



Quantification, passing-on defence and interest

Practical challenges and case law following the EU Directive on Antitrust Damage Actions

by **Till Schreiber and Martin Seegers**

The number of actions for damages resulting from the infringement of EU and/or national competition law has increased over the past five years. This trend is expected to continue, particularly now that all member states have implemented Directive 2014/104 on antitrust damages actions (the “Directive”)[1] into national law.[2]

The Directive codifies the CJEU’s case law that anyone who has suffered harm caused by an infringement of competition law has a right to full compensation[3] and can claim compensation for actual loss, loss of profit and adequate interest.[4] However, the substantiation of these heads of damages in court proceedings remains challenging for any (potential) plaintiff. The substantiation of the harm caused by infringements of Article 101 and Article 102 TFEU involves both economic and legal aspects, which current case law is increasingly clarifying. This article explores these practical challenges and how courts across the EU have recently dealt with them.

Practical challenges to full compensation

One main obstacle for successful damage actions is the substantiation and proof of the individual damaging effects of market-wide competition law infringements, most notably cartels. In fact, the assessment of the value of a damage claim may already be decisive for the (pre-trial) decision whether to pursue a claim at all. Such economic analysis and quantification, including causality aspects, typically require sufficient detailed data and information covering the affected market before, during, and after the infringement period. The infringers may be jointly and severally liable as well for loss resulting from the fact that market participants that are not participating in the illegal practices set their prices higher than would otherwise have

been the case under competitive conditions (“umbrella pricing”).[5]

Rebuttable presumption of harm

The Directive stipulates a presumption that cartels cause harm.[6] Cartelists may rebut the presumption by introducing evidence that their infringement had no effect on the market or on the claimant. The presumption is based on the economic insight that more than 90% of cartels artificially and unlawfully lead to price increases.[7] In most jurisdictions the presumption is a procedural element so that it applies to cartels that took place prior to the entry into force (Article 22 of the Directive). In any event, courts have applied the presumption prior to its entry into force and consequently also in recent judgments relating to pre-Directive infringements.

In Germany, for example, the Federal Court of Justice (Bundesgerichtshof) in its *Grauzement II* (Grey Cement II) judgment[8] recently confirmed the long-standing practice of lower courts which recognised in relation to pre-Directive infringements a prima facie assumption that cartels result in higher prices. The highest German civil court held:

“It is a principle of economic experience that the creation of a cartel serves to increase the profits of the undertakings participating in the cartel. Therefore, there is a high probability that the cartel will be formed and maintained because it generates higher prices than can be obtained on the competitive market.”

Moreover, several German courts have recognised the further prima facie assumption that any given transaction of the cartelised product during the cartel period and within the cartel’s geographic scope was affected by the cartel.[9]

In the Netherlands, the Rotterdam District Court recently decided in line with the Supreme Court (Hoge Raad) judgment in *TenneT vs ABB* that even if the Directive is not directly applicable, the national procedural rules on evidence have to be interpreted in light of the Directive.[10] The court therefore held that the presumption of harm can already be relied on in actions relating to cartels that took place prior to the entry into force of the Directive.

The English courts have taken a slightly different approach and held that the presumption of harm in the Directive is not applicable prior to the entry into force of the Directive. However, English judges have recognised in relation to infringements pre-Directive that the aim of competition law infringements is typically the artificial increase of prices and margins.[11]

Quantification methods and evidence requirements

Even if courts base their judgment on a presumption of harm, claimants should start an action only if they have undergone a robust damage analysis. However, significant practical impediments exist in quantifying relevant damages. Claimants are usually disadvantaged vis à vis the infringers in terms of access to relevant information and data. The existing information asymmetry arises mainly due to (i) the clandestine nature of the competition law infringement, (ii) the limited and inadequate information contained in non-confidential fining decisions of competition authorities, particularly settlement decisions, and (iii) the infringement having market-wide effects, but the claimants not having access to aggregated market wide data. The Directive consequently provides that the national courts shall be empowered to estimate the amount of harm by the infringement, and that neither the burden nor the standard of proof required for the quantification of damages shall render the exercise of the right to full compensation practically impossible or excessively difficult. [12] Disclosure and the right of access to information may further alleviate the information asymmetry.

The complexity of calculating damages also depends on the chosen method of quantification. The Commission has published a “Practical Guide on the Quantification of harm in actions for damages based on breaches of Art. 101 and 102 TFEU”. [13] The Guidance confirms that there is no standard or generally superior quantification method and the choice of which method to use is dependent on the individual case characteristics (eg type of infringement, affected product(s) or service(s), geographic market(s), availability and quality of data and information, legal considerations). Gathering the required information and data can be complicated and time consuming. In practice, individual claimants often lack the ability to compile such a market wide database, notably in Europe-wide cases. Also, due to diverging document and data retention obligations, companies may not be in the possession anymore of purchase and transaction data in the earlier years of the infringement.

Courts across the EU have recognised the inherent difficulties in the quantification and have taken pragmatic approaches when estimating damages caused by competition law infringements. The Court of Appeal of England and Wales in its *Sainsbury’s and ASDA Stores v Mastercard* judgment confirmed that due to the hypothetical nature of the “but for price” the “broad axe” principle applies to antitrust damage claims as in these cases a precise calculation is not possible: “*The broad axe principle is applicable where the claimant has suffered loss as a result of the defendant’s culpable conduct but there is a lack of evidence as to the amount of such loss.*”[14] The High Court previously held in *Asda v Mastercard*: “*The fact that it is not possible for a claimant to prove the exact sum of its loss is not a bar to recovery. Where, as in this case, the assessment of damages inevitably involves an element of estimation and assumption, restoration by way of compensatory damages is often accomplished by ‘sound imagination’ and a ‘broad axe’ (...). The court will not allow an unreasonable insistence on precision to defeat the justice of compensating a claimant for infringement of its rights.*”[15]

The English courts referred to the following passages from the 2013 Commission Practical Guide on Quantifying Harm to justify their approach:

“16. *It is impossible to know with certainty how a market would have exactly evolved in the absence of the infringement of Article 101 or 102 TFEU. Prices, sales volumes, and profit margins depend on a range of factors and complex, often strategic, interactions between market participants that are not easily estimated. Estimation of the hypothetical non-infringement scenario will thus by definition rely on a number of assumptions. In practice, the unavailability of data will often add to this intrinsic limitation.*

17. *For these reasons, quantification of harm in competition cases is, by its very nature, subject to considerable limits as to the degree of certainty and precision that can be expected. There cannot be a single “true” value of the harm suffered that could be determined, but only best estimates relying on assumptions and approximations (...)*

The requirements of courts in whether they accept evidence in electronic form differs between member states. In some jurisdictions it might be possible that claimants are forced to submit even hundreds of thousands of invoices in hard copy to substantiate its claim. This represents an unnecessary obstacle to private enforcement and should be rectified by simply allowing data and evidence in electronic format.

Passing-on defence and standing of indirect purchasers

The Directive clarifies consequences of the situation in which direct customers of an infringer offset increased

prices they had to pay by raising the prices they charge downstream to their own (“indirect”) customers.[16] On the one hand, the infringer might only be liable towards the direct customers for a reduced amount of damages, as far as the latter successfully passed damages to customers further down the supply chain (“passing-on defence”). On the other hand, the Directive recognises the standing of these indirect customers to bring damage actions. While the burden of proof regarding the passing-on defence shall rest on the infringers, indirect customers shall enjoy a rebuttable presumption of pass-on.

While the standing of both direct and indirect purchasers was acknowledged following the CJEU’s holding that “any” individual suffering harm from a competition law infringement can claim damages,[17] the member states’ laws did not, prior to the Directive, stipulate a presumption of pass-on for the benefit of indirect customers. Thus, it is no surprise that, until now, damages actions by indirect purchasers have been rare and practically limited to cases in which there is a level of transparency with respect to pricing in relation to direct customers (eg “cost plus” pricing). But it is unclear how and to what extent defendants in the future will rebut the new presumption of pass-on. They will have to demonstrate that the overcharge was not, or not entirely, passed on to the indirect purchaser plaintiff.

In contrast, the pre-Directive case law of most of the member states recognised that in actions of direct purchasers the defendant bears the burden of proof when relying on the passing-on defence. In this respect the Damages Directive leaves the exact conditions for the passing-on defence to the member states’ legal orders and their procedural autonomy.[18]

Recent case law from the highest courts in several member states, for example Germany, the Netherlands and the UK, indicates a common understanding of the passing-on defence and its conditions. Firstly, the defendant, in addition to the pass-on itself, has to show an adequate causal link between the infringement and the increase in prices charged to the indirect customers. Similarly to the German Federal Court of Justice in its *ORWI* judgment of 28 June 2011, allowing the passing-on defence under the principles of the setting-off of benefits (“*Vorteilsausgleich*”),[19] the Supreme Court of the Netherlands in its judgment of 8 July 2016 in the case *TenneT v ABB*,[20] held that under the passing-on defence, the only benefits that can be taken into account, are those that were adequately caused by the cartel. Equally, the UK Competition Appeal Tribunal (CAT) in its judgment of 14 July 2016 in *Sainsbury’s v Mastercard*, required a sufficient causal link between the price increase towards indirect customers and the infringement. The CAT notably made a distinction between the economic and the legal concept involved in the passing-on issue:

“First, whereas an economist might well define pass-on more widely (i.e. to include cost savings and

reduced expenditure), the pass-on defence is only concerned with identifiable increases in prices by a firm to its customers. Secondly, the increase in price must be causally connected with the overcharge, and demonstrably so.”[21]

Secondly, the application of the passing-on defence shall not lead to an undue relief of the infringer, namely an absence of liability. According to the *ORWI* case law of the German Federal Court of Justice, benefits received from indirect purchasers can only be taken into account provided that this offsetting is in line with the purpose of the right to compensation and the infringers’ liability for the antitrust infringement, ie that they “do not unduly relieve the infringers”[22] from liability. Again, we see that the (broader) economic concept of pass-on under the passing-on defence is balanced by normative elements. Further, the German courts have recently applied such reasonableness test and excluded the passing-on defence correspondingly. They point out that, if there has been a pass-on, the multitude of end customers to whom the damages might ultimately have been passed-on to, did suffer from small and dispersed (“atomised”) damages. As a consequence, it was practically impossible to prove the exact level of pass-on across the different levels of the supply chain. Even if that proof was possible, none of the end customers would bring an action. Under such circumstances, regardless of the acceptance of the passing-on defence, its application would lead to an “undue relief” of the infringers.

A good example is the recent judgment by the Regional Court of Dortmund in a damage action against the trucks cartel.[23] The court specifically assessed both jurisprudence and literature from Germany, the Netherlands, the UK and Austria, as well as the Damages Directive and concluded:

“The passing-on defence is moreover also excluded due to the normative considerations generally to be taken into account in the context of the ‘balancing of benefits’ (cf *BGH KZR 75/10 number 58 – ORWI*; *BGH X ZR 126/13*, MDR 2015, 13, number 14; *BGH VII ZR 81/06 [...]*; the application of such normative considerations is also recognised in other European countries, for example for the Netherlands *Hoge Raad*, judgment of 8 July 2016, *ECLI:NL:HR:2016:1483*, number 4.4.3 –*TenneT/ABB* and for the United Kingdom *CAT*, judgment of 14 July 2016, *CAT 11*, file number 1241/5/7/15 number 484(5) – *Sainsbury’s/ Mastercard*).

Such minor damage will arrive normally at the latest at the end consumer level even within the framework of a supply chain in one and the same market – provided there was at all a passing on of an overcharge – but depending on the length of the supply chain, also at previous market levels, that are so small they are not claimed and the cartel member

thus for practical purposes would be released from his obligation to provide damage compensation [...].

The threat of a conflict of objectives between the virtual complete release from liability of the damaging party on the one hand and the prohibition on enrichment of the damaged party under compensation law is to be resolved in favour of the damaged party.”

In 2016 the Supreme Court of the Netherlands in *TenneT v ABB* clarified the legal test to be used to assess the passing-on defence and states that it can only succeed where the setting-off of benefits in the case at hand is “appropriate” or “reasonable” (“redelijk”).[24] The first instance court had held that allowing the passing-on defence would unjustly enrich the infringer, because it would reduce damages of the direct purchaser claimant without indirect purchasers downstream of TenneT being in a position to bring damages actions due to evidentiary problems, other procedural complications and due to their relatively small and dispersed losses.[25]

The CAT in *Sainsbury’s v Mastercard* explicitly took a normative approach to the pass-on defence:

*“(…) There is danger in presuming pass-on of costs to indirect purchasers (pace Article 14 of the Damages Directive), because of the risk that any potential claim becomes either so fragmented or else so impossible to prove that the end-result is that the defendant retains the overcharge in default of a successful claimant or group of claimants. This risk of under-compensation, we consider, to be as great as the risk of over-compensation, and it informs the legal (as opposed to the economic) approach. It would also run counter to the EU principle of effectiveness in cases with an EU law element, as it would render recovery of compensation “impossible or excessively difficult” (Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297, [2002] 1 QB 507 at [29]).*

Given these factors, we consider that the pass-on ‘defence’ ought only to succeed where, on the balance of probabilities, the defendant has shown that there exists another class of claimant, downstream of the claimant(s) in the action, to whom the overcharge has been passed on. Unless the defendant (and we stress that the burden is on the defendant) demonstrates the existence of such a class, we consider that a claimant’s recovery of the overcharge incurred by it should not be reduced or defeated on this ground.”[26]

Thirdly, according to the case law of some member states, an infringer must, in order to plea the passing-on defence successfully, not only demonstrate and prove the pass-on itself and the conditions mentioned above, but also that the direct purchaser did not suffer any disadvantage from the passing-on, especially no

decrease in demand, which fully or partly sets off any benefit from the price increase.[27] Such volume effect leads to a loss of profit to the disadvantage of the direct purchaser. Article 12(3) of the Damages Directive therefore specifically confirms that its provisions “shall be without prejudice” to the right of the injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on. The relation of the passing-on of overcharges and countervailing volume effects is confirmed by the Commission’s “Study on the Passing-on of Overcharges” published in 2016.[28] In any event, claimants should be prepared to show and quantify potential volume effects to offset a passing-on defence when potentially raised by defendants.

From an economic perspective, the estimation of passing-on is further challenging. Estimating the extent of passing-on can require an in-depth analysis of the market the direct customer operates in. Whether and to what extent an overcharge has been passed-on without having been offset by volume effects may require the analysis of aspects such as whether the infringement affected all or only a subset of firms active in the downstream market; the nature of competition in that market; the availability of substitutes; the elasticity of supply and demand; the nature of the vertical relationships in the chain of supply such as relative bargaining power and the type of negotiations; and the existence of economies or diseconomies of scale. This is even more challenging than the quantification of the damage at the direct purchaser level, particularly if multiple downstream markets are relevant.

Interest

Interest plays a key role in an action for damages arising from infringements of competition law. According to the Directive and in line with the case law of the CJEU, interest shall be due from the time when the harm occurred until the time when compensation is paid.[29] The payment of interest is regarded as integral part of the right to full compensation.

The calculation of interest is governed by national law but must conform to the EU principles of equivalence and effectiveness. Interest is therefore treated differently across the various European jurisdictions. A claimant should be familiar with the disparities between countries over time and the relating impact on its claim for damages.

A recent study by the European University Institute[30] offers a useful and practical overview of interest regimes in certain European jurisdictions and how those rules should be applied in calculating interest on damages pertaining to infringements of competition law. The different national regimes can have a very significant impact on the overall amount to be compensated, in particular if the competition law infringement is of a long duration.

In *Sainsbury's v Mastercard* the CAT held that the claimant, in line with English case law, had a right to obtain compound interest on the effective damage (ie after taking account of pass-on) for the following reasons:

- “(i) *Having lower cash balances in the bank. Therefore, if the overcharge had not been made, these cash balances would have been higher, and Sainsbury's would have received interest on these sums, which as a result of the overcharge it has lost.*
- (ii) *Requiring less borrowing. Again, it follows that if the overcharge had not been made, Sainsbury's borrowing needs would have been less, and it would not have incurred the costs of borrowing.*”[31]

In Germany the Federal Court of Justice in its *Grauzement II* judgment,[32] confirmed that based on general tort law principles parties damaged by an infringement of Article 101 TEFU or the national equivalent have a right to obtain interest as of the date the harm occurred, even if this date pre-empted the introduction of the specific provision in the competition act which entered into force on 1 July 2005. In line with the general tort law provisions, the interest rate is 4% per annum, non-compounded. This is an important clarification as it considerably extends the period for which interest is due, particularly in long-lasting infringements.

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Endnotes

1. Directive 2014/104 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 Unions.
2. See on the implementation: http://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html.
3. Article 1(1) of the Directive states: “*This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association.*”
4. Article 3(2) and Recital 12, as well as the CJEU in Case C-295/04 *Manfredi*.
5. CJEU in Case C-557/12 *Kone*; Article 11(6) Directive.
6. Article 17(2) Directive.
7. Oxera study, p 91.
8. Judgment of 12 June 2018, KZR 56/16.
9. See only as a recent example, with further references Regional Court of Dortmund, judgment of 27 June 2018, ref. 8 O 13/17 [Kart] – *Trucks cartel*.
10. Rotterdam District Court, judgment of 26 September 2018, ref. C/10/468552 / HA ZA 15-90 C/10/498808 / HA ZA 16-343 – Bitumen cartel, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2018:8001>.
11. See High Court of England and Wales, judgment of 9 October 2018, [2018] EWHC 2616 (ch) – *BritNed v ABB* (available at: <https://www.judiciary.uk/wp-content/uploads/2018/10/britned-v-abb-judgement.pdf>) – Power cables cartel, where Justice Smith held: “I accept that in a rational organisation, and rational people, are not going to engage in illegal cartel behaviour unless they are satisfied that it benefits them.”
12. Article 17(1).
13. Commission, 11 June 2013, SWD(2013) 205, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf.
14. [2018] EWCA 1536 (Civ), judgment of 4 July 2018, para 331, available at: <https://www.judiciary.uk/wp-content/uploads/2018/07/mastercard-appeals-judgment.pdf>.
15. [2017] EWHC 93 (Comm), judgment of 30 January 2017, para 306 – *ASDA Stores v Mastercard* (available at: <https://www.matrixlaw.co.uk/wp-content/uploads/2017/01/30.01.17.pdf>).
16. Articles 12 etc.
17. Eg CJEU in Case C-453/99 *Courage/Crehan*, para. 26.
18. See on the member states’ procedural autonomy when implementing Directives, Article 288 TFEU and Recital 11 of the Damages Directive; Case C-530/11 *Commission v UK* EU:C:2014:67, para 46; Case C-601/15 *J. N. v Staatssecretaris van Veiligheid en Justitie* EU:C:2016:84, para 60; Case C-260/11 *Edwards und Pallikaropoulos* EU:C:2013:221, para 37; Case C-421/12 *Commission v Belgium*, EU:C:2014:2064, para 46.
19. Bundesgerichtshof, KZR 75/10, BGHZ 190, 145 – *ORWI*, allowing the passing-on defence under the principles and conditions of the setting-off of benefits (“*Vorteilsausgleich*”).
20. Hoge Raad, ECLI:NL:HR:2016:1483 – *TenneT v ABB*, No 4.3.1 to 4.4.5.; followed by *Rechtbank Gelderland*, judgment of 29 March 2017, C/05/244194/HA ZA 13-373, No 4.13. to 4.22.
21. CAT, [2016] CAT 11, Ref. 1241/5/7/15, para 484(4)(ii) – *Sainsbury's v Mastercard*.
22. *ORWI*, para 58.
23. Regional Court Dortmund, judgment of 27 June 2018, ref. 8 O 13/17 [Kart], ECLI:DE:LGDO:2018:062 7.8O13.17KART.00, paras 169 to 173 – *Trucks cartel*.

24. Hoge Raad, ECLI:NL:HR:2016:1483 – *TenneT v ABB*, No 4.4.3, also referring to the Damages Directive and the effectiveness principle.
25. District Court of Gelderland, judgment of 10 June 2015, ECLI:NL:RBGEL:2015:3713 – *TenneT v ABB*.
26. CAT, *Sainsbury's*, 484(5); the Court of Appeal, judgment of 4 July 2018, [2018] EWCA 1536 (Civ), para 335 etc has not adjudicated on this point.
27. See eg *ORWI* (n 14), para 69.
28. Commission, Study on the Passing-on of Overcharges, Final Report written by RBB Economics and Cuatrecasas, 2016, available at: <http://ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf>.
29. Article 3 and Recital 12, and CJEU in Cases C-295/04 *Manfredi* and C-271/91 *Marshall*.
30. Monti, Giorgio et al. [2016] *EU Law and Interest on Damages for Infringements of Competition Law: A Comparative Report*.
31. CAT, [2016] CAT 11, Ref. 1241/5/7/15, para 525 (2) – *Sainsbury's v Mastercard*.
32. Judgment of 12 June 2018, KZR 56/16.

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