textsuperscript{153} Ibid., Article 1(1).
that the person would have been in if the infringement had not been committed. Full compensation should therefore cover compensation for actual loss and for loss of profit, including payment of interest. However, the provision further states that full compensation under the Directive shall not result in overcompensation.

The Directive explicitly requires Member States to allow both indirect purchasers’ right to damages and the use of the defence of passing on.\textsuperscript{154} The main focus of the analysis of this paper is this solution chosen to the issues of passing on in the Directive, and the provisions on this matter laid down in Chapter IV of the Directive.

5 Analysis

This section analyses the material rules of EU law regarding indirect purchasers’ right to damages and infringers possibilities to use the defence of passing on prior to and after the adoption of the Directive. In subsection 5.1 the Directive’s effect on these issues is analysed. It is examined whether the provisions of the Directive regarding this matter are merely codifications of case law, or whether the adoption of the Directive alters EU law. In subsection 5.2, different policy interests considered when drafting the provisions on this matter are analysed. These policy interests are balanced against each other in order to determine what policy interest was given priority when constructing the provisions on this matter and whether it was preferable to give priority to that particular policy interest.

5.1 The Directive’s effect on indirect purchasers and the defence of passing on

The new Directive includes provisions on indirect purchasers’ right to damages and the defence of passing on. The Directive reaffirms the \textit{acquis communautaire} on the right to compensation for harm caused by infringements of EU competition law, especially regarding standing and the definition of damages, as it has been stated in the case law of the CJEU. Furthermore, it is stated that the Directive should not pre-empt any further

\textsuperscript{154} Provisions regarding these two issues may be found in the Directive, Chapter IV, regarding the passing on of overcharges.
The development of this right. The question is whether the Directive entails any significant changes for the position of indirect purchasers and the defence of passing on.

5.1.1 The use of the defence of passing on

Prior to the adoption of the Directive there was no case law on the defence of passing on in the field of competition law. However, as described in subsection 4.2.2, the defence had been accepted in other areas of EU law by the CJEU, at least when arguments of unjust enrichment were used. Therefore, it seems like the defence of passing on could either be allowed or prohibited in national law. There was nothing in case law from the CJEU or in EU legislation that required Member States to make this type of defence available to defendants in competition law cases but there was nothing that prohibited the use of this type of defence in such cases either.

Article 3(3) of the Directive states that the right to full compensation shall not lead to overcompensation. This is a statement of policy rather than a legal rule as the wording of this provision is too broad to work as a positive legal rule and does not seem to entail any positive rights for defendants to invoke the passing on defence. The policy statement in Article 3(2) is however developed further in subsequent parts of the Directive. Article 12(2) of the Directive provides that Member States shall lay down procedural rules that are suitable to ensure that overcompensation is avoided. Article 12(2) thus leaves the procedural rules on this subject to the discretion of the Member States in accordance with the principle of procedural autonomy. However, the principles of equivalence and effectiveness must be taken into account as they set the outer boundaries for how these procedural rules may be constructed.

Article 12(2) of the Directive should, for the purpose of this paper, be read together with Article 13 of the Directive. Article 13 states that Member States shall guarantee that the defendant may invoke the fact that the plaintiff passed on the whole or part of the overcharge that resulted from the infringement of competition law as a defence against a damages claim. The burden of proving that the overcharge was passed on shall rest with the defendant. Article 13 is thus an additional requirement beside the

155 The Directive, recital 12.
156 See also Strand, M, Indirect purchasers, Passing-on and the New Directive on Competition Law Damages, p. 372.
requirements of effectiveness and equivalence, that the Member States’ procedural rules must comply with.

There was no explicit case law on passing on defence in the area of competition law prior to the adoption of the Directive. The Directive therefore alters EU law on this matter, as the Member States are required to allow the defence of passing on. Thus, there is now an increased possibility for infringers to defend themselves from damages claims using this defence of passing on. How the defence of passing on is to be used is however not clarified further in the Directive, apart from the fact that the burden of proving that an overcharge was passed on shall rest with the defendant. The restrictions to the defensive use of passing on that have been established in other areas of EU law, as discussed in subsection 4.2.2, were not included in the provisions on passing on in the Directive.

In the Commission Proposal, the Commission suggested a limitation to the use of the defence of passing on in Article 12(1). Insofar as the overcharge has been passed on to individuals at the next level of the supply chain, for which it is not legally possible to claim compensation for the harm they have suffered, the defendant should not be allowed to invoke the defence of passing on. This provision was however, excluded from the final version of the Directive. Thus it seems like the Directive sets no limits to when the defence of passing on may be used by an infringer of competition law. However, there seems to be a natural limit to the use of the defence of passing on when the claimant is a final consumer, as the supply chain ends there. The infringer should therefore not successfully be able to use the passing on defence to escape liability when the claimant is a final consumer.

Prior to the adoption of the Directive, Member States were allowed to take into account that passing on could result in unjust enrichment and could refuse claimants the award of damages based on such arguments. However, there was no requirement to do so. After the adoption of the Directive there is an explicit requirement in EU law that Member States shall allow the use of the defence of passing on. Moreover, the limitations to the use of this defence that have been applied in other areas of EU law have not been included in the provisions of the Directive. The possibility for infringers to use the defence of passing on to avoid damages claims has thus been strengthened in EU law after the adoption of the Directive.
5.1.2 The limits to indirect purchasers’ access to court

Prior to the adoption of the Directive, the case law of the CJEU established that any individual could claim compensation for harm suffered due to an infringement of competition law, if there was a causal relationship between the harm suffered and the infringement in question.\(^{157}\) Even though the CJEU seemed to establish certain limits for when indirect purchasers may claim damages, the interpretation of the rules established remained debated. The question of how broadly the rule established in *Manfredi* should be interpreted thus remained and there has been debate among legal scholars on this matter, as discussed under subsection 4.2.1.3.

It is important to distinguish the substantial right of indirect purchasers from the question of limitations to indirect purchasers’ access to court, or in other words indirect purchasers’ standing. Article 3(1) of the Directive lays down the substantial right to full compensation stating that any natural or legal person who has suffered damages caused by an infringement of competition law should be able to claim and obtain full compensation for the harm suffered. Article 3(1) may, like Article 3(3) discussed in subsection 5.1.1, be seen as a statement of policy rather than a legal rule.\(^{158}\) This provision is a point of origin from which limitations must be made, e.g. limitations to the concept of the right to access to court of any individual.\(^{159}\) However, the Directive does not specify what such limitations entail. Article 12(1) of the Directive merely states that compensation of harm suffered due to an infringement of competition law may be claimed by anyone who has suffered it, irrespective of whether that person is a direct or an indirect purchaser of the infringer. This provision thus makes it explicitly clear that indirect purchasers are included in the scope of the Directive and that they have a substantial right to damages for harm suffered due to competition law infringements. This however merely confirms the judgment of the CJEU in *Manfredi*, and does not alter EU law.

It is clear that the Directive assumes that access to court should be granted for a number of potential plaintiffs located at different levels of the supply chain.\(^{160}\) However, in recital 11 of the preamble it is stated that where Member States provide

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\(^{159}\) Ibid.

\(^{160}\) Ibid., pp. 371–372.
other conditions for compensation under national law, e.g. adequacy, immutability, or culpability, they should be able to keep such conditions as far as they comply with the case law of the CJEU, the principles of effectiveness and equivalence, and the Directive. Such other conditions for compensation limit the right to full compensation established in Article 3(1) of the Directive. Restrictions to indirect purchasers’ access to court are not named as an example of an acceptable ‘other condition for compensation’ in recital 11. However, the examples presented in this recital are not exhaustive and there is seemingly no reason why certain limitations to access to court may not be such a condition for compensation, provided that the limitations to access to court are subject to the principles of equivalence and effectiveness. Thus, it is submitted that the Directive does not lay down that all national rules restricting indirect purchasers’ access to court are contrary to EU competition law.\textsuperscript{161} Additional requirements may be kept to limit standing in competition law cases, subject to their compliance with the case law of the CJEU, the principles of effectiveness and equivalence, and the Directive.

The absence of restrictions to the concept of any individual in the provisions concerning indirect purchasers’ standing may arguably be interpreted as meaning that there are no limitations to who may have standing. However, this interpretation is contested, especially seen in the light of recital 11 that explicitly allows other conditions for compensation’ under national law in some cases. It is likely that the legislator recognised a variety of national restrictions on standing in order to include several such restrictions that have been deemed as legitimate and compatible with EU law and furthermore with the intentions behind the Directive.\textsuperscript{162}

Without further clarification of the concept of any individual or to the potential limits to the access to court of indirect purchasers, the Directive does not alter indirect purchasers’ standing in competition law cases significantly. It seems that the limits to indirect purchasers’ standing remain unclear after the adoption of the Directive. It has been argued that it would have been desirable with an explicit rule regarding when access to court should be granted to indirect purchasers.\textsuperscript{163} It submitted that a rule explicitly providing for the limits to indirect purchasers’ access to court should

\textsuperscript{161} Such an interpretation of the limitations to indirect purchasers’ standing established in \textit{Manfredi} was been taken by Komninos prior to the adoption of the Directive. For the full reasoning of Komninos, see further Komninos, \textit{A, EC Private Anti Enforcement – Decentralised Application of EC Competition Law by National Courts}, p. 175.


\textsuperscript{163} This opinion has also been expressed by Strand. See Strand, M, \textit{Indirect purchasers, Passing-on and the New Directive on Competition Law Damages}, pp. 373–374.
preferably have been included in the Directive, as it would help prevent legal uncertainty and contribute to judicial efficiency in the national courts of the Member States on this matter.

5.1.3 The burden and standard of proof of offensive and defensive of passing on

According to established case law of the CJEU the harm suffered by the plaintiff must be certain, special, proven and quantifiable in order for victims to obtain damages.\textsuperscript{164} There were no specific rules laid down regarding how to prove passing on in competition law cases prior to the adoption of the Directive. The Member State had to see to that injured parties could seek damages for actual loss, loss of profit and that interest should be payable. However, remaining rules regarding the proof of passing on, both for the defensive and the offensive use of passing on, was left to the national rules of the Member States, provided that the principles of equivalence and effectiveness were observed.\textsuperscript{165}

In the Directive, certain requirements for proving passing on have now been included. When passing on is used as a defence, Article 13 of the Directive states that the burden of proof shall be on the defendant, but it does not lay down any further requirements for how to prove that the overcharge has passed on. Instead this is left up to national rules.

Article 14 of the Directive, which concerns offensive use of passing on, lays down requirements both for who should have the burden of proof, in this case the claimant, and what the requirements of proof should be. There are three cumulative conditions in Article 14(2) of the Directive. The three cumulative conditions in Article 14(2) of the Directive are (i) that the defendant infringed competition law, (ii) that the infringement led to an overcharge for the direct purchaser of the defendant, and (iii) that the indirect purchaser purchased the goods or services that were the object of the infringement, or has purchased goods or services that were derived from or contained them. If these conditions are shown by the victim there is a presumption that passing on has occurred.


\textsuperscript{165} Joined Cases C-295/04–298/04 Manfredi v Lloyd Adriatico Assicurazioni SpA, Operative part para. 5.
However, this presumption may be rebutted by the infringer if he can demonstrate to the satisfaction of the court that the overcharge was not, in part or in its entirety, passed on to the indirect purchaser.

The reason for the different treatment of indirect purchasers and infringers seems to be the information asymmetry between the infringer and the victim. The rebuttable presumption established in favour of indirect purchasers aims to lighten the burden of the victim when passing on is used as a sword. When passing on is used as a shield, the infringer usually has an information advantage and therefore does not need the same protection as a victim, thus there is no presumption established in the Directive in favour of a defendant. It has however, been questioned how effectively the presumption established in Article 14(2) protects the victims, as it is in fact rebuttable.\textsuperscript{166} There are no provisions in the Directive on how an infringer may prove sufficiently that the overcharge was not passed on to the indirect purchaser. Therefore the protection of indirect purchasers by this presumption may vary from one Member State to another. However, the national rules on when an infringer has proved sufficiently that the overcharge was not passed on must meet the requirements of the principles of equivalence and effectiveness.

In the White Paper the Commission proposed that indirect purchasers should be able to rely on a rebuttable presumption that the illegal overcharge had been passed on to the indirect purchaser in its entirety.\textsuperscript{167} This presumption would strengthen the position of indirect purchasers as it would decrease their burden of proof. This provision suggested during the legislative process was later not included in the final text of the Directive.

Competition law litigation is generally characterised by an asymmetry of information between the parties.\textsuperscript{168} The proposed rebuttable presumption could arguably be motivated against this background as a means of levelling the playing field between victims and infringers. It appears that the Commission Proposal attempted to strengthen the position of indirect purchasers. In the report of the European Parliament on the White Paper on damages actions for breach of the EC antitrust rules from the Committee on Economic and Monetary Affairs, the Parliament agreed with the Commission that the defence of passing on was admissible in Europe. However, the


\textsuperscript{167} The White Paper, p. 8.

\textsuperscript{168} The Directive, recital 15.
Parliament argued that the Commission had not showed that it was justified to lessen the burden of proof for indirect purchasers. Further, it was argued that there was no scientific evidence that suggested that the harm was generally passed on from the direct purchaser on to the indirect purchaser.\textsuperscript{169} This rebuttable presumption was therefore not included in the text of the adopted Directive.

To some extent, the law regarding the standard of proof for indirect purchasers has thus been altered through the Directive, while the standard of proof is still regulated by natural procedural rules when it comes to the use of the defence of passing on. It is submitted that the clarification of what an indirect purchaser needs to prove is a welcome addition in EU law as it reduces legal uncertainty in competition law cases where the claimant is an indirect purchaser. Thus, it seems that the legislator has taken the information asymmetry into some consideration on this matter. However, the fact that the presumption established is rebuttable means that the protection that this presumption offers indirect purchasers is not absolute. Furthermore, in the final text of the Directive the presumption that the overcharge passed on in its entirety, suggested by the Commission in the White Paper, was excluded. The position of indirect purchasers has thus been strengthened to some extent, due to the fact that the Directive provides clearer and more uniform rules regarding the standard of proof. However, the increased protection of indirect purchasers on this matter is not very strong as the presumption may be rebutted by the infringer in accordance with national rules.

\textbf{5.1.4 The condition of causation}

Prior to the adoption of the Directive, it was settled case law of the CJEU that any individual could claim compensation for harm suffered where there was a \textit{causal relationship} between the harm suffered and the infringement of competition law. However, the case law did not provide any guidance on how this causal relationship should be shown. Instead, this was left to the national procedural rules of the Member States, albeit subject to the principles of equivalence and effectiveness.\textsuperscript{170}


\textsuperscript{170} See Joined Cases C-295/04–298/04 Manfredi v. Lloyd Adriatico Assicurazion SpA, para. 61.
Article 14(2) of the Directive presents a rebuttable presumption for passing on of overcharge when the three cumulative conditions in Article 14(2) are met. The second condition in Article 14(2) is that the infringement of competition law led to an overcharge for the direct purchaser of the defendant. In other words the claimant has to show that there was causation between the harm and the infringement. The Directive, however, does not include any provisions regarding how to prove causation. Therefore the Directive does not alter EU law regarding the requirement of causation significantly from when it was first presented in Manfredi. It merely states that the burden of proof shall rest with the claimant, as previously discussed in subsection 5.1.3. It is explicitly stated in Recital 11 of the preamble that in the absence of Union law, “the notion of causal relationship between the infringement and the harm“ is to be governed by national rules and procedures of the Member States. All national rules that govern the exercise of the right to compensation for harm suffered due to an infringement of competition law should be governed by national rules, albeit subject to the principles of effectiveness and equivalence. This includes national rules on aspects that are not dealt with in the Directive, such as the notion of causal relationship between the infringement and the harm.171

It thus seems that the Directive does not alter or develop the interpretation of the requirement of causation for indirect purchasers’ right to damages in EU competition law cases. Thus, in this part, the position of indirect purchasers has not been altered as it remains up to national procedural rules to determine whether the requirement of causation has been satisfied or not.

5.1.5 The balance between indirect purchasers and infringers

The possibility for infringers to use the defence of passing on seems to have been strengthened in EU law after the adoption of the Directive, even more than what was originally intended by the Commission. Meanwhile the initial intention to strengthen indirect purchasers’ position seems to have been deteriorated through the legislative process. It may be questioned how well this complies with the overriding aim of consumer welfare that has become increasingly prioritised in EU competition law. The provisions on passing on included in the Directive places infringers in a better position

171 The Directive, recital 11.
but they do not strengthen the position of indirect purchasers and consumers in any significant way. However, it should be kept in mind that the Directive encompasses more than the provisions regarding passing on and that its other provisions, which are not specific to passing on, may contribute to consumer welfare. These other provisions will however not be examined further as that goes beyond the scope of this paper.

Despite the fact that the Directive in itself does not add much clarity to the concept of any individual and what the limits to indirect purchasers’ right to damages are, the Directive and the codification of the case law may make the rights of indirect purchasers more accessible as they have become more visible. The Directive must furthermore be transposed into national legislation according to Article 21 of the Directive. Therefore, it may be argued that even though the rights in EU law of indirect purchasers may not have changed substantially by the adoption of the Directive, they may still have become more visible. This will help facilitate the use of private enforcement tools by indirect purchasers.

5.2 Policy interests motivating the solution chosen in the Directive

Ideally, the legal system would provide for a way to enable both direct and indirect purchasers to claim and obtain damages that are the exact equivalent to the harm they suffered. However, this is a difficult task as market structures and supply chains are often highly complex. Therefore, each jurisdiction must make an important policy choice when deciding whether to grant indirect purchasers the right to damages and to allow the defence of passing on. Different policy interests, or elements, must be weighed against each other when determining how the rules on these matters should be designed.

The first policy interest is the element of fairness. This element requires that purchasers, both indirect and direct, should be entitled to compensation, or compensatory justice, for the harm that they have suffered due to an infringement of competition law. Furthermore, this element requires that both infringers and indirect purchasers should be allowed to use the same type of evidence to achieve procedural

172 Parlak, S. 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, pp. 41–43.
fairness. The second policy interest is the element of effectiveness. This element considers deterrence of anticompetitive behaviour as the ultimate aim of private enforcement. The final policy interest is the element of judicial efficiency. This element puts the judicial process first and requires a system that benefits judicial economy.¹⁷³

These elements are linked to each other but they also conflict with each other and different solutions to the issues of passing on will benefit different elements. There are obvious conflicts between these three elements when choosing how the design of the system of private enforcement with regard to indirect purchasers’ right to damages and the defence of passing on. The enforcement system that is finally chosen must therefore make a choice as to whether fairness, effectiveness or judicial efficiency should be valued most. The solution chosen will depend on what element, or policy interest, that is given the highest priority.¹⁷⁴

5.2.1 Compensatory justice v. Deterrence

One argument in favour of requiring Member States to grant indirect purchasers the right to damages is that it is consistent with the principle of compensatory justice. This principle obliges harm-doers to compensate the harm-sufferers. If the direct purchaser has passed on an overcharge, that purchaser has neutralised their harm while the indirect purchaser has suffered harm instead. Furthermore, when the indirect purchaser who suffered harm is a consumer, allowing indirect purchasers to claim damages is consistent with the principle that consumer welfare should be maximised by competition law.¹⁷⁵

To achieve compensatory justice it seems that it is necessary to grant indirect purchasers the right to damages. If this right is not granted, a great number of victims who have suffered harm due to infringements of competition law would not be able to retrieve compensation. However, as previously discussed, if indirect purchasers are to have a right to damages there is a risk that the infringer of competition law is forced to

¹⁷⁴ Parlak, S, 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?, p. 43.
¹⁷⁵ Petrucci, C, The issues of the passing-on defence and indirect purchasers’ standing in European competition law, p. 33.
pay damages for the same infringement to several claimants on different levels of the supply chain. Therefore, the defence of passing on must arguably be allowed in order to prevent such a situation and prevent infringers from being forced to pay multiple damages.

However, given the fact that the amount of damages paid to indirect purchasers may be rather small, it may be argued that indirect purchasers have little incentive to sue infringers of competition law for damages. This could undermine the deterrence of competition law infringements. If indirect purchasers do not sue for damages, even though they have the legal possibility to do so, compensatory justice will de facto not be achieved. A direct purchaser may arguably be in a better position to discover an infringement and to claim damages for that infringement because of his greater proximity to the infringer. Moreover, it may be claimed that direct purchasers are better enforcers than indirect purchasers because, being closer to the infringer, they are more likely to have access to information needed in order to bring proceedings at a lower cost than an indirect purchaser.

Direct purchasers’ incentives to sue infringers may be stronger than that of indirect purchasers for two main reasons. First, the uncertainty of the outcome of a case may be smaller if the claimant is a direct purchaser, as less complex evidence is needed in order to prove a causal link between the harm and the infringement. Second, normally compensation will not need to be distributed among as many plaintiffs if direct purchasers sue the infringer as it would if indirect purchasers sue for damages. The amount of damages paid to a direct purchaser would thus be higher than the amount paid to an indirect purchaser. This line of reasoning was applied by the Supreme Court of the United States in the Illinois Brick ruling discussed earlier in section 3 and it was an important argument in favour of the chosen solution not to allow the offensive use of passing on in federal American law. If indirect purchasers incentive to sue infringers for damages is low they will de facto not make use of their right to sue infringers to obtain compensation. In such cases corrective justice would not be achieved. Furthermore, to calculate damages is one of the most complex tasks when it comes to private enforcement, and sometimes the complexity that is associated with this

177 Petrucci, C, The issues of the passing-on defence and indirect purchasers’ standing in European competition law, p. 36.
task will prevent victims from receiving full compensation for damages. This is a significant problem associated with allowing indirect purchasers’ right to damages and it may be argued that it is somewhat overlooked in the case law of the CJEU.

It is true that the problem of a potential lack of incentives for some indirect purchasers to sue infringers for damages is an issue of significance and that this should not be overlooked. However, as previously discussed in subsection 3.3, in some cases, direct purchasers may profit more from e.g. a cartel above them in the supply chain, than they would profit from suing the infringer for damages. In such cases the system of only granting direct purchasers the right to damages may effectively silence the only party who has the power to sue the infringer. Not granting indirect purchasers this right would in such cases be detrimental to the element of effectiveness and the deterrence of competition law infringements.

Furthermore, it is submitted that the fact that the incentives for indirect purchasers to sue may be small in certain cases must not mean that this is true in all cases. It is contested that the fact that incentive for indirect purchasers may be lacking in certain cases should hinder the ones who wish to seek compensation for the harm they have suffered from doing so. Furthermore, even though the harm suffered by indirect purchasers may sometimes be marginal, there is nothing that says that this is always the case. The harm may be substantial for some indirect purchasers. In cases where supply chains are very long or complex it may not be too difficult to calculate the overcharge and prove that the harm has been passed on to the indirect purchaser. In such cases, compensatory justice may be achieved for indirect purchasers. It seems that indirect purchasers should not be denied the chance to obtain compensation in such cases merely due to the fact that it in other cases might be more difficult for them to obtain damages. Therefore, it is submitted that it was preferable to grant indirect purchasers the right to damages in the Directive. However, as previously mentioned, the provisions on indirect purchasers could preferably have clarified the limits to where the legal standing of indirect purchaser ends. Such a clarification would have helped mitigate the problem of indirect purchasers’ lack of incentive to sue as this incentive is normally reduced when the potential claimant is uncertain of whether he has will be granted access to court or not.

178 Stakheyeva, H, *Removing obstacles to a more effective private enforcement of competition law*, p. 401.
179 See e.g. Joined Cases C-295/04–298/04 *Manfredi v. Lloyd Adriatico Assicurazion SpA* where the CJEU does not seem to pay much regard to this issue.
5.2.2 Unjust enrichment v. Deterrence

One argument in favour of allowing the defence of passing is that it prevents *unjust enrichment*. If a claimant has passed on his overcharge to someone further down in the supply chain, he would be unjustly enriched if he was compensated for harm that he *de facto* had not suffered.\(^{180}\) On the other hand one may claim that even though the claimant passed on the overcharge he may still have suffered damages if the increase in prices that he was forced to make resulted in a reduction of the sales of the product in question and a potential loss of customers.\(^{181}\) However, such a situation is addressed in Recital 40 of the Directive. It is stated that in situations where the passing on of damages led to a reduction in sales and thus harm in the form of a loss of profit, the claimant’s right to retrieve damages for such harm should remain unaffected. The defence of passing on that is required by the Directive thus only applies to actual loss.\(^{182}\) Therefore, it seems that the solution chosen in the Directive contributes to preventing unjust enrichment while it still allows claimants to retrieve damages for a potential loss of profit. This is furthermore consistent with the element of fairness.

Moreover, the Directive seeks to prevent infringers from being forced to pay multiple damages through the provision in Article 15 of the Directive. In order to prevent that actions for damages by plaintiffs from different levels in a supply chain lead to multiple liability, Member States shall ensure that national courts are able to take due account of any of actions for damages, judgments or relevant public information resulting from the public enforcement of competition law that relate to the same infringement of competition law.

However, it may be argued that allowing the defence of passing on results in less effective *deterrence* of competition law infringements. A successful use of the defence of passing on will mean that the defendant escapes liability even though he may have infringed competition rules.\(^{183}\) Allowing the defence of passing on may therefore reduce deterrence in private enforcement of competition law as it allows infringers to avoid paying damages. This type of reasoning was used by the Supreme Court of the United

\(^{180}\) Petrucci, C, *The issues of passing on defence and indirect purchasers’ standing in European competition law*, p. 39.


\(^{182}\) See further the Directive, recital 39.

\(^{183}\) The Ashurst Report, p. 110.
States when prohibiting the defence of passing on in *Hanover Shoe*, discussed in subsection 3.1.

However, deterrence of competition law violations may also be achieved through public enforcement of competition law rules. The Commission and the national competition authorities have a crucial role when it comes to detecting, protecting and deterring infringements of EU competition law. There already exists EU legislation on the subject of public enforcement, such as Regulation (EC) No 1/2003 and the Commission’s Leniency Notice. It has been considered that public enforcement is best suited for obtaining the aim of deterrence of competition law violations. The degree of deterrence that Regulation (EC) No 1/2003 and the Commission’s Leniency Notice achieve have however been questioned. Some argue that these public enforcement tools are not capable of achieving a degree of the deterrence high enough to effectively enforce EU competition law.

It is true that private enforcement may function as a complement to public enforcement when it comes to deterring competition law infringements. Private enforcement may lighten the enforcement burden on public agencies and may assist in deterring infringements and contribute to developing and clarifying of competition law. However, if these tools of public enforcement are not able to achieve a level of deterrence necessary to effectively enforce EU competition law, it is contested that the best way to solve these issues is by making deterrence the primary aim for private enforcement as well. It appears better to attempt to solve the problems with the existing legislation on public enforcement, thereby increasing the level of deterrence in the system of enforcement of EU competition law. Suggestions on how deterrence in public enforcement of competition law could be increased do exist, but will not be discussed for the purpose of this paper as it goes beyond the scope of the issues analysed here.

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190 It has been argued that introducing a system of leniency plus could increase deterrence in the public enforcement system, for further reflections on this subject see e.g. McElwee, D, *Should the European Commission adopt “amnesty plus” in its fight against hard-core cartels?*, pp. 558–565.
5.2.3 Procedural fairness v. Judicial efficiency

One argument in favour of allowing both offensive and defensive use of passing on concerns *procedural fairness*. Procedural fairness, for the purpose of this essay, means that there should be equality as to what evidence may be used in private enforcement litigation. Indirect purchasers’ right to damages has been accepted in EU case law through *Courage* and *Manfredi*. It is clear that indirect purchasers who sue price-fixers have to show that direct purchasers have passed on the overcharge when the indirect purchasers sue infringers of competition law. This requires that the proof of passing on of the overcharge is admitted in the trial.

If the proof of passing on is admitted in competition law trials concerning private enforcement for the use of indirect purchasers, the infringer of competition law should, from a fairness perspective, not be denied the opportunity to prove the same facts. The facts that should be proved by an indirect purchaser when using passing on offensively are the same as the facts that should be proved by an infringer who wants to use passing on defensively. As the judgments of *Courage* and *Manfredi* provide that indirect purchasers have a right to damages, an equal treatment between claimants and defendants requires the defence of passing on to be allowed.\(^{191}\)

However, admitting the proof of passing on in a trial complicates damages actions and decrease *judicial efficiency*.\(^{192}\) Arguments of passing on may block and overwhelm the judicial process since the claims will involve complex economic analysis. More complex judicial analysis will naturally increase procedural costs and thus decrease judicial efficiency. To calculate the total overcharge is already very complicated and any attempt to go further than this and to try to apportion the overcharge throughout the supply chain could increase the cost and complexity of competition law enforcement greatly.\(^{193}\) Therefore, in the previously studied *Illinois Brick*, the Supreme Court of the United States decided not to allow passing on arguments, stating that it was an insurmountable task to do so. Furthermore, an over-inclusive enforcement policy is likely to result in a great number of unmeritorious and counter-productive suits that

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\(^{191}\) Petrucci, C, *The issues of the passing-on defence and indirect purchasers’ standing in European competition law*, p. 41.

\(^{192}\) The Ashurst Report, p. 110.

could overwhelm the judicial system.\textsuperscript{194} Excluding the use of passing on would therefore simplify judicial proceedings.\textsuperscript{195}

However, this is not always the case. When the supply chain is uncomplicated and short the effects of the overcharge may not be too difficult to determine. In such cases like these, a rule sets out an absolute bar to passing on arguments, on the grounds that its proof is uncertain and burdensome, is clearly inconsistent. Therefore, it has been claimed that it is inappropriate to assume that identifying the harm further down in a supply chain is always complicated and entails great risk of inaccuracy.\textsuperscript{196} Furthermore, it is submitted, that while judicial efficiency is important, it should not be given priority over fairness on this matter. The award of damages should mainly concern compensating victims for harm suffered and thus fairness should be the prioritised element over judicial efficiency.

5.2.4 \textbf{Was the solution chosen in the Directive preferable?}

The Directive requires Member States to grant indirect purchasers a right to damages and to allow the defence of passing on. This solution allows indirect purchasers to achieve compensatory justice, helps to avoid unjust enrichment and benefits procedural fairness. It thus seems that the policy interest that was given priority was the element of fairness. If another policy interest had been given priority the provisions of the Directive would have been different. If the element of effectiveness, which primary aim is to promote deterrence, had been prioritised the provisions on passing on would have been more similar to the solution chosen in American federal law discussed in section 3. \textit{The element of judicial efficiency} would also require that neither indirect purchasers’ right to damages nor the defence of passing on would be allowed. Calculating the exact amount of harm that has been inflicted on each level of the supply chain requires

\textsuperscript{194} Hjelming, E, \textit{Competition Law Remedies: striving for coherence or finding new ways?}, p. 1036.
\textsuperscript{195} Parlak, S, \textit{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?}, p. 34.
\textsuperscript{196} Petrucci, C, \textit{The issues of the passing-on defence and indirect purchasers’ standing in European competition law}, p. 37.
complex economic analysis. The strain on the judicial system would thus increase as more complex examination of evidence would be required.

Even though a solution such as the American one has certain advantages in promoting effectiveness and judicial efficiency it is submitted that the solution chosen in EU law was preferable as it promotes the element of fairness. It is true that it may be difficult to achieve compensatory justice in cases where the supply chains are long and complex as it becomes difficult to prove that the overcharge passed on to an indirect purchaser. However, in other cases it may be possible to achieve such justice. It is submitted that as the primary aim of awards of damages should be to accurately compensate victims for harm suffered, all possibilities to achieve compensatory justice should not be denied parties in competition law litigation merely because it is difficult to achieve this result in some cases.

6 Conclusion

In November 2014 the long awaited Directive was adopted. Two of the issues addressed in the Directive were the issue of indirect purchasers’ right to damages and the issue of the defence of passing on. Prior to the adoption of the Directive, EU law granted indirect purchasers the right to damages while it was up to the national rules to decide whether to allow the defence of passing on or not. After the adoption of the Directive the Member States are expressly required to grant indirect purchasers the right to damages and to allow the defence of passing on. This solution differentiates itself greatly from the solution chosen by the Supreme Court of the United States which prohibits the use of both the offensive and the defensive passing on.

It is submitted that the provisions regarding the offensive and the defensive use of passing on in the Directive has not significantly altered EU law in all aspects of passing on. The Directive has not significantly altered or strengthened the position of indirect purchasers, even though this seems to have been the original intention of the

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197 See further Stakheyeva, H, *Removing obstacles to a more effective private enforcement of competition law*, p. 401.
198 See also the reasoning in the Supreme Court in *Hanover Shoe v. United shoe Machinery Corp* [1968] 392 US 481, p. 493.
199 Petrucci, C, *The issues of the passing-on defence and indirect purchasers’ standing in European competition law*, p. 41.
Commission. However, the possibilities for infringers to defend themselves from damages claims by using the defence of passing on has been strengthened as the Member States’ competition law rules must now provide for the use of the defence of passing on. Furthermore, the limits to the defence of passing on suggested in the Commission Proposal where later not included in the adopted version of the Directive. Competition law litigation is generally characterised by an asymmetry of information between the parties. The information asymmetry may require that some advantages be given to the weaker party in order to protect him. In matters of passing on, the weaker party is the indirect purchaser. This protection of the weaker party seems to have been incorporated in the earlier stages of the legislative process of the Directive but has been deteriorated throughout the legislative process. It may be questioned how well the material provisions in the Directive serves the overriding aim or consumer welfare in EU competition law as it seems to alter EU law in a manner that benefits infringers more than indirect purchasers and consumers.

As the Directive requires Member States to grant indirect purchasers the right to damages and to allow the defence of passing on it seems that the policy interest that was given priority when drafting these provisions was the element of fairness. Damages awarded should be fair in order for the awarded damages to actually compensate the real victims of the infringements properly. Fairness is best achieved if both the offensive and defensive use of passing on is allowed so that there is a real chance of locating and awarding damages to the actual injured party. It is submitted that it was correct to give the element of fairness the highest priority among the policy interests influencing the Directive. Therefore the choice to allow indirect purchasers’ right to damages and the defence of passing on seems preferable. However, the provisions of the directive on these issue could have been more clearly drafted. This applies in particular to the limits to the standing of indirect purchasers. Furthermore, the information asymmetry between infringers of competition law and indirect purchasers could have been given more consideration when drafting these provisions in order to better serve the overriding aim of consumer welfare in EU competition law.
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