The Defence of Passing On

Comparing Reasons in the Commission White Paper with those presented by the United States Antitrust Modernization Commission

Author:
Magnus Strand, doctoral candidate in European Law, Uppsala University
Introduction

Let’s say you run a small shop selling shoes. One day you read in your paper that the national competition authority has struck down on a cartel among shoe producers, many of which are your suppliers. As the scandal unravels, you realise that you are one of the victims of the cartel: For the last few years, you have been buying your shoes at prices that have been at least 5 per cent too high.

Discussing this issue with your lawyer, it is decided that your lawyer will send a letter to the suppliers in question, demanding repayment of the 5 per cent difference, with interest, and threatening to pursue the claim in court if the suppliers do not comply with your demand.

One week later, your lawyer informs you that what seemed to be a rather straightforward affair has taken an odd turn: The suppliers have responded that regardless of whether they have or have not been involved in any illegal cartel (which, of course, they deny) no repayment will be made. The suppliers argue that if such repayment was made, you would be unjustly enriched. How so? you ask. Well, your lawyer replies, what they are saying is, essentially, that when setting your customer prices you have taken into account the price you paid to the suppliers, including any overcharge. As a retailer you always adjust retail prices to your own costs so as to maintain the profit margin needed for you to make a living. In this process, the burden of any extra 5 per cent has passed on to your customers. Hence, any extra costs incurred due to illegal cartel activities have already been compensated for when you sell the shoes to your own customers. Repayment would, under such circumstances, amount to compensating you twice over, and such double compensation would constitute unjust enrichment, say the suppliers.

The line of argument used by your suppliers in the example above is commonly referred to as the defence of passing on. However, passing on can be used not only as a defence, but also as basis for a claim. In the example above, you were the direct purchaser and passing on was used as a defence against your claim. If you are an indirect purchaser, you will instead wish to prove that the overcharge has been passed on from the direct purchaser to you. Consider the following adaptation of the example above:

The line of argument used by your suppliers in the example above is commonly referred to as the defence of passing on. However, passing on can be used not only as a defence, but also as basis for a claim. In the example above, you were the direct purchaser and passing on was used as a defence against your claim. If you are an indirect purchaser, you will instead wish to prove that the overcharge has been passed on from the direct purchaser to you. Consider the following adaptation of the example above:
Ceteris paribus, you have purchased your shoes not directly from the shoe producers in cartel, but from wholesalers who have purchased them from the shoe producers. You learn that the wholesalers are moving to sue the shoe producers for damages due to the 5 per cent overcharge levied, but that the defence of passing on has been raised against them by the shoe producers.

Discussing with your lawyer, you reach the conclusion that if the wholesalers have passed the overcharge on to you, then you and your equals in retail are the parties who have truly been damaged. It is decided that your lawyer will send a letter to the shoe producers, demanding repayment of the 5 per cent overcharge that has been passed on to you, with interest, and threatening to pursue the claim in court if the producers do not comply with your demand.

The response of the producers is nevertheless in the negative. They argue firstly that there has been no illegal cartel, secondly (to your shock and surprise!) that even if there had been an overcharge, it has not passed on to you because it would have been absorbed in full by the wholesalers, and thirdly that in the event that any overcharge had passed on to you, it would have continued to pass further on to your own customers.

The defence of passing on and the related issue of standing for indirect purchasers are two main issues examined by the Commission of the European Communities (the “Commission”) in its White paper on Damages actions for breach of the EC antitrust rules, issued 2 April, 2008. Below, the reasoning in the Commission White paper when approaching the defence of passing on and the issue of standing for indirect purchasers will be analysed. To add a further dimension, it will also be compared to the reasoning of its American counterpart, the Report and Recommendations of the American Antitrust Modernization Commission (the “AMC”).

One Problem – Differing Solutions

Use of the defence of passing on is not limited to competition law. Before the European Court of Justice (the “ECJ”), it has on numerous occasions been invoked by Member States of the European Union as a defence against claims for repayment of charges levied in breach of EC law on the free movement of goods.¹ If, however, we decide to lift our gaze from the

confinements of Community law and competition law (whatsoever the jurisdiction) alike, we can find that the defence of passing on has been invoked in a great variety of jurisdictions and fields of law. Therefore, we should begin by outlining the problem in a more abstract way.

The defendant in a dispute, referred to in this section as “A”, has done something unlawful – be it the levy of an unlawful tax, abusing a dominant position by imposing an overcharge or some other unlawful act. The crucial point here is that this unlawful act has resulted in an enrichment of A. It is of no interest, at this point, whether this fact is disputed or settled. The unlawful act of A has caused the claimant, referred to in this section as “B”, to transfer money (or property) to A. Now, B will need to recover his expenses for the transaction to A while maintaining the profit margin of his or her business in some way. The classic example is that prices vis-à-vis B’s own customers are increased.2 Furthermore, if B is not a retailer but operates higher in the distribution line, it is possible that B’s customers in turn have their customers, and so on. This diaspora of actors who have purchased from B, directly or through intermediaries, are collectively referred to in this section as “C”.

As we can see, the defence of passing on focuses on the fact that although A has been unlawfully enriched, it will not remedy the corresponding expenses suffered by C if restitution is made by A to B. There is no point in making restitution to B, it will be argued by A, since B has suffered no expense with regard to the enrichment of A. In fact, A argues, if restitution was made to B then that would cause the unjustified enrichment of B!

It is not surprising that courts may find this a difficult situation. The court has the option of rejecting B’s claim, leaving A unjustly enriched, or to uphold B’s claim, causing B to be unjustly enriched. None of the two options will remedy the expenses of C that have been caused by A’s unlawful act. And to be sure, the view taken on the defence of passing on by courts in the various jurisdictions and fields of law displays no uniformity, but substantial variation.

The defence of passing on has been rejected for the purposes of antitrust law in the United States of America, 3 for the purposes of restitution under an

---

2 There are alternative ways of maintaining the profit margin, such as increasing sales or cutting other expenses. This is one of the arguments presented by Michael Rush in his book *The Defence of Passing On* (Hart Publishing, Oxford 2006) for the abandoning of the term “passing on” in favour of the term “disimpoveryment”.

3 *Hanover Shoe Inc. v United Shoe Machinery Corp*, 392 U.S. 481 (1968).
unlawful contract in the United Kingdom, and for the purposes of tax law in Australia and Sweden.

By contrast, the defence of passing on has been declared to be available for the purposes of competition law in Denmark, France and Italy, and has been upheld for the purposes of tax law in Norway.

The Supreme Court of Canada has travelled a strange route, first upholding the defence and then rejecting it in its entirety, both in tax law.

Approach of the European Court of Justice

As noted above, the case-law of the ECJ on the defence of passing on has substantially developed in the field of EC law on the free movement of goods. In this case-law, the ECJ has consistently held that the right to recover charges levied by a Member State in breach of Community law is a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions as interpreted by the ECJ. Therefore, as a point of departure, Member States are in principle obliged to make restitution of such illegal charges. However, as Community law does not contain rules on the details of such restitution, practical and procedural matters regarding the restitution fall into the field of procedural autonomy of the Member States, subject to the limitations set by the Community law principles of equivalence and effectiveness.

---

4 Kleinwort Benson v Birmingham City Council [1997] QB 380. It should be noted that this is not a ruling by the House of Lords, but the Court of Appeal. A British competition law case where the defence of passing on was raised, BCL Old Co Ltd v Aventis SA [2005] CAT 2, was settled before the issue of passing on was resolved.

5 Commissioner State Revenue (Victoria) v Royal Insurance Australia Ltd (1994) 182 CLR 51 (HCA). In Roxborough v Rothmans Pall Mall (2001) 208 CLR 516 (HCA) the defendant, a wholesaler, had collected license fees from retailers on behalf of the government when such fees were held unconstitutional, the retailers were able to recover fees that had not been forwarded to the government from the defendant wholesaler, notwithstanding the fact that the burden of the fees had been passed on to consumers. It seems therefore that Australia may have rejected the defence of passing on altogether.

6 Axfood Private Label AB v Statens Folkhälsoinstitut, RÅ 2002 ref. 108.


8 Arkopharma v Roche et Hoffman – La Roche, RG 2004F02643.

9 Indaba Incentive Co v Juventus FC, Turin Court of Appeal 6 July 2000.

10 KLM Royal Dutch Airlines v Staten, Høyesterett 28. mai 2008 HR-2008-00935-A.

11 Air Canada v British Columbia [1989] 1 SCR 1161.

12 Kingstreet Investments Ltd v New Brunswick (State Finance) [2007] 1 SCR 3 (SCC).

One such issue that has been handed over to the discretion of the national courts – subject to quite elaborated limitations – is the defence of passing on. In its reasoning, the ECJ has stressed that “to repay the trader the amount of the charge already received from the purchaser would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of the charge”.

However, as mentioned, the ECJ has also limited the availability of the defence. Firstly, the ECJ requires the Member State to establish, in each individual case, that the charge has been borne in its entirety by someone other than the trader and that reimbursement of the latter would constitute unjust enrichment. If the charge has been passed on only in part, the amount not passed on must be repaid. If the customers of the claimant are able to claim reimbursement for the illegal charge from the trader, the trader must in turn be able to recover that expense from the national authorities. It must further be taken into account that the increase of sales prices may lead to a drop of sales, causing loss to the trader. Therefore, the existence and the degree of unjust enrichment which repayment of an illegal charge entails can be established only following an economic analysis in which all the relevant circumstances are taken into account.

Passing On in EC Competition Law

In competition law cases, the approach of the ECJ has not, thus far, been quite as elaborated as in the case-law on free movement of goods. The ECJ has simply restated that Community law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by Community law does not entail the unjust enrichment of those who enjoy them. Therefore, the decision on whether or not to allow the defence of passing on is still left to the discretion of national courts.

---

14 Joined cases C-192/95 to C-218/95 Société Comateb and others v Directeur général des douanes et droits indirects [1997] ECR I-165, para. 22. To ‘translate’ this quote to competition law, replace the term ‘trader’ with ‘direct purchaser’, and the term ‘purchaser’ with ‘indirect purchaser’.
15 Ibid para. 27.
16 Ibid para. 28.
In the *Courage and Crehan* case, the ECJ ruled that it must be “open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition”. However, the ECJ continued to rule that “in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law” subject to the principles of effectiveness and equivalence.

This latter statement opened the door for the Commission to begin work on filling the gap on the details of actions for damages in EC competition law. The Commission Green Paper on Damages actions for breach of the EC antitrust rules was issued 19 December, 2005. Section 2.4 of the Green Paper asked for comments on the defence of passing on and standing for indirect purchasers. The fruits of these comments, and of the work of the Commission since then, have been presented in the Commission White Paper on Damages actions for breach of the EC antitrust rules, issued 2 April, 2008.

Meanwhile, in America…

While the Commission was working on its White paper, across the Atlantic Ocean in the United States of America, the AMC finalised their work and presented their Report and Recommendations in April, 2007.

In the United States, the issues of passing on and standing for indirect purchasers have been debated among antitrust lawyers for a very long time.

---

This statement by the ECJ seems general, but is not. The ECJ rejected such a defence of unjust enrichment in case C-377/89 *Ann Cotter and Norah McDermott v Minister for Social Welfare and Attorney General* [1991] ECR I-1155.


Ibid para. 29.


Case-law of the Supreme Court of the United States of America on the defence of passing on dates back to *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906). The earliest scholarly comments on the defence of passing on that I have found in American legal periodicals are from the 1950’s.
The landmark cases of the Supreme Court of the United States on the defence of passing on and standing for indirect purchasers, *Hanover Shoe* and *Illinois Brick*,26 have the combined effect of rejecting the defence of passing on and barring indirect purchaser claims under federal antitrust law. Defendants are not allowed to invoke the defence of passing on against the claims of direct purchasers,28 and indirect purchasers cannot claim damages on the basis that an overcharge has been passed on to them.29 Many state legislatures found the policy chosen by the Supreme Court inequitable, and enacted state antitrust laws granting standing to indirect purchasers within their jurisdiction.30

In their Report and Recommendations, the AMC recommends Congress to overrule the decisions in *Hanover Shoe* and *Illinois Brick*. The outlines of the reasoning leading up to this recommendation are as follows:

1. The case-law of Hanover Shoe and Illinois Brick has caused multiple and parallel litigation for damages resulting from the same antitrust violation.31

2. Multiple and parallel litigation makes it difficult to achieve settlements in general, and global settlements in particular.32

3. Differences in the antitrust laws of states cause inequality among indirect purchasers.33

4. Defendants should not be liable for multiple damages.34

5. Direct purchasers should not receive windfall awards exceeding their actual damages.35

---

26 *Hanover Shoe Inc. v United Shoe Machinery Corp*, 392 U.S. 481 (1968).
28 Save for in the special case of so-called cost plus arrangements, *Hanover Shoe Inc. v United Shoe Machinery Corp*, 392 U.S. 481 (1968) 494.
29 The cost plus exception applies also to this rule, making it possible for indirect purchasers to claim damages if the overcharge is proven to have been passed on under a cost plus arrangement. Also, federal courts recognise an exception for fixed quantity contracts that existed before the overcharge took effect, Herbert Hovenkamp, *Federal Antitrust Policy*. 3rd edition, (West Publishing Co., St. Paul, Minnesota 2005) 626.
31 Ibid 266.
32 Ibid 271.
33 Ibid 275.
34 Ibid 271.
35 Ibid.
6. Indirect purchasers should not be left without compensation for injuries actually sustained.36

7. Federalism and political pragmatism require Congress to follow the displayed preference of the majority of states.37

Firstly, the AMC shows that the difference between federal and state policies has caused an increasing amount of parallel litigation.38 The AMC describes a situation where the judicial system is unnecessarily burdened by multiple and wasteful proceedings, where defendants suffer costs for uncoordinated discovery in several courts, and where claimants lack access to the findings of other claimants.39 The AMC concludes that efficient litigation will be achieved only by consolidating, as far as possible, all claims arising out of the same alleged antitrust violation to be tried in one single court.40 This is quite convincing, but it does not really tell us anything about the defence of passing on. It simply describes a situation created by the peculiarities of the American legal system and how that situation can be remedied. Certainly, a similar situation could arise within the Community, if there is a difference between the approach of EC competition law and national competition law. But it does not entail any normative reasons for or against the defence of passing on. The same result can be achieved either by rejecting the defence of passing on and gathering all direct purchasers in a global class action, or by upholding the defence of passing on and gathering all possible claimants in a global class action.

Secondly, the AMC shows that the scattering of claimants between courts makes it difficult to negotiate global settlements.41 Again, this is straightforward and easily understood, but does not entail any normative reasons for or against the defence of passing on.

Thirdly, as state competition law differs on standing for indirect purchasers, some are able to recover under state law, while others are left uncompensated. Therefore, the AMC concludes, Illinois Brick should be overruled so as to increase fairness among indirect purchasers.42 This reason, too, is a situation created by the peculiarities of the American legal system that could possibly arise also within the Community. However,

37 Ibid.
38 Ibid 269.
39 Ibid 271.
40 Ibid 275.
41 Ibid 271.
42 Ibid 275.
although we may agree that the same policy should apply universally within the same legal system, this reason does not really tell us anything on what that policy should be.

Fourthly, the AMC expresses fear that under the present circumstances defendants will be inequitably liable for multiple damages. In the extreme, a defendant could be held liable for the entire amount of the overcharge to direct purchasers, and then again for the amount passed on to indirect purchasers. The longer the line of distribution is, the worse off a defendant might be – theoretically. This argument illustrates the difficulty of determining who along the line of distribution have been injured by an overcharge, and to appreciate the amount of the injury. This reason will be analysed in some detail below.

Fifthly, the AMC notes that, if the defence of passing on is rejected, direct purchasers who successfully pursue a claim for compensation to the full amount of an overcharge may receive windfall awards exceeding their actual damages. The AMC expresses the view that acceptance in law of such windfall gains runs against the promotion of fairness.

This is perhaps the most common normative reason for upholding the defence of passing on, and we will return to it below. Here, it will simply be noted that this reason points to the heart of the concept of “compensation”, that compensation is presumed to be compensation for an injury, and that it is controversial whether a claimant who has passed on an overcharge is truly “injured”.

Sixthly, the AMC holds it to be “[t]he most fundamental criticism of the Illinois Brick rule” that indirect purchasers are not permitted by federal law to recover damages suffered because of antitrust violations.

This reason, like the fifth, strikes at the “common sense” of the concept of compensation. If C is injured by A’s antitrust violation, then A should reasonably be liable to compensate C. In American law, any compensation for the antitrust infringement stays with B. It never finds its way to C. As we shall soon see, however, this discussion is not as relevant in the Community law context.

Seventhly and finally, the paramount reason for overruling Hanover Shoe and Illinois Brick is, according to the AMC, the fact that a majority of the

44 This assessment also involves the issue of compensation for loss of profits over and above compensation for the overcharge.
46 Ibid 273.
states have expressed it as their preference to allow standing to indirect purchasers.47

This political reason is, of course, specific to the American context and is not translatable to the Community context since the Member States lack such a firm stance on this issue. Therefore, it will not be discussed further.

The White Paper

Between the issuing of the Green and White Papers, the ECJ delivered its ruling in the Manfredi case.48 In this case, the ECJ held that “Article 81 EC must be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm”.49 Such compensation, the ECJ continued, is payable “not only for actual loss (damnum emergens) but also for loss of profit (lucrum cessans) plus interest”.50

In its White Paper, the Commission has concluded that it follows from the use of the words “any individual” in both the Courage and Crehan case and the Manfredi case that, as a matter of Community law, there is no bar against claims of indirect purchasers.51 The issue to be addressed by national courts in deciding whether a claimant is entitled to compensation will instead be if there is a causal relationship between the injury of the claimant and the infringement of competition law.52 Since the ECJ has come to this conclusion by way of interpretation of Treaty Article 81, the principal issue of standing for indirect purchasers (the sixth reason of the AMC in my list above) is thereby settled as a matter of Community law.

Therefore, the Commission has instead focused on how to approach other problems than the issue of standing as such, e.g., how to facilitate class actions and how to overcome the specific difficulty for indirect purchasers to

49 Ibid para. 63.
50 Ibid para. 100.
52 Joined cases C-295/04 to C-298/04 Vincenzo Manfredi and others v Lloyd Adriatico Assicurazioni SpA m.fl. [2006] ECR I-6619, paras. 63-64.
prove the passing on of an overcharge to them. Such issues fall outside the scope of this paper.

The issue of the availability of the defence of passing on, however, remains. The defence of passing on can be used not only against direct purchasers, but also against indirect purchasers who are not end consumers, since indirect purchasers too can have customers to whom the burden of an overcharge can be passed on. Therefore, this issue concerns all claimants who are not consumers.

The Commission argues that defendants should be allowed to invoke the defence of passing on. The reasons presented are the following:

1. Purchasers should not be unjustly enriched by pursuing a claim in competition law.

2. Defendants should not be liable for multiple damages.

The first reason of the Commission corresponds to the fifth argument of the AMC in my list above, and will be analysed in detail in the Discussion section below.

The second reason of the Commission corresponds to the fourth argument of the AMC in my list above. It too, will be analysed further below.

The Commission presents fewer reasons for its point of view than the AMC does. Probably, this can be explained at least in part by the fact that the Commission is bound by the conclusions reached by the ECJ on the issue of standing for indirect purchasers. The AMC, on their part, can feel free to recommend Congress to overrule decisions made by the Supreme Court on antitrust law issues. Therefore, the Commission reasons do not include the interest of compensating indirect purchasers (AMC reason no. 6 in my list).

Moreover, the AMC’s reasons 1 to 3 in my list are drawn from experiences in the United States that Europe does not share, namely the difficulties and wastes of multiple litigation concerning the same antitrust infringement. The AMC’s seventh reason is also particular to the United States. These reasons are nevertheless interesting since Europe should anticipate and act so as to avoid repeating the American experience. The White Paper is one step in the process of taking such action for European competition law.

54 Ibid 7.
55 Ibid 7-8.
56 Ibid 8.
Discussion

This discussion will focus on the two major issues that are common to the reasoning of both the Commission and the AMC. Firstly, I will discuss the risk that claimants are unjustly enriched if the defence of passing on is not allowed. Secondly, I will discuss the risk of defendants being liable in multiple damages.

I will try to bring into this discussion two problems that are given only little attention in the White Paper and in the AMC Report and Recommendations, but that I find important: The problem of defining “injury” to a business, and the problem of deterrence in competition law.

Unjust enrichment

As we have seen, the Commission and the AMC agree that direct purchasers may be unjustly enriched if defendants are not allowed to invoke the defence of passing on. This point should not, however, be limited to direct purchasers. Any indirect purchaser who is not an end consumer could also pass on an overcharge to their customers. Thus, the unjust enrichment reason applies to all claims for compensation in competition law.

There are two main problems with this reason for allowing the defence of passing on. The first is that it is difficult, if not “virtually impossible or excessively difficult”, to assess the extent to which any potential claimant has passed on an overcharge. The second is that it is controversial whether the award of compensation in excess of injury can validly be described as “unjust enrichment” of the recipient.

The first problem is one of evidence. The AMC mentions in passing that “recent advances in econometrics and other methodologies have made such assessments somewhat more manageable”, but continues to hold that the calculation of injury among direct and indirect purchasers nevertheless remains complex. These difficulties are arguably the paramount reason why the Supreme Court of the United States has simply ruled that all damages are due to direct purchasers and none to indirect purchasers.

Firstly, it is misconceived to think that all costs in a business are simply lumped together and a profit margin added to them to set prices in a business. Businesses need to position themselves on a market, and the possibility of including an overcharge in prices depends on the price elasticity of demand in that market. As pointed out by AG Geelhoed, only in the extreme case of zero price elasticity on demand will it be possible to pass on an overcharge without risking a drop in sales. But even in such cases a price increase cannot with certainty be attributed to an overcharge. Perhaps the price increase was caused by other circumstances? It has therefore been held that “[t]here is no reason to protect the perpetrator of a serious competition law violation (…) just because the surcharge may have been passed on”. In other words, if there is a risk of overcompensating a claimant at the expense of the infringer, we should rather let the infringer bear that risk than the claimant. Such a policy would contribute to the interest of deterrence as well as that of ensuring compensation for injuries.

The second problem deals with the concept of unjust enrichment, but also with how to calculate injury to a business. The early case-law of the ECJ on the defence of passing on, developed in the field of free movement of goods, has been severely criticised, inter alia on this point. Commentators have stressed that any unjust enrichment in this situation will be the enrichment made by the infringer of law (in these cases a Member State), not the first victim of that infringement. In his Opinion in the Société Comateb case, AG Tesauro states frankly that “I do not in fact believe it can be right to describe as unjust enrichment the profit derived by an individual from the reimbursement of a charge unduly required and levied by the authorities”. The same line of reasoning can be translated into competition law: Why should we be so hesitant to allow the direct purchaser to receive compensation that may be in some excess of the injury sustained, that we allow the infringer of law to keep the enrichment gained through an infringement of competition law?

Furthermore, if the direct purchaser has paid too much for the commodity sold by the infringer, is the direct purchaser not injured at the moment of paying the overcharge? Should we at all take subsequent actions to mitigate that cost into account? In the Hanover Shoe case, the Supreme Court of the United States answered these questions in the negative. “At whatever price

the buyer sells”, the Court held, “the price he pays the seller remains illegally high, and his profits would be greater were his costs lower”. If this point of departure is accepted, we will perceive “injury” to occur already at the moment when the direct (or indirect, as the case may be) pays the overcharge. With such a view, there can be no subsequent unjust enrichment of the direct purchaser when receiving compensation for this injury. Walter van Gerven, former AG, has also suggested that one way of going about this problem is to assess the amount of damages not only on the basis of injury sustained by the claimant, but also on the basis of the benefit gained by the infringer. Therefore, it is clear that the fear of unjustly enriching a claimant of damages in competition law flows from a certain concept of injury to a business – one that is not necessarily the Right One.

I will not pretend that it is possible to find a way to calculate injury to a business which is suitable to all Member States in this paper. The lesson to be learned, however, is that we should not be so quick to hold that claimants who are awarded compensation will be unjustly enriched by that compensation just because the burden of an overcharge may have been passed on. Instead, we should focus on making sure that infringers of competition law are not allowed to be enriched by their infringements. No matter how we go about constructing our system of European private enforcement of competition law, it must entail the disenrichment of infringers in order to be deterrent. Otherwise, there may well be an incentive to violate competition law.

Multiple Damages

Both the AMC and the Commission express that defendants should not be liable in multiple damages, and that the issues of passing on and indirect purchasers must be addressed in a way that eliminates that risk. There are two ways to approach this. The first is to accept that this risk should be eliminated and find a solution that makes sure there is no multiple liability. The second is to embrace the risk, holding that it contributes to deter from infringements of competition law.

---

63 Hanover Shoe Inc. v United Shoe Machinery Corp, 392 U.S. 481 (1968) 489.
If we begin by approaching this problem in the traditional way, accepting the presupposition that defendants should not be held liable in multiple damages, we find that this reason can swing both ways. It is arguably the overriding reason behind the decision of the Supreme Court in *Illinois Brick* to deny standing for indirect purchasers.\(^{66}\) However, the Supreme Court in that case came from a point of departure where it had already been settled that the defence of passing on was not available to defendants against direct purchasers. In such a situation, to also allow indirect purchasers to claim compensation for an overcharge that has been passed on to them certainly creates a great risk for defendants being liable in multiple damages.

In the White Paper, the situation is reversed: it is settled that indirect purchasers are not barred from claiming compensation for their injuries. Here, therefore, the risk of defendants being liable in multiple damages occurs if defendants are not allowed to invoke the defence of passing on against direct purchasers.

In this light, it becomes clear that the issues of the defence of passing on and standing for indirect purchasers are intimately linked to each other. If we wish to avoid multiple damages for defendants, we must make a choice: Either to reject the defence of passing on altogether and to deny standing for indirect purchasers (the *Hanover Shoe* and *Illinois Brick* choice), or to grant standing to indirect purchasers, in which case we must also allow the defence of passing on (the White Paper choice).\(^{67}\) However, it is not certain that the choice made in the White Paper is as effective in avoiding multiple damages as the choice made by the Supreme Court of the United States. It has pointed out by commentators that defendants may very well find themselves in a situation where they are unsuccessful both in litigation against the direct purchasers, and then in litigation against the indirect purchasers. In the first litigation, the court may find that the overcharge has not been passed on, awarding full compensation to the direct purchaser. In the second litigation, the court may find that the overcharge was passed on to the indirect purchasers, awarding them full compensation too.\(^{68}\) Therefore, if our aim is to avoid multiple damages, perhaps the *Hanover Shoe* and *Illinois Brick* choice is preferable to the White Paper choice.

\(^{67}\) A third option of allowing the defence of passing on and to deny standing for indirect purchasers is also conceivable, but entails a risk that none at all will be compensated.
\(^{68}\) This point is made in the 'Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law on the White Paper by the Directorate-General for Competition of April 2008 on Damages for Breach of the EC Antitrust Rules’, Munich, 15 July 2008, 13-14, and in the ‘Joint Comments of the American Bar Association Section of Antitrust Law, Section of International Law, and Section of Business Law on the Commission of the European Communities’ White Paper on Damages Actions for Breach of the EC Antitrust Rules’, June 30, 2008, available at the same URL (cf. n. 64), 21-22.
There is also the option of embracing the risk of multiple damages for defendants. Such a policy would serve the interest of deterrence from infringements of competition law. The obvious objection is that such a policy would “open the floodgates” and cause an unforeseeable amount of claims based on the same infringement of competition law. However, in the light of the concept of “causal relationship” introduced by the ECJ in the Manfredi case, such fears may be exaggerated.

National courts will need to develop case-law on what such a “causal relationship” may be. A line will have to be drawn at some point down the chain of distribution. Depending on circumstances, and judging from the general apprehensiveness of courts to compensate losses that are “widely dispersed, do not represent the disappointment of strongly held expectations, and can (…) be adapted to without severe dislocation in the lives of the persons affected”,69 it is likely that not many links on that chain will be awarded compensation. Moreover, the more remote from the infringement, the less likely it is that the indirect purchaser will risk litigation costs to pursue a claim for what is probably not so large an amount of compensation. In most cases, the direct purchaser aside, we will probably be risking one or two levels of indirect purchasers successfully claiming compensation, and certainly not all of them.

In the United States, successful claimants are awarded threefold the amount of their injury (so-called “treble damages”).70 In their report, the AMC holds that this provision serves well to deter from anticompetitive conduct and to ensure full compensation to victims.71 The AMC therefore recommends no change to this statute. The AMC view is that companies are economic beings who will risk liability in single damages if the risk of detection is 50 per cent or less. Furthermore, the difficulties of proving and in calculating injury would lead to victims receiving less than full compensation unless treble damages were awarded.72 It should be noted that this view comes from a position where direct purchasers, who are closest to the infringement and who can most easily prove their injury, are allowed to claim damages without being faced with the defence of passing on.

In the European context, only single damages are awarded. In the light of the American policy, European infringers will be better off than their American counterparts even if indirect purchasers from one or even two levels of the chain of distribution claim damages together with the direct purchasers. This also casts new light on why the AMC is apprehensive about

72 Ibid.
multiple damages in the American context – that would entail treble
damages to all claimants!

It follows from these observations that the fear of multiple damages may be
exaggerated in the context of European law. However, I will not go so far as
to suggesting without reservation that claimants at all levels should be
allowed to claim damages for the full amount of any overcharge passed on to
them, without reduction for what they have passed on in turn. In Europe,
public enforcement is much stronger than in America, and private law
liability must be proportional, somehow, to public law sanctions. In its
comment to the White Paper, the Max Planck Institute for Intellectual
Property, Competition and Tax Law makes this precise point:

If private enforcement is primarily seen as an annex or a supplement to
public enforcement, the thrust will be to facilitate follow-on actions and
to limit claims to strict compensation. If, however, private enforcement
was to be seen as a tool to contribute to the enforcement of competition
law in the public interest, one would have to promote the deterrent
effect of private enforcement even beyond mere compensation.73

Conclusions

In this paper, I have tried to analyse the Commission White Paper on
Damages actions for breach of the EC antitrust rules and the AMC Report
and Recommendations. Specifically, I have focused on the reasons presented
by both for allowing defendants to invoke the defence of passing on against
claims for damages due to infringements of competition law.

It is submitted that at least the following conclusions can be drawn from this
investigation:

1. It is excessively difficult to assess who in the chain of distribution has
   absorbed any portion of an overcharge. In many cases, we need to
   choose between the risk of awarding too little compensation and the risk
   of awarding too much compensation. It will serve the interest of
deterrence best to risk awarding too much compensation.

73 ‘Comments of the Max Planck Institute for Intellectual Property, Competition and Tax Law
on the White Paper by the Directorate-General for Competition of April 2008 on Damages for
2. The issue of whether a claimant is unjustly enriched when receiving too much compensation is debatable.

3. The issue of whether defendants should be protected against being liable in multiple damages is debatable.

4. If we wish to avoid multiple damages, another solution than the one in the White Paper should be found.

In this paper, the discussion has been confined to the points made by the Commission and the AMC in their respective reports, and critique aimed directly at those points. There are many more points to be made on the defence of passing on. Still, the points made above can at least serve to illustrate some of the difficulties in assessing what can seem *prima facie* as a rather straightforward issue of compensating those who should be compensated.

---

74 Most of which I hope to be able to discuss in my coming doctoral thesis on the problem of passing on in European law.