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Private damages actions under EU competition law: an analysis of standing to sue for indirect purchasers and proving loss

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It was announced in April 2014 that agreement had been reached between the European Parliament and the Council of the European Union on the text of the proposed EU directive on rules governing damages actions under national law for infringements of EU competition law.[2] The agreed text is an amended version of the Commission's draft directive published in 2013[3] and with agreement having been reached it now appears to be just a matter of time before the directive is enacted.[4]

Facilitating and encouraging increased private enforcement of EU competition law has been a priority of the EU Commission for a number of years so enactment of the EU Directive will represent the culmination of a long process of planning, discussion and consultation, including the publication of a Green Paper in 2005[5] and a White Paper[6] in 2008. While the measures contained in the agreed text of the EU Directive do not go 'as far' as the proposals put forward in the White Paper in a number of ways in terms of harmonising the rules governing private damages actions in Member State courts, it will no doubt come as a relief to those who have been promoting harmonisation over a period of time that a legislative result looks likely to be achieved shortly.

Now that agreement has been reached on the text of the EU Directive, attention can turn to examining how the rules will operate in practice rather than speculating on the pros and cons of the various options that were put forward in the Green and White Papers.

This paper will discuss one of the key areas covered by the EU Directive, that of standing for indirect purchasers to sue and the use of the passing-on defence by defendants in private damages actions.

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[2] Agreed text of the Directive: Amendments by the European Parliament to the Commission proposal: Directive of the European Parliament and of the Council 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, A7-0089/2014, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html

[3] Proposal for a Directive of the European Parliament and of the Council 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, COM(2013) 404 final, available at: http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF.

[4] The directive in question is referred to throughout this paper as the "EU Directive".

[5] Green Paper - Damages Actions for Breach of the EC Antitrust Rules, COM(2005) 672 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52005DC0672:EN:NOT.

[6] White Paper on damages actions for breach of the EC antitrust rules, COM (2008) 165 final, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008DC0165:EN:NOT.

After introducing the topic, the paper will discuss the legal position in the United States given that the USA has a much more developed system of private enforcement of competition law which has influenced the polemic in the EU on private enforcement in particular with regard to indirect purchaser standing and passing-on. The paper will the briefly deal with the current *acquis communautaire* in the EU on these matters before discussing the measures contained within the EU Directive. The focus will then shift to the current legal position in the UK and how the proposals in the EU Directive correspond with this. An attempt will then be made to identify some of the practical problems which the measures in the EU Directive might come up against, in particular difficulties of causation and quantification which indirect purchasers may face. Finally, it shall be concluded that while the measures in the EU Directive are coherent and largely in tune with the legal traditions of most EU Member States, for the rules to function effectively, it is imperative that courts seek to rationalise linked actions concerning the same supply chain and that effective collective redress mechanisms are put in place to facilitate actions by consumers – who are in so many cases the ultimate 'indirect purchaser' victims of antitrust offences.

The perennial issue of indirect purchaser standing and the passing-on defence

The question of whether a party that purchases indirectly from a seller which is guilty of a competition law infringement has standing to sue the infringer for loss suffered by the claimant in its 'downstream' position in the supply chain, has long been one of the key debates surrounding private enforcement. The issue of whether standing is granted to indirect purchasers is generally viewed in conjunction with the question of whether a 'passing-on' defence is permitted for alleged infringers i.e. can a party which has infringed competition law, when sued by a direct purchaser, as an alleged 'victim' of that infringement, plead in defence that the claimant has itself 'passed-on' its loss to the claimant's own purchaser, therefore avoiding any actual loss.

While the EU Commission has consistently advocated standing for indirect purchasers and a passing-on defence[7], before examining the proposals in the EU Directive, it is worth briefly considering the situation in the USA, where neither standing for indirect purchasers (at federal level) nor the passing-on defence are generally permitted, because this highlights the possible arguments for and against standing being granted to indirect purchasers and sheds light on some of the potential difficulties that the measures in EU Directive discussed below may encounter when applied in practice.

[7] See p.4 and pp.7-8 of White Paper, *op. cit.* fn. 6.

Indirect Purchaser standing and passing-on in the USA

In the United States, the key Supreme Court decision in which the passing-on defence was effectively ruled out, *Hanover Shoe, Inc. v United Shoe Machinery Corp*[8] predated the decision that standing should not be granted to indirect purchasers in the case of *Illinois Brick Co. v Illinois*[9], with the decision in the latter case being taken in large part as a consequence of the decision of the Supreme Court in the earlier case.

The former case concerned a claim against a manufacturer of shoe machinery by a direct purchaser. The defendant unsuccessfully argued that the plaintiff should not be entitled to sue because the defendant had, in fact, passed-on the illegal overcharge which it had been subject to on to its own purchasers and had thus not actually suffered any identifiable loss. The Court gave two main reasons for refusing to allow the passing on defence. Firstly it was held that to allow such a defence would open up the requirement for a series of complicated hypothetical calculations to try to establish the actual extent of the passing-on of the overcharge and that "[s]ince establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable".[10] Consequently "[t]reble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories".[11]

Secondly, the Court also argued that to allow the passing-on defence, would drastically reduce the likelihood of private enforcement, as the ultimate purchasers of a product, typically consumers, would not individually have a sufficient financial stake to motivate them to bring an action to recover their loss. Consequently infringers of antitrust law would be less likely to face law suits and would therefore retain the proceeds of their illegal conduct:

> *"In addition, if buyers are subjected to the passing-on defense, those who buy from them would also have to meet the challenge that they passed on the higher price to their customers. These ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their*

[8] *Hanover Shoe Inc v United Shoe Machinery Corp*., 392 U.S. 481 (1968).
[9] *Illinois Brick Co. v Illinois,* 431 U.S. 720 (1977).
[10] *Op. cit*., fn. 8, p. 493.
[11] *Ibid*, p. 493.

illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness".[12]

The later case of *Illinois Brick* concerned an action by the state of Illinois and 700 local government entities as indirect purchasers, against the Illinois Brick Co, a manufacturer of concrete blocks. In a successful appeal against an earlier decision, Illinois Brick Co successfully argued that the claimants should not be entitled to use passing-on offensively.

In its decision, the Supreme Court began on the logical premise that "…whatever rule is to be adopted regarding pass-on in antitrust damages actions, it must apply equally to plaintiffs and defendants".[13] It was noted that to allow the use of passing-on defensively but not offensively would create the risk of multiple liability for defendants. Furthermore in the same way that allowing defensive passing-on would make it difficult to calculate where losses truly lied the same argument would apply to allowing passing-on offensively.[14]

Given that the defensive use of passing-on had been ruled out in *Hanover Shoe* - and the Supreme Court did not feel in a position to overrule that judgment – it followed that the offensive use of passing-on should not be permitted.[15]

While one can follow the reasoning behind the decision in *Hanover Shoe* and the subsequent decision in *Illinois Brick*, both decisions have been the subject of a great deal of discussion down the years, much of it critical.[16] With regard to *Hanover Shoe*, for present purposes, it is perhaps worth

[12] *Ibid*, p. 494.
[13] *Op. cit*., fn. 9, p. 728.
[14] *Ibid*., p. 732.
[15] Subsequent case-law has complicated the issue of standing in the USA, however, in particular the case of *California v. ARC Am. Corp.* (490 U.S. 93 (1989)) in which it was held that states were entitled to derogate from the federal rule denying standing to indirect purchasers. For a discussion of *Illinois Brick* in the context of subsequent case-law developments see R. Blair and J. Harrison, "Reexamining the Role of *Illinois Brick* in Modern Antitrust Standing Analysis", *George Washington Law Review* 68(1), 1999, pp. 1-43, where the authors argued that the general rule set out in *Illinois Brick* was "obsolete" due to subsequent case-law, in particular the aforementioned *ARC America* case (p. 42). They argued that at the time of writing "…*Illinois Brick* and more general standards for antitrust standing operate simultaneously, resulting in a derationalization of the system of private enforcement" and suggested a number of possible ways of overhauling the system of private enforcement (p. 42).
[16] See for example, for a defence of the decision in *Illinois Brick*, W. Londes and R. Posner, "Should indirect purchasers have standing to sue under the antitrust laws? An economic analysis of the Rule of Illinois Brick", *University of Chicago Law Review* 46, 1979, p. 602; for a more critical view of *Illinois Brick* see for example H. Hovenkamp, "The indirect-purchaser rule and cost-plus sales", *Harvard Law Review* 103, 1990, pp. 1717-1731, where the author argues that in the case of cost-plus sales, indirect purchasers should have standing to sue and that to deny such standing "…appears inconsistent with section four of the Clayton Act, the damages action

highlighting just a few of the potentially problematic aspects of the decision. Firstly, with regard to the first ground put forward by the court – the complication of identifying where losses lie in the supply chain - while there is no disputing that if standing for indirect purchasers is permitted, it potentially becomes very difficult to calculate the precise loss sustained by each party, one could counter that in many causes of action involving tort law, courts are required to make complex calculations based on a highly speculative hypothetical counterfactual. If one were to follow the logic of *Hanover Shoe,* one might argue that many forms of action and/or defence in tort should not be permitted on the basis that in calculating damages the court will require to make various speculative assumptions. Secondly, preventing the use of the passing-on defence on the basis that to allow it would make it very difficult to apportion loss between the various damaged parties, perhaps somewhat ironically, effectively amounts to an acceptance that in a great many cases losses will *not* be apportioned correctly, with the direct purchaser being unjustifiably enriched as a result of the actions of the infringing party. It is also worth pointing out that such an unjustified enrichment of the direct purchaser suggests that the focus of the law is upon punishing the infringer rather than compensating those who have actually lost out. Consequently such a rule would not be suitable in the European context where the focus of tort law is primarily upon compensating loss incurred by claimants as a result of the tort.[17] It should, of course, be borne in mind that in the United States, given the lack of public enforcement, more emphasis is placed upon private enforcement as a means of enforcing antitrust law in the interests of the public at large rather than serving the end of providing compensation to the actual victims of specific torts.[18]

The philosophy underpinning private enforcement in the American context should also be borne in mind when considering the second main line of reasoning given by the court in *Hanover Shoe* – that of consumers and those further down the supply chain from the direct purchaser not individually having a significant enough financially recoverable loss to motivate the bringing of an action. If compensating the victims of antitrust abuses was the priority of US private enforcement of antitrust law, the focus would be upon *how* consumers could be incentivized to bring actions rather than denying them the right to do so in order that direct purchasers with a substantial financial interest are

provision of the antitrust laws that entitles a person injured by an antitrust violation to three times the damages "by him sustained"." (p. 1718).

[17] For example, according to the agreed text of the EU Directive, article 12(2) states that "in order to avoid overcompensation, Member States shall lay down the appropriate procedural rules in order to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level", *Op. cit.* fn. 2, p. 54.

[18] On the differences between the basic philosophies underlying the US and EU systems of competition law generally see for example K. Bernard, "Private antitrust litigation in the European Union – why does the EC want to embrace what the US FTC is trying to avoid?", *Global Competition Litigation Review* 3(2), 2010, pp. 69-74.

not dis-incentivized from bringing actions which presumably can serve the purposes of 'punishing' the infringers of antitrust law.

Indirect purchasers and passing-on in the EU: the current position

As mentioned above, the legal situation in the United States is worth considering because it helps to identify some of the main debates and potential problems surrounding passing-on and standing for indirect purchasers. However, it can be argued that it is also of relevance when discussing the issue in the context of the EU, because it has to a certain extent influenced and conditioned the way in which standing for indirect purchasers and passing-on has been approached in the EU, notwithstanding that the EU Directive ultimately rejects the American approach. Perhaps the clearest example of this is that much of the EU literature has framed the issue of passing-on and indirect purchaser standing in terms of whether or not it should be permitted and yet one might ask whether the more pertinent question is actually why should it not be permitted? It is difficult to identify fundamental principles within EU Member State tort law systems or EU law itself that would prevent indirect purchaser standing (regardless of the practical difficulties that many claimants may face when actually litigating). So it might even be suggested that the USA situation, where the Supreme Court decided to rule out passing-on for very specific reasons, put the very idea into European heads when there would be no obvious reason for disallowing passing-on/indirect purchaser standing in a European context.

The extent to which the American legal system has influenced the EU discussion on passing on/indirect purchaser standing, can probably be put down largely to the fact that the USA, having a highly developed system of private enforcement, provides a point of reference for the EU where, in relative terms, there is still a great dearth of private damages actions under EU competition law. Indeed the indirect purchaser/passing-on issue has rarely been confronted in the EU by either Member State or Union courts.[19] In confirming standing for indirect purchasers and the use of the passing-on defence, however, the EU directive seems to be very much in line with union jurisprudence at any rate which has done nothing to suggest that such rules would not be permitted.[20] For example, the statement of the Court of Justice in the case of *Manfredi* that "…any individual can claim

[19] It has been considered in a few cases though for example see Y. Utzschneider and H. Parmentier, "The new frontier of antitrust: damages actions by indirect purchasers and the passing on defence in France and California", *European Competition Law Review* 32(5), 2011, pp. 266-272, which discusses the French Cour de Cassation case of *Ajinomoto Eurolysine*, 15 June 2010, which dealt with this issue and contrasts the decision with that of the Californian Supreme Court in *Clay worth v Pfizer, Inc*., No.S166435,_Cal.4th_2010 WL 2721021 (Cal. July 12, 2010), which upheld the *Hanover Shoe* rule with regard to the passing-on defence.

[20] Indeed the amended text of the EU Directive states that "this directive reaffirms the acquis communautaire on the Union right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as it has been stated in the case-law of the Court of Justice of the European Union, and does not pre-empt any further development thereof", *Op. cit*., fn. 2, p.10.

compensation for the harm suffered where there is a causal relationship between the harm and an agreement or practice prohibited under Article 81 EC" strongly suggested that standing should be granted for indirect purchasers.[21] With regard to defensive passing-on, Jones and Surfin highlight the fact that "the Court of Justice has consistently held that Community law does not prevent national courts from ensuring that the protection of rights guaranteed by Community law does not entail the *unjust enrichment* of those who enjoyed them…".[22]

The EU Directive

The EU Directive confirms that standing for indirect purchasers and the passing-on defence should be permitted, however it also includes further provisions on the operation of the rules.[23]

The Directive principally discusses two forms of loss, actual loss (*damnum emergens*) and loss of profit (*lucrum cessans*).[24] The former concerns the difference between the price actually paid by a direct purchaser to an infringer and the price that would have been payable but for the competition law infringement. Loss of profit concerns the effect of reduced sales resulting from the artificially raised price. Under the EU Directive, the passing-on defence can be invoked by the infringer in the case of actual loss, with the burden being on the defendant to prove that the overcharge has been passed on.[25] The passing-on rule does not affect claims for loss of profit, however.[26] So hypothetically at least, a claimant could, in the same case, fail to be awarded compensation for actual loss on the basis that the full overcharge was passed on by the claimant to its own customers, but succeed with a claim for loss of profit on the basis that due to the raised – albeit 'passed-on' price – sales were less than what they would have been in the absence of the illegal overcharge.

The original draft of the directive contained a caveat that "insofar as the overcharge has been passed on to persons at the next level of the supply chain for whom it is legally impossible to claim compensation for their harm, the defendant shall not be able to invoke the defence referred to in the preceding paragraph".[27] Interestingly this has been deleted from the amended text. One presumes that this is because it could have resulted in the unjustified enrichment of a direct purchaser claimant.

[21] Joined cases C-295/04 to C-298/04, *Manfredi*, [2006] ECR I-6619, paras. 60-61, pp. I-6660-6661.
[22] A. Jones and B. Surfin, *EU Competition Law: text, cases and materials* (fourth ed.), Oxford, Oxford University Press, 2011, p. 1210. Cases cited: Case 68/79, *Just I/S* v. *Danish Ministry for Fiscal Affairs* [1980] ECR 501; Case 199/82, *Amministrazione delle Finanze dello Stato* v. *San Georgio SpA* [1983] ECR 3595.
[23] *Op. cit*., fn. 2.
[24] *Ibid.*, p. 10, paragraph 12 of Preamble.
[25] *Ibid.*, p. 55, Article 13.
[26] *Ibid*., p. 25, paragraph 35 of Preamble.
[27] *Op. cit*., fn. 3, p. 37, Article 12(2).

Meanwhile, indirect purchasers who bring a claim based on the assertion that an overcharge has been passed on to them have the burden of proving the "existence and scope of such pass-on",[28] however the EU Directive includes a number of provisions to help them on their way in this regard. Firstly, in the agreed text of Article 14(1), the European Parliament has inserted the words "taking into account the commercial practice that price increases are passed on down the supply chain…".[29] This perhaps pre-empts Article 14(2) which sets out a rebuttable presumption that passing-on has occurred where it is shown that (i) the defendant has committed a competition law infringement; (ii) the infringement in question resulted in an overcharge to the direct purchaser from the defendant; and (iii) the claimant "…purchased the goods or services that were the subject of the infringement of competition law, or purchased goods or services derived from or containing the goods or services that were the subject of the infringement".[30] The presumption of passing-on where these three things are shown shall not apply, however, where the defendant "…can demonstrate credibly to the satisfaction of the court that the overcharge was not, or not entirely, passed on to the indirect purchaser"[31]

While these rules are clearly designed to help indirect purchasers and should at least to some extent achieve that aim, if the three aspects of the *prima facie* presumption are dissected, it becomes clear that many indirect purchasers may still face significant difficulties. The first leg should be the easiest part to demonstrate at least in the case of 'follow-on' actions i.e. where the defendant has been subject to a published finding of infringement by either the Commission or the national competition authority in the relevant Member State. The claimant is likely to run into problems as regards the second leg, however, unless a court has already ruled on the existence of an overcharge to the direct purchaser. At the same time, undoubtedly one thing that will put many direct purchasers off raising an action, is the knowledge that the direct purchaser will have difficulty in rebutting the infringer's defence that the direct purchaser has passed on the overcharge to its own purchasers. Indeed there is – as the above mentioned insertion of the parliament reflects ("taking into account the commercial practice that price increases are passed on down the supply chain…")[32] something of a natural presumption that an illegal overcharge will usually be passed on, at least in part by a direct purchaser. That being the case, the fact that a direct purchaser has chosen not to bring an action in a particular case need not indicate that it will be hugely difficult to demonstrate that there has been an overcharge by the infringer to the direct purchaser. Indeed the very fact that a direct purchaser has chosen not to bring an action might sometimes be an indicator that the indirect purchaser is in a better position to bring an action. Nonetheless, proving the existence and in particular the extent of the overcharge by the infringer to

[28] *Op. cit*., fn. 2, p. 55, Article 41(1).
[29] *Ibid*., p. 55.
[30] *Ibid*., p. 56.
[31] *Ibid*., p. 56, Article 14(2).
[32] *Op. cit*., fn. 29.

the direct purchaser in the absence of an existing court decision on the matter is not likely to be an easy task for an indirect purchaser.

The third leg of the *prima facie* presumption should be easy enough for an indirect purchaser to demonstrate at some level, however, where the claimant has purchased "goods or services derived from or containing the goods or services that were the subject of the infringement", the great difficulty will be proving the extent of the overcharge pass-on. Consider the example where it has been established under a Commission decision that party A is a member of a cartel, party B has purchased from party A and that it has been established that party B paid an overcharge as a result of A's participation in the cartel. Party B used the product purchased from party A in an industrial process to manufacture something which was then sold on *inter alia* to party C. In this case, even though all three parts of the *prima facie* presumption can be satisfied by party C, there may still be significant uncertainty as to the existence and extent of any overcharge pass-on to C. Even if party C is convinced that it has suffered significant loss, it may not be confident that it can satisfy a court of this.

As well as the presumption in favour of the indirect purchaser, the EU Directive also sets out further provisions to try to ensure coherence and consistency between different actions involving the same supply chain and to avoid over or under-compensation by infringers for victims. Member States are required to ensure that national courts seized of a damages action can take account of damages actions which are related to the present action but brought by claimants from other levels of the supply chain[33], the judgments resulting from such actions[34] and "relevant information in the public domain resulting from public enforcement cases.[35] The preamble to the Directive also states that national courts "…should have the power to estimate which share of the overcharge was suffered by the direct or indirect purchasers in the dispute pending before it" and "…should have at their disposal appropriate procedural means, such as joinder of claims, to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level".[36] In this context, actions pending before courts of different Member States can be considered as 'related actions' in terms of Article 30 of Regulation No 1215/2012 of the European Parliament and of the Council,[37] which will allow courts to stay proceedings or decline jurisdiction where appropriate.[38]

Standing for indirect purchasers and passing-on in the UK

[33] *Ibid.*, p. 57, Article 15(1)(a).
[34] *Ibid*., p. 57, Article 15(1)(b).
[35] *Ibid*., p. 57, Article 15(1)(c).
[36] *Ibid*., p. 27, paragraph 39 of Preamble.
[37] Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (*OJ*, 2012, L 351/78).
[38] *Ibid*., p. 28, paragraph 39 of Preamble.

In common with most EU Member States, the specific question of whether standing for direct purchasers and the use of the passing-on defence are permissible under any of the UK jurisdictions has not been considered by a UK court, however all the indications are that both are permitted in terms of the laws of all UK jurisdictions. This is reflected in the UK government proposals on private damages actions published in January 2013 which state that:

> *"Regarding the passing on defence, in line with the majority of respondents, the Government's position remains that there is no strong case for new legislation explicitly addressing the passing-on defence. Whilst the Government accepts that there might be some small benefit in terms of certainty from legislating, it considers that, under general principles of English tort law, there is no reason why the passing-on defence should not be allowed and considers that the fine details of its application would be better addressed through judicial case law than via legislation"*[39]

It would therefore appear that that the EU Directive rules largely reflect the existing legal position in the UK insofar as indirect purchaser standing and passing-on are concerned.

In terms of existing case law, the issue of passing-on was touched upon in the case of *Devenish Nutrition Ltd and others v Sanofi-Aventis SA (France) and others*.[40] In this case, the main issues for consideration were whether the claimant could sue for restitutionary damages and/or exemplary damages, however on the passing-on defence, it was commented by Longmore LJ that:

> *"No one suggests that, to the extent the claimant has in fact suffered a loss because it has paid too high a price which it has been unable (for any reason) to pass on to its own purchasers, that loss cannot be recovered. If, however, the claimant has in fact passed the excessive price on to its purchasers and not absorbed the excess price itself, there is no very obvious reason why the profit made by the defendants (albeit undeserved and wrongful) should be transferred to the claimant without the claimant being obliged to transfer it down the line to those who have actually suffered the loss. Neither the law of restitution nor the law of damages is in the business of transferring monetary gains from one undeserving recipient to another undeserving recipient even in the former has acted illegally while the latter has not".*[41]

[39] Department for Business Innovation & Skills, *Private Actions in Competition Law: A consultation on options for reform – government response*, January 2013, p. 25.
[40] *Devenish Nutrition Ltd and others v Sanofi-Aventis SA (France) and others* [2008] EWCA Civ 1086.
[41] *Ibid*., p. 72.

Tuckey LJ echoed these sentiments:

> *"If Devenish has suffered a loss it is recoverable as damages, but if it has not I do not see how this can be a reason for saying that damages are an inadequate remedy; they are adequate for anyone who has suffered a loss. An account of profits of the kind advanced would give Devenish a windfall. I can see no justification for this. As Longmore LJ says the law is not in the business of transferring monetary gains from one undeserving recipient to another".*[42]

So from the limited pronouncements on the subject, all the indications would appear to be that both the passing-on defence and standing for indirect purchasers are fully compatible with English tort law at any rate and probably all the UK systems of tort law.

Problems of causation and quantification

One of the most interesting aspects of the above mentioned case of *Devenish Nutrition*, is that it was explained that the reason why the claimant was asking the court, as a preliminary issue, whether it was entitled to claim restitutionary damages and exemplary damages, was that the claimant feared that it would be very difficult to prove its losses in the event of a passing-off defence being employed by the defendant. If the claimant could not convince a court that it had not passed on the overcharge to which it had been subject by the cartel member from which it had purchased to its own purchasers, there would be no possibility of claiming compensatory damages for actual loss.[43]

When one considers the difficulties that direct purchasers have faced in bringing actions and the general dearth of private damages actions by direct purchasers, it is hard to imagine that indirect purchasers are likely to find the obstacles presented by causation – not to mention quantification of damages – to be any less problematic even with a presumption of passing-on in their favour.[44]

In short, while the rules in the EU Directive on passing-on and indirect purchaser standing are sensible and well-intentioned, as the above discussion of the directive shows, such rules may only improve the position of many potential claimants in theory. The biggest problem facing many indirect purchasers in practice is likely to be in terms of causation and perhaps more so in terms of

[42] *Ibid*., p. 74.
[43] *Ibid*. See Arden LJ at p. 63, Longmore LJ at pp. 69-70 and Tuckey LJ at p. 73.
[44] Although as mentioned above, the problems faced by direct purchasers will often be similar to that faced by the plaintiff in *Devenish Nutrition* – overcoming the natural presumption that a direct purchaser has passed on the overcharge at least in part to its own purchasers.

quantification: proving that the actions of an infringer have resulted in loss to the indirect purchaser and quantifying the extent of that loss.[45] The Directive Proposal acknowledges the difficulties which consumers (the interests of whom the EU Directive is first and foremost aimed at protecting) face:

> *"Depending on the conditions under which undertakings are operating, it may be commercial practice to pass on price increases down the supply chain.[…]. While such harm should be compensated for by the infringer, it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringer to prove the scope of that harm".*[46]

In this regard, effective mechanisms for collective redress are crucial if the rules on indirect purchaser standing are going to bear fruit. While possible mechanisms for collective redress were included within the White Paper, these do not figure in the EU Directive,[47] the decision having been taken to deal with this issue as part of a more general collective redress regime covering other matters than just EU competition law.[48]

Limits to the "Indirect Purchaser"

One question which might be asked is whether more should be done in terms of defining what an indirect purchaser is in the context of when the liability of an infringer of competition law ends *vis a vis* third parties.[49] [50] Depending on how private enforcement develops in Europe this may be a point which requires to be looked at; however for the time being this would not appear necessary. Firstly, it can be pointed out that in the case of tort law, whether a party has standing to sue is commonly not a matter that is carefully defined for each type of action but rather a matter that falls to be decided on a case by case basis according to the normal rules on title and interest. Secondly, given the dearth of

[45] For an analysis of methods of calculating pass-on in cartel cases see T. van Dijk and F. Verboven, "Implementing the passing-on defence in cartel damages actions", *Global Competition Litigation Review* 3(3), 2010, pp. 98-105; see also J. de Solà-Morales and J. Van der Veer, "Cartel damages and more than full "pass-on": who pays what?", *European Competition Law Review* 35(4), 2014, pp. 179-184 where the authors consider the functioning of price increase pass-on including the scenario where the direct purchaser "passes on" more than 100% of the price increase paid to the infringer.

[46] *Op. cit*., fn. 2, p. 27, Article 36 of Preamble.

[47] *Op. cit*., fn. 6.

[48] See: Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (*OJ*, 2013, L 201/60)).

[49] An "indirect purchaser" is defined in the EU Directive as "…a natural or legal person who acquired products or services that were the subject of an infringement of competition law, or products or services derived from or containing such goods or services, not directly from an infringer, but from a direct purchaser or a subsequent purchaser", *op. cit*., fn. 2, p. 41, Article 4(24).

[50] See A. Hamilton and D. Henry, "Bricks, beer and shoes: indirect purchaser standing in the European Union and the United States", *Global Competition Litigation Review* 5(3), 2012, pp. 111-117, where the authors argue that in the interests of legal certainty there should be "a definitive point where liability ends" (p.117).

private enforcement to date and the difficulties which even direct purchasers seem to face in bringing successful actions, there is no hint at present that a stream of speculative opportunistic actions by indirect purchasers many degrees removed from the competition law infringer is imminent.

Conclusion

While virtually any discussion of passing-on and standing for indirect purchasers should take note of the American system given the much more developed system of private enforcement in the USA and the extent to which it has influenced the debate within the EU, the American prohibition on both should, at least to some extent, be seen as resulting from the different aims underpinning the American system of private enforcement than the EU, where compensation of victims is by far the key priority.

In 'allowing' standing for indirect purchasers and the use of the passing-on defence, the EU Directive can in many ways be seen as simply codifying the *acquis communautaire* at a Union level. However, the lack of attempted private damages actions to date by indirect purchasers tells its own story. While the measures contained within the Directive represent a well-intentioned and coherent attempt to facilitate actions by indirect purchasers, it is likely that indirect purchasers will continue to face significant difficulties in terms of proving loss and perhaps more so quantifying such loss. This is not to suggest, however, that such actions are all doomed to failure. The proposals in the EU Directive should offer at least some encouragement to potential claimants. If the proposals are to prove successful, though, it is essential that national courts take on board the provisions of Article 15 of the EU Directive and take account of linked existing or ongoing actions and where possible facilitate joinder of claims to allow them to ensure that the losses, if any, caused by a particular competition law infringement are apportioned accurately. Additionally, developing an organised and effective system of collective redress is key. Given that the EU is attempting to deal with the issue of collective redress by way of a recently issued recommendation rather than a directive, the onus will remain upon Member States to take the initiative on providing effective collective redress systems.