Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE DISCUSSION ON PRIVATE REMEDIES: PASSING ON DEFENSE; INDIRECT PURCHASER STANDING; DEFINITION OF DAMAGES

-- European Commission --

The attached document is submitted by the delegation of the European Commission to Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III of the agenda at its forthcoming meeting on 7 February 2006.
CONTRIBUTION¹ OF THE EUROPEAN COMMISSION TO

The OECD Roundtable Discussion on Private Remedies: Passing-on defence; indirect purchaser standing; definition of damages

Working Party No. 3, February 7, 2006

I. PASSING ON DEFENCE/ INDIRECT PURCHASER STANDING

A. Introduction

If a cartel or a dominant company sells its goods at supra-competitive prices, a direct purchaser, e.g. a wholesaler, suffers as a result of having paid a price that is in excess of the competitive price. However, the direct purchaser may or may not be able to pass on all or some of the loss to the next purchaser in the chain, e.g. a retailer or a consumer. In case of pass-on, these purchasers, who are only indirectly linked with the seller, e.g. a cartelist or a dominant firm engaged in anti-competitive behaviour, in turn suffer a loss by paying a supra-competitive price which has been passed on to them. If there has been such a pass-on, can the original seller invoke a pass-on defence with regard to the final purchaser?

What becomes clear from the example is that the ‘passing-on defence’ substantially increases the complexity of damages claims as the exact distribution of damages along the supply chain could be exceedingly difficult to prove. Evidentiary problems also burden actions of ‘indirect purchasers’, as they might be unable to prove the extent of their damages and the causal link with the infringing behaviour of the original sellers.

B. Rules in EU jurisdiction

The existence and operation of rules in EU jurisdiction on the passing-on defence in EU law is complex. So far the Community Courts have not examined the issue in depth in the area of competition. Section V of the Annex to the Green Paper sums up the situation by stating “that there is no passing-on defence in Community law; rather, there is an unjust enrichment defence which requires (1) proof of passing on and (2) proof of no reduction in sales or other reduction to income.”² This issue is considered in greater detail in section V of the Annex to the Green Paper attached to this contribution.

On the subject of standing for indirect purchasers to bring civil actions for damages the Annex to the Green Paper states that “the Community courts have not taken any position on the standing of indirect purchasers in antitrust actions. It has been argued, however, that the ruling of the Court in its Courgaxe v Crehan ruling operates against any restriction on standing of indirect

¹ The issues which are the subject matter of this contribution are addressed in greater detail in sections IV and V of the Annex to the Green Paper [COM(2005) 672 final] (attached).

² Quote from paragraph 173, section V of the Annex to the Green Paper (attached).
purchasers.”  

This leads to two related questions:

- Should there be rules on the admissibility and operation of the passing-on defence? If so, which form should such rules take?
- Should the indirect purchaser have standing?

The question then arises as to what criteria should be used when assessing the impact of different options on the effectiveness and efficiency of antitrust damage claims. This means having to balance a number of criteria such as deterrence, compensation, engaging consumers and efficient administration of justice.

**C. Policy options for the treatment of the passing on defence and indirect purchaser standing**

The Green Paper identifies the following options for the treatment of the passing-on defence and indirect purchaser standing:

**1st Option**: The passing on defence is allowed and both indirect and direct purchasers can sue the infringer

Under this model, damages have to be apportioned between direct and indirect purchasers. This can involve difficulties in the assessment of passing on at the various stages in the production and distribution chain, as discussed above, though the system would adhere to the principle of damages for each party that has suffered injury. The actions would be in principle separate and independent though in practice there is no reason why parties could not seek to coordinate their actions and thereby possibly save costs and time through making use of appropriate procedural devices. In this regard, the use of group action mechanisms as well as some form of representative action at consumer level could be applied under this model.

**2nd Option**: The passing on defence is excluded and only direct purchasers can sue the infringer

This option privileges direct purchaser recovery over recovery by other classes of potential litigants. This brings advantages principally in terms of the deterrent effect of actions for damages of competition law, since it can be anticipated that the direct purchaser normally has better access to the evidence necessary to establish the infringement and also to quantify damage, including damage suffered at lower levels of the production/distribution chain. The more one moves away from the infringer(s) and direct purchasers, the more difficult it becomes to assess damages. For these reasons the direct purchaser is usually the best placed claimant and so a system which

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3 Quote from paragraph 177, section V of the Annex to the Green Paper (attached).
4 The same as option 21 in the Green Paper.
5 The same as option 22 in the Green Paper.
encourages direct purchaser claims can be anticipated to achieve a greater degree of enforcement and deterrent effect.
It is arguable in addition that if the direct purchaser is operating in a competitive market, market dynamics may, in some cases, redress the alleged unjust enrichment made by the direct purchaser by forcing him to pass on the gain made in the form of any damages award to the next levels of the production/distribution chain.
In order to allow for the possibility of recovery at the consumer level and the protection of consumer interests an exception could be created within this model to the reservation of standing to direct purchasers so as to allow for claims at the consumer level, such as claims by consumer organisations.

3rd Option: The passing on defence is excluded but both direct and indirect purchasers can sue the infringer

This model could lead to over-recovery from the infringer. On the other hand, this model promotes a strong form of deterrence against the infringer and increased incentives to sue for both direct and indirect purchasers.

4th Option: A two-step procedure

This system could be structured as follows:

- In initial proceedings the passing on defence is excluded and the infringer is sued for the total overcharge.
- In later proceedings damages are allocated as between all parties that have suffered a loss.

This system has the advantage of ensuring that the infringer has to repair all damages (deterrence aim). The subsequent allocation proceedings ensure as far as possible that the compensation aim is achieved. This option raises some further questions as to the precise modalities in which it might operate, which would require further consideration.

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6 The same as option 23 in the Green Paper.
7 The same as option 24 in the Green Paper.
II. THE DEFINITION OF DAMAGES

A. The basis of the calculation

Damages are traditionally considered to compensate a victim for the financial loss suffered because of an increase in price resulting from an antitrust infringement. It seems, however, that pure compensation of such financial loss does not always constitute a sufficient incentive for antitrust claimants to bring a case before the court. Thought should therefore be given to other methods of approaching damages. To the extent that these alternatives increase the likelihood of claimants bringing an antitrust damages claim before the court, they also contribute to the overall respect of the competition rules.

1. Compensation of financial and quantitative loss

The damage suffered by the victim is not only the financial loss suffered because of an increase in price, but also the victim’s quantitative loss in terms of volume of purchase and sales. When damages are awarded on the basis of compensating the claimant for its loss, both should be taken into account. The European Court of Justice indeed confirmed that “[t]otal exclusion of loss of profit as a head of damage for which reparation may be awarded in the case of a breach of Community law cannot be accepted. Especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible.”

The amount of the quantitative loss largely depends on the price elasticity of the claimant’s demand. In those circumstances in which it is difficult for the claimant to quantify his quantitative loss, an ex aequo et bono estimation of damages seems most appropriate.

2. Calculation based on the claimant’s loss or on the defendant’s illegal gain

It may be that, even when both financial and quantitative loss is taken into account, the individual loss of the claimant is lower than the illegal gain made by the infringer. In that scenario, it could be considered to allow the claimant to base the calculation of damages on the defendant’s illegal gain.

3. Interests

The European Court of Justice recognised that the award of interest must be regarded as an essential component of compensation. What matters in the award of interest are both the interest rate and the point in time from which interest is awarded. In order to attain a genuine form of

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8 Joined cases C-46/93 and C-48/93 Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others [1996] ECR I-1029 at paragraph 87.

compensation, both elements have to be determined at a level that ensures that at least real values, as opposed to mere nominal values, are being compensated. That implies that in principle, interest is to be awarded from the moment the damage occurred. When set at a level that goes beyond compensating real value, interest may serve as a technique to increase deterrence. Setting high interest rates and/or allowing for compound interest seems to be the most workable technique in this respect.

4. Damages beyond mere compensation

Some EU Member States pursue beyond the mere compensation, a distinct aim of deterring the wrongdoer by the grant of punitive damages. The punitive element of a damages award can be viewed in part as simply compensating for aspects of real damage that are difficult to estimate. But usually, punitive damages deliberately go beyond compensation in order to achieve more deterrence or other policy goals. Under Community law, it has been established that if domestic law allows for punitive damages for actions similar to antitrust damages actions, it must also be possible to award exemplary damages for the latter actions. This implies that when punitive damages are available in actions for breach of national competition law, punitive damages must also be available to a claimant in an action concerning a breach of Article 81 or 82 EC.

One has to consider whether it would be appropriate to allow the national court to award damages beyond the mere compensation in case of the most serious antitrust infringements in order to create a clear incentive for claimants to file a damages claim. In its Green Paper on antitrust damages actions, the Commission put forward for debate an option to award double damages in the case of horizontal cartels. The resulting incentive for the claimant to file a claim would be most apparent were the national court to automatically award more than single damages in case of the most serious antitrust infringements. One could, however, also make the award dependent on the existence or the absence of predefined conditions or, alternatively, leave it completely to the discretion of the national court.

B. Split proceedings

Independent from the basis of calculation of the damage, the risk remains that the mere fact that damages have to be quantified may serve as a disincentive for potential claimants. It may therefore be useful to consider a procedural alternative by splitting the finding of the liability from the calculation and the award of the exact quantum of damages. This type of two-step procedure may well reduce the cost of litigation. If liability is demonstrated it is not unlikely that parties will reach a settlement as regards the quantum of damages, thereby avoiding costly recourse to experts and shortening the actual court proceedings.

Annexes:

1. Section IV of the Annex to the Green Paper [COM(2005) 672 final]: Damages
2. Section V of the Annex to the Green Paper: The passing on defence and indirect purchaser standing
SECTION IV: DAMAGES

A. INTRODUCTION

112. Damages are traditionally considered to compensate a victim for the loss suffered because of an antitrust infringement. It seems, however, that pure compensation of the loss does not always constitute a sufficient incentive for antitrust claimants to bring a case before the court. As a result, thought should be given to other methods of approaching damages. Paragraphs 114 to 124 present different approaches that Member States have taken to calculate the basis of the damage in a way that makes it more attractive for claimants to file a damages claim. In doing so, the award may have as its purpose not only the compensation of the victim’s individual loss but also the recovery of benefits gained by the defendant as a consequence of the tortious act. In addition, some Member States pursue beyond the mere deterrent effect of compensation, a distinct aim of punishing or deterring the wrongdoer by the grant of punitive or exemplary damages.

113. Apart from defining the basis of the damage, difficulties often arise with regard to the calculation of damages. Paragraphs 125 to 144 focus on different methods of quantification, showing both various models for the calculation of damages and a more equity based approach. Independent from the quantification method chosen, the risk remains that the mere fact that damages have to be quantified may serve as a disincentive for potential claimants. The final paragraphs 145 and 145 therefore consider a procedural alternative by splitting the finding of the liability from the calculation and the award of the exact quantum of damages.

B. ELEMENTS RELEVANT TO THE DEFINITION OF DAMAGE

1. Compensation

114. Compensation is the grant of an equivalent in kind or in money for the harm suffered. It differs from restitution, that aims at putting the victim in the situation he was in prior to the infringement. In some Member States compensation may only be given where full restitution is impossible or excessively difficult.

2. Recovery of illegal gain

115. Alternatively, the action can be structured as an action for recovery of illegal gain made by the infringer as a result of the infringement. In this case, the claimant’s claim is not for subjective loss suffered, but for the illegal gain that the defendant has made from the infringement. Where the illegal gain made by the infringer exceeds the loss of the claimant, using the former as a basis for calculating the damage is more advantageous to the claimant than pure compensation. The German competition law contains an example of this approach by allowing the national competition authority (Bundeskartellamt) to order an undertaking that infringed the competition rules to pay an amount that corresponds to the gain made as a result of the antitrust infringement.\(^1\)

\(^1\) Section 34 GWB.
3. Exemplary or punitive damages

116. Exemplary or punitive damages are damages awarded by way of punishment of the defendant for breach of the law and in order to deter repetition of wrongful conduct. The punitive element of a damages award can be viewed in part as simply compensating for aspects of real damage that are difficult to estimate. But usually, punitive damages deliberately go beyond compensation in order to achieve more deterrence or other policy goals.

117. In Brasserie du Pêcheur, the Court of Justice held that “in the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims or actions based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims for damages founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law”. Therefore, if domestic law allows for exemplary damages for actions similar to damages actions for breach of the competition rules, it should also be possible to award exemplary damages for the latter actions.

118. In England, case law has established categories for determining which claims allow for the award of exemplary damages. One of these categories is “wrongful conduct which has been calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the claimant”. An action for breach of competition law is considered to fall into this category in extreme cases, such as where there was evidence that the defendant had calculated that his illegal profit would outweigh any damages awarded against him.

119. In Ireland, exemplary damages are available in actions for breach of national competition law. In accordance with the principle of equivalence, exemplary damages should thus also be available to a claimant in an action concerning a breach of Article 81 or 82 EC. Exemplary damages may be awarded where there has been a conscious and deliberate violation of rights or where the court is satisfied that the wrongdoer intended to make a profit over and above what would be awarded to the injured party. In Donovan v Electricity Supply Board, the court stated that, in compensating injured parties for damage suffered as a result of a breach of Irish competition law, “[it] is not concerned with the motives or the intention of the party in default unless the question of exemplary

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2 Brasserie du Pêcheur, para 90.
4 See e.g. B. Rodger, Private Enforcement and the Enterprise Act: An Exemplary System of Awarding Damages, [2003] ECLR 103
5 Section 14(5) of the Competition Act.
damages arises”. Exemplary damages are rarely awarded in Ireland and are, usually, relatively modest.7

120. Under German law, exemplary or punitive damages are deemed to be contrary to public policy.8 Nevertheless, the recent report of the Monopolkommission, Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle, lists a number of measures which it considers not to be purely compensatory in nature.9 In particular it refers to provisions that have a sanctioning character such as damages claims for copyright infringements that are monitored by the collecting society GEMA. GEMA is entitled to recover double damages under which a 100% addition to the ordinary licensing fee can be made. This has been upheld by the Federal Court of Justice (Bundesgerichtshof) in Germany, that justified the sanctioning character of the double damages claim on the basis that potential infringers would have otherwise no incentive to comply with the rules.10

121. It should be borne in mind that most Member States exclude exemplary or punitive damages as contrary to their public policy. For that very reason, those Member States may refuse to recognize and to enforce decisions providing for such damages.11 Despite this situation, one has to consider whether it would be appropriate to allow the national court to award more than single damages in case of the most serious antitrust infringements. In doing so, one would create a clear incentive for claimants to file a damages claim. Such an incentive would be most apparent were the national court to automatically award more than single damages in case of the most serious antitrust infringements. One could, however, also make the award dependent on the existence or the absence of predefined conditions or, alternatively, leave it completely to the discretion of the national court.

4. Interest on damages

122. In the Marshall II case, the Court of Justice acknowledged that

“full compensation for the loss and damage sustained (...) cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value. The award of interest, in accordance with the applicable national rules, must therefore be regarded as an essential component of compensation”.12

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6 Donovan v Electricity Supply Board [1997] 3 IR 573 at page 585.
8 See Sections 723 s.2(2) and 328 s.1(4) ZPO.
9 The report is available at: http://www.monopolkommission.de/sg_41/text_s41.pdf. See paragraph 79 and following.
11 See Article 11 of the Convention of 30 June 2005 on Choice of Court Agreements concluded within the context of the Hague Conference on Private International Law: “(1) Recognition or enforcement of a judgment may be refused if, and to the extent that, the judgment awards damages, including exemplary or punitive damages, that do not compensate a party for actual loss or harm suffered. (2) The court addressed shall take into account whether and to what extent the damages awarded by the court of origin serve to cover costs and expenses relating to the proceedings.”
123. What matters in the award of interest are both the interest rate and the point in time from which interest is awarded. In order to attain a genuine form of compensation, both elements have to be determined at a level that ensures that at least real values, as opposed to mere nominal values, are being compensated. There are a number of possible points in time from which interest can be awarded, such as the date of the infringement, the date of the injury, the date of a demand for payment, the date of the notice to stop the breach, the date of the filing of a claim or the service of a writ of summons and finally the date of judgment. Courts frequently have discretion in this matter. For example, in Crehan v Inntrepreneur Pub Company, the English High Court ruled that although the normal rule under English law is that damages are assessed at the date of loss, this is not an invariable rule of law and it may be that the justice of the case requires damages to be measured at the date of judgment, e.g. “in times of high inflation when interest would not be any form of acceptable compensation”.14

124. When set at a level that goes beyond compensating real value, interest may serve as a technique to increase deterrence. That technique was used in the Directive on combating late payment in commercial transactions. The Directive recognises the problem of late payments and the resulting heavy administrative and financial burdens which they place on businesses, particularly SMEs. It finds that late payment has been made financially attractive to debtors in most Member States by low interest rates. The Directive therefore aims at reversing this trend of late payments and ensuring that the consequences of late payments are such as to discourage late payment. The Directive does so by establishing the interest rate at a level where it becomes financially more interesting to borrow at lower interest rates than to extend ones debts by way of late payment.

C. QUANTIFICATION OF DAMAGES

1. Introduction

125. In an action for damages for breach of Community competition law, as in any damages action, the claimant will need to quantify the damages suffered. Quantification of damages in competition litigation can be particularly complex given the economic nature of the illegality and the difficulty of reconstructing what the situation of the claimant would have been absent the infringement, as usually required under tort rules.

126. Typically the measure of loss which shall be compensated in an antitrust damages case is taken to be the difference between the claimant’s actual position and the situation he would have been in “but for” the illegal conduct (the counterfactual). The former encompasses actual losses as well as profits that have not been gained, while the latter refers to the hypothetical situation in which the claimant would be had no competition law infringement occurred. The loss is thus compensated if the claimant is put into the financial situation he would have been in “but for” the infringement. A number of methods are used to establish this “but for” scenario, e.g. the prices, profits, costs, and the

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13  For an overview of what Member States use as the point in time from when interest can be claimed, see the Comparative Report, page 86.
14  Crehan v Inntrepreneur Pub Company and another (Case No: CH 1998 C801), [2003] EWHC 1510 (Ch).
market situation etc., that would have prevailed in the absence of the infringement, to allow a comparison between the hypothetical and the actual situation.

127. The most commonly claimed types of antitrust damages are likely to be overcharges (i.e. increased prices in case of cartels or excessive prices in case of a dominant position) and damages claimed for other anti-competitive conduct (i.e. predatory pricing or refusal to supply) which has led to lost net profits to a continuing business or even lost going concern value of a terminated business.

128. A damage due to overcharge can consist of two parts, the damage due to the infringement (i.e. the higher price paid due to the cartel), but also lost profits due to the fact that the purchaser might have bought fewer input goods or services, e.g. for production purposes, and thus made less profit as he only could produce and sell fewer products.

129. When awarding damages, the court may also have to take into account effects that result from the behaviour of the claimant. That is particularly the case when the claimant is under an obligation to mitigate any losses. In addition, there is a question as to whether the claimant would have had to pay taxes in relation to the revenues he lost as a result of the antitrust infringement and for which he now asks compensation. If so, a court order would normally take these taxes into account by reducing the award.

2. Methods for calculation of damages

130. A variety of damage quantification methods are available to the parties, as described in part II of the Study (the Economics Report). There is no reason why any Member State should require the use of one quantification method over another, though the claimant will often (in the common law jurisdictions in particular) need to bear in mind that his quantification will be disputed by the other side and to this extent will need to “defeat” the evidence put forward by the other side. In civil law jurisdictions investigation of quantum may to a greater degree be undertaken by the court, if necessary assisted by an expert.

131. Although in what follows, the methods for calculation of damages are presented separately, they are complementary in the sense that several methods may be considered depending on the facts of the case in order to see whether they yield similar estimates of the quantum of any damage. To a certain degree an overlap of the methods can not be avoided and does not diminish the value of one method over the other. The simple methods can be used as a cross-check for the more complex methods. The existing case law from the Member States to date appears to show that the courts prefer the simple methods. There appears to be no case law to date in which econometric evidence has been considered by the court as the basis for an award.

132. A crucial question from a policy perspective is whether the accuracy brought by the more complex methods (assuming that this is the case) is sufficient to outweigh the extra cost and time involved in bringing and assessing this evidence. It might be desirable for courts to rely on simpler techniques, underpinned by the presumption that an equity estimation is sufficient or even, in some respects, preferable.
a. The simple calculation methods\textsuperscript{17}

There are basically three simple methods to calculate the damage caused by an antitrust infringement:

\begin{itemize}
  \item the \textit{before-and-after method} involves a simple comparison of prices during the infringement with the situation before and after the infringement to provide a reasonable assumption of the real price levels in the absence of an infringement;
  \item the \textit{yardstick approach} compares the distorted market with similar markets that were not affected by the infringement. Ideally the structure as to prices, costs and other characteristics is more or less similar to allow the assumption that price differences in the distorted market are the result of the anticompetitive action;
  \item the \textit{cost based approach} is based on information produced by those responsible for the infringement about their average unit production cost, to which a reasonable profit margin is added to obtain a price which can be considered to be reasonable under competitive conditions.
\end{itemize}

b. More complex calculation methods\textsuperscript{18}

The following two calculation methods may lead to a more accurate result, but are more time-consuming and data-intensive:

\begin{itemize}
  \item the \textit{price prediction approach} uses econometric modelling to seek to predict prices in a “but for” scenario on the basis of historical determinants of prices or yardstick comparisons with other markets. This approach is a more sophisticated version of the before and after and yardstick approaches but is heavily dependent on the quality of the data available;
  \item the \textit{theoretic modelling approach} simulates an oligopolistic model to ascertain the effects of the distortion. Econometric modelling and other data are used to estimate key model parameters to feed them into a theoretical model.
\end{itemize}

c. The sampling method

Sometimes it may be disproportionately difficult or even impossible to exactly calculate the damage suffered as a result of an antitrust infringement. In those circumstances, it should be acceptable to show reasonable approximations of the damage suffered. One method to reach an approximation is the sampling method. This technique may be particularly effective in litigation involving large groups, such as certain indirect purchaser classes or consumer associations.\textsuperscript{19}

In \textit{Société anonyme des laminoirs} the European Court of Justice supported the technique to calculate damage via sampling. It held that

\begin{quote}
\textit{``...when it is necessary to consider a situation as it would have been if there had been no wrongful act or omission, the court must, whilst insisting that all available evidence be produced, accept realistic approximations, such as averages which have been established by means of comparisons. (…) In assessing their loss the applicants have...''}
\end{quote}

\textsuperscript{17} See Study on the conditions of claims for damages in case of infringement of EC competition rules, Analysis of economic models for the calculation of damages (the "Economics Report"), from page 17 onwards.

\textsuperscript{18} See the Economics Report, from page 21 onwards.

\textsuperscript{19} In US parens patriae actions, damages may be calculated in a price fixing case for the whole class represented by statistical or sampling methods. There is no need to calculate damages for each individual on whose behalf the action has been brought (Section 4D of the Clayton Act).
used the only method possible. This consists in imagining the position which would have arisen for each factory concerned as regards the purchase of ferrous scrap, if the promises relating to the transport parity had not been made. Although in using this method it is not possible to arrive at an exact assessment of the damage, nevertheless the sampling methods habitually used in economic surveys make it possible to reach acceptable approximations provided that the basic facts are sufficiently reliable. 20

d. The ex aequo et bono quantification

137. The basic rule, operating in many Member States, is that where exact quantum is difficult to prove, proof of exact damage can be waived and the court can award a reasonable amount in its place (this is often called an ex aequo et bono estimation). In a few Member States, this possibility only applies to certain categories of damage, most notably loss of future profit. 21

138. In a few Member States, this lowering of the required standard of proof of the claimant in relation to the quantification of damages does not exist. That means that if the claimant is unable to prove the exact loss, the claim fails. That is the case, e.g. in Spain, where a civil court may request the Competition Court to issue a report on the origin and quantum of damage. 22 The Competition Court is, however, not obliged to produce such a report and the findings of the report do not bind the requesting court.

139. Ex aequo et bono estimation of damages could be used in conjunction with, or to underpin from a legal perspective the use of simple calculation methods as outlined above. The principle is less compatible with complex models, that attempt to quantify damages with precision on the basis of econometric or statistical techniques.

3. Two special cases: calculating lost profits of the claimant and calculating damage on the basis of the defendant’s illegal gain

a. Calculating lost profits of the claimant

140. To calculate losses sustained in cases of anticompetitive conduct other than price increases, such as refusal to supply or predatory pricing, different methods are used. In such circumstances, damages may be assessed in terms of lost profits arising from the misconduct where the objective is to value that portion of a business that has been lost as a result of the antitrust infringement. A calculation will involve accounting, finance and economic methodologies to estimate the difference between what the claimant’s profit was and what it would have been but for the infringement.

141. The following methods could be used for calculating lost profits. 23 These methods also appear to presuppose the use of one of the methods outlined at paragraphs 133 and 134 in the calculation of the counterfactual (i.e. the hypothetical price against which lost profit is measured):

– the earnings based approach involves discounting sales, costs and cash flows from the income statement in order to provide an estimate of the “but for” scenario;

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20 Joined cases 29, 31, 36, 39 to 47, 50 and 51/63 Société anonyme des laminoirs v High Authority [1966] ECR 139.

21 See in particular the table at page 71 of the Comparative Report.


23 See paragraph 5.6 and following of the Economics Report.
– the market based valuation approach uses financial multiples to value the injured business, such as stock market value or profits of comparable businesses whose shares are publicly traded on stock exchanges;

– the assets based valuation approach uses information from the balance sheet to value a business. Measures include the book value of tangible net worth, fair market value of tangible net worth and liquidation value.

142. A number of generic issues are raised in loss of profits calculations that would apply to antitrust cases as well as in other contexts. Timing of injury means establishing the period in which the claimant’s business was affected by the infringement. This might be difficult as this period could have started later than the infringement, but the infringement may continue to have consequences even after it has been terminated.

143. Finally, it should be underlined that in case of calculating damage resulting from lost profits, the Court of Justice pointed at the broad discretion of national courts where it stated that

“the loss of earnings is the result not of a simple mathematical calculation but of an evaluation and assessment of complex economic data. The Court is thus called upon to evaluate economic activities which are of a largely hypothetical nature. Like a national court, it therefore has a broad discretion as to both the figures and the statistical data to be chosen and also, above all, as to the way in which they are to be used to calculate and evaluate the damage.”

b. Calculating damage on the basis of the defendant’s illegal gain

144. Where the claimant’s individual loss is too difficult to assess on a subjective basis, as may be the case particularly in relation to consumer claims, it may be possible to calculate the loss on the basis of the defendant’s illegal gain.25 E.g. in the case of a cartel the illegal gain is the difference between the competitive price and the cartel price, namely the overcharge. The calculation of the illegal gain does thus not take into account the lost profits from sales which the defendant no longer made as a result of the price increase. In Community law, the Directive on the protection of intellectual property rights26 provides that the unfair profits made by the infringer can be taken into account in the calculation of the claimant’s damages, next to the lost profits that the injured party has suffered.

D. SPLIT PROCEEDINGS

145. In some Member States, it is possible to get a partial judgment regarding the finding of the infringement and the finding of the damage. That judgment does not pronounce on the quantification of the damage, but the procedure continues until such time when the damages can be quantified. It is not infrequent for this latter procedure to be interrupted by a settlement between the parties as to the damages to be awarded.

146. Such split proceedings generally exists in two forms. In a first group of Member States, a single procedure is split into two phases, whereby liability is established in a first phase

25  This calculation method is accepted in Cyprus, Germany, the Netherlands, Poland, Lithuania and Spain.
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and damages are assessed in a second phase. In a second group of Member States, two “full” and separately appealable judgments are rendered: a first one finding the liability and a subsequent one setting the amount of damages.

E. POLICY OPTIONS

1. Options in relation to the basis of defining the damage

Option 14: Compensatory damages

147. A first option is to award damages to the victim on the basis of pure compensation, to make amends for loss or injury arising from an infringement of EC antitrust rules.

Option 15: Recovery of illegal gain

148. Another option would be to allow the victim to calculate its loss on the basis of the defendant’s overcharge. One could envisage two sub-options:

- a first is to allow the victim to claim the entire overcharge from the infringement. In a subsequent procedure, damages are then allocated between all parties that have suffered a loss;
- another option would be to allow the victim to claim the overcharge only arising from his commercial dealings with the defendant. For example if the overcharge was 30%, the claim would be for 30% of invoice price of the victim’s purchases.

149. The recovery of the defendant’s illegal gain only covers part of the victim’s loss, namely what the latter paid more than what he would have paid at a competitive price (damnum emergens). In order to fully compensate the victim, this part needs to be completed by a compensation of the victim’s quantitative loss in purchase (lucrum cessans, named “deadweight loss” because it is not appropriated by the defendant). The amount of the deadweight loss largely depends on the price elasticity of the claimant’s demand. It may in some circumstances therefore be difficult for the claimant to quantify the deadweight loss. In those circumstances, an ex aequo et bono estimation of damages seems most appropriate.

Option 16: Double damages for horizontal cartels

150. In order to create a clear incentive for claimants to bring antitrust damages cases, it could be envisaged to award double damages in case of the most serious antitrust infringements, i.e. horizontal cartels. Comments are invited as to whether, if it is introduced, such award is considered useful, it would be automatic, conditional or at the discretion of the national court.

Option 17: Prejudgment interest

151. To ensure that the availability of prejudgment interest is a sufficiently strong incentive to encourage claimants to bring cases, the date from which prejudgment interest runs could be set at the date of the infringement or the date of the injury. A similar incentive could

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27 This is the case in the Czech Republic, Spain, France, Ireland, Italy, Malta, Poland.

28 This is the case in Denmark, Germany, Estonia, the Netherlands, Portugal and Slovenia. In Germany, the claimant who does not have all necessary information to quantify the amount of damage, can ask the court for a declaratory judgment stating the defendant’s obligation to compensate the claimant for all damage caused by the infringement.
be created by increasing interest rates generally and/or allowing for claimants to claim compound interest.

2. **Options in relation to methods of quantification of damages**

**Option 18: The quantification methods**

152. From the description in paragraphs 125 to 144 it can be seen that there are a variety of techniques available for quantifying damages. The choice of technique, ranging from an equity approach, over simple methods to more complex and detailed methods will usually depend on the specifics of the case and the data that are available.

153. Views are sought as to the suitability of the described methods in damages quantification before civil courts. In particular, a key issue would appear to be the added value brought by the more complex models over the simpler models in terms of greater accuracy of quantification and whether, in the view of stakeholders, any such added value is justified by the additional time and cost that the more complex models might be expected to bring.

3. **Other options**

**Option 19: Commission guidelines on quantification of damages**

154. It may be appropriate to provide national courts with some form of guidance with regard to the quantification of damages. Such guidance might be particularly useful in explaining the more complex quantification techniques as set out above.

**Option 20: Split proceedings as between liability and quantum**

155. Split proceedings may be another way of facilitating actions for damages. If liability can be established separately before assessing damages, this may well reduce the cost of litigation. If liability is demonstrated it is not unlikely that parties will reach a settlement as regards the quantum of damages, thereby avoiding costly recourse to experts and shortening the actual court proceedings.
SECTION V: THE PASSING ON DEFENCE AND INDIRECT PURCHASER STANDING

A. INTRODUCTION

156. If a cartel or a dominant company sells its goods at supra-competitive prices, a direct purchaser, e.g. a wholesaler, suffers as a result of having paid a price that is in excess of the competitive price. However, the direct purchaser may be able to pass on all or some of the loss to the next purchaser in the chain, e.g. a retailer or a consumer. These purchasers, who are only indirectly linked with the seller, e.g. a cartelist or a dominant firm engaged in anti-competitive behaviour, in turn suffer a loss by paying a supra-competitive price which has been passed on to them.

157. This leads to two related questions:

- Firstly, if the direct purchaser brings a damages claim, should the court take account of the passing on of some or all of the loss to other purchasers down the line?
- Secondly, should indirect purchasers be entitled to bring actions to compensate them in respect of their loss?

158. These questions are at the heart of the way in which a system for damages for breach of antitrust law, particularly in relation to overcharge claims, functions.

B. THE PASSING ON DEFENCE

159. Price fixing (or other anti-competitive behaviour leading to an increase in price) in one market not only harms the purchasers in the subsequent downstream market. Harm can be inflicted upon purchasers and non-purchasers at all levels of the supply chain. The Study addresses the model where passing on and indirect purchaser standing are allowed. The example given is that of a cartel between manufacturers of a foodstuff which is refined by processors, then included by food manufacturers in various products sold to grocery retailers. It is stated that “the analysis becomes considerably more difficult as pass through must be assessed at each stage of the supply chain.” It is furthermore argued that if a passing on defence is allowed, this may also create conflicts between the claimants at the various levels of the supply chain.38

160. The Study gives an overview of the determinants of passing on.39 In simple terms, the key determinants of passing on are the nature of competition in the claimant’s output market, and whether the overcharge affects the position of the claimant relative to its competitors. According to the Study, in general, the more competitive the downstream market (i.e. the market in which the claimant is operating), the greater the likelihood of passing on.

161. The Study addresses the crucial issue of measuring the impact of passing on.40 Techniques include a “theoretical approach” which would start from a theoretical model

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38 See paragraph 4.3 of Part I of the Economics Report.
40 Paragraphs 4.15 to 4.21 of Part I of the "Economics Report".
of the claimant’s market and the structural determinants of pass-on, to an approach which directly estimates the extent of pass-on using a statistical study of the historical relationship between the claimant’s prices and the determinants of these prices. Both of these approaches are described in the Study. However, given their highly complex and technical nature they are not reproduced here. While a certain level of complexity is necessary in determining the total overcharge of the cartel, replicating this complexity at every stage of the supply chain would magnify the complexity and cost of actions for damages. It does not appear possible to construct a model which accurately identifies, at reasonable cost, the harm suffered by players at different levels of the supply chain.

162. This great technical complexity associated with calculating the passing on of the overcharge along the supply chain has been a determining consideration in US law. In its Illinois Brick ruling, the US Supreme Court motivated as follows its decision not to permit the passing-on defence in federal US antitrust law:

“Permitting the use of pass-on theories ... essentially would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge – from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.”

163. In conclusion, having to calculate the total overcharge is already sufficiently complex and any attempt to go beyond this and apportion overcharge along the supply chain would greatly increase the complexity and cost of antitrust enforcement.

164. There is no detailed analysis of the passing-on defence in competition law in the case law of the Community courts. However, the ECJ has held as follows at paragraph 30 of the judgment in Courage:

“The Court has held that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them (see, in particular, Case 238/78 Ireks-Arkady v Council and Commission [1979] ECR 2955, paragraph 14, Case 68/79 Just [1980] ECR 501, paragraph 26, and Joined Cases C-441/98 and C-442/98 Michailidis [2000] ECR I-7145, paragraph 31).”

165. The passage from *Courage* set out above draws on previous case law of the ECJ. The possibility of the passing on defence has been acknowledged by the Court in actions for the non-contractual liability of the Community (Article 288(2) EC)\(^42\) and actions for the recovery of illegally levied duties brought by undertakings against Member States.\(^43\)

166. The existence and operation of the passing on defence in Community law is complex. Indeed, the Court itself has placed such conditions on the operation of the passing on defence that it could be argued that when it exists such a defence is in practice redundant.

167. Firstly, the majority of the Community case law is not in the field of competition. So far the Community courts have not examined the issue in depth in competition litigation. In particular, apportionment of damage as a result of the use of the passing on defence could be more complex in antitrust cases than in tax or subsidy refund cases because of the wider effects of the cartel globally.

168. Secondly, the existing case law of the Community courts is limited to stating that Community law does not preclude a rule of national law which seeks to prevent unjust enrichment. It does not establish the existence of the passing on defence as a matter of Community law. As AG Slynn stated in his Opinion in *Bianco*:

> “The Court [in *Just*] did not, however, hold that the fact that charges had been passed on must as a matter of Community law, e.g. pursuant to a general principle forbidding unjust enrichment, mean that the charges wrongly demanded and paid could never be recovered.”\(^44\)

169. The primary basis for the existence of the passing on defence in the reasoning of the Community courts is the prevention of the unjust enrichment of the claimant. This is the motivation referred to at paragraph 30 of *Courage*. However, passing on does not necessarily result in the unjust enrichment of the claimant because it can equally result in a reduced volume of sales as the trader has to raise prices.\(^45\)

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\(^42\) Case 238/78 Ireks-Arkady v Council and Commission [1979] ECR 2955, referred to in paragraph 30 of *Courage*.

\(^43\) See *Just*, joined cases C-441/98 and C-441/98 Kapniki Michailidis v IKA [2000] ECR I-7145, referred to in paragraph 30 of *Courage*; see also San Giorgio, joined cases 331/85, 376/85 and 378/85 Les Fils de Jules Bianco and J Girard Fils v Directeur général des douanes et droits indirects [1988] ECR 1099 and Comateh, see also the Opinion of AG van Gerven in *Banks*, para 48: “Community law does not prevent the national court from ensuring, in accordance with national law, that the protection of rights guaranteed by the Community legal order does not result in the unjust enrichment of those entitled” and para 51: “In quantifying the damage it is necessary, in any event, in accordance with the (...) prohibition on unjust enrichment (...), to take account of the extent to which the damage has been passed on in the selling prices of the complainant undertaking.”

\(^44\) *Bianco*, as note 43 above.

\(^45\) The consideration as to a reduction in sales in cases where an overcharge is passed on also is suggested by the reasoning of the US Supreme Court in Hanover Shoe v United Shoe Machinery, 392 US 481 (1968).
170. Indeed, in the later case law of the Court of Justice passing on and actual unjust enrichment are expressed by the ECJ as cumulative conditions to be fulfilled for the reduction of the charge on the basis of passing on. As the Court held in Comateb at paragraph 27

“Accordingly, a Member State may resist repayment to the trader of a charge levied in breach of Community law only where it is established that the charge has been borne in its entirety by someone other than the trader and that reimbursement of the latter would constitute unjust enrichment.”

171. More recently, the Court has held at paragraph 102 of its judgment in Weber

“It must therefore be concluded on this point that the rules of Community law on the recovery of sums levied but not due are to be interpreted as meaning that they preclude national rules which refuse – a point which falls to be determined by the national court – repayment of a charge incompatible with Community law on the sole ground that the charge was passed on to third parties, without requiring that the degree of unjust enrichment that repayment of the charge would entail for the trader be established.”

172. The disconnection between passing on and the unjust enrichment of the claimant has evolved in the case law of the Court to the point where a presumption that passing on leads to unjust enrichment is so unfounded as to offend against the Community law principle of effectiveness (where the context is judicial protection of a Community law right, namely restitution of a charge levied in contravention of Community law).

173. It can be said that there is no passing on defence in Community law; rather, there is an unjust enrichment defence which requires (1) proof of passing on (which can be difficult in itself – see below) and (2) proof of no reduction in sales or other reduction to income.

174. Furthermore, if the passing on defence were to be recognized, it would be extremely difficult to apportion damage as between the different claimants at the different levels of the production/distribution chain. The door to apportionment is opened by the Court’s recognition of partial passing on in Comateb and Michailidis. This is correct as a matter of principle if one wishes to seek to try to estimate as precisely as possible the extent of any unjust enrichment. However, it does not open the same complexities when applied in the field of recovery of charges as the possibility of consumer actions in the latter does not appear to be of any relevance (though it could be a theoretical possibility). This cannot be said of antitrust actions.

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47 Weber, as note 46 above (emphasis added).
48 See para 117 of Weber, as note 46 above.
49 Comateb, paras 27 and 28 and Michailidis, as note 43 above, para 33. See also para 51 of the Opinion of Advocate General van Gerven in Banks.
50 See para 7 of the Opinion of AG Mancini in San Giorgio, “[i]t is absurd to think of a mass of consumers who, in a system in which the class action is unknown, would bring an action against the State in order to recover minimal amounts”.
Finally, in *San Giorgio*\(^{51}\) the ECJ held that a provision of national law which placed the burden of proof on the party claiming repayment to show that it had not passed on the charges to the final consumer was incompatible with Community law on the grounds that it made it virtually impossible or excessively difficult to secure repayment of the charge wrongly levied and paid. Under Community law the burden of proving passing on, where the issue arises under national law, is on the defendant. Passing on operates, where it does operate, as a *defence*.\(^{52}\) It is a question of fact for the *defendant* to establish. The defendant’s burden of showing passing on in the individual case will often be very difficult in practice to discharge.

**C. INDIRECT PURCHASER STANDING**

As mentioned above, the question of standing of indirect purchasers and the question how, if these purchasers have standing, their claim can be calculated in situations where passing on has taken place, is intimately linked with the question of the availability of the passing-on defence as such and, where it exists, its operation.

The Community courts have not taken any position on the standing of indirect purchasers in antitrust actions. It has been argued that the ruling of the Court in *Courage* operates against any restriction on standing of indirect purchasers. Firstly, the Court reaffirmed at paragraphs 23 and 24 of its judgment in the *Courage* case that Articles 81 and 82:

> “produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard (...). It follows from the foregoing considerations that any individual can rely on a breach of Article [81](1) before a national court” (emphasis added).

This is a reaffirmation of principles laid down in the Court’s earlier jurisprudence.\(^{53}\)

It is submitted that, looked at in isolation and applying the general principles set out in the foregoing case law, both direct and indirect purchasers have the right to bring a claim subject to proving infringement, injury suffered and causation. To depart from such a principle would deny those most likely to have suffered antitrust injury a remedy. It is equally clear that allowing all parties downstream of a competition infringement to claim damages creates additional complexities (how to calculate the level of passing on), disincentives (successful claimants will get less), and higher transaction costs (increase in number and complexity of cases following from the same infringement).

In designing any system for claiming antitrust damages the main objective must be the efficient and effective enforcement of the antitrust rules. Such a system would ideally be able to accommodate both the deterrence and the compensation aims to some degree. Therefore, providing an efficient system can be found to compensate indirect purchasers, and in particular final purchasers, then there is no reason why they should not also

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51 San Giorgio

52 It should also be noted that according to Section 33 (3)(2) GWB as amended by the 7th Amendment, the passing-on defence is not excluded as a matter of German civil law, but that it operates as a defence and that the facts underlying that defence have therefore to be proven by the defendant.

benefit from actions for damages. Given the above-mentioned complexities, it is, however, likely that a trade-off between justice (in the sense of full recovery for all those who have suffered a loss from an illegal practice) and efficiency is inevitable.

180. It is suggested that the determining factor could be the effective enforcement of Community law. If limiting the rights of certain individuals to claim is necessary to ensure a system which is more effective in safeguarding the enforcement of Articles 81 and 82, then it is submitted that such limitations should be acceptable under Community law. Therefore, it might be necessary to determine what rights must be facilitated to ensure an effective enforcement system rather than insisting on the absolute protection of all private rights. For the protection of the rights of consumers, a specific small claims procedure or collective action might be an efficient form of redress given the very low level of individual damage suffered in many of the cases (see further below in Section VI).

D. Policy Options for the Treatment of the Passing on Defence and Indirect Purchaser Standing

Option 21: The passing on defence is allowed and both indirect and direct purchasers can sue the infringer

181. Under this model, damages have to be apportioned between direct and indirect purchasers. This can involve difficulties in the assessment of passing on at the various stages in the production and distribution chain, as discussed above, though the system would adhere to the principle of compensatory damages for each party that has suffered injury. The actions would be in principle separate and independent though in practice there is no reason why parties could not seek to coordinate their actions and thereby possibly save costs and time through making use of appropriate procedural devices. In this regard, the use of joinder or group action mechanisms, as well as some form of collective or representative action at consumer level (see further below in Section VI), could be applied under this model.

Option 22: The passing on defence is excluded and only direct purchasers can sue the infringer

182. This option privileges direct purchaser recovery over recovery by other classes of potential litigant. This brings advantages principally in terms of the deterrent effect of actions for damages of competition law, since it can be anticipated that the direct purchaser normally has better access to the evidence necessary to establish the infringement and also to quantify damage, including damage suffered at lower levels of the production/distribution chain. The more one moves away from the infringer(s) and direct purchasers, the more difficult it becomes to assess effects. For these reasons the direct purchaser is usually the best placed claimant and so a system which encourages direct purchaser claims can be anticipated to achieve a greater degree of enforcement and deterrent effect.
183. It is arguable in addition that if the direct purchaser is operating in a competitive market, market dynamics may, in some cases, redress the alleged unjust enrichment made by the direct purchaser by forcing him to pass on the gain made in the form of any damages award to the next levels of the production/distribution chain.

184. In order to allow for the possibility of recovery at the consumer level and the protection of consumer interests, an exception would need to be created within this model to the reservation of standing to direct purchasers so as to allow for claims at the consumer level (see further section VI below).

Option 23: The passing on defence is excluded and both direct and indirect purchasers can sue the infringer

185. This model could lead to over-recovery from the infringer. On the other hand, this model promotes a strong form of deterrence against the infringer and increased incentives to sue for both direct and indirect purchasers.

Option 24: A two-step procedure\(^5\)

186. This system could be structured as follows:

(A) In initial proceedings the passing on defence is excluded and the infringer is sued for the total overcharge.

(B) In later proceedings damages are allocated as between all parties that have suffered a loss.

187. This system has the advantage of ensuring that the infringer pays (deterrence aim). The subsequent allocation proceedings ensure as far as possible that the compensation aim is achieved. This option raises some further questions as to the precise modalities in which it might operate, which would require further consideration.

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