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„Pass-on defense and claims by indirect purchasers under EU competition law and Directive 2014/104/EU"

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I List of Abbreviations

EU - European Union

TFEU – Treaty on the Functioning of the European Union

NCA – national competition authority

CJEU – Court of Justice of the European Union

US – United States

II Introduction

1. Aims and Scope of the Thesis

This thesis examines the issues of passing-on defense and claims by indirect purchasers on EU level. The current state of affairs and all important developments that led to it are presented. An important comparison with the US system of private enforcement of competition law is provided for the better understanding of the subject and the logic, which influenced certain policy decisions. The thesis aims at explaining the solutions Directive 2014/104/EU[1] (the Damages Directive) supported and the possible problems that can arise with the explicit admission of pass-on defense and claims by indirect purchasers in the EU. My goal is to show that such admission represents the better approach to the issue. At the same time it should be born in mind that the adoption of certain solutions leads to the bolstering of some goals of private enforcement of competition law and to the lessening of others. Thus, some complications in the subject of passing-on defense and claims by indirect purchasers are to be expected.

2. Competition law

Competition law is usually described as a 'set of rules that are intended to protect the process of competition in order to maximise consumer welfare'.[2] The basis for competition law on EU level is found in articles 101-109 of the TFEU.[3] In May 2004 a substantial reform was undertaken by the EU legislator with the enactment of a new regulation – 1/2003.[4] Most

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

[2] Richard Whish and David Bailey, *Competition law* (7th edn, Oxford University Press 2012) 1.

[3] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47.

[4] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

notably, competition law became a matter of shared competence between the EU and member states. For the better understanding of competition law in general and of more specific issues, such as defence of passing on and claims by indirect purchasers, it is necessary to identify the main policy goals of the EU in this area and also to separate clearly public from private enforcement of competition law.

2.1. Goals of competition law

The aforementioned definition of competition law [5] should not be interpreted too narrowly, but in a broader manner. As Whish points out, it should not be believed that competition rules would only become relevant in a situation when the costs for final customers have risen.[6] Consumer welfare 'can be indirectly harmed by action that harms the competitive structure of the market'.[7] Moreover, based on the particular case and on relevant legislation, other policy concerns such as unemployment and regional policy can become relevant. [8] Although the proposed definition of competition law[9] is precise and true, it leaves out a crucial goal of EU policy, namely the internal market imperative. Logically, a distorted competitive process would also hinder the free movement of goods, services, persons and capital. Clear and precise competition rules together with a proper enforcement can prevent attempts for economic seclusion among EU members and at the same time aid trade relations between those states.[10] To summarize, goals of EU competition law should always be born in mind for the easier understanding of more specific issues. It is very important to be realized that consumer welfare has a much broader meaning than it seems and that sometimes unexpected policy considerations can become relevant when applying competition law rules. Additionally, the essential purpose of the EU, namely the internal market, plays a significant role as a policy goal in various aspects of competition law such as the shaping of new legislation and relevant case law by EU courts.

2.2. Public and Private Enforcement of EU Competition law

Most systems of competition law can be divided into two main branches based on the interest that is protected – public and private. After the changes from 2004 on EU level enforcement of competition rules in the public interest is now the responsibility of the EU Commission,

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[5] Whish (n2) 1.
[6] Richard Whish and David Bailey, *Competition law* (7[th] edn, Oxford University Press 2012) 19.

[7] Ibid 19.
[8] Ibid 23.
[9] Whish (n2) 1.
[10] Richard Whish and David Bailey, *Competition law* (7[th] edn, Oxford University Press 2012) 1.

NCA's and national courts.[11] At the same time based on the direct applicability of European Union law in member states, private parties have the right to sue infringers of competition law for damages in national courts. This is the private enforcement aspect of EU competition law. It should be noted that national courts apply the principle of national procedural autonomy, developed by the case law of the CJEU.[12] According to this main principle national substantive and procedural rules are applicable in the absence of community rules and these rules 'cannot be less favorable than those relating to similar actions of domestic nature'[13] and 'must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation'.[14] These standards are also known as the principles of equivalence and effectiveness.

In the EU public enforcement has a prevailing role compared to private proceedings.[15] A famous study conducted for the EU Commission, which is known as the Ashurst[16] report, describes the situation of private enforcement of competition rules in the EU as one of 'astonishing diversity and total underdevelopment'.[17] The predominating role of public enforcement can be attributed to three main reasons: the unequal access to information, the plausibility of a case to actually materialize and the magnitude of the envisioned penalty.[18] First of all, it is to be expected that a competition authority, which is comprised of experienced competition law professionals and to which the legislator has conferred the right to conduct investigations would have a much broader access to relevant information than the average private claimant.[19] Second of all, a private claimant has a much lower incentive to initiate proceedings than a competition authority pursuing the public interest due to the costs involved and the unclear outcome for the plaintiff.[20] And finally, even if the claimant in private proceedings is successful, the awarded sum may be too low to justify the costs paid.

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[11] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.
[12] Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989.
[13] Ibid, para 6.
[14] Joined Cases C-6/90 and C-9/90 *Andrea Frankovich and Danila Bonifaci and others v. Italian Republic* [1991] ECR I-5357, para 43.
[15] Richard Whish and David Bailey, *Competition law* (7th edn, Oxford University Press 2012) 295.

[16] Study on the conditions of claims for damages in case of infringement of EC competition rules (2004) 1.
[17] Ibid.
[18] Roger Van Den Bergh and Sonja Keske, 'Private Enforcement of EU Competion law: Que vadis?'(2007) 3(4) European Review of contract law 468, 471.
[19] WPJ Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?' (2003) 26(3) World Competition 473, 480.
[20] Roger Van Den Bergh and Sonja Keske, 'Private Enforcement of EU Competion law: Que vadis?'(2007) 3(4) European Review of contract law 468, 472.

Moreover, a public authority is usually entitled by law to impose higher penalties on infringers.[21]

2.3. Functions of private enforcement of EU Competition law: Deterrence versus Compensation

As a separate branch of the competition law system in the EU private enforcement is characterized by its own functions. Claims against infringers of competition law can have a double effect: they can provide compensation for the victims of the violation, while also discouraging any present or future anticompetitive behavior by the infringer.[22] The first effect can be described as the function of compensation and the second one as the function of deterrence. The compensation function is closely connected with the element of fairness, which has the purpose of ensuring that every injured party is entitled to seek reparation in court for the harm suffered by the actions of the competition law infringer.[23] At the same time the deterrence function incorporates the element of effectiveness, which perceives the restriction of anticompetitive behavior as the focal point of any competition law policy and the element of efficiency, which is concerned with sparing national courts the handling of lengthy and costly proceedings.[24] The two main functions and the elements that are included in them are closely linked, but also collisions are inescapable.[25] It can be expected that strengthening compensation might weaken deterrence and vice versa. This issue raises the question whether the system of private enforcement should aim at combining the two functions or should choose to give priority of one over the other?

In the first place it should be stressed that there are opinions that hold the extreme position that private enforcement is incapable of fulfilling the tasks of deterrence and compensation and thus its existence is altogether pointless.[26] It has been suggested that private enforcement is too expensive to actually realize its functions and that public enforcement is the branch whose development should be encouraged.[27] On the contrary, the close association between public and private enforcement should always be born in mind: an investigation by a competition authority and the information that has been gathered can serve as the basis of a

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[21] Ibid.
[22] Andrew I Gavil, 'Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antirust Litigation (2000) 69 George Washington Law Review 860.
[23] Firat Cengiz, 'Antitrust Damages Actions: Lessons from American Indirect Purchasers' Litigation (2010) 59 International and Comparative law Quarterly 39, 43.
[24] Ibid 43-44.
[25] Ibid 44.
[26] WPJ Wils, 'Should Private Antitrust Enforcement be Encouraged in Europe?' (2003) 26(3) World Competition 473.
[27] Ibid.

private claim before court (follow-on actions), while the same private proceedings can discourage the unlawful actions of the infringer.[28] In my opinion these positive effects that public and private enforcement have on one another discredit the notion that the latter is in principle unnecessary. In fact, public and private enforcement complement each other.

Although public and private enforcement are firmly linked, this does not mean that there should not be a strict differentiation of the functions that they pursue. As Komninos correctly pointed out 'the ideal antitrust model should combine both public and private elements'.[29] However, upon a closer look at the functions of compensation and deterrence together with the elements they incorporate, it comes as a logical conclusion that public enforcement is the appropriate tool to achieve deterrence and private enforcement is adapted to accomplish compensation.[30] Claims before courts pursue compensation, while actions by public authorities are much more suited to prevent infringements of competition law. Wils refers to this matter as the 'separate-task approach'.[31] I believe that this separation does not contradict the positive interaction between public and private enforcement. In fact, such beneficial cooperation could be strengthened by the clear division of the two functions between public and private enforcement. It would be unrealistic to expect from private enforcement to perfectly combine both functions. Instead, it should focus on compensation and by creating a strong system of rules the positive effects between the two branches of competition law would increase. Same reasoning applies for public enforcement and deterrence. The EU Commission seems to follow a similar logic. It is true that the Commission states in its Green Paper on Damage Actions for Breach of EC Antitrust Rules (the Green Paper)[32] that 'damages actions for infringement of antitrust law serve several purposes, namely to compensate those who have suffered a loss as a consequence of anti-competitive behavior and to ensure the full effectiveness of antitrust rules of the Treaty by discouraging anti-competitive behavior'[33] This proclaimed objective undoubtedly tries to combine the functions of compensation and

[28] WPJ Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 World Competition 3.
[29] AP Komninos, 'Public and Private Antitrust Enforcement in Europe: Complement? Overlap?' (2006) 3 Competition law Review 1, 10-13.
[30] WPJ Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 World Competition 3, 12-13.
[31] Ibid.
[32] Commission of the European Communities, 'Green Paper on Damage Actions for Breach of EC Antitrust Rules' COM (2005) 672 (the Green Paper).

[33] The Green Paper COM (2005) 672, para 1.1.

deterrence, while giving some priority to the latter one. However, in the White Paper[34] it appears that the EU Commission has realized the need for a much clearer separation between the two functions and that compensation is more adapt to serve the purpose of private enforcement. This is visible from the statement that 'this White Paper considers and puts forward proposals for policy choices and specific measures that would ensure, more than is the case today, that all victims of infringements of EC competition law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered'.[35] This demonstrated objective shows that private enforcement should be concerned first and foremost with compensation. The relevance of the findings in the previous paragraphs will be shown in subsequent sections connected with the defense of passing on and claims by indirect purchasers.

3. Pass-on defense and Claims by indirect purchasers

The following example can serve as an illustration of the matters of passing-on defense and claims by indirect purchasers, with the remark that production chains can be much more complicated: The European Commission or an NCA conducts an investigation, which leads to the discovery of a price-fixing cartel. The manufacturer of car tires A has participated in this cartel in the last ten years. As a result A has given its direct customers much higher prices than it would normally do in the absence of the cartel and B has paid these prices – a case of an overcharge. The Damages Directive[36] defines 'overcharge' as 'the difference between the price actually paid and the price that would have otherwise prevailed in the absence of an infringement of competition law'.[37] The retailer of tires B is one of the affected direct purchasers, which found out that they have been unfairly charged over the period of ten years. B believes to be entitled to receive compensation as a client of the cartel and thus files a claim before court against A. A may or may not deny its participation in any illegal activities, but more importantly A does not accept the position that B has suffered any harm. A argues in court that any overcharge paid by B caused by the cartel has already been passed on to the final customers of B. Moreover, A alleges that B incorporated the overcharge when setting the price for final consumers and thus B would be unjustly enriched if the court awards any compensation. The claims by A can be summarized as the defense of passing-on. At the same

[34] Commission of the European Communities, 'White Paper on Damage Actions for Breach of EC Antitrust Rules',COM (2008) 165 (the White Paper).
[35] The White Paper COM (2008) 165, para 1.2.
[36] Directive 2014/104/EU of the European Parliament and of the Council of 26 November on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1 (Damages Directive).
[37] Damages Dir. 2014/104/EU OJ L349/1, art. 2 (20).

time the final consumer of tires C discovers the existence of the cartel and the proceedings started by B. C decides that he/she has been affected by the price fixing and has the right to sue A for damages due to the assumption that the overcharge has been passed on him/her. In this new situation A chooses a different strategy and claims that the whole overcharge has been born by B and prices for final purchasers have not been unfairly raised. In fact, the retailer B has three options: to pass-on the whole overcharge by raising the price for C, to fully bear the negative effect of the overcharge by not elevating the price for final customers or to only partly bear the effect by boosting prices slightly.[38] The actions undertaken by C are a typical example of a claim by an indirect purchaser.

It has been suggested that a flawless competition law system of private enforcement would grant standing to both direct and indirect purchasers in order to receive compensation for the distinctive harm the infringer has caused them.[39] An approach as such is an apparent manifestation of the compensation function and the element of fairness.[40] The same path is followed in Directive 2014/104/EU[41], which specifically requires member states to guarantee the admissibility of the passing-on defense and claims by indirect purchasers in their national legislations.[42] Member states have the obligation to transpose these rules until the 27 of December 2016.[43] The policy decisions behind the Damages Directive have been a subject of a lengthy development, which will be presented in the following paragraphs. It is important to realize that there are other solutions to the issues of passing-on defense and claims by indirect purchasers, which follow a different logic than the one currently adopted by the EU legislator. The comparison between the contrasting approaches helps to answer the question if the correct policy decisions have been taken, what could have been done better and what could be improved in the future. Further parts of the thesis also aim at establishing problems, which could arise with the implementation of the rules included in the Damages Directive.

[38] Firat Cengiz, 'Antitrust Damages Actions: Lessons from American Indirect Purchasers' Litigation (2010) 59 International and Comparative law Quarterly 39, 43.
[39] Ibid.
[40] Ibid.
[41] Damages Dir. 2014/104/EU OJ L349/1.
[42] Ibid, art. 13-14.
[43] Ibid, art.21, para 1.

III **Main Part**

1. **The approach in the United States**

The legal framework in the United States regarding the passing-on defense and claims by indirect purchasers has been shaped by two landmark cases – *Hannover Shoe Inc v United Machinery Corp*[44] and *Illinois Brick Co v Illinois.*[45] In the first case from the end of the 1960's it was ruled that the invocation of passing-on defense is inadmissible and nine years later in 1977 the legal standing of indirect purchasers was also rejected. These rulings have been a subject of criticism from many sides since the moment they were published due to the combined effect of rejecting final customers the important right of compensation.[46] The reasoning of the US Supreme Court behind the rulings and also the relevant policy considerations, both the one strictly connected with competition and others tied to the factual situation in the US, will be discussed below.

1.1 Hannover Shoe Inc v United Machinery Corp[47]

In this case it was suspected that the manufacturer of shoe machinery United has infringed US competition rules by utilizing practices, which resulted in the monopolization of the relevant market. United were subsequently sanctioned for their anticompetitive behavior. Meanwhile, Hannover, one of the direct purchasers of the shoe machinery, filed a claim for damages against United, which forced United to invoke the defense of passing-on. The defendant argued that the overcharge paid by Hannover was moved to the next step of the production chain – the customers of Hannover.[48] The District Court and the Court of Appeals were not convinced by the economic rationale behind the defense of passing-on. The US Supreme Court, which heard the case, also rejected the application of the passing-one defense mainly emphasizing on three key points. First of all, the Supreme Court concluded that the direct purchaser, as a victim of an antitrust infringement, is entitled to take the illegal overcharge into consideration when establishing its pricing policy. [49] Even if the direct purchaser decided to sustain its revenue by passing-on the overcharge to the consumers, it should be kept in mind that Hannover could have gained more benefit if not for the initially unfair pricing. [50]

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[44] Case 392 US 481[1968].
[45] Case 431 US 720 [1977].
[46] Firat Cengiz, 'Antitrust Damages Actions: Lessons from American Indirect Purchasers' Litigation (2010) 59 International and Comparative law Quarterly 39, 47.
[47] Case 392 US 481[1968].
[48] Ibid.
[49] Ibid.
[50] Ibid.

Such a reaction does not eliminate the right to claim compensation.[51] These stances of the Court can be understood as a rejection of the notion that the direct purchasers can be unjustly enriched. Second of all, it must be remembered that the calculation of a price is determined by a large number of components and there are practical complications in establishing if and to what extent the initial overcharge had an imprint on the prices charged by the direct purchaser to its customers, especially after the fact.[52] The third point emphasized by the US Supreme Court when it ruled the defense of passing-on inadmissible recognizes the connection between this defense and claims by indirect purchasers. It is concluded by the court that allowing one concept, would lead to admitting the other. Furthermore, it is specifically pointed out that end consumers generally have a small interest in filing a lawsuit.[53] It can be expected that they would be discouraged by the discrepancy between the cost of proceeding and the expected award. As a result, a manufacturer, who successfully invokes the defense of passing-on, would not be punished for his violation of competition law and would ultimately profit from its unlawful behavior.[54] The overall approach by the US Supreme Courts regarding the defense of passing-on can be summarized as pragmatic. As Cengiz correctly points out, when taking a stance on the matter, the Court primarily considered the elements of effectiveness and efficiency.[55]

1.2 Illinois Brick Co v Illinois.[56]

Nine years later the US Supreme Court was confronted with the issue of claims by indirect purchasers. In this case Illinois Brick was a brick manufacturing company based in Chicago and it was sanctioned among other companies for participating in a price-fixing cartel. The state of Illinois and other governmental agencies started a follow-on action after the cartel was discovered by requesting a compensation for the unfairly high price of bricks. The main question the Court had to answer was whether the claimants, which were indirect purchasers, were entitled to sue for damages. The District Court rejected the standing of indirect purchasers, but the Court of Appeals took the contrary position, which led to the US Supreme Court hearing the case. The Supreme Court showed unwillingness to recognize the position of indirect purchasers, because it would essentially mean overruling *Hannover Shoe Inc v United*

[51] Ibid.
[52] Ibid.
[53] Ibid.
[54] Ibid.
[55] Firat Cengiz, 'Antitrust Damages Actions: Lessons from American Indirect Purchasers' Litigation (2010) 59 International and Comparative law Quarterly 39, 46.
[56] Case 431 US 720 [1977].

Machinery Corp[57] or at least considerably changing its previous findings.[58] The Court was convinced that in an antitrust compensation action claimants and defendants cannot be treated unevenly, which would happen if indirect purchasers can sue for damages, considering the already stated inadmissibility of pass-on defense.[59] The second concern of the US Supreme Court is connected with multiple damages. The Court recognizes a threat in a situation when there are two independent lawsuits against the infringer. The issue of overlapping recoveries will appear when the infringer is being sued by the direct and by the indirect purchaser simultaneously and being unable to invoke the defense of passing-on, the likelihood of the unwanted possibility to be held liable two times for the same violation of competition law increases. [60] The sum of these considerations and the reluctance to reconsider its previous positions led to the rejection of the legal standing of indirect purchasers. It can be summarized that to a large extent the US Supreme Court repeated its findings from its previous ruling in Hannover Shoe. The concentration of the right to sue for damages exclusively in the sphere of direct purchasers is a natural continuation of the pragmatic approach adopted by the Court and another manifestation of the priority given to the elements of effectiveness and efficiency over the element of fairness.

When a comparison is made between the solutions adopted by the US Supreme Court and the EU positions a couple of key points need to be kept in mind. The first point is related to the differentiating factual situation in Europe and in the US. The EU Commission has an interest in encouraging the still underdeveloped private enforcement of competition law before the judiciary in member states as an important form of aid and enrichment to its public enforcement efforts.[61] Meanwhile in the US, where private enforcement is much more developed, an opposite problem can be identified. As a general perception courts in the US recognize the threat of a too liberal judicial system characterized by excessive litigation and groundless lawsuits.[62] As a second meaningful point, it should be noted that the solutions of the Supreme Court regarding the pass-on defense and claims by indirect purchasers have been continuously criticized by various organizations and authorities in the US.[63] Many US states, especially among the industrialized ones, have passed-on legislations contrary to the findings

[57] Case 392 US 481 [1968].
[58] Case 431 US 720 [1977].
[59] Ibid.
[60] Ibid.
[61] Richard Whish and David Bailey, *Competition law* (7th edn, Oxford University Press 2012) 295-296.

[62] WPJ Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' (2009) 32 World Competition 3, 8-12.
[63] n 46.

of the Supreme Court[64] regarding the legal standing of indirect purchasers, which leads to the legal paradox of indirect purchasers being able to sue for damages before State Courts, but not under federal antitrust law.

Although many states have modified their laws, the overall approach in the US, based on the stances of the Supreme Court, can be described as disregarding towards the element of fairness. Even with the risk of wasteful litigation in mind, it seems disproportionate to reject meritorious claims as a mean of discouraging groundless ones. The EU followed its own path when reaching decisions on the issues of passing-on defense and claims by indirect purchasers. The inescapable collisions between deterrence and compensations, together with the elements these functions incorporate, have the result of forcing authorities to make a decision in favor of one or the other.[65] The EU could have opted for the solutions of the US Supreme Court on the issues of pass-on defense and indirect purchaser claims by giving priority to deterrence. Many factors played a role in the decision to grant preference to compensation in Europe. As will be seen below the EU courts and legislators also had to deal with the problems of multiple liability and unjust enrichment. In any case, establishing the reasoning behind the US solutions provides for a good base for comparison with the EU and better understanding of the policy considerations behind Directive 2014/104/EU.[66]

2. <u>The approach in the EU.</u>

2.1 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others.[67]

In the first place, it should be noted that notwithstanding the direct effect and the direct applicability of EU law until 2001 it was not clear whether it compels member states to recognize as admissible damages claims for violations of EU competition rules against private parties.[68] The CJEU identified that private enforcement of Art. 101 and 102 of the TFEU is possible in the case *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others.*[69]Although this case does not deal specifically with the issues of pass-on defense and indirect purchaser claims it is an important step in the shaping of EU policies on damages

[64] Firat Cengiz, ‘Passig-on Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition law: what can the EU learn from the US?’ (2007) CCP Working Paper 19.

[65] Firat Cengiz, ‘Antitrust Damages Actions: Lessons from American Indirect Purchasers’ Litigation (2010) 59 International and Comparative law Quarterly 39, 44.

[66] Damages Dir. 2014/104/EU OJ L349/1.

[67] Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297.

[68] Richard Whish and David Bailey, *Competition law* (7th edn, Oxford University Press 2012) 297.

[69] Case C-453/99 [2001] ECR I-6297.

claims in general and it should be examined before the case law, which dealt with granting legal standing to indirect purchasers in the EU. Logically, the CJEU could not have provided such a standing to indirect purchasers before confirming that the overall right to claim damages before national courts for infringements of EU law is in existence.

The facts of the case were the following: The brewery Courage filed a claim for compensation against the public house tenant Crehan for unpaid deliveries of beer. The parties had a contract in place, which stipulated that Courage and another company are leasing the pub to Mr. Crehan who was obliged to purchase certain quantities of beer exclusively from Courage. Among other defenses, Mr. Crehan declared that the contract is void due to violation of EU competition rules and counterclaimed for damages. The case is especially interesting due to the fact that the Court of Appeal of England and Wales was not assured whether such reasoning would not be against the standard existing in most jurisdictions that a party to a violation of law cannot benefit from its unlawful behavior. This led the Court to ask the CJEU for a preliminary ruling in accordance with article 267 TFEU. The main questions asked were whether a contracting party to an anticompetitive agreement within the meaning of the TFEU can sue the other party for damages before a court in a member state and whether EU law prohibits national rules, which exclude such possibility.[70]

In order to provide the necessary answers the Court begins with confirming its previous case law about the existence of a separate legal system incorporated into national legal orders conferring rights and obligations not only on member states, but also on individuals.[71] The CJEU continues by affirming the significance of EU competition rules and the sanctions that they entail.[72] Furthermore, the Court expressly declares that anyone is entitled to base its claim for violation of competition rules before national judiciary 'even as he is a party to a contract that is liable to restrict or distort competition'.[73] The CJEU is convinced that 'there should not be an absolute bar'.[74] The Court expressly recognized in its preliminary ruling the right to sue another party for damages. This right however is not intended to be unlimited. Most compelling evidence can be found in the notion of the Court that member states are not obstructed by EU law to apply standards, which hinder the efforts of parties responsible for

[70] Case C-453/99 [2001] ECR I-6297, para 7.
[71] Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297, para 19.
[72] Case C-453/99 [2001] ECR I-6297, paras 20-21.

[73] Ibid, para 24.
[74] Ibid, para 28.

infringements to obtain compensation.[75] Nevertheless, it should not be believed that the Court had an interest in prohibiting the right to damages in any way. Instead, it could be derived that its major concern was avoiding unjust enrichment of claimants and therefore the Court identified that national legal orders are entitled to create their own requirements concerning the exercise of the right to damages, which can ultimately lead to its limitation. For that purpose, national law should be constructed in a way that recognizes the aforementioned principles[76] of equivalence and effectiveness.[77] To summarize, the Court did rule damages claims for breaches of EU before national courts as admissible. It recognizes the two separate legal orders that exist in every member state and their correlation in the specific matter of claims for damages in competition law. Although the preliminary ruling was concerned with the specific issue of actions started by a party, who bears responsibility for the distortion of competition, the findings of the court are universally applicable. Nowadays, many of these findings might seem self-evident, but in 2001 they provided a much needed clarification. The case of Crehan preceded and opened the door for claims by indirect purchasers in competition law, whose standing was recognized in the next landmark case.

2.2 The Green Paper[78]

Four years after Crehan's case the EU Commission published the Green Paper, which among other matters also discusses the defense of passing-on and indirect purchaser claims. It considers four different options on how to deal with these issues in further legislative efforts.[79] Under all of the options direct purchasers are entitled to sue for damages. Under the second option the pass-on defense and the indirect purchaser claims are both inadmissible.[80] A solution as this duplicates the approach by the US Supreme Court. It admittedly brings certain advantages from a deterrence and efficiency standpoint, but totally disregards the function of compensation, which should be a leading concern in private enforcement of competition law. The third option envisions elimination of the passing-on defense, while the indirect purchaser is entitled to sue for damages just like the direct one. This solution gives rise to the multiple damages complication just as recognized by the US Supreme Court.[81] The fourth option provides for a two-step system where the passing-on defense is denied and

[75] Ibid, para 36.
[76] n 13-14.
[77] Case C-453/99 [2001] ECR I-6297, para 29.

[78] Commission of the European Communities, 'Green Paper on Damage Actions for Breach of EC Antitrust Rules' COM (2005) 672 (the Green Paper).
[79] The Green Paper COM (2005) 672, para 2.4.
[80] Ibid.
[81] n 60.

anyone can claim damages from the violator of competition law, while in the second step the overcharge is dispersed among all affected claimants.[82] The apparent result is certainly strengthening fairness and consequently compensation, but as the EU Commission admits itself, it is burdensome from a technical standpoint.[83] What is left is the first option, which grants standing both to the infringer to rely on the passing-on defense and to the indirect purchaser to claim damages.[84] The main problem with this resolution, according to the EU Commission, consists in the possibility that the infringer will successfully apply the defense of passing-on and at the same time the indirect purchasers will fail in sufficiently proving their lawsuit against the infringer.[85] As a result, the violator will retain the fruits of its unlawful actions. Such an outcome equals not only failure of the fairness element, but also unjust enrichment of the infringer. The same threat has been recognized by the US Supreme Court when discussing the minimal incentive, which an indirect purchaser might have to sue an infringer of competition rules.[86] In my opinion, such reasoning has its flaws and the risk that the infringer will ultimately gain a benefit is exaggerated. If it is assumed that a functional system of private enforcement should be primarily concerned with compensation, then the first option proposed in the Green Paper is the only viable possibility. The main concern is that the deterrence function would be harmed. Deterrence, however, can be expected to be achieved in a better way at public enforcement level. Moreover, strengthening compensation by allowing the pass-on defense and claims by indirect purchasers does not mean that deterrence will necessarily suffer. Two separately strong systems of private and public enforcement have a positive effect on each other. The beneficial correlation cannot be achieved by purposely weakening one system at the expense of the other. It is a prerogative of the judiciary and the legislator to fill the voids between private and public enforcement of competition rules. The US Supreme Court, based on its previous position to deny passing-on defense, took the fairly extreme stance of also rejecting claims by indirect purchasers as a way of avoiding the risk that the infringer will benefit from his behavior. As it will be seen below, the EU has found other means of dealing with the situation in its case law and legislative efforts. As the Green Paper indicates ‘special consideration should be given to the burden of proof’.[87]

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[82] The Green Paper COM (2005) 672, para 2.4.
[83] Ibid.
[84] Ibid.
[85] Ibid.
[86] n 53.
[87] The Green Paper COM (2005) 672, para 2.4.

2.3 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni Spa.[88]

In this case the Italian NCA investigated insurance companies for anticompetitive behavior. As a result a concerted practice was discovered. The exchange of information between the companies led to the possibility of higher insurance prices, not based on the situation in the relevant market. Most notably, in a five year span the prices for auto insurances in Italy have risen, contrary to the trend in other parts of Europe.[89] Moreover, the concerted practice resulted in an average 20 per cent overcharge for final customers of auto insurances.[90] Mr. Manfredi was one of the end consumers affected by the overcharge. He was an indirect purchaser, because he did not buy his insurance directly from a competition law infringing company. Manfredi claimed to be entitles to reparation by the insurance companies and initiated proceedings before his national court. The Italian court submitted various question to CJEU in accordance with article 267 TFEU. The two main points on which the Italian court needed clarification were how to quantify the damages suffered by Manfredi and most importantly if he has a legal standing at all as an indirect purchaser.

Before providing opinion on these two major points of inquiry the Court confirmed as a response to another question that the concerted practice is in position to violate not just Italian competition law, but also EU competition rules. That would be the case when there is a 'sufficient degree of probability'[91] of a valid impact on the sales in one member state conducted by traders settled in another member state. [92] Another interesting point made by the Court is that national legal orders in line with the principles of equivalence and effectiveness[93] are responsible for establishing the proper court institutions and rules of procedure, which can protect rights of individuals received by community law.[94] In order to answer the two main questions asked by the Italian court, the CJEU relies once again heavily and reaffirms its findings from *Courage Ltd v Bernard Crehan.*[95] More specifically, the Court once again emphasizes on the application of the well-established principles of equivalence and effectiveness.[96] As to the first main issue of quantification of damages the Court is convinced that in line with equivalence there is no reason for a member state, which recognized the right of punitive damages in its domestic law not to acknowledge them in respect of EU

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[88] Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.
[89] Case C-295/04 [2006] ECR I-6619, para 8.
[90] Ibid, para 14.
[91] Ibid, para 52.
[92] Ibid.
[93] n 13-14.
[94] Case C-295/04 [2006] ECR I-6619, para 62.
[95] Case C-453/99 [2001] ECR I-6297.
[96] Case C-295/04 [2006] ECR I-6619, para 64.

competition law violations.[97] Furthermore, in line with the principle of effectiveness a harmed party is entitled to seek reparation not only for actual loss, but also for loss of profit plus interest.[98] On the core issue in the preliminary ruling the Court is very clear in stating that 'any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and a prohibited practice or agreement'.[99] By providing such an answer to a preliminary ruling asked, the CJEU leaves no doubt that damages claims by indirect purchasers against infringers of EU competition law are admissible. Apparently there are three conditions to be observed: prohibited agreement or practice, harm suffered and causation between them. It should be noted however that there were some differentiating opinions on how broad the findings of the preliminary ruling should be interpreted.[100] It has been suggested that the right of indirect purchasers to claim damages should be a subject of certain of certain limitations for the purpose of not burdening the judicial systems of member states.[101] This opinion can be seen as closely relying on one of the elements of the deterrence function, namely the element of efficiency.[102] In my view such a statement has no ground in the wording of the answers in the preliminary ruling and cannot be supported. Moreover, this discussion has lost its relevance after the adoption of the solutions in Directive 2014/104/EU.[103] The importance of the answers given by the Court in the case of Manfredi cannot be overstated. They represent a logical continuation and a considerable development of the solutions adopted in *Courage v Crehan*.[104] Moreover, as it will be shown below, the imprint of the conclusions in the preliminary ruling regarding Manfredi can be seen in Directive 104/2014/EU.[105]

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[97] Ibid, para 93.
[98] Ibid, para 95.
[99] Ibid, para 61.
[100] Hanna Wingren, 'Indirect Purchasers' Right to Damages and the Defense of Passing-On' (Master's Thesis in EU Competition Law, Uppsala University 2014) 27.
[101] Veljko Milutinovic, *'The 'Right to Damages' under EU Competition law: from Courage v. Crehan to the White Paper and Beyond* (1st edn, Kluwer Competition Law 2010) 217.

[102] n 24.
[103] Damages Dir. 2014/104/EU OJ L349/1.
[104] Case C-453/99 [2001] ECR I-6297.

[105] Damages Dir. 2014/104/EU OJ L349/1.

2.4 The White Paper[106]

The EU Commission published the White Paper in 2008, two years after its important preliminary ruling in the case of Manfredi.[107] This document embraces the concept of full compensation as its 'first and foremost guiding principle'.[108] As noted above[109] the Commission reconsidered its stance from the Green Paper and identified the leading role of the compensation function in private enforcement of competition law. The EU Commission expressly declares that 'improving compensatory justice would inherently also produce beneficial effects in terms of deterrence of future infringements and grater compliance with EU antitrust rules'.[110] Additionally, the Commission shows determination to rely on a 'genuinely European approach'[111] and 'balanced measures that are rooted in European legal culture and traditions'[112] when dealing with private enforcement of competition rules. These declarations by the Commission serve as evidence that there is a need for a strong private enforcement system in Europe, which can successfully complement public enforcement efforts as a separate setup based on compensation considerations. The EU Commission's proclamations in the White Paper do not remain just empty statements. In the first place, the Commission states its approval of the preliminary ruling in Manfredi[113] and of the fact that an indirect purchaser is a party with a legal standing to sue an infringer of competition law for damages before a national court.[114] In the second place, regarding the defense of passing-on, the Commission picks the first option out of the four deliberated in the Green Paper.[115] Such a decision is most compelling evidence of the superior role of compensation in private enforcement of competition law. In the White Paper the Commission first states that it 'recalls the Court's emphasis on the compensation principle'[116] and then suggests that 'defendants should be able to invoke the passing-on defense'[117]. At the same time, it is important to

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[106] Commission of the European Communities, 'White Paper on Damage Actions for Breach of EC Antitrust Rules',COM (2008) 165 (the White Paper).

[107]Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.
[108] The White Paper COM (2008) 165, para 1.2.
[109] n 35.
[110] The White Paper COM (2008) 165, para 1.2.

[111] Ibid.
[112] Ibid.
[113] Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.
[114] The White Paper COM (2008) 165, para 2.1.

[115] n 79.
[116] The White Paper COM (2008) 165, para 2.1.
[117] Ibid.

realize that the Commission is seriously concerned with the issue of unjust enrichment and proposes some practical solutions, which will be discussed in the next paragraph.

3. Further remarks on the case law in the EU and US.

3.1 Unjust enrichment

The examined case law until now dealt with the rejection of passing-on defense as well as indirect purchaser claims in the US and the reviewed EU case law to this point was concerned with the granting of the right to sue competition law infringers for damages and of the subsequently provided legal standing of indirect purchasers in Europe. What is missing for the complete picture is EU case law, which deals with the defense of passing-on. In fact, there is none in the specific field of competition law. The CJEU had to deal with issues similar to the defense of passing-on in cases concerned with other areas such as taxation and administrative charges and in these occasions the Court has identified that the defendant is entitled to fend off the claim by stating that the plaintiff would be unjustly enriched – de facto the essence of passing-on.[118] In terms of legal certainty, however, the situation remained unclear due to the fact that the judgments, which recognized passing-on considerations, did not come from cases specifically dealing with competition law. In some member states courts applied the defense of passing-on and others rejected it. This served as another reason in favor of Directive 104/2014/EU[119], which will lead to the recognition of passing-on in competition law in all EU member states. Such an approach represents a substantive difference compared to the view of the US Supreme Court, which has rebuffed the defense of passing-on. At the same time, by granting indirect purchasers a legal standing, the CJEU follows a path exactly opposite to the one given favor by the US Supreme Court. Most of the points of argumentation by the Supreme Court in *Illinois Brick Co v Illinois*[120] are unique to the US due to the previous ruling in *Hannover Shoe Inc v United Machinery Corp*[121], which excluded the right to invoke the defense of passing-on and to a large extent predetermined the solution not to grant legal standing for damages claims to indirect purchasers. The situations in the EU and in the US differ considerably. As noted above the EU Commission is aiming at promoting private enforcement of competition law in Europe.[122] Meanwhile, in the US there is a focus on

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[118] Hanna Wingren, 'Indirect Purchasers' Right to Damages and the Defense of Passing-On' (Master's Thesis in EU Competition Law, Uppsala University 2014) 29.
[119] Damages Dir. 2014/104/EU OJ L349/1.
[120] Case 431 US 720 [1968].

[121] Case 392 US 481 [1977].
[122] n 61.

restricting unjustified claims before courts.[123] One point, however, remains of common relevance in the US and the EU – the need to avoid unjust enrichment. By its line of reasoning that direct purchasers have the right to react to an illegal overcharge when determining the pricing policy for their own customers, the US Supreme Court basically holds the idea that direct purchasers cannot be unjustly enriched.[124] This is not the case, however, with a cartelist that invoked successfully pass-on defense when sued by the direct purchasers and then in a claim by an indirect customer the harm was either not proven by the plaintiff or the final consumer decided not to bear the cost of starting proceedings at all. Nevertheless, the Supreme Court rejected the defense of passing-on as a necessary measure to avoid unjust enrichment for the infringer. The EU followed a different path, which is also unique due to the existence of two separate legal orders in every EU member state.[125] Firstly, the CJEU In *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni Spa*[126] expressly reaffirms that 'it is settled case law that community law does not prevent 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'.[127] In its case law the CJEU welcomes private enforcement of competition rules and damages claims by indirect purchasers, while recognizing any possible limitations and further requirements can be subjected to the national law of member states if they are in accordance with the principles of equivalence and effectiveness. Secondly, it should not be assumed from the points stated so far that the EU Commission retains only a passive approach towards the issue of unjust enrichment and leaves possible strategies to deal with the matter only to legislative or judicial authorities in member states. On the contrary, the Commission leaves no doubt in its concerns regarding unjust enrichment. This can be observed in the White Paper[128], which preceded the adoption of Directive 2014/104/EU.[129] As noted above the US Supreme Courts shares the view that the direct purchasers have the right to react to the illegal charge in its pricing policy without any consequences and thereby excluding them from any further unjust enrichment considerations.[130] The EU Commission takes exactly the opposite position by basically considering that the issue of unjust enrichment has two aspects. As for the first aspect, the Commission retains the function of compensation as the focal point in private enforcement of

[123] n 62.
[124] n 49-51.
[125] n 71.
[126] Case C-295/04 [2006] ECR I-6619.
[127] Ibid, para 94.
[128] The White Paper COM (2008) 165.
[129] Damages Dir. 2014/104/EU OJ L349/1.
[130] n 49.

competition rules. This point is manifested by following the idea that infringers have the right to invoke the defense of passing-on in cases when the overcharge has been moved further down the production chain due to the fact that the direct purchasers could have been unjustly enriched.[131] In addition, the Commission suggests that 'the standard of proof for the defense of passing-on should be not lower than standard imposed on the claimant to prove the damages.'[132] Solutions as these promote fairness in private enforcement of competition. The second aspect is the possible unjust enrichment of the competition rules infringer himself. In contrast with the first aspect, the US Supreme Court was concerned with the possibility of the violator ultimately benefiting from an unlawful action.[133] One of the main reasons for the pass-on defense to be declared inapplicable in the US was exactly the risk of unjust enrichment. The violator of competition would rely on the claim that the overcharge was passed-on by the direct purchasers to indirect purchasers, which are expected to have a minimal to none financial incentive to file a claim against the infringer.[134] Being concerned with both aspects of unjust enrichment, the EU Commission cannot share the US position and simply rule the defense of passing-on inapplicable. The Commission proposes to solve the issue with legislative measures, which would soften the burden on indirect purchasers and give them an incentive to file damages claims against parties distorting competition law. More specifically, it is suggested that a rebuttable presumption according to which the illegal overcharge has been passed-on from the direct to the indirect purchasers in its entirety should be created.[135] Being a final consumer at the end of the production chain certainly brings difficulties in proving a damages claim. This distance increases the risk of being left without reparation and naturally some plaintiffs would abandon the idea of starting proceedings at all. A rebuttable presumption undoubtedly serves in favor of the indirect purchasers and in more general terms in favor of improving private enforcement of competition law in the EU and can prove as a proportionate way of avoiding the unjust infringement of a party that has distorted competition. Moreover, a rebuttable presumption would be a clear case of the above mentioned 'genuinely European approach'.[136]

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[131] The White Paper COM (2008) 165, para 2.6.
[132] Ibid.
[133] n 54.
[134] n 53.
[135] The White Paper COM (2008) 165, para 2.6.
[136] n 111.

3.2 Multiple Damages

Another important reason for the defense of passing-on and indirect purchaser claims to be regarded as applicable in the EU is the need to avoid multiple damages. A risk of multiple liabilities occurs when both a direct and an indirect purchaser have initiated proceedings for compensation against the party responsible for the distortion of competition. If both plaintiffs are successful in their lawsuits, the infringer would have to repay twice for the same violation of competition rules. Strand points out that there are two possibilities when it comes to averting multiple damages – a conventional consisting of completely removing the risk by ensuring that overlapping liabilities would be impossible to occur or accepting the risk in some cases as a policy of deterrence.[137] Systems of private enforcement of competition law are confronted with the difficulty either to identify both pass-on defense and indirect purchaser claims or to neglect both.[138] The US Supreme Court choose the second option in order to eradicate any threat of multiple damages first by rejecting the defense of passing-on[139] and then under the influence of its first decision by denying the legal standing of indirect purchasers.[140] The solution on EU level was reached from a different starting point – first it was established that indirect purchasers are entitled to sue for damages.[141] Therefore the risk of multiple damages in Europe would transpire if the defense of passing-on is declared inadmissible. Among other purposes, in order to avoid the threat of multiple liabilities, first the White Paper[142] and subsequently Directive 2014/104/EU[143] recognize the applicability of the pass-on defense. It remains debatable, which option is preferable. Strand takes a stance in favor of the US approach by doubting the efficacy of the EU solution.[144] According to him overlapping liabilities would remain and issue in a situation where in the first proceeding started by the direct purchaser the infringer is able to rely on passing-on defense, but is just unsuccessful in such attempts and subsequently loses a second case to the indirect purchaser.[145] From this point of view Strand regards the US approach as the desirable one

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[137] Magnus Strand, 'The Defense of Passing-on: Loss, Gain and the Award of Damages in Private Enforcement of Competition Law' (5/2010) Uppsala University Faculty of Law Working Paper, 18.
[138] Ibid.
[139] Case 392 US 481[1968].

[140] Case 431 US 720 [1977].
[141] Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.
[142] The White Paper COM (2008) 165.
[143] Damages Dir. 2014/104/EU OJ L349/1.
[144] Magnus Strand, 'The Defense of Passing-on: Loss, Gain and the Award of Damages in Private Enforcement of Competition Law' (5/2010) Uppsala University Faculty of Law Working Paper, 19.

[145] Ibid.

when it comes to averting multiple damages.[146] Although based on logical deliberations, an alternative belief can be presented. In my opinion, it is impossible for any legislator to take into account every possible development of a lawsuit. Although it might be likely that the infringer would lose both lawsuits, nothing suggests that it is less conceivable for him to be successful in at least one of the proceedings and thereby the risk of multiple damages would be avoided. A proper legislative effort would be to grant each interest party in a production chain the opportunity to actively or passively rely on the rights they believe to have. The indirect purchasers should be entitled to ask for reparation, as much as the infringer should be able to use the defense of passing-on. I believe that the case law and the legislator in the EU aim at providing every possible mechanism, but it remains for the interested party to exercise it to its advantage. To put it another way, the infringer has been given every legal opportunity to rely on passing-on and he has himself to blame if courts award full compensation both to the direct and to the indirect purchasers. From this angle the EU approach in dealing with multiple damages seems preferable. Strand describes it as 'embracing the risk of multiple damages'.[147] Such a qualification appears exaggerated. It could rather be stated that the EU adopts a flexible approach, which in principle excludes multiple liabilities, although they remain possible in a situation when the defendant fails in multiple litigations against him. Another interesting point made by Strand is that the EU solution is promoting deterrence.[148] That would be the result of an expected growth in the number of lawsuits filed from direct and indirect customers for an identical violation of competition rules.[149] It is questionable, however, if such an effect can be perceived as undesirable. After all, it serves the overall aim of developing private enforcement of competition rules in the EU.[150] Also, as Strand admits it himself, the threat of excessive litigation in Europe is exaggerated due to the requirements developed by case law.[151] In Manfredi[152] the CJEU introduced its formula with three conditions for compensation to be awarded to the claimant: prohibited practice or agreement, suffered harm and causal relationship between them.[153] These requirements, which have also

[146] Ibid.
[147] Ibid.
[148] n 137.
[149] Magnus Strand, 'The Defense of Passing-on: Loss, Gain and the Award of Damages in Private Enforcement of Competition Law' (5/2010) Uppsala University Faculty of Law Working Paper, 19.

[150] n 61.
[151] Magnus Strand, 'The Defense of Passing-on: Loss, Gain and the Award of Damages in Private Enforcement of Competition Law' (5/2010) Uppsala University Faculty of Law Working Paper, 19.
[152] Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.
[153] n 99.

heavily influenced Directive 2014/104 /EU,[154] provide for a barrier against groundless litigation. In my opinion, the promotion of deterrence is only half of the picture. It is true, at least in theory, that recognizing the defense of passing-on and indirect purchaser claims should give rise to litigation and therefore would lead to an increase of the deterrence function due to the fact that infringers could be expected to reconsider before violating competition rules. However, this effect should be seen as connected with other policy considerations and not as an isolated outcome. When read in conjunction with other issues such as the two aspects of unjust enrichment examined in the previous paragraph, it becomes clear that considering the defense of passing-on and claims by indirect purchasers as admissible serves a bigger purpose. Namely, allowing defendants to rely on the defense of passing-on and allowing every indirect purchaser to sue for the damages suffered undoubtedly promotes the element of fairness by granting each party the opportunity to exercise its rights. The element of fairness is a constituting part of the compensation function.[155] Therefore, I believe that when the broader picture is born in mind, compensation remains the overriding function in the EU approach although an element advantageous for deterrence can be observed in form of a hope for increased meritorious litigation.

3.3 Could the EU have chosen the US approach?

The US Supreme Court reached solutions that ultimately rejected the notions of passing-on defense and indirect purchasers standing.[156] The right to claim damages for infringements of competition law has been solely granted to the direct purchasers. Even though these positions have been strongly criticized since their adoption and many US states ratified legislation that would allow indirect purchasers to sue for damages[157], it should be admitted that the stances of the US Supreme Court might seem attractive with their pragmatism and simplicity. It is true that the US approach overlooks the function of compensation and the element of fairness by heavily limiting the rights of parties in the production chain acting as plaintiffs or defendants. It is also true that the solution to declare the defense of passing-on and indirect purchaser claim as inadmissible serves in favor of the deterrence function and thereby weakens the function of compensation with the possible result of undermining private enforcement efforts.[158] In spite of these facts and the notions that a private enforcement system should primarily be concerned with reparation and that rejecting the defense of

[154] Damages Dir. 2014/104/EU OJ L349/1.
[155] n 23.
[156] n 49-51, n 59.
[157] n 63-64.
[158] n 55.

passing-on and indirect purchaser claims is a disproportionate mean of achieving deterrence, the US appraoch might be considered appealing by many. Not so much from an effectiveness point of view – even though infringers are discouraged, a system of private enforcement of competition law should first and foremost aim at compensation and leave deterrence to public enforcement. Deterrence can be achieved as a byproduct of a properly working system of private enforcement, but in principal it should be left to the efforts of public authorities. From the efficiency standpoint, however, it seems natural for the US approach to gain support among the judiciary due to the fact that it spares courts the task of quantifying the damages suffered by the claimant. An interesting question to be asked is whether the EU could have chosen the US way for the purpose of lightening the burden on national courts. Quantification of damages is a serious practical task connected with its considerable amount of difficulties, which the US Supreme Court decided to avoid by declaring the concepts of passing-on and claims by indirect purchasers inapplicable. The EU, however, driven by other considerations such as fairness chose the more challenging, but also more balanced path of adopting rules on quantification of damages. This matter will be dealt with below in the chapter dedicated to Directive 2014/104/EU.[159] With these deliberations in mind, it is important to realize that there are other serious issues with the US approach, which either can simply be contrary to established EU case law or make the adoption of the decisions by US Supreme Court less attractive.

First of all, a valid question to be asked is whether a direct purchaser really has the best possible motivation to initiate proceedings against the infringer of competition law. In the production chain model consisting of a manufacturer, a retailer and final consumers where the manufacturer distorted competition by participating in a cartel or abusing its dominant position, the retailer has the role of the direct purchaser. The marked can be structured in a way that creates a strong bond between the retailer and the manufacturer.[160] It is quite possible that the direct purchaser is reluctant to sue its supplier for damages due to a positive relationship they might have.[161] As mentioned before the retailer has three possibilities: to pass-on the overcharge caused by the actions of the infringing manufacturer, to absorb all of it or to absorb part of it.[162] Logically, absorbing the overcharge in whole or on part should

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[159] Damages Dir. 2014/104/EU OJ L349/1.
[160] Firat Cengiz, 'Passig-on Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition law: what can the EU learn from the US?' (2007) CCP Working Paper 12.

[161] Ibid.
[162] n 38.

theoretically motivate the retailer to seek reparation. In practice, the retailer might be driven by other objective and as result be afraid of harming its business relationship with the manufacturer in any way. Therefore, it can be very doubtful whether the direct purchaser has the proper inclination to claim compensation.[163] With this consideration in mind, making direct purchasers the sole party entitled to sue for damages[164] seems like a risky and definitely less alluring option. The infringer would be able to ultimately keep its unlawful gains when the only party with the right to reparation lacks any motivation to seek reparation.

Second of all, it should be born in mind that usually anticompetitive activities such as abuse of dominant position or especially cartel participation are connected with a certain degree of refinement, where violators of competition rules create new methods to maintain their unlawful behavior.[165] As Cengiz points out the infringer would probably be aware of the threat to become a defendant in damages case and in its attempts to avoid such a lawsuit would try to conspire with the direct purchasers by offering them some of its illegal profit.[166] This factual situation is certainly detrimental to private enforcement. Again, a flaw in the US approach, which leads to the benefit of competition law infringers, is exposed. By granting legal standing only to direct purchasers[167] and thereby limiting the circle of possible plaintiffs, the US Supreme Court also assisted violators, which have to conspire only with direct purchasers in order to avert the risk of litigation. If the indirect purchasers were entitled to sue, the possible circle of plaintiffs would increase substantially and the infringer would have a harder task in initiating collusion. It should be kept in mind however that this issue can be approached strictly from public enforcement perspective. Ultimately, competition authorities are assigned with discovering cartels and abuses of dominant position and it should also be their responsibility to unearth collusion, which aims at undermining possible litigation against the infringing party. A plaintiff normally would not possess the resources to detect a complicated anticompetitive organization. In any case, the path chosen by the US Supreme

[163] Firat Cengiz, 'Passig-on Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition law: what can the EU learn from the US?' (2007) CCP Working Paper 12.
[164] n 59.
[165] Firat Cengiz, 'Passig-on Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition law: what can the EU learn from the US?' (2007) CCP Working Paper 12.

[166] Ibid.

[167] n 59.

Court to grant legal standing only to direct purchasers[168] leaves a void in the private enforcement of competition rules.

Last, but not least, the EU is not in a position to accept the US solution due to the concept of direct effect. The direct effectiveness of primary EU law has been established in the case law of the CJEU in the preliminary ruling of *Algemene Transport-en Expeditie Onderneming van Gend an Loos v. Nederlandse Adminisratie der Belastingen.*[169] The Court unambiguously stated that ‘this Treaty (the EEC Treaty) is more than an agreement which merely creates mutual obligations between the contracting states’.[170] Moreover, the Courts continues with the assertion that ‘the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals’.[171] Articles 101 and 102 TFEU [172] are part of primary EU law and as such confer rights and obligations upon individuals. At the same time the US Supreme Court considerably limited individual rights in terms of private enforcement of competition law by rejecting the notions of passing-on defense and indirect purchaser claims.[173] As Cengiz rightfully recognized, there is a glaring disparity between the EU concept of direct effect and the solutions reached by the US Supreme Court.[174] Therefore, the EU could not have chosen the US approach when dealing with the issues of passing-on defense and indirect purchaser claims. It contradicts the concept of direct effectiveness as a fundamental principle of EU law established as early as 1963.

3.4 Were there any deterrence consideration by the CJEU in the case Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others?[175]

As already mentioned the Green Paper[176] puts emphasis on the deterrence function.[177] The White Paper[178] changes significantly this position and highlights on the function of

[168] Ibid.

[169] Case 26/62 *Algemene Transport-en Expeditie Onderneming van Gend an Loos v. Nederlandse Adminisratie der Belastingen* [1963] ECR I.
[170] Ibid.
[171] Ibid.
[172] Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47.

[173] n 49-51, n 59.
[174] Firat Cengiz, ‘Passig-on Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition law: what can the EU learn from the US?’ (2007) CCP Working Paper 26.
[175] Case C-453/99 [2001] ECR I-6297.
[176] The Green Paper COM (2005) 672.
[177] n 33.
[178] The White Paper COM (2008) 165.

compensation.[179] Nonetheless, it is interesting to unearth the primarily source of the EU Commission's initial idea to give priority to deterrence. In its background and objectives section The Green Paper expressly relies on the preliminary ruling in Courage v. Crehan.[180] In that case the CJEU after stating the right of individuals to claim damages for infringements of competition law[181], continues its deliberations by declaring that 'the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition'.[182] It is true that the discouragement of anticompetitive practices is the essence of deterrence and in this sense the Court emphasized on its importance. In spite of that, I think that by relying on that particular statement the Green Paper overstates the importance of deterrence. In my opinion, the Court intended to reiterate the correctness behind its decision to ensure the right of individuals to claim reparation by pointing out positive influences on deterrence. In my opinion, the statements by the Court cannot be interpreted as a prioritization of deterrence, but rather as recognition of the need to build a strong system of private enforcement of EU competition law. A separate durable structure of private enforcement, primarily concerned with the function of compensation, can serve as a factor increasing deterrence and thereby providing aid to the efforts of public enforcement of competition rules.

4. Directive 2014/104[183] (Damages Directive)

4.1 Overview

The Damages Directive was predated by the EU Commission's Proposal for the adoption of a directive from 2013.[184] In this document the EU Commission states its aims such as 'optimizing the interaction between public and private enforcement of competition law'[185] and 'ensuring that victims of infringement of EU competition rules can obtain full compensation

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[179] n 35.
[180] Case C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others* [2001] ECR I-6297.
[181] Ibid, para 26.
[182] Ibid, para 27.
[183] Directive 2014/104/EU of the European Parliament and of the Council of 26 November on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1 (the Damages Directive).
[184] EU Commission '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 Stated and of the European Union' COM (2013) 404 (the Commission's Proposal).

[185] The Commission's Proposal COM (2013) 404, para 1.2.

for the harm suffered'.[186] The first aim can be interpreted as a desire by the Commission to embrace the 'separate tasks approach'[187] where public and private enforcement of competition law complement each other, but nevertheless follow different purposes. The second aim is a clear identification of the leading role of the compensatory principle as far as private enforcement is concerned. The next logical step on EU level was trying to introduce a comprehensive piece of legislation, which would provide clarity on a wide range of issues connected with damages claims for infringements of competition law. The Damages Directive was adopted in 2014. From the outset it makes some important points such as reaffirming the changes that Regulation 1/2003[188] introduced[189] and the important role of national courts in terms of private enforcement of competition rules.[190] The Damages Directive states the significance of two strong systems of private and public enforcement in order for the positive interaction between them to occur.[191] It also outlines the relevance of internal market considerations.[192] As noted above, the proper functioning of the internal market is a goal not just of private enforcement, but of competition law as a whole.[193] A specific risk for the internal market is the fact that 'undertakings established and operating in various member states are subject to differing procedural rules that significantly affect the extent to which they can be held liable for infringements of competition law'.[194] The outcome of distinctive procedural regimes in member states poses a threat of providing benefits to violators of competition rules and lowering the motivation of individuals to exercise their rights under the free movement of goods, services, persons and capital.[195] Furthermore, the Damages Directive reaffirms the achievements of the CJEU case law.[196] Namely, the right of any harmed party to claim reparation[197] and the principle of full compensation.[198] Recital (9) of the Damages Directive is essential in outlining the focus of the legislator. Particularly, by once again relying on the goal of a properly functioning internal market, the Damages Directive aims to 'increase legal certainty and to reduce the differences between the member states as to the

[186] Ibid.
[187] n 30, n 31.
[188] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.
[189] Damages Dir. 2014/104/EU OJ L349/1, recital (2).
[190] Ibid, recital (3).
[191] Ibid, recital (6).
[192] Ibid, recital (7).
[193] n 10.
[194] Damages Dir. 2014/104/EU OJ L349/1, recital (8).
[195] Ibid.
[196] Damages Dir. 2014/104/EU OJ L349/1, recital (11)-(12).

[197] n 73-74.
[198] n 97-98.

national rules governing actions for damages for infringements of both Union competition law and national competition law where that is applied in parallel with Union competition law'.[199] This statement clarifies two points: the Damages Directive is dealing only with the specific issue of harmonizing damages actions in all member states when there is a violation of EU competition rules or of both EU and national rules. The anticipation of the EU legislator is that an 'approximation of those rules (competition rules) will help to prevent the increase of differences between the member states' rules governing actions for damages in competition cases.'[200] The beginning of chapter I of the Damages Directive once again solidifies the points made in the recitals section concerning full compensation of harmed parties and the need for a sound functioning competition in Europe.[201] The subject matter and the scope of the Damages Directive are outlined in Article 1, which states that '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 undertaking can effectively exercise the right to claim full compensation'.[202] Furthermore, the significance of eliminating bars harming the well-being of the internal market is once again expressly articulated[203] and it is stated that 'the Directive sets out rules coordinating the enforcement of competition rules by competition authorities and the enforcement of those rules in damages actions before national courts.[204] In Article 3[205] several other key point are emphasized on. First it introduces an obligation for every member state to provide remedies for parties harmed by infringements of competition law.[206] Then once again the right for reparation for the suffered harm, including loss of profit plus interest, first established by CJEU case law, is clearly articulated.[207] At the same time the Damages Directive introduces the important limitation of full compensation, namely that it 'shall not lead to overcompensation'.[208] Moreover, the EU legislator finds it necessary once again to reaffirm the significance of the principles of effectiveness and equivalence.[209] Such a statement seems logical due to the fact that the goal of decreasing legal uncertainty and harmonizing national rules related to damages claims for

[199] Damages Dir. 2014/104/EU OJ L349/1, recital (9).
[200] Ibid.
[201] Damages Dir. 2014/104/EU OJ L349/1, Article 1.
[202] Ibid.
[203] Damages Dir. 2014/104/EU OJ L349/1, Article 1.
[204] Ibid.
[205] Ibid, Article 3.
[206] Ibid, Article 3 (1).
[207] Damages Dir. 2014/104/EU OJ L349/1, Article 3 (2).
[208] Ibid, Article 3 (3).
[209] Damages Dir. 2014/104/EU OJ L349/1, Article 4.

competition law distortions[210] would be considerably undermined if member states disregard the principles of equivalence and effectiveness. It remains to be seen after the Damages Directive is transposed in national laws of member states whether this aim was realistic or not. As mentioned above the transposition deadline for member states expires on the 27.12.2016.[211] The Damages Directive deals with a wide range of issues such as disclosure of evidence, penalties, joint and several liability and limitation periods. The topics of relevance for the current discussion are the defense of passing-on, claims by indirect purchasers and quantification of the suffered harm.

4.2 The defense of passing-on under the Damages Directive.

As stated above there is no case law of EU courts dealing specifically with the defense of passing-on in regards competition rules. Instead this concept was mentioned with connection to unjust enrichment in other areas of community law.[212] The Damages Directive regulates that defendants will be entitled to invoke the defense of passing-on.[213] Such a solution is in line with the White Paper[214] and the Commission's Proposal[215], both of which supported the defense of passing-on being allowed on EU level. It corresponds with the notion of a 'genuinely European approach'[216] and the two stated goals in the Commission Proposal.[217] The admissibility of the pass-on defense is one of the series of measures indented to deepen the interaction between public and private enforcement by clarifying and approximating as much as possible rules on damages actions.[218] At the same time the expressly stated aim of full compensation[219] can be strengthened, among other ways, by recognizing the defense of passing-on. Although this effect might seem difficult to comprehend at first, the following should be kept in mind: if we follow the idea that every harmed party must receive reparation, then in order to truly reach that goal, rules that guarantee that the injured parties and only they shall be entitled to compensation should be put in place. If the direct purchaser obtains compensation higher than the sum of the quantified harm and lost profit plus interest, then the goal of full compensation has been distorted. The more obvious example would be if the

[210] n 199-200.
[211] n 43.
[212] n 118.
[213] Damages Dir. 2014/104/EU OJ L349/1, Article 13.
[214] The White Paper COM (2008) 165.

[215] The Commission's Proposal COM (2013) 404.
[216] The White Paper COM (2008) 165, para 1.2.

[217] The Commission's Proposal COM (2013) 404, para 1.2.

[218] n 185.
[219] n 86.

plaintiff does not receive any reparation at all or the awarded sum is below what he was entitled to receive, but both options, namely overcompensation and under compensation can be perceived as unwanted and burdensome on efforts of improving private enforcement of competition rules. Therefore, the EU legislator recognized the need to evade overcompensation.[220]

An interesting point of discussion made by Strand claims that the rule in Article 3 (3) of Damages Directive lacks the element of an enforceable positive legal norm due to its broad nature and should be perceived just as a declaration of policy and nothing else.[221] I believe that such an opinion cannot be supported. For one thing, even though Article 3 (3) of the Damages Directive is broadly formulated it is also sufficiently clear in its wording. Regardless of the way the provision is labeled – as a positive legal norm conferring rights and obligations or as a principle not entailing any specific obligations, its significance can be observed in subsequent articles of the Damages Directive. As it has been pointed out, the rule in Article 3 (3) has been additionally expanded in Article 12 (2) of the Damages Directive.[222] According to this provision 'in order to avoid overcompensation, member states shall lay down procedural rules appropriate to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level'.[223] Therefore, I would suggest that the discussion on whether Article 3 (3) contains a positive legal rule or not is not significant. Even though I believe the wording of the provision is clear and therefore it is unreasonable to limit its importance by labeling it as unenforceable and too broadly formulated, the key point remains the connection between Articles 3 (3) and 12 (2). The combination of these two provisions undoubtedly entails an obligation for member states and strengthens the idea of how crucial it is to avoid overcompensation for the benefit of a well-functioning system of damages claims.

In addition to the points made so far concerning the pass-on defense in the Damages Directive, it should be born in mind that the solution of Article 12 to allow the defense on EU law would not be complete if nothing is mentioned about the burden of proof. For that reason

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[220] Damages Dir. 2014/104/EU OJ L349/1, Article 3 (3).
[221] Magnus Strand, 'Indirect purchasers, Passing-on and the New Directive on Competition Law Damages' (2014) 10(2) European Competition Journal 361, 372.
[222] Hanna Wingren, 'Indirect Purchasers' Right to Damages and the Defense of Passing-On' (Master's Thesis in EU Competition Law, Uppsala University 2014) 39.

[223] Damages Dir. 2014/104/EU OJ L349/1, Article 12 (2).

the Damages Directive expressly states that 'the burden of proving that the overcharge was passed on shall be on defendant, who may reasonably require disclosure from the claimant or from third parties'.[224] Since the infringer has the interest to show that the direct purchasers passed-on the overcharge down the supply chain and therefore has not suffered any harm, the resolution in Article 13 rests on the solid logic present in most legal systems that the party, which benefits from certain facts is the party who has to prove them. An interesting issue raised by Wingren is determining the boarders of the defense of passing-on.[225] The EU Commission's Proposal states firmly that 'in situations where the overcharge was passed on to natural or legal persons at the next level of the supply chain for whom it is legally impossible to claim compensation, the passing-on defense cannot be invoked'.[226] Furthermore, the Commission shows its concern that 'allowing the passing-on defense when it is legally impossible for the party to whom the overcharge was allegedly passed on to claim compensation would be unjustified, since it would mean that the infringing undertaking is unduly freed from liability for the harm he caused'.[227] However, these considerations included in the Commission's Proposal are absent from the final version of the Damages Directive. Considering the stated aim of the legislator in Recital (9) of the Damages Directive[228] on significantly decreasing the discrepancies between national rules on damages combined with the fact that the Directive provides for a broad set of rules designed to overcome differences, it could be inferred that the legislator was reluctant to admit the chance for a legal impossibility as outlined in the Commission's Proposal and therefore excluded any legal barriers on the application of the passing-on defense. This possible explanation leads to the conclusion that there are no barriers on EU level as far as the pass-on defense is concerned. Wingren denies that notion by emphasizing on the fact that the product chain is exhausted when the plaintiff is also an end consumer who is practically unable to pass on the overcharge to anyone else.[229] Such an opinion can be supported with the important remark that there is a difference between a legal and a practical limitation. The lines between the two should not be blurred. When considering impossibility the EU Commission refers to legal bars in the

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[224] Damages Dir. 2014/104/EU OJ L349/1, Article 13.

[225] Hanna Wingren, 'Indirect Purchasers' Right to Damages and the Defense of Passing-On' (Master's Thesis in EU Competition Law, Uppsala University 2014) 40.

[226] The Commission's Proposal COM (2013) 404, para 4.4.
[227] Ibid.
[228] n 199-200.
[229] Hanna Wingren, 'Indirect Purchasers' Right to Damages and the Defense of Passing-On' (Master's Thesis in EU Competition Law, Uppsala University 2014) 40.

systems of member states such as 'national rules of causality (including rules on foresee ability and remoteness)'.[230] These bars should be eliminated in order for the defense of passing-on to fully correspond with subject matter and scope of the Damages Directive.[231] At the same time, every production chain, even the most complicated one, has its end consumer, who in practical terms represents the final party to whom the overcharge can be passed-on.

In summary, it can be concluded that the Damages Directive fills the void existent in the absence of specific CJEU case law by undoubtedly confirming the obligation of member states to ensure the implementation of the passing-on defense in their national legislations. Moreover, it provides a much needed clarity on the burden of proof and strengthens compensation by promoting fairness in the form of denying reparation to parties, which passed on the overcharge (avoiding overcompensation).[232] In the next paragraph it will be established how the solution of Article 13 of Damages Direction is connected with the case law concerning claims by indirect purchasers and how these claims were approached by the EU legislator.

4.3 The claims by indirect purchasers under the Damages Directive.

In contrast with the defense of passing-on, the CJEU had to deal with the issue of claims by indirect purchasers in its case law.[233] As mentioned before the Court recognized the idea that 'any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and a prohibited practice or agreement'.[234] This rule has been believed to include not only direct, but also indirect purchasers and Articles 12 and 14 of the Damages Directive follow the same notion. Additionally, the principle of full compensation has first been established in the case of Manfredi.[235] In terms of the Damages Directive the principle of full compensation can first be seen in Article 3.[236] Article 12 serves as a logical continuation of Article 3 by explicitly stating that 'compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers'.[237] This statement leaves no room for doubt that claims by indirect purchasers are admissible on EU level and at the same time opens the door for the more specific solutions adopted in Article 14 of the Damages Directive. However, the interpretation of some specific points remains

[230] The Commission's Proposal COM (2013) 404, para 4.4.
[231] n 201-204.
[232] n 220.
[233] Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.
[234] n 99.
[235] n 97-98.
[236] Damages Dir. 2014/104/EU OJ L349/1, Articles 3 (1).
[237] Damages Dir. 2014/104/EU OJ L349/1, Articles 12 (1).

debatable. For instance, similarly to his statements concerning the pass-on defense[238], Strand argues that Article 3 (3) is to be perceived as a policy consideration lacking the qualities of a legal norm that would confer rights and obligations on member states.[239] In my view such reasoning is flawed and the same indication used for disagreeing with Strand's opinion on pass-on defense can be applied – the rule in Article 3 (3) is sufficiently clear and should be read in close connection with Article 12 (1). Regardless whether his opinion on the interpretation of Article 3 (3) is true or not, I believe that such a discussion would not lead to any valuable findings. There is another aspect to be taken out from Strand's statements. He basically uses his analysis of Article 3 (3) to prove his larger point, namely that the Damages Directive encompasses restrictions on the right of individuals and more specifically of indirect purchasers to claim damages in national courts.[240] The main evidence used for proving the existence of such bars is Recital (11) of the Damages Directive, which first explains that 'in the absence of Union law, actions for damages are governed by the national rules and procedures of the member states'[241] and later on in its last sentence asserts that 'where member states provide other conditions for compensation under national law, they should be able to maintain such conditions in so far as they comply with the case law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive.'[242] One possible interpretation of this recital is that the legislator has recognized the usefulness of certain national limitations on damages claims and therefore granted member states a significant freedom in imposing such restrictions.[243] In my opinion, however, such a reading of Recital (11) is too broad and ultimately flawed upon further examination. If a stricter approach is applied to interpreting the text of the recital together with a view on the broader picture envisioned by the Damages Directive, it would be established that the notion of existing bars for damages claims is unfounded. First of all, the text of the recital very clearly sets the limits for applying national conditions for compensation – the principles of equivalence and effectiveness,[244] the Damages Directive and the CJEU case law. If we accept an unlimited right for member states to set bars, then the scope and subject matter[245] of the Damages

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[238] n 221.
[239] Magnus Strand, 'Indirect purchasers, Passing-on and the New Directive on Competition Law Damages' (2014) 10(2) European Competition Journal 361, 372.
[240] Magnus Strand, 'Indirect purchasers, Passing-on and the New Directive on Competition Law Damages' (2014) 10(2) European Competition Journal 361, 371-372.
[241] Damages Dir. 2014/104/EU OJ L349/1, recital (11).
[242] Ibid.
[243] Magnus Strand, 'Indirect purchasers, Passing-on and the New Directive on Competition Law Damages' (2014) 10(2) European Competition Journal 361, 371-372.
[244] n 13-14.
[245] n 201-204.

Directive together with the aims recognized in Recital (9)[246] would be substantially undermined. It is true that Recital (11) grants member states a right to maintain additional conditions established in their national systems, but in reality with the requirements that have to be observed, such a possibility remains only theoretical. The principles of equivalence and effectiveness would ensure in the absence of community law that the national rules to be applied are not less advantageous than EU ones and that there is a possibility for compensation without any disproportionate burdens. Moreover, the CJEU in Manfredi[247] and Article 12 of the Damages Directive do not envision any restriction to the right of indirect purchasers to claim damages. Therefore, any national bar with that effect would not comply with EU case law and the Directive in the meaning of Recital (11). As a result, I believe that in practice there are no national bars, which would satisfy the criteria in Recital (11) and even if there are such limitations, with the requirements that they have to comply with, they would not alter the position of indirect purchasers in the EU. It should be born in mind, however, that this opinion is only an expectation for the moment and that it remains to be seen how the Damages Directive is transposed and applied in member states in the future.

The next important aspect in examining claims by indirect purchasers in the Damages Directive is the burden of proof. The Directive provides more details on the issue in comparison to the burden of proof in the pass-on defense, where the infringer has to show the overcharge was distributed further down the supply chain.[248] According to Article 14 of the Damages Directive three requirements have to be satisfied by the indirect purchaser in order to prove he is entitled to receive compensation. The Directive provides that 'the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that: (a) the defendant has committed an infringement of competition law; (b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and (c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.'[249] The wording 'shall be deemed' clearly shows the existence of a presumption provided the three requirements are fulfilled. Several key points from the text of the Directive are worth exploring. First of all, it is apparent that when drafting Article 14 the legislator was guided by the three requirements

[246] n 199-200.
[247] Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.
[248] n 224.

[249] Damages Dir. 2014/104/EU OJ L349/1, Articles 14 (2).

for damages claims outlined by the CJEU, namely: violation of competition law, suffered harm and a causal relationship between them.[250] Article 14 (2) of the Damages Directive corresponds with the formula established in Manfredi.[251] In terms of causation, rules on establishing a causal relationship are governed by national law, which has to comply with the principles of equivalence and effectiveness[252] As a result the concept of causation can differ in member states. By all means, the effort to codify the achievements of case law in legislation should be supported. Second of all, it should not be forgotten that the White Paper[253] suggested a rebuttable presumption according to which the illegal overcharge has been passed-on from the direct to the indirect purchasers in its entirety should be created.[254]As already noted in the discussion of unjust enrichment[255] for the purpose of improving private enforcement of competition law in Europe, the EU legislator has an interest in strengthening the position of indirect purchasers. This version of a rebuttable presumption, however, has not been included in the final text of the Damages Directive. The indirect purchasers cannot rely on a presumption that the entirety of the overcharge was born by the indirect purchaser. Instead, as mentioned above, the legislator offers a presumption, which ensures that the plaintiff would receive compensation when the three requirements of Article 14 (2)[256] are satisfied. However, this presumption is rebuttable as it allows the alleged infringer of competition law to 'demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser.'[257] In comparison to the solution proposed by the White Paper[258] the final approach chosen by the Damages Directive seems like a clear retreat from the initial idea of the EU Commission. In spite of the fact that the final presumption is weaker than the initial proposal, it should be born in mind that it relies on the same concept and serves the same purposes. It could be regretted that the legislator did not follow the Commission's suggestion entirely, but that does not mean the position of indirect purchasers and thereby private enforcement mechanisms are not invigorated. On the contrary, the aim of encouraging indirect purchasers to claim the damages

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[250] n 99.
[251] Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.
[252] Damages Dir. 2014/104/EU OJ L349/1, recital (11).

[253] The White Paper COM (2008) 165.
[254] Ibid, para 2.6.
[255] Chapter 3.1.
[256] n 249.

[257] Damages Dir. 2014/104/EU OJ L349/1, Articles 14 (2).
[258] The White Paper COM (2008) 165, para 2.6.

can still be considered fulfilled. Besides general aims of competition law policy, there can be different practical reasons behind decreasing the burden of proof for indirect purchasers in contrast to defendants using the pass-on defense. One such acumen recognized by Strand is the imbalance of information.[259] The infringer is not expected to have any difficulties in obtaining any necessary information in order to rely on the defense of passing-on, considering the fact that he is the party initially responsible for the overcharge.[260] Therefore the legislator briefly states that the infringer has to prove the passing-on[261] without specifying the rule any further. At the same time, the indirect purchaser is in a much more vulnerable position in securing all the necessary information to initiate proceedings and subsequently prove his case for compensation.[262] For that reason by relying on the established case law of the CJEU[263] the Damages Directive provides the needed clarity for the plaintiff by outlining the points that he must prove in order to rely on the rebuttable presumption and ultimately obtain reparation. Naturally, there are other parts of the Directive concerned with other questions also aiming to overcome the informational discrepancy. It should be noted that the Damages Directive expressly recognized the 'information asymmetry' albeit in a context different than the specific issues of passing-on defense and claims by indirect purchasers.[264]

In summary of the approach towards claims by indirect purchasers, it could be stated the legislative efforts in the Damages Directive should be encouraged. Although, it can be regretted that the legislator did not adopt the initial version of a rebuttable presumption[265], the position of indirect purchasers remains strong due to the overall decreased burden of proof. This lightening of the burden of proof is a result of an increased clarity on the points that need to be proven, which lead to satisfying the criteria of the presumption and obtaining reparation. As a matter of fact it remains to be seen after the transposition of the Damages Directive whether in reality indirect purchasers would benefit from the solutions proposed by the legislator, but nevertheless the approach in the Directive can be described as favorable towards the general aim of promoting private enforcement of competition law.

[259] Magnus Strand, 'Indirect purchasers, Passing-on and the New Directive on Competition Law Damages' (2014) 10(2) European Competition Journal 361, 382-383.
[260] Ibid.
[261] n 224.
[262] Magnus Strand, 'Indirect purchasers, Passing-on and the New Directive on Competition Law Damages' (2014) 10(2) European Competition Journal 361, 382-383.
[263] n 251.
[264] Damages Dir. 2014/104/EU OJ L349/1, recital (15).
[265] n 254.

4.4 Quantification of damages

As mentioned above, in contrast to the approach in the US, by recognizing the concepts of passing-on and claims by indirect purchasers, the EU chose the more difficult path of having to deal with the issue of quantifying damages.[266] Although, the precise quantification remains a question of national law, the Damages Directive lays down important rules to be followed by every member state in order to facilitate private enforcement of competition law. Therefore the EU legislator provides that ‘member states shall ensure that neither the burden nor the standard of proof required for the quantification of harm renders the exercise of the right to damages practically impossible or excessively difficult’.[267] Moreover, national courts are entrusted with the task to calculate the compensation themselves in cases where the existence of harm has been proven by the plaintiff, but the evidence he presented is insufficient for a definite quantification.[268] In addition, the Damages Directive identifies the need for cooperation between courts and NCA’s by granting courts the right to ask the competition authority in their country for assistance in the estimation of damages.[269] Clearly, the Directive aims at preventing national measures, which would undermine damages claims from the outset, while giving freedom to national courts to act when necessary for a better functioning enforcement system. Another measure intended to promote private proceedings is a rebuttable presumption that cartels have caused harm.[270] In summary, the rules in Article 17 are constructed with the hope that national rules will not interfere with quantification and where quantification is nonetheless a practically challenging task, enough mechanism are put in place to overcome those difficulties. Moreover, the active role of courts in specific situations is encouraged and the help of competition authorities is endorsed.

IV Conclusions

The central target of the thesis was to examine in detail the issues of the passing-on defense and claim by indirect purchasers and subsequently to prove that on the issue whether to declare those two concepts as admissible or to disallow them, choosing the former approach is a much better solution on EU level. In order to verify that point, it was necessary first to provide an overview on the definition of competition law and the goals it pursues. Secondly, the difference between public and private enforcement and more specifically the function they

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[266] Chapter 3.3.
[267] Damages Dir. 2014/104/EU OJ L349/1, Articles 17 (1).
[268] Ibid.
[269] Damages Dir. 2014/104/EU OJ L349/1, Articles 17 (3).

[270] Damages Dir. 2014/104/EU OJ L349/1, Articles 17 (2).

are suited to serve had to be shown. The problems of passing-on defense and claims by indirect purchasers are complex and therefore cannot be fully comprehended without on one hand examining two core issues connected with them, namely unjust enrichment and multiple damages and on the other hand without comparing possible differentiating approaches. With this in mind, the contrast between the landmark case law in the Europe and the US, together with the chronological evolution of the Commission's opinions on pass-on and legal standing of indirect purchasers were key issues in the thesis. Also, a historical overview is essential in establishing the reasoning behind Directive 2014/104/EU[271], which represents the first comprehensive piece of legislation dealing with private enforcement of competition law in the EU. Furthermore, the thesis analyzed how the issues of passing-on, standing of indirect purchasers and quantification of damages are regulated in the Damages Directive with the remark that the practical effects of the Directive remain to be seen after its transposition in the legislation of member states.

The first significant conclusion to be taken out from the thesis is the connection and interaction between public and private enforcement of competition law. For various reasons public enforcement holds the leading role in the EU.[272] This fact serves as an important preface for the functions of compensation and deterrence.[273] The first function contains the element of fairness and second one the elements of efficiency and effectiveness.[274] The complex interaction between the two functions and the inevitable collisions between them lead to the conclusion that private enforcement of competition law is better suited to achieve compensation.[275] The thesis showed that a clearer separation between the functions does not mean elimination of positive cooperation between them and works better than a mechanical combination of compensation and deterrence. Moreover, it proved that it is better to have two properly operating systems of private and public competition law, which by pursuing their own goals beneficially influence each other in a natural, rather than in an artificial way.

The second important conclusion is connected with the question what is the consequence of having two contrasting approaches towards passing-on and legal standing of indirect purchasers in the EU and US. The thesis examined in detail the landmark cases, which shaped the current situation in both continents. At the same time it is important to realize that the two

[271] Damages Dir. 2014/104/EU OJ L349/1.
[272] n 15, n 18.
[273] n 22-24.
[274] Ibid.
[275] n 31.

differentiating approaches were also formed by other factors besides case law such as the superior system of private enforcement in the US and the fear of excessive litigation it entails.[276] As shown above the US Supreme Court denies the admissibility of passing-on defense and legal standing of indirect purchasers in damages claims, while the EU after a relatively long historical process undoubtedly recognizes the need for those two concepts to be applied. With this entire in mind, it could be stated that the second significant conclusion is that it was impossible for the EU to adopt the US approach for various reasons – disregarding the element of fairness and thereby the function of compensation would seriously undermine efforts of creating a strong system of private enforcement of competition law[277], exclusivity for direct purchasers can be risky and can create bigger issues than the ones it initially intended to solve[278] and the ruling of the US Supreme Court do not match with the concept of direct effect.[279]

The next findings are based on the concepts of unjust enrichment and multiple damages. While the effect of unjust enrichment is unwanted both in the EU and US, the EU showed willingness to be much more flexible towards to issue by correcting any possible injustices with legislative measures. In contrast the US Supreme Court decided to remove the cause for unjust enrichment by declaring passing-on inadmissible and stripping indirect purchasers of a substantial part of their rights. I believe the thesis managed to show that the problem is much better suited to be fixed by proportionate measures such as a balanced legislation.[280] With a broader picture in mind, such a solution is much more appropriate considering the desire of shaping a 'genuinely European approach'[281] and the element of fairness.[282] Multiple damages can also be described as a threat recognized both in the US and the EU, but the two systems reached their solutions from different starting points.[283] It is clear now that in the EU both the pass-on defense and indirect purchaser claims are admissible, among other reasons also for the avoidance of multiple damages. Again the EU case law and the legislator remain flexible by granting rights rather than stripping them and thereby giving equal opportunities for every party to protect its interest. Therefore, the risk is still in existence, but any possible occurrence

[276] n 61-62.
[277] n 158.
[278] n 163-164.
[279] n 174.
[280] n 135.
[281] n 136.

[282] n 23.

[283] n 141.

is attributed to a party's own inability to exercise its rights properly. Moreover, as proven above, the EU approach promotes, taking into consideration the broader picture of private enforcement of competition law, not only the deterrence, but also the compensation function is strengthened considerably.[284]

As far as the Damages Directive is concerned, the thesis aimed at providing a deeper look at the legislator's approach on the passing-on defense, claims by indirect purchasers and quantification of damages. The Directive makes a significant step forward by stating the express admissibility of the passing-on defense and thereby providing clarity for member states, which are obliged to implement that solution in their national legislations.[285] The next positive improvement in the Directive is the reliance on case law in reaffirming the applicability of claims by indirect purchasers and establishing the burden of proof to be satisfied by them.[286] In this way a rebuttable presumption in favor of the plaintiff is created and although it is not the strongest possible one, it can be concluded that it enhances considerably the efforts of indirect purchasers to obtain compensation.[287] In terms of quantification, the Directive adopts interesting solutions in order to avoid any national rules, which would undermine proper quantification of damages and as a result disrupt the chance of compensation, while an active role for national courts is promoted in addition to developing the assistance of national competition authorities. Overall, the most important conclusion concerning the Damages Directive is that it represents a much needed legislative instrument for dealing with the issue of damages claims in the EU and approximating rules in member states. It can be summarized that the solutions adopted in the Directive are in position to have a positive influence on the efforts to receive reparation and are therefore in line with the compensation function and the element of fairness. The practical effect of implementation in member states remains to be seen, but the first important steps towards a properly operating system of private enforcement and more specifically of damages claims have been undoubtedly made.

[284] n 149-151.
[285] n 213.
[286] n 237.
[287] n 249, n 256-57.

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VI Annex

The thesis is divided into three main chapters, namely introduction, main part and conclusions. Each of the three main chapters includes numerous subchapters examining different issues. As a first step, the introduction section outlines the aims and scope of thesis. From the outset, it is established that there are two main solutions regarding the defense of passing on and claims by indirect purchasers – the US approach denying the admissibility of the two concepts and EU approach, which ultimately grants legal standing to indirect purchasers and gives the opportunity to the infringer to rely on the defense of passing on. The thesis gives preference to the European path. As it is shown throughout the thesis, however, the European solutions were not reached easily, but are a result of a long historical development, which for the moment ends with the adoption of Directive 104/2014/EU. As a necessary step towards understanding the problems of passing on and the claims by indirect purchasers, the thesis provides a short overview on the definition of competition law and the goals it pursues. Moreover, an important distinction on private and public enforcement of competition rules is provided. Then the thesis explains in detail the two function of private enforcement of competition law and the elements that they incorporate. The Compensation function (incorporating the element of fairness) and the deterrence function (incorporating the elements of efficiency and effectiveness) are two concepts essential for the understanding the logic behind private enforcement of competition rules and subsequent findings in the thesis. The last part of the introduction provides an example of a simple production chain with a manufacturer, a wholesaler and a final consumer as the main participants. The first method used in the main part of the thesis is a comparison between the approaches in the US and EU by examining two landmark cases in North America – Hannover Shoe and Illinois Brick with other two notable judgments in Europe – Crehan and Manfredi. After that the thesis examines the acts that led to the adoption of Directive 104/2014/EU. A second method used by the thesis to show the differences between the two continents is analyzing in detail the issues of multiple damages, unjust enrichment, quantification of damages and also the diverse interpretations that they entail. A key point in the main chapter is explaining the reason why it was not possible for the EU to copy the American model of private enforcement of competition rules. After examining these issues, it is necessary to deal in detail with Directive 104/2014/EU, first by explaining the universally applicable concepts in the Directive, their possible and expected interpretation in the legislation of member states and then by specifically analyzing the articles dedicated to the defense of passing on, legal standing of indirect purchasers and quantification of damages. A common thread repeated in the thesis is the belief that the systems of private enforcement of competition law in the EU would function better and would bring key benefits to public enforcement efforts only if it is primarily concerned with the function of compensation. This concept also influences the final main chapter of the thesis – conclusions. In this final part, the most important findings of the thesis proving the point that the European approach of allowing the pass on defense and granting legal standing to indirect purchasers is much more beneficial are once again repeated. Concerning the solutions of the Directive on the concepts of passing on, indirect purchasers and quantification, the thesis ends with the hope those rules will be transposed properly by member states, but also with the conviction that the EU legislator follows a favorable path, which would improve private enforcement of competition law in Europe.

Die Masterarbeit ist in drei Teile gegliedert, nämlich Einführung, Hauptteil und Schlussfolgerungen. Jeder Teil enthält zahlreiche Unterkapitel, die verschiedene Fragen analysieren. Als erster Schritt wurden in der Einführung die Ziele und der Umfang der Masterarbeit dargelegt. Vom Anfang legt die Masterarbeit fest, dass es zwei Hauptlösungen in Bezug auf das Thema Abwälzung zur Verteidigung und Klagen indirekter Abnehmer gibt – Die Position in den USA, wo beide Konzepte (die Abwälzung zur Verteidigung und die Klagen indirekter Abnehmer) abgelehnt worden sind und die Lösung in Europa, wo letztlich die Abwälzung zur Verteidigung anerkannt ist und auch indirekte Abnehmer haben das Recht Schadensersatz vor dem Gericht zu verlangen. Diese Masterarbeit bevorzugt die europäische Position. Allerdings, es ist wichtig zu verstehen, dass es nicht leicht diese europäische Lösung zu schöpfen war und dass die europäische Position das Ergebnis einer langen historischen Entwicklung ist. Bis jetzt ist Richtlinie 104/2014/EU der letzte Schritt dieser Entwicklung. Um ein besseres Verständnis über die Fragen Abwälzung zur Verteidigung und Klagen indirekter Abnehmer anzubieten, beginnt die Masterarbeit mit einer kurzen Einführung zum Thema Wettbewerbsrecht. In diesem Kapitel bietet die Masterarbeit eine Definition von Wettbewerbsrecht und die Hauptziele dieses Rechtsgebiets an. Außerdem wird der wichtige Unterschied zwischen der privaten und der öffentlichen Durchsetzung von Wettbewerbsrecht gezeigt. Als nächster Schritt erklärt die Masterarbeit ausführlich die zwei Funktionen der privaten Durchsetzung von Wettbewerbsrecht und die zwei Bestandteile, die sie enthalten. Entschädigung (verbunden mit Gerechtigkeit) und Abschreckung (verbunden mit Effizienz und Effektivität) sind zwei wichtige Begriffe für das bessere Verständnis der Logik des Wettbewerbsrechts und der Schlussfolgerungen in der Masterarbeit. Der letzte Teil der Einführung bietet ein Bespiel einer einfachen Produktionskette mit Hersteller, Großhändler und Endverbraucher als die Hauptfiguren an. Die erste Methode benutzt in der Hauptteil der Masterarbeit ist eine Fallstudie von dem wichtigsten Fallrecht in Europa und Nordamerika – Hannover Shoe und Illinois Brick in den USA und Crehan and Manfredi in der EU. Diese Fallstudie ermöglicht den Vergleich zwischen beiden Systeme. Danach analysiert die Masterarbeit alle bedeutenden Schritte, die zu dem Erlass von Richtlinie 104/2014/EU geführt haben. Eine zweite Methode benutzt in der Masterarbeit ist die unterschiedliche Ansätze in Europa und Amerika zu den Fragen Mehrfachschäden, ungerechtfertigte Bereicherung und Quantifizierung der Schaden und die verschiede Auslegung die sie anführen können, näher anzuschauen. Ein wichtiger Punkt in dem Hauptteil der Masterarbeit ist die Antwort der Frage warum die EU eigentlich nicht den amerikanischen Ansatz zum Thema Abwälzung zur Verteidigung und Klagen indirekter Abnehmer annehmen konnte. Der nächste große Teil der Masterarbeit beschäftigt sich ausführlich mit Richtlinie 104/2014/EU, zuerst mit den allgemeinen Ideen unterstützt in der Richtlinie, ihre mögliche und erwartete Auslegung und danach mit dem Ansatz zu den spezifischen Fragen der Mehrfachschäden, ungerechtfertigte Bereicherung und Quantifizierung der Schaden. Eine gemeinsame Linie in der Masterarbeit besteht aus dem Glauben, dass das System von der privaten Durchsetzung des Wettbewerbsrechts in der EU würde besser funktionieren und würde auch entscheidende Vorteile zu dem System der öffentlichen Durchsetzung, nur wenn die Entschädigung der führende Prinzip ist. Diese Idee hat auch den letzten Teil der Masterarbeit beeinflusst. In diesem letzten Teil sind die wichtigsten Schlussfolgerungen der Masterarbeit einschließlich des Ergebnisses, dass die Anerkennung der Abwälzung zur Verteidigung und des Rechts auf Schadensersatz für indirekte Abnehmer das bessere Lösungskonzept, wiederholt. Betreffend die Lösungen der Richtlinie 104/2014/EU zu den Fragen Mehrfachschäden, ungerechtfertigte Bereicherung und Quantifizierung der Schaden endet die Masterarbeit mit der Hoffnung, dass alle Regeln der Richtlinie korrekt von EU Mitglieder transponiert werden, aber auch mit der Überzeugung, dass der europäische Gesetzgeber hat einen guten Weg für die Verbesserung der privaten Durchsetzung von Wettbewerbsrecht gewählt hat.