Effectiveness of Private Enforcement of European Competition Law in Case of Passing-on of Overcharges: Implementation of Antitrust Damages Directive in Germany, France, and Ireland

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I. Introduction

The term 'passing-on' in the framework of private enforcement of European competition law has been a point of discussion for a considerable period of time now. The debate has elevated to its peak following the judgments of the Court of Justice of the European Union (hereinafter CJEU, Court of Justice or the Court) in case *Courage* and later *Manfredi*.[1] In those milestone cases the Court supported the idea that *any* individual who suffers harm as a result of competition law infringement ought to be able to claim damages. As a result of this jurisprudential development, it soon became clear that the EU legislator will have to catch up with the idea of strengthening the position of individuals in private enforcement proceedings. The foregoing implied the necessity to introduce procedural tools that would support and secure the position of the claimants involved in damages proceedings and has become one of the main reasons to harmonise the procedural rules regarding private damages claims across the EU. After over a decade long political discourse,[2] the Directive 2014/104/EU on actions for damages for infringements of the competition law provisions (hereafter Damages Directive or Directive), that aligns the European regulatory framework with the above-mentioned case law of the Court, was adopted.[3] The main aim of this legislative act, which should have been transposed into the legal systems of all the Member States by 27 December 2016,[4] is to enhance and facilitate private damages actions for infringements of competition law in national courts. To achieve that, the Directive proposes a number of provisions aimed at lessening the burden of proof for claimants, while safeguarding public enforcement of competition law performed by

Key Points

- Directive 2014/104/EU on actions for damages for infringements of the competition law provisions clarifies the framework and legal consequences of 'passing on'.
- The Damages Directive has the effect of bringing the private enforcement closer to all the categories of claimants and facilitates claims of indirect purchasers by establishing a rebuttable presumption that they suffered some level of overcharge harm.
- National implementations of the Damages Directive in France, Germany, and Ireland show that Article 14 of the Directive on rebuttable presumption and its rebuttal might cause confusion and legal uncertainty and result in possible incorrect interpretation and application of the provision.

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1 Case C-453/99 *Courage and Crehan*, EU: C: 2001, 6297; Joined Cases C-295/04 and C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni Sp*, EU: C: 2006, 6619.

2 S Peyer, 'The Antitrust Damages Directive – much ado about nothing?' in M Marquis and R Cisotta (eds), *Litigation and Arbitration in EU Competition Law* (2015) 33.

3 Council and European Parliament Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

4 At the time of writing twenty-six Member States transposed the Directive. See European Commission, 'Directive on Antitrust Damages Actions' (EC Europa, 10 January 2018) <http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html> accessed on 10 January 2018.

authorities.[5] The important innovations brought about by the Directive include: the rules governing the disclosure of evidence,[6] limitations periods,[7] joint and several liability[8] and ensuring that claimants have access to consensual dispute resolution mechanism.[9] However, it is particularly the 'passing-on of overcharges' provisions that have the effect of bringing the private enforcement closer to all the categories of claimants, including the indirect purchasers.

The introduction of the passing-on by the Directive, as both a shield (for the defendant in the proceeding) and a sword (for the indirect purchaser), supports the idea that the central role of public enforcement by the European as well as the national authorities should be supplemented by private actions for damages, which ought to play a compensatory role.[10] However, the claimants should neither be over- nor under-compensated.[11] As a result, the choice for and the form of the passing-on provisions as introduced by the Damages Directive reflects this compensatory nature of private enforcement of competition law, i.e. rendering the passing-on provisions useful for both the indirect purchasers as well as the infringing defendant.

As with every EU directive, the Member States must ensure its proper transposition and implementation in the national legal order, while retaining the freedom to decide about the form and means of implementation.[12] It is against this background that a number of questions arise concerning the real effect of the Directive provisions regarding the passing-on in the area of private enforcement, as well as its (procedural) practicalities during the national proceedings. How has the Directive been transposed by the Member States and has the transposition been correct, i.e. does it ensure the achievement of the goals sought by the Directive? In particular, how have passing-on provisions changed the position of the parties and the role of the national courts in actions for damages within the context of private enforcement of competition law in the EU? These are the questions that have to be borne in mind when assessing the impact of the new passing-on provisions as introduced by the Directive, and that form the main interest of this contribution. The importance of these questions lies in the need to provide an analysis of the current, national post-Directive situation of the passing-on regulations concerning the position of the parties. For this analysis the national transpositions of the Damages Directives and the possible effects thereof in three Member States, namely Ireland, France, and Germany, will be assessed.

In order address the above-mentioned questions, the structure of this contribution shall be divided as follows. First, the concept of passing-on in EU law before and after introduction of the Directive will be addressed. The road to the development of the Antitrust Damages will be briefly sketched out, followed by the discussion on the transposition of the specific provisions of the Directive regarding passing-on into the legal systems of three Member States – Ireland, Germany, and France. Finally, general conclusions concerning the results of these implementations for the standing of individuals in antitrust damages disputes will be drawn.

II. The concept of passing-on in EU law: before the Damages Directive

Consider a situation where X – a big European lithium producer which is a party to a cartel[13] increases prices of its product, which it then sells on the downstream market. Y – a lithium battery manufacturer, which is the direct purchaser of lithium from X, is subjected to an overcharge as a result of the anticompetitive behaviour by X. Ordinarily, Y is able to claim damages reflecting the extent of the overcharge as well as any profits which might have been lost as a result of it. There are however two questions that arise in this respect. The first one being whether X can argue in its defence that a part of or the whole of the overcharge (unduly higher prices for the products) was in fact passed-on to the stream below, i.e. onto the indirect purchaser Z. The second question that may arise is whether Z may claim damages against X as a result of these passed-on overcharges. Both types of claims were not regulated at the EU level prior to the adoption of the Damages Directive.

The development of the passing-on in the EU system has been one of various factors and inputs which include the gradual evolution of it through the jurisprudence of the CJEU, the legislative efforts of EU legislator as well as various other third-party contributions received during the public consultation phase of the Directive.

The case *Courage* was the starting point of what ultimately led to be the Damages Directive, as it was for the

5 K Wright, 'The Ambit of Judicial Competence after the EU Antitrust Damages Directive' (2016) 43(1) Legal Issues of Economic Integration, 15. See also, Damages Directive (fn 3), art 1(1) and (2).

6 Damages Directive (fn 3), Chapter II.

7 ibid art 10.

8 ibid art 11.

9 ibid Chapter VI.

10 W P J Wils, 'Private Enforcement of EU Antitrust Law and its Relationship with Public Enforcement: Past, Present and Future' (2017) 40(1) World Competition, 39.

11 European Commission, 'White Paper on Damages Actions for Breach of the EC Antitrust Rules' COM (2008) 165 final, 8.

12 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01, Article 288.

13 ibid Article 101.

first time that the Court explicitly established a right to claim damages by individuals for the harm suffered as a result of a breach of EU competition rules. Following *Courage*, the Commission began to analyse the state of the right to claim damages and the procedural hurdles that existed in the legal systems of the Member States. The Ashurst report[14] has found that the private enforcement of competition law was one of 'astonishing diversity and total underdevelopment'.[15] The passing-on defence was procedurally possible only in few Member States, and theoretically possible in all other Member States applying general principles of compensation-restitution, with the exception of Cyprus.[16] The indirect purchasers could in theory also sue, however demonstrating the causal link would be a difficult exercise.[17] Interestingly, the Report named the very existence of the passing-on defence itself as an obstacle to improving the status quo of the private enforcement.[18] The extent of the foregoing would ultimately depend on the national procedural tool, with which the defendant can claim the defence against the claimant.[19] The more invasive the tool, the less likely that the claimant will bring a claim.[20] The findings of the Ashurst Report were essentially reiterated in the Commission's Green Paper from 2005.[21] However, it is the case of *Manfredi* that was a turning point for the development of EU framework for passing-on.

In *Manfredi* the Court clarified that also indirect purchasers can claim damages as a result of competition law infringement.[22] The causal nexus between the breach and the harm reaffirmed the standing of not just the direct, but most importantly of the indirect purchasers. However, allowing the passing-on would still be dependent on the *Rewe* principles[23] and whether national procedural rules existed that would allow for the passing-on to be effectively exercised.[24]

Successively, the European Parliament adopted a resolution[25] supporting the above-discussed rulings of the Court that all victims of a breach of EU competition law should be able to bring legal actions, hence supporting the passing-on in an offensive manner. It was also underscored that the Member States must provide for a possibility of bringing forward the passing-on in a defensive manner. This resolution was followed by the White Paper of the Commission[26] which aimed at recommending specific measures allowing for a full compensation for all victims of competition infringements, aligning with the recently established jurisprudence. The Commission essentially recapped the Court's emphasis on the compensatory principle and its foundation that damages should be available to any injured person who can demonstrate a satisfactory causal link with the breach.[27] The Commission argued for the introduction of the passing-on defence for the defendants and thus concluding that the passing-on of overcharges ought to work both in an offensive as well as a defensive manner. In order to 'lighten the victim's burden',[28] the Commission proposed that the indirect purchasers ought to be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.[29] It was also reiterated that under- and overcompensation of the damage should be avoided.[30]

Before the Directive was finally adopted, the Parliament issued another resolution approving the admissibility of passing-on as a defence.[31] It is worth mentioning that in contrast to the (eventually) positive attitude of EU institutions, third-party consultation phase during the legislative procedure were mostly critical.[32]

14 D Waelbroeck, D Slater and G Even-Shoshan, 'Study on the conditions of claims for damages in case of infringement of EC competition rules: Comparative Report' (Ashurst 31 August 2004).

15 ibid 1.

16 ibid 6.

17 ibid 6.

18 ibid 6. The authors of the Report concluded that the passing-on defence has the effect of complicating the claims and reducing the incentive to bring a claim, considering that the amount to be paid out to the claimant may be reduced. If successful, passing-on defence might reduce liability of the defendant which would, in turn, create an obstacle to private enforcement as such.

19 ibid 110.

20 Furthermore, the report noted that the defendant can quite easily discharge the burden of proof, while the indirect purchaser is faced with evidentiary difficulties of demonstrating the causal link and harm; ibid 111.

21 European Commission, 'Green Paper on Damages Actions for Breach of the EC Antitrust Rules' COM (2005) 672 final.

22 *Manfredi* (fn 1) para 60.

23 The principles of effectiveness and equivalence; see Case C-33/76 *Rewe v Landwirtschaftskammer*, EU: C: 1976, 1989.

24 A Jones, 'Private Enforcement of EU Competition Law: A Comparison with, and Lessons from, the US' in M Bergström, M Iacovides, M Strand (eds), Harmonising EU Competition Litigation: The New Directive and Beyond (2016) 11.

25 European Parliament, 'European Parliament Resolution of 25 April 2007 on the Green Paper on damages actions for breach of the EC antitrust rules' (2006/2207 (INI)).

26 'White Paper on Damages Actions' (fn 11).

27 ibid 7.

28 ibid 8.

29 ibid 8.

30 ibid 8.

31 European Parliament, 'European Parliament Resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules' (2008/2154 (INI)) 12. The Parliament approved the admissibility of passing-on as a defence, provided that the burden of proof lies with the defendant and that all the elements of tort are governed by the national rules.

32 For instance, German Association of Chambers of Industry and Commerce, as well as The German Retail Confederation were firmly of the opinion that the rebuttable presumption given to indirect purchasers constitutes an unreasonable burden and would only be justified if passing-on was a typical practice. See German Association of Chambers of Industry and Commerce, 'Position Paper on: White Paper on damages actions for breach of EC antitrust rules, COM (2008), 165 final of 2 April 2008', <http://ec.europa.eu/competition/antitrust/actionsdamages/white_

III. Passing-on in the Damages Directive

On 26 November 2014 the Damages Directive was adopted. In Chapter IV entitled 'The Passing-On of Overcharges', the Directive covers: the right to full compensation,[33] passing-on defence,[34] standing of indirect purchasers (and with it the rebuttable presumption),[35] actions for damages by claimants from different levels in the supply chain,[36] and finally, proposal for guidelines on how to estimate the share of the overcharge for national courts.[37] Following the adoption of the Directive, the Commission published the *Study on Passing-on of Overcharges* in order to assist the Commission in constructing specific guidelines for national courts on how to estimate the share of the overcharge as stipulated by Article 16.[38] The Study elaborates on all the above-mentioned passing-on elements of the Directive. Below the elements of the Directive concerning the position of the parties and the conditions under which they can operate (Articles 12–14 of the Directive) are discussed in more detail.

A. The right to full compensation: for whom and under what conditions?

Article 12(1) of the Directive stipulates that in order to ensure the full effectiveness of the right to full compensation, such a compensation must be open to be claimed by anyone who has suffered harm and can demonstrate a causal link between the infringement and the harm suffered. This reading of the provision implies that the spectrum of potential claimants can include direct and indirect purchasers, intermediaries as well as the customers at the very end of a supply chain and seems to be in line with the case law of the CJEU.[39] This broad reading of the category of potential claimants seems to suggest that also the victims of the umbrella passing-on may claim damages.[40]

The burden of proving that the defendant's overcharge was passed-on and thus caused harm to an indirect purchaser lays with the indirect purchaser claiming the damage, unless the rebuttable presumption is triggered, in which case, the burden is reversed onto the defendant.[41] According to Article 14 (2) of the Directive, the indirect purchasers enjoy a rebuttable presumption that a passing-on to that indirect purchaser occurred, if the defendant infringed competition law, which in turn resulted in an overcharge for the direct purchaser, and the indirect purchaser has purchased from that direct purchaser.[42] Most importantly, the introduction of rebuttable presumption resulted in a number of side effects, i.e. change in the stance of each of the parties, the indirect purchaser, the defendant and the direct purchaser. The main reason behind the introduction of the rebuttable presumption lies in the Commission's attempt to bring indirect purchasers and private claims closer to what used to be a closed circle of selected few – the infringing undertaking and its direct purchasers. The guiding principle is the compensation-based approach.[43] In other words, (a) the infringer should not escape liability (the reason why the indirect purchaser standing was introduced and strengthened through a rebuttable presumption) and (b) there ought to be no unjust enrichment or double liability (why the passing-on defence was introduced). The presumption as introduced by the Directive, most certainly improves the position of the indirect purchaser, and has a potential of encouraging private damages claims. Prior, indirect purchaser may have been discouraged in bringing their claims forward

paper_comments/dihk_en.pdf> accessed 16 January 2018; and The German Retail Confederation, 'Position Paper on: White Paper on damages actions for breach of EC antitrust rules, COM (2008) 165, 2.4.2008', <http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/hde_en.pdf> accessed 16 January 2018.

33 Damages Directive (fn 3) art 12 (1).

34 ibid art 13.

35 ibid art 14.

36 ibid art 15.

37 ibid art 16.

38 RBB Economics and Cuatrecasas, Gonçalves Pereira, 'Study on the Passing-on of Overcharges: Final Report, prepared for the Directorate-General for Competition of the European Commission' (Commission 2016). The Study on Passing-on of Overcharges is a 315 pages long report that '[provides] judges, and other practitioners who are not economic experts, with practical guidance on obtaining and assessing economic evidence in relation to pass-on'.

39 ibid 5.

40 The umbrella effect occurs when an undertaking not directly affected by an overcharge increases its prices as a result of the infringement which damages the competitive environment. See Case C-557/12 *Kone and Others*, EU: C: 2014, 1317 in which the claimant alleged that it had been harmed by the infringer (a member of a cartel), whose conduct made other suppliers raise prices above the level they would have been in the absence of that cartel. While such a claim was not possible under Austrian law, the Court held that the full effectiveness of EU competition law would be put at risk if it were not open for any person, where there is a causal relationship between the harm and the infringement, to claim compensation for that harm; see paras 21–22. It should be underscored that the standing of the victims of the umbrella pricing remains somewhat ambiguous.

41 Damages Directive (fn 3) art 14(1).

42 There are a number of concerns surrounding the introduction of this presumption. Firstly, the presumption unlike the defence or indirect purchaser standing is not prescribed by the ECJ's jurisprudence. In Case C-192/95, *Comateb v Directeur General des Douanes et Droits Indirects*, EU: C: 1975, 165, para 25 the ECJ held that even if the passing-on of costs may be considered a normal commercial practice, no presumption of such can be established. Secondly, differing opinions of the national courts on the types of burden of proof exist.

43 S Parlak, 'Passing-on Defence and Indirect Purchaser Standing: Should the Passing-on Defence Be Rejected Now the Indirect Purchaser Has Standing after *Manfredi* and the White Paper of the European Commission?' (2010) 33(1) World Competition 31, 33.

due to the fact that proving the passing-on is extremely complex and as a result extremely costly. By reversing this burden onto the defendant under certain circumstances, this procedural hurdle rests with the party that has infringed the law in the first place and allows more readily, a full compensation to the victims. However, the existence of a rebuttable presumption is not justified by the economic realities and may cause more harm than benefits. Even the Commission itself has recognised in its White Paper that a rebuttable presumption can result in inconsistent findings between the different layers of the supply chain.[44] It might prove quite challenging for the national courts to coordinate that, where, for instance, a defendant in one jurisdiction fails to show that the overcharge has been passed, that an indirect purchaser in another jurisdiction cannot recover the passing-on. By and large, it creates complicated jurisdictional and procedural conundrums and fosters a race for justice within private enforcement of competition law.

Finally, in order to obtain a standing under Article 12, one must prove the causal link via the passing-on of overcharges. On the issue of causality, the Study recommends that 'the best that the law and courts can do in such cases is to estimate the amount of the loss that must be compensated and assess the sufficiency of the causal link'.[45] It thus becomes clear that the Directive does not establish a clear framework on the legal test of causation, and leaves it up to the national law governing the issue. Hence, one may argue that Directive does not fully facilitate the task of national courts as it allows for the incoherence in these claims.[46]

B. Passing-on defence and the position of parties

In line with Article 13 of the Directive,

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

The Directive is clear that the burden of proving that the claimant passed-on any overcharges lays with the defendant raising such a defence.[47] Thus, the Directive not only reaffirmed standing of the indirect purchaser, but it also allows for a defensive tool in form of a passing-on defence. Denying the passing-on defence, while allowing the indirect purchaser standing bolstered by a rebuttable presumption would potentially lead to multiple liability and over-deterrence of the defendant.[48] Since the passing-on defence only affects the defendant and the direct purchaser, against whose claim such a defence can be brought, only the altered position of these two parties needs to be discussed.

The introduction of the passing-on defence may in fact have the opposite impact to what was initially desired, i.e. the prevention of over-deterrence and compensating only that what was caused. It can instead lead to under-deterrence whereby the defendant by virtue of his 'upper-hand position' has both the time and assets to successfully make use of the defence and escape any sort of liability. In fact, the risk of unjust enrichment of the defendant is higher than the risk of unjust enrichment of the direct purchaser if the passing-on defence is not allowed.[49] Even the Study underscores the fact that as a result of the passing-on defence, infringers will not be paying for the consequences of their wrongs, particularly, where downstream customers of the cartel do not have a feasible claim, due to the issue of remoteness.[50] In other words, the desired success of this defence as it stands now in the Directive, will depend strongly on whether indirect purchasers are able to effectively claim the damages.[51] This in turn depends on a variety of procedural and substantive factors, one of which is the already mentioned rebuttable presumption. Also, there is a higher risk of administrative errors. By a virtue of possibly having two separate judicial proceedings and no coordination, according to the Commission's own *Impact Assessment Report*, two possibilities of error arise. Firstly, 'the defendant's passing-on defence is mistakenly rejected on its facts, though a degree of passing-on actually occurred, so that the defendant pays damages to the direct purchaser, whereas indirect purchasers get eventually compensated for the passed-on overcharge' or secondly, 'the pass-through rate is miscalculated in the first trial, and the follow-on trial involving indirect purchasers leads to a portion of damages being compensated twice (in which case, the error lies in the fact that the same portion of damages is compensated

44 'White Paper on Damages Actions' (fn 11) 8.

45 'The Study on the passing on of Overcharges' (fn 38) 156.

46 E Büyüksagis, 'Standing and Passing-on in the New EU Directive on Antitrust Damages Action' (2015) 87(1) Swiss Review of Business Law 18, 24.

47 Damages Directive (fn 3) art 13.

48 Parlak (fn 43) 35.

49 ibid 41.

50 'The Study on passing on of Overcharges' (fn 38) 36.

51 See also Centre for European Policy Studies, 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios, Final Report prepared for the Directorate-General for Competition of the European Commission' (Commission 2007) 463.

twice)'.[52] Understandably, the direct purchasers are negatively affected by this defence the most. Namely, there is a strong chance that the direct purchasers will not initiate damage claims in order not to disrupt the business relationship with the defendant, particularly when there is a chance that the direct purchaser might have passed-on the overcharge.[53] It simply might be worth the risk even less after the introduction of the defence – a mind-set that goes against the idea of private enforcement as pursued by the Commission. Quite the contrary, it might even invite a 'silent vertical coordination' between the defendant and the direct purchaser, which will result in the indirect purchaser being rather defenceless.[54] Meaning, that unless the direct purchaser brings the proceedings, the success rate of the indirect purchaser may drop significantly. The defendant and the direct purchaser will suddenly find themselves both engaging in an unlawful activity to the detriment of the final consumer.

C. Estimating pass-on

According to the Article 12 (5) of the Directive, the power to estimate the share of overcharge that was passed on is the task of national courts. So far very limited jurisprudence on the passing-on in the EU has been carried out using quantitative analysis. Generally, the national courts have utilised a method of 'threshold questions' around the likelihood of passing-on having occurred.[55] Indeed, the Directive itself follows a more probabilistic approach to assessing the damage. The Study on passing on of Overcharges attempts at providing national courts with empirical strategies that may be utilised to measure the extent of the passing-on.[56] It reaffirms that the guiding economic principle to estimate the suffered damage is the difference between, 'the actual position of the injured party [and] the position in which this party would have been but for the infringement',[57] in other words: the counterfactual. Most importantly, measuring the passing-on is inevitably going to be complex, time-consuming and uncertain process in which the courts may ultimately not have confidence.[58]

All in all, is it possible to estimate the passing-on? With the sufficient amount of relevant data, probably yes. Is it possible to estimate the passing-on in practice? Accurately and persuasively, probably not. The overcharge may pass through several layers of a supply chain and in the real world, market structures are complex. While it may be possible to estimate the passing-on as it is happening, such an analysis may be rendered extremely difficult for the courts and/or experts to execute *ex post*.[59] It remains to be seen how the national courts who have not had a chance to take on such an insurmountable task in the past, will handle this going forward, and more importantly, whether this will have a negative effect on the attractiveness of private enforcement. The risk of a wrong estimation of the passing-on can prove to be of a decisive factor in a decision of whether to pursue a claim for damages, since the fear of under-compensating and the over-compensating is inherent to the passing-on by the very nature of the opacity of its estimation.

D. Preliminary conclusions

As illustrated, the introduction of the passing-on by the Damages Directive has brought about numerous substantive and procedural changes. The Study has exemplified the difficulties that the national courts might face when estimating and procedurally facilitating the passing-on. While the more detailed assessment of the passing-on defence and the rebuttable presumption has illustrated the various paradoxes and gaps that the national courts as well as the parties involved will have to become familiar with, and assess against the attractiveness of bringing the claims. Indeed, the overall scheme has improved the situation of the indirect purchasers, which is what the Directive aimed at. In order to assess these changes in a national context, and what impact they will have on the claimants, the defendants as well as the courts at a domestic level, an examination of the three Member State's transposition of the Directive will follow.

IV. National transposition

Flowing the general logic of EU law, the newly established regime of private enforcement under the Directive is dependent upon (correct) national implementation which

52 ibid 469.

53 Parlak (fn 43) 41.

54 Max Planck Institute for Intellectual Property, Competition and Tax Law, 'Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the White Paper by the Directorate-General for Competition of April 2008 on Damages Actions for Breach of the EC Antitrust Rules' (July 2008) 14 <http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments/maxpl_en.pdf> accessed 16 January 2018.

55 'The Study on passing on of Overcharges' (fn 38) 26. See also Case No. 10/18285, *Doux v Ajinomoto & CEVA*, judgment of 27 February 2014.

56 'The Study on passing on of Overcharges' (fn 38) 66.

57 Commission, 'Staff Working Document – Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' SWD (2013) 205, para 11.

58 L J Basso and T W Ross, 'Measuring the True Harm from Price-Fixing to Both Direct and Indirect Purchasers' (2007) Working Paper, University of British Columbia, 27. See also T van Dijk and F Verboven, 'Cartel Damages Claims and the Passing-on Defence' (2009) 57(3) The Journal of Industrial Economics 457 who argue that in order to assess the passing-on, the most specific economic analysis is required.

59 Parlak (fn 43) 40.

will naturally differ from Member State to Member State.[60] Also, anything not governed or regulated by EU law, remains within the ambit of national rules and procedures of the individual Member States.[61] The foregoing implies that the success of the potential claims may depend on how strong and claimant friendly the culture of private enforcement in that Member State is.[62] For the following analysis the national transposition in three Member States, i.e. Germany, France, and Ireland is assessed. The choice for these countries is quite pragmatic. Germany expressly denied the rebuttable presumption. France on the other hand recognised the passing-on (defence) with the burden resting essentially with the claimant. Finally, Ireland allowed both the passing-on defence and indirect purchaser standing in theory only, following the ordinary principles of restitution and unjust enrichment, without having either to be ever raised during the proceedings.

In order to assess the correctness of each national transposition concerning the above-discussed elements of the Directive, a number of fundamental issues have to be addressed:

(i) Passing-on defence can be claimed vis-à-vis whole or part of the overcharge, and the burden must rest with the defendant.

(ii) It must be made clear that the rebuttable presumption of the passing-on was intended solely in favour of the indirect purchasers.

(iii) The rebuttable presumption means that the illegal overcharge was passed-on in its entirety.

(iv) The rebuttal of the presumption may be achieved by proving that the passing-on did not occur in its entirety.

A closer reading of the relevant provisions reveals that in particular points iii. and iv. which are reflected in Article 14 of the Directive have the potential of becoming the areas of confusion and uncertainty. At a first look, the obscurity here lies in whether the presumption relates to the occurrence of the passing-on or also to its quantum i.e. that the overcharge was passed-on in its entirety. This is questionable due to the sentence; 'the indirect purchaser shall be deemed to have proven that a passing-on [...] *occurred* where that indirect purchaser has shown that...' However, if this first sentence of Article 14(2) was to be read as precluding anything but the occurrence, the three conditions that the indirect purchaser must demonstrate before a rebuttable presumption is given an effect, would be rendered obsolete. Indeed, these three conditions in effect prove such an occurrence. The presumption goes inherently together with its rebuttal. Following the above, the phrasing of this provision may indeed carry the risk of an incorrect transposition. Particularly the phrase 'was not, or was not entirely, passed-on' must be transposed so as to ensure that the presumption can be rebutted at a display of evidence that shows that the overcharge was not passed-on as a whole, and must not be understood as meaning that the presumption may only be rebutted by proving that the *whole* of passing-on was not passed-on, or by proving that the whole of the presumed *partial* overcharge was not passed-on. How the three different Member States have dealt with these provisions will now be discussed.

A. Germany

The passing-on, although accepted in principle, remained prior to the Directive quite unclear in the German system. Both the defence and the indirect purchaser standing was allowed, according to the leading case of *ORWI*,[63] however, many procedural and material rules had to be amended as a result of the Directive to facilitate such passing-on claim or defence. The revised national law in fact alleviated the high threshold of the defendant's burden of proof as put forward by case *ORWI*.[64]

Since the concept of overcompensation, or deterrence, is not recognised under German law, and although it is avoided by the Directive, the fact that the Directive allows for a presumption of harm to the advantage of the direct purchasers, as well as the presumption of passing-on to the advantage of the indirect purchaser raises, according to some, concerns in regards to the overcompensation by the defendant.[65] Therefore, the German legislators and drafters of the implementing measures had to assure that this too will be evaded. The law as it stands[66] will likely

60 D Leczykiewicz, 'Compensatory Remedies in EU law: The Relationship Between EU Law and National Law' in Paula Giliker (ed), *Research Handbook on EU Tort* Law (2017) 11.

61 Damages Directive (fn 3) recital 11.

62 Despite the efforts of the Commission, there continues to be a probability of a divide between those Member States that have a substantial existing experience and understand the importance of private enforcement of the competition law sphere as an avenue for a compensatory remedy (for instance, the United Kingdom, the Netherlands, or Germany), versus those that merely rely on the national and European authorities to operate as the watchdogs in ensuring the effectiveness of the competition law order (predominantly the Member States of the Easter enlargement).

63 Bundesgerichtshof KZR 75/10, judgment of 28 June 2011.

64 C Gottlieb, 'Germany implements the EU Antitrust Damages Directive' (Memorandum, 14 March 2017) 3 <https://www.clearygottlieb.com/news-and-insights/publication-listing/germany-implements-the-eu-antitrust-damages-directive> accessed 16 January 2018.

65 ibid 3.

66 See Neuntes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, Bundesgesetzblatt Jahrgang 2017 Teil I Nr. 33 (Bonn, 8 June 2017) <https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl117s1416.pdf#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl117s1416.pdf%27%5D__151613601088 > accessed 16 January 2018.

contribute to Germany becoming even a more popular forum for private enforcement of competition law.[67] However, there are rules introduced by the Directive which might create new problems and which were not previously fully addressed by the legislator or even admissible by national courts, i.e. the presumption that an overcharge is passed onto the indirect purchasers. This, according to some German practitioners may lead to double compensation if the defendant is incapable of rebutting it.[68] Particularly, it is observed that the national courts will have to find a solution for the potential conflicts in contradictory findings arising from the different levels of the supply chain, as there is usually no direct link between the various damage actions.[69]

Paragraph 33c entitled 'Schadensabwälzung' or the 'Passing-on' of the *Ninth Amendment of the Act against Restraints of Competition*[70] (the 9th Amendment) concerns the transposition of the passing-on provisions of the Directive. The first sub-paragraph of § 33c entails the transposition of Article 13 and 12 (1) and (4) of the Directive and reads as follows:[71]

> (1) If a product or a service is purchased at an inflated price (overcharge), the damage is therefore not excluded because the goods or services have been resold. The damage of the purchaser is offset, insofar as the purchaser passed-on an overcharge (passing-on), which is caused by an infringement pursuant to § 33a (1), to his purchasers (indirect purchasers). This shall be without prejudice to the right of an injured party to compensation for his loss of profits pursuant to § 252 of the German Civil Code, insofar as the lost profit is due to the passing-on of the overcharge.

By its first sentence, the 9th Amendment adheres to the existing law, introduced by the 7th Amendment to the Act, and merely states that the damages claims will not be restrained by the fact that the goods have been resold. Thus, national law confirms the position of the direct purchasers in the intermediate level of the supply chain as well as the position of the indirect purchasers. It is the second sentence that confirms the judicial recognition of the passing-on defence as recognised by the *ORWI* judgment, aligning with the well known German principle of '*Vorteilsausgleichung*' or the '*Adjustments of Benefits*', the premise of which has been elaborated on in the same judgment.[72] However, unlike the *ORWI* judgment, the defendant is no longer required to prove that the claimant has not suffered any harm as a result of the volume effect. The burden of proof nevertheless still rests, according to the general procedural rules, with the defendant.[73] The entire first sub-paragraph attempts to encourage the claims of the indirect purchasers. This is according to some German academics dubious from the point of view of legal policy.[74] Furthermore, the critics observe that the issue of scattered damages has not been resolved, quite the contrary, it supports the risk of the feared contradictory findings.[75]

The second sub-paragraph transposes Article 14 (2) of the Directive regarding the rebuttable presumption to the benefit of the indirect purchaser and reads:[76]

> (2) In terms of reason, it shall be presumed to the advantage of the indirect purchaser, that the overcharge was passed on to him if,
>
> - The infringer has committed a breach of § 1 or 19 or Article 101 or 102 of the Treaty on Functioning of the European Union.
> - The infringement has resulted in an overcharge for the direct purchaser of the infringer.
> - The indirect purchaser has purchased the goods or services that were
>   (a) the object of the infringement,
>   (b) derived from such goods or services, or
>   (c) contained such goods or services.

It becomes clear that there are some alterations when this sub-paragraph is compared to that of the Directive. Firstly, the transposing measure has substituted the word 'defendant' with the word 'infringer' and is thus praised for underlining the substantive legal character of the presumption without changing its content which might otherwise be due by a procedural definition of the 'defendant'.[77] Secondly, the original phrase '*dem Grunde*

67 M Gramsch, 'Update on competition damages claims' (Simmons and Simmons, 10 May 2017) <http://www.elexica.com/-/media/files/training/2017/05%20may/update%20on%20competition%20damages%20claims.mp3?ext=.mp3> accessed 16 January 2018.

68 ibid.

69 ibid.

70 Neuntes Gesetz (fn 66).

71 Authors' translation of the German law.

72 Gesetzentwurf der Bundesregierung, Entwurf eines Neunten Gesetzes zur zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen (7 November 2016) <http://dipbt.bundestag.de/extrakt/ba/WP18/772/77250.html> accessed 16 January 2018.

73 Ch Kersting and N Preuß, 'Implementation of the Cartel Damages Directive into German Law' (2016) 8/16 Economy and Competition (WuW), 11.

74 For more see ibid 12.

75 Ch Kersting, 'Cartel Damage Claims after the 9th Amendment of the Act against Restraints of Competition' (2017) 581 Insurance, Liability and Damages Law Journal (VersR), 15.

76 Authors' translation of the German law.

77 Kersting and Preuß, 'Implementation of the Cartel Damages Directive into German Law' (fn 73) 14.

nach' ('in terms of reason') was inserted, meaning that the presumption merely supports the existence of the passing-on from a causal point of view, not in regards to its extent. As discussed earlier this provision was deemed to be the point of confusion for some Member States' transpositions and indeed the German transposition of this provision is according to some German academics contrary to the intentions of the Directive.[78] It is understood that when reading Article 14 (2) as whole, that is, the presumption (first sentence) and the rebuttal (second sentence), particularly the phrase 'where [...] the overcharge was not, or was not entirely, passed', it ought to be assumed that presumption entails the passing-on in its entirety.[79] This is not supported by the German transposition.[80] It would only then be supported if the original phrase '*dem Grunde nach*' was substituted by '*der Höhe nach*' ('to the extent of'), which would imply that the overcharge has been passed-on in its entirety.[81]

Finally, the sub-paragraphs 4 and 5 give effect, respectively, to Article 12 (4) regarding the upstream passing-on, and Article 12(5) regarding the national procedures on estimating the overcharge. Overall, it is presumed that the new provisions on the passing-on will have the effect of creating more complex national proceedings, which might in turn increase the administrative costs and also increase the risk of liability. As a result, it is believed that there will be a greater emphasis placed on preventative compliance measures than on a support for private enforcement going forward, which is hoped to ultimately improve the overall market environment.[82]

B. France

In France, the leading jurisprudence prior to the introduction of the Directive were cases *Le Gouessant* and *Doux*[83] which allocated the burden of proof that no passing-on has occurred on the claimant. Clearly, both these decisions were not aligned with the passing-on scheme as introduced by the Directive which places the burden of proof on the defendant. The French transposing measure had to implement this division of burden of proof and ensure that it is the defendant proving or rebutting that the overcharge was passed on. Indeed, that is what the French Ordonnance of 9 March 2017 (n°2017-303)[84] (the Ordonnance) has done as it reads:[85]

> Art L. 481-4. – The direct or indirect purchaser, of goods or service, is deemed not to have passed-on the overcharge to its direct contractors, unless there is evidence contrary to a full or partial passing-on of the overcharge, brought by the defendant, the author of the anticompetitive conduct.

This brings the French law in line with the Article 13 of the Directive, i.e. it reverses the negative burden of proof established in *Doux*. The claimants are no longer obliged to prove the absence of passing-on, as they are deemed not to have passed-on the overcharge, unless the defendant can show otherwise. The legislative measure continues in Art. L. 481-5 by noting:[86]

> The direct or indirect purchaser, of goods or services, who claims to have suffered harm as result of the overcharge, must prove the existence thereof and its extent.
> However, the indirect purchaser, of goods or services, shall be deemed to have provided proof of such an effect when it has shown that:
>
> (1) The defendant has committed an anticompetitive conduct referred to in Article L. 481-1.
> (2) This conduct entailed an overcharge for the direct contractor of the defendant.
> (3) The indirect purchaser has purchased the goods or services that were the object of the anticompetitive conduct, or purchased good or services derived or containing them.
>
> The defendant may, however, prove that the overcharge has not been passed-on to the indirect purchaser or that it was only partially passed by the previous contractor.

This section of the measure ought to reflect Article 14 on the indirect purchaser standing and the rebuttable presumption linked to it. The transposition here is quite clear that the rebuttable presumption operates to the 'existence [of the passing-on] and its extent', that is the passing-on in its entirety, as the indirect purchaser is deemed to have provided proof of such an *effect* when the three conditions

78 ibid 14. See also Kersting, 'Cartel Damage Claims after the 9th Amendment of the Act against Restraints of Competition' (fn 75) 16–17.

79 ibid.

80 ibid 14. See also Kersting, 'Cartel Damage Claims after the 9th Amendment of the Act against Restraints of Competition' (fn 75) 16–17.

81 ibid.

82 Allen & Overy, 'Modernisation on all Fronts: Today's Adoption of 2017 Amendments to the German Act against Restraints of Competition' (March 2017) 6 <http://www.allenovery.com/SiteCollectionDocuments/Germany/German%20Act%20against%20restraints%20of%20competition%202017.pdf> accessed 16 January 2018.

83 Case No. 08/08727, *Le Gouessant v Ajinomot & CEVA*, judgment of 16 February 2011 and Case No. 10/18285, *Doux v Ajinomoto & CEVA*, judgment of 27 February 2014.

84 Ordonnance n° 2017-303 of 9 March 2017 on damages actions as a result of anticompetitive practices, <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034160223&fastPos=1&fastReqId=696038724&categorieLien=id&oldAction=rechTexte> accessed 16 January 2018.

85 Authors' translation of the French law.

86 Authors' translation of the French law.

are met. The rebuttal too suggests that the presumption may be rebutted if it is shown that the passing-on has not occurred in its entirety. It is interesting to see how the French courts will put these provisions into practice, considering that the various rebuttable presumptions created by the Directive were to be concerned as the main changes to the French passing-on system.[87]

Finally, the Ordonnance in Art. L. 481-6 gives effect to Article 12 (4) of the Directive, which ensures that the rules laid down in Chapter IV apply accordingly to a supply to the infringer. Hence, facilitating for claims of the suppliers negatively affected by, for instance, buyers' cartel.[88]

Overall, it is believed by some commentators that the biggest challenge that the Ordonnance will face, lies with how the French judges will take on the task of estimating the overcharge. As noted, the French lower courts often felt uncomfortable with complex economic evidence, and could even dismiss a claim for the sole reason that they were not convinced by the determination of harm.[89] In fact, under the French tort law, to exempt a defendant from liability, it is sufficient to deem the harm uncertain.[90] Hence, it will be interesting to see how this will impact the success of the passing-on, having regard to the obvious and the already mentioned difficulties in its quantification. Indeed, this approach is not as prominent as it used to be, and some French courts are less reluctant to award damages. Nevertheless, as some French academics note: 'It is not to say that legal reforms are without merit but, as often, we must face the fact that human factors prevail. This is perhaps the key to an efficient private enforcement application of EU competition law in French courts'.[91]

Frédéric Jenny, a former judge of the French Court of Cassation, noted that the main restrictions to a proper assessment of complex economic theories and evidence for judges are:

> (a) the difficulty for courts (or lawyers or economic experts) to find the appropriate economic tools to assess damages, or (b) the difficulty experienced by courts when they must arbitrate between contradictory, but methodologically sophisticated and scientifically sound economic empirical assessment of harm....[92]

The latter point is particularly the case with the national courts, such as the German, Dutch, UK, along with the French, that allow confronting economic reports brought in by the parties themselves.[93] It is therefore of vital importance that the legislators at both the EU as well as the national level provide for clear guidelines and support the judges in fulfilling their task as effectively and as accurately as possible in order to achieve the objectives of the Directive and the coherence of private enforcement.

C. Ireland

Ireland has a common law system which implies that the rules regarding causation or compensation may differ from those usually found in the civil law systems such as in Germany or France. Also, Ireland has prior to the Directive allowed exemplary damages regarding the competition law infringements, an aspect of Irish law which had to be amended to facilitate a successful transposition of the Directive, which precludes such punitive or exemplary fines.[94]

Ireland transposed the Directive into law on 17 February 2017 by the *European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017*[95] (the Regulations). Part 4 deals with the transposition of the passing-on articles of the Directive and is divided into four parts. The first part, Section 11, concerns 'Passing-on of overcharges and right to full compensation'. This article is a word-for-word copy of Article 12 of the Directive and clarifies the rules of passing-on in Ireland. It reaffirms the position of both the direct and indirect purchasers;[96] 'compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer',[97] but more interestingly it also explicitly reiterates Directive's position regarding overcompensation by stating that '[the] compensation of harm referred to in paragraph (1) shall not exceed that caused by the infringement of competition law to the claimant'.[98] This removes the previously existing exemplary damages as governed by the provisions of the Irish Competition Act 2002.[99] To date however, the national courts have not exercised this

87 R Amaro, 'Chapter 12: Recent Developments in the Application of Articles 101 and 102 TFEU by French Courts' in Adriana Almăşan and Peter Whelan (eds), *The Consistent Application of EU Competition Law* (2017) 225.

88 Damages Directive (fn 3) recital 43.

89 Amaro (fn 87) 222.

90 ibid.

91 ibid.

92 F Jenny, 'A French Perspective on the Quantification of Antitrust Harm' in Economist workshop on the quantification of antitrust harm in actions for damages held by DG Competition on 26 January 2010 (2010).

93 'The Study on passing on of Overcharges' (fn 38) 168.

94 D Waelbroeck, D Slater and G Even-Shoshan, 'Executive summary and overview of the national report for Ireland' (Ashurst 31 August 2004), 4. See Damages Directive (fn 3) art 12(2).

95 EU (Actions for Damages) Regulations 2017 (Regulations).

96 Competition Act 2002, s 14(1): 'Any person who is aggrieved...'

97 Regulations (fn 95) s 11 (1).

98 ibid s 11(2).

99 Competition Act (fn 92) s 14 (4) and (5).

power[100] and it is therefore quite unlike that the removal of the exemplary damages from the Irish legal system will result in any practical implications.

While the principle of unjust enrichment would ordinarily apply under Irish law, the Regulations formally introduce the passing-on defence into it. Section 12 of the Regulations governs the defence, and again is a direct copy of Article 13 of the Directive. However, the more important change is the rebuttable presumption linked to the indirect purchaser standing. The standing and the presumption that goes with it are regulated by Section 13 of the Regulations. Paragraphs 4 and 5 in particular read:

> '(4) For the purposes of paragraph (1), the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that [...]
>
> (5) Paragraph (4) does not apply where the defendant can demonstrate credibly to the satisfaction of a court that the overcharge was not, or was not entirely, passed on to the claimant.'

Concerning whether these paragraphs relate to the passing-on in its entirety and thus can also be rebutted by proving that the overcharge was not passed-on as a whole is not clear, but can nevertheless be implied since the wording 'occurred' and 'the overcharge was not, or was not entirely, passed', suggests the meaning given to these provisions in the Directive, which utilises the exact wording. Moreover, the rebuttable presumption is seen as an innovation for the position of claimants under the Irish law, since it is the claimants that generally have to identify, prove and quantify the loss.[101] What impact this will have if any, however will only be seen in the years to come considering that the Regulations apply only to the infringements that occurred after 27 December 2016.[102]

From the above it becomes clear that the Irish transposition, out of the three discussed, is the most consistent with the Directive in the sense that it exactly reflects the wording of the Directive. It can therefore be argued that despite some drawbacks (that are in effect inherent in the Directive), the Irish Regulations will overall encourage private competition litigations, and are expected to transform Ireland into an attractive venue for such cases particularly post-Brexit.[103]

V. Conclusions

It is quite difficult to assess any successes of the passing-on provisions at this stage, taking into account of the fact that at the time of writing it has been just a year since the deadline for the transposition has passed, and several Member States are yet to implement the Directive fully. It can however already be noted, that it is quite likely that we will witness some incorrect interpretations and, consequently, applications of the provisions regarding the rebuttable presumption and its rebuttal. In particular if we take into account that these provisions are seen as the innovations, brought about by the Directive into the national procedural systems of the three Member States discussed, and have already caused some uncertainty during their transposition. This implies that national courts will quite likely resort to the Court of Justice who will have to clarify the exact meaning of the relevant provisions of the Directive.

Overall, the Directive introduces a new and intriguing chapter into the development of private enforcement of EU competition law. Indeed, the changes brought about by the introduction of the passing-on are not insignificant as may seem at first glance and the Member States that remain to implement the Directive must be warned of taking good care in transposing the relevant provisions. As the transpositions in the three discussed Member States illustrate, there are many concerns that underscore the possible ineffectiveness of the Directive or even reaching effects that would be contrary to what was originally hoped for when it comes to the passing-on and furthering of private enforcement in the EU. Nevertheless, the exact extent of the impact of the passing-on on private enforcement will have to be patiently waited out.

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100 H Kelly, 'Competition Law Damages Actions – Rules Make Ireland an Attractive Venue for Competition Litigation' (Matheson, 28 February 2017) <http://www.matheson.com/news-and-insights/article/competition-law-damages-actions-rules-make-ireland-an-attractive-venue-for> accessed 16 January 2018.

101 A Cox, 'Implementation of the Competition Damages Directive in Ireland' (March 2017) 2 <http://www.arthurcox.com/wp-content/uploads/2017/03/Implementation-of-the-Competition-Damages-Directive-in-Ireland.pdf> accessed 16 January 2018. See also R Ryan and P Horan, 'Chapter 15, Ireland' in E Burrows (ed), *The International Comparative Legal Guide to: Competition Litigation 2017* (9th edn, 2016) 127.

102 Regulations (fn 95) s 3.

103 Kelly (fn 100).