Standing and Passing-on in the New EU Directive on Antitrust Damages Actions

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This article critically evaluates private enforcement of the competition rules in Switzerland and compares them to recent developments at EU level, particularly regarding indirect purchaser standing and the passing-on defence. The article addresses the question of whether, and under what conditions, the new EU Directive on Antitrust Damages Actions, along with the Recommendation on Common Principles for Collective Redress, has the potential to establish an effective private enforcement system. It also identifies a number of areas where the latter could be improved in order to ensure both equal access to justice for indirect purchasers (frequently SMEs and consumers) as well as the elimination of the risk that cartel members might face excessive liability.

Table of contents

I. Introduction
II. The Boundaries of the Current Law
   1. Swiss Law
   2. Other Legal Systems
III. The New Private Enforcement Regime
   1. The Right to Damages
   2. Access to Justice
IV. Conclusion

I. Introduction

Despite scholarly criticisms, important CJEU decisions and the publication of the EU Commission’s Green and White Papers on Damages Actions, most courts still consider it a precondition for standing to sue for alleged violations of the competition rules that the anti-competitive practice be targeted at the victim.1 That is why, in Switzerland, for instance, it is widely accepted that a person who had no direct dealings with the infringer but who may have suffered harm because an illegal overcharge was passed on to him along the distribution chain lacks standing to sue for damages.2 Hence, this rule leads to a significant gap in private enforcement of competition law.3 In order to address this issue at EU level, on 26 November 2014, a Directive on Antitrust Damages Claims was signed into law.4 The Directive is the first binding piece of EU legislation in this area, and looks set to bring about a new wave of antitrust damages actions. In its Article 3(1), it defines its goal in terms of ensuring that anyone who has suffered harm caused by an infringement of competition law can effectively enforce the right to full compensation for that harm.

The argument that I will make in the present study is that the statutory provisions adopted by the new Directive have merits from a private enforcement perspective, although they are not free of criticism. First I will study the boundaries of the current law in terms of the indirect purchaser standing and

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1 Council of the EU, New Rules to Facilitate Damage Claims for Antitrust Law Violations, Brussels, 26 March 2014, 8136/14, Presse 182.
4 2014/104/EU.
the passing-on defence (II). Then I will present the solutions offered by the new regulatory framework and suggest some substantive and procedural measures which may contribute to a more effective private enforcement regime in Switzerland (III).

II. The Boundaries of the Current Law

Different countries have different patterns of competition enforcement practices.\(^5\) Competition enforcement is primarily considered as administrative law in Switzerland (1).\(^6\) In some other countries such as Germany, France and the U.K., the application and enforcement of competition law is not only the task of the national competition authority but also that of courts (2).

1. Swiss Law

In Switzerland, the enforcement largely rests upon the national competition authority (Comco).\(^7\) The latter is empowered to conduct investigations on the basis of indicators such as the magnitude and gravity of the infringement, the vulnerability of the potential victims, and the possibility for them to file a civil lawsuit.\(^8\)

Article 12 of the Federal Act on Cartels and other Restraints of Competition (CartA) provides that only a limited class of persons have a right to file a civil lawsuit upon a showing of damage, and this only in specifically defined circumstances and, more importantly, in accordance with the general provisions of tort law:

“A person hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request:
1. the elimination of or desistance from the hindrance;
2. damages and satisfaction in accordance with the Code of Obligations;
3. surrender of unlawfully earned profits in accordance with the provisions on agency without authority.

Hindrances of competition include in particular the refusal to deal and discriminatory measures.

The rights set out in paragraph 1 above are also accorded to persons who are hindered by a lawful restraint of competition more than is necessary for the implementation of that restraint.”\(^9\)

Accordingly, only persons who are impeded by an unlawful restraint of competition from entering or competing in a market may seek damages under the CartA.\(^10\) When it comes to the assessment of the damage, since the CartA does not contain specific rules, the Code of Obligations (CO), in particular Article 42(2), applies. Pursuant to this provision, the court estimates the value of the loss at its discretion in the light of the normal course of events and the steps taken by the injured party. The decision handed down by the Handelsgericht (Commercial Court) of the Canton of Aargau on 13 February 2003 is one of the rare examples of such quantification of antitrust damages in Switzerland.\(^11\)

Since they cannot be regarded as potential competitors or market entrants, consumers have no standing to sue for damages basing a legal claim on an alleged breach of the CartA, even if they have suffered harm from an unlawful restraint of competition.\(^12\) Consumers’ claims for compensatory dam-
ages are, theoretically, subject to general tort liability rules established under Articles 41 ff CO.\textsuperscript{13}

Article 42(1) CO reads that “a person claiming damages must prove that loss or damage occurred”.\textsuperscript{14}

Accordingly, in the context of competition law, the consumer should prove he has suffered a damage that takes the form of a loss resulting from the price difference between what he actually paid and what he would have paid in the absence of the infringement. However, in complex market structures and sophisticated interconnected supply chains, that is difficult to achieve. Indeed, since distributors and retailers usually pass on the overcharge resulting from a cartel or an abusive conduct in part or in full to downstream market participants and mostly to consumers, the burden of proving these elements shall rest with the consumer:

1. the defendant has committed an infringement;
2. the infringement resulted in an price overcharge for the direct purchaser of the defendant;
3. the price overcharge was passed-on to the consumer; and
4. the consumer purchased the goods or services that were the subject of the infringement.

In such circumstances, for a consumer to bring a damages claim against the infringer sounds closer to myth than to reality.\textsuperscript{15} There are two main reasons for this. First, competition cases are particularly fact-intensive. Because of the practical difficulties encountered in discovery – particularly its cost –, in cases where there is no prior or simultaneous governmental action against cartel arrangements such as price-fixing or bid-rigging, the consumer is not in a position to present facts and evidence showing plausible grounds for suspecting that he has suffered harm caused by the defendant’s infringement.\textsuperscript{16} Second, as the Conseil fédéral (Federal Council) has recently stated, there are no procedural mechanisms to convince individuals and small businesses, who have suffered fairly low damage to bring individual claims, in spite of the expenses, delays, uncertainties, and other encumbrances involved in private enforcement of competition law.\textsuperscript{17}

From this perspective, it is unfortunate that, on 17 September 2014, the National Council rejected the reform of the CartA which, among other aims, sought to establish an effective private enforcement regime.

2. Other Legal Systems

In some legal systems, public authorities are not the only institution charged with assessing potentially abusive practices; it is also the task of national courts to weigh and balance the competing interests. In Germany, the 7\textsuperscript{th} Amendment to the German Competition Act, which has been in force since 1 July 2005, replaced the requirement that only persons within the protective scope of the law were entitled to claim damages (Schutznormtheorie) by the “affected parties test” (§ 33 of the Gesetz gegen Wettbewerbsbeschränkungen – GWB).\textsuperscript{18} This change has contributed, to some extent, to more effective private competition enforcement in Germany.\textsuperscript{19} The Federal Court of Jus-

\textsuperscript{14} For an analysis, see Frans Werro, Art. 42 CO, in: Luc Thévenoz/Franz Werro (eds), Commentaire romand, Code des Obligations I, 2\textsuperscript{nd} edn Geneva/Basel 2012.
\textsuperscript{15} Up to date, no case was reported from the Swiss Federal Supreme Court. See also the results obtained by Evaluationsgruppe Kartellgesetz, Statistik zu den kartellrechtlichen Fällen und Gutachten im Rahmen des zivilrechtlichen Weges, Projekterbericht P7 der KG-Evaluation gemäss Art. 59u KG, Bern 2008.
\textsuperscript{17} Conseil fédéral, supra note 16 at 2: « L’analyse des instruments du droit suisse, comparé aux droits étrangers, montre leur insuffisance voire leur inadéquation à permettre une mise en œuvre efficace et effective des droits en cas de dommages collectifs ou dispersés. Il en résulte un système de protection juridique lacunaire, qui peut entraîner l’accès au juge. » See also Erdem Büyüksagis, New Perspectives on Misuse of Market Power: How Should the Effects-Based Approach Complement the Existing Normative Solution?, SZW/RSDA 2013, p. 65.
\textsuperscript{18} Assimakis P. Komininos, Private Enforcement in the EU with Emphasis on Damages Actions, in: Damien Geradin/ Ioannis Lianos (eds), Research Handbook on European Competition Law, Cheltenham 2013, p. 249.
\textsuperscript{19} Michael Dietrich/Wolfgang Gruber/Marco Hartmann-Rüppel, Germany, in: Ilene Knable Gotts (supra note 5), p. 89.
tice has recently decided in the ORWI case that indirect purchasers are entitled to claim damages.\textsuperscript{20}

French tort law, unlike German tort law, avoids discrimination against the recovery of pure economic losses, and assumes that tort law must protect against all losses caused by negligence (Article 1382 of the Code civil).\textsuperscript{21} Indeed, French law envisions a general duty of care, whenever there is a foreseeable risk of harm.\textsuperscript{22} That is why, in France, the standing of indirect purchasers has never really been questioned and a specific legislation like in Germany has never truly been needed. In French private competition enforcement, whether an indirect purchaser will ultimately recover his (potential) loss is not a matter of standing but of an evaluation of the merits of his claim.\textsuperscript{23}

In the U.K., the ordinary negligence principle applicable to breaches of statutory duty will apply to standing. Accordingly, the claimant must fall within the class of persons intended to be protected by the law in question. In Garden Cottage, Lord Diplock defined a breach of duty imposed by Article 102 of the Treaty on the Functioning of the European Union (TFEU) as being for the benefit of individuals to whom loss is caused by a breach of that duty.\textsuperscript{24} For a duty to be imposed, there must be a sufficient relationship of proximity between the defendant and the plaintiff.\textsuperscript{25} In ascertaining whether such proximity exists, account is to be taken of all the circumstances, in particular the level of competition in the market for a particular product or service. In 2 Travel v. Cardiff City Transport Services (Cardiff Bus), 2 Travel brought a follow-on claim for damages against Cardiff Bus arising out of a finding by the Office of Fair Trading that Cardiff Bus had abused its dominant position.\textsuperscript{26} In a judgment handed down on 5 July 2012, the Competition Appeal Tribunal (CAT) made its first ever award of damages in a UK follow-on competition case. The Tribunal granted damages for lost profits as well as exemplary damages to 2 Travel. It held that Cardiff Bus had deliberately decided to recklessly disregard 2 Travel’s rights.

These extracts show that, in some legal systems in Europe, direct competitors as well as indirect purchasers have standing to sue for damages. However, despite recent improvements in some European states, local courts are still reluctant to accept indirect purchasers’ claims because of the risk that cartel members might face excessive liability when they lose a legal action against a direct purchaser and are later sued by indirect purchasers. The decision of the Appellate Court of Karlsruhe of 11 June 2010 illustrates this phenomenon.\textsuperscript{27} In order to address this issue, EU Member States have formally approved a new Directive on Antitrust Damages Claims.\textsuperscript{28}

III. The New Private Enforcement Regime

The new regime in the EU is shaped by the need, on the one hand, to promote the effective protection of the rights to damages (1) and, on the other hand, to decentralise the private enforcement by way of implementing local collective actions (2).

1. The Right to Damages

The Directive on Antitrust Damages Claims allows indirect purchaser standing (1.1) as well as some kind of presumptions and defences (1.2) in order to ensure the effective protection of the right to damages. Since the new regime requires complicated proceedings in...
In order to address the issues raised by the legal system in different jurisdictions and harmonise them with EU standards, in 2009, the EU Commission drafted a proposal for a directive on actions for damages, which aimed at setting out “the rules necessary to ensure that anyone who has suffered a harm caused by an infringement of Article [101] or [102] TFEU can effectively enforce the right to full compensation”. However, this proposal was never formally proposed to the Council and abandoned. Five years later, the European Parliament adopted a text of the proposed Directive which was agreed between the European Parliament and the Council during the ordinary legislative procedure. Even if it is to some extent different than the 2009 proposal of the Commission, the new Directive of 2014 provides some similar rules concerning damages actions, and has a very similar goal to the 2009 proposal of the Commission: among other, facilitating and stimulating indirect purchaser actions.

In Article 12(1), the Directive prescribes that anyone who has suffered a harm caused by an infringement of Union or national competition law can enforce the right to compensation: 

“[…], Member States shall ensure that […] compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers […]”.

Such broad standard is in conformity with the case-law of the CJEU. The latter recognized that a third party victim of an anti-competitive practice may claim damages for any injury or loss. Accepting that both direct and indirect purchasers have the right to bring a claim for any loss (including consequential damages), the Court also established a broad rule of standing in competition law cases.

1.2 Presumptions and Defences

In order to facilitate and stimulate indirect purchaser actions, the new Directive includes a rebuttable presumption that any cartel infringement has caused harm (a), a possibility for the defendant-infringer to raise the passing-on defence (b), and a presumption of passing-on of the overcharge (c).

a. Presumption of Harm

The new Directive aims at ensuring the effective exercise of the victims’ right to full compensation. To this end, it first establishes a presumption that “cartel infringements result in harm, in particular via an effect on prices” (Article 17(2); Recital 47). This presumption in favour of the claimant is justified by two facts. First, in most cases, the cartel results in higher price levels than those which would have otherwise prevailed or in reduced quality or consumer choice. As the French Supreme Court recently remarked in Ajinomoto Eurolysine, victims of anti-competitive practices systematically pass on overcharges to their


31 2014/104/ELI, on which see European Law Institute (ELI), Statement of the European Law Institute on Collective Redress and Competition Damages Claims, Section II, Vienna 2014.

own customers. Second, “the information asymmetry, some of the difficulties associated with quantifying harm in competition law cases” would make it almost impossible for the claimant to access to justice but for the presumption.

The application of the presumption raises the issue of the determination of the causal relationship between harm and antitrust violation. One of the most debated questions is “umbrella pricing”: May any person claim from members of a cartel damages for the loss which he has been caused by a person not party to the cartel who, benefiting from the protection of the increased market prices, raises his own prices for his products more than he would have done without the cartel?

In a judgment handed down on 5 June 2014, the CJEU, in response to the preliminary question of the Austrian Supreme Court, stated that the effectiveness of the private enforcement “would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (para. 21). Any person is thus entitled to claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited. (para. 22) […] Consequently, the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if he did not have contractual links with them, where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those circumstances and specific aspects could not be ignored by the members of that cartel” (para. 34).

According to this case-law, harm does not result only in a rise in prices, but also in preventing prices from falling, which would otherwise have occurred but for the cartel. In turn, this interpretation tably extends the scope of the presumption of harm, and creates an incentive for direct and indirect purchasers to file lawsuits against the infringer.

b. The Passing-on Defence

Article 13 of the Directive provides a possibility for the defendant-infringer to rebut the presumption of harm (passing-on defence):

“[…] the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.”

The recognition of such a defence allows avoiding unjust enrichment of purchasers, who passed on the overcharge as well as multiple compensation for the illegal overcharge by the defendant. Indeed, the passing-on defence allows the infringer to argue that a direct purchaser’s loss has been reduced or negated by the direct purchaser having passed on to his customer all, or a proportion of, any overcharge resulting from the infringer’s anti-competitive practice.

In the case of actions by direct and indirect purchasers, even if direct purchasers run the risk of losing standing because of the passing-on defence, indirect purchasers at the end of the distribution chain can still claim damages since a passing-on defence cannot be put up against a damages action brought by end-consumers.

c. Presumption of Passing-on of the Overcharge

Although the solution promoted by the new Directive seems, at first sight, in favour of the indirect purchasers at the end of the distribution chain, I think it necessary to point out that they will find it almost impossible to provide sufficient proof of the extent of passing-on of the overcharge along the distribution chain.

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34 French Supreme Court (Cour de cassation), Ajinomoto Eurolysine, supra note 22.
35 2014/104/EU, Recital 47.
36 CJEU, Kone AG and Others [2014] ECR I-0000.
37 2014/104/EU, Recital 47. For a criticism, see Andreas Fuchs, Anspruchsberechtigter, Schadensabwälzung und Schadensbemessung bei Kartellverstößen, in: Oliver Remien (ed), Schadensersatz im europäischen Privat- und Wirtschaftsrecht, Tübingen 2012, p. 61 (the author argues that the price-setting of undertakings, which are not members of the cartel, is made independently).
In order to deal with this issue, Article 14(1) of the Directive offers the judge tools granting him flexibility to determine the existence of a claim for damages or the amount of compensation to be awarded. In his assessment, the judge should take into account whether – or to what degree – an overcharge was passed on to the claimant, considering the commercial practice that price increases are passed down the supply chain.

Pursuant to Article 14(2), “the burden of proving the existence and scope of such pass-on shall (nevertheless) rest with the claimant who may reasonably require disclosure from the defendant and from third parties […] The indirect purchaser shall be deemed to have proven that a passing-on to him occurred where he 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) he 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.

This [rule] shall not apply where the defendant can demonstrate […] that the overcharge was not, or was not entirely, passed on to the indirect purchaser.”

The approach that the new EU Directive adopted significantly differs from that in the U.S. (at the federal level).46 In the seminal case of *Illinois Brick*, the U.S. Supreme Court denied standing to indirect purchasers to sue infringers, which has been subjected to steady and widespread criticism since it was decided in 1977.47 To some extent, the EU Directive aims to respond to these criticisms.

### 1.3 Possible Practical Issues

From the perspective of courts (a), direct purchasers (b) and indirect purchasers (c), it is unfortunate that the new Directive did not prohibit the passing-on defence.

**a. From the Perspective of Courts**

In the evaluation of complex market structures and sophisticated interconnected supply chains, it would be difficult for courts to define who the direct and indirect purchasers in fact are in a specific case.48 That is why the way the new Directive deals with the passing-on defence in two Articles (Articles 13 and 14) is somewhat confusing and might undermine the EU’s goal of effective private enforcement.

Besides, damages actions for infringements already require a highly complex factual analysis. If one accepts claims by indirect purchasers but allows the “pass-on” defence, it may be exceedingly difficult to establish how much of the cartel overcharge is actually absorbed by each distribution level.49 This issue is particularly relevant in cross-border situations. Indeed, final cartel decisions of national courts and competition authorities are not binding for judges of other Member States; according to Article 9(2), these findings are only valid as prima facie evidence that an infringement has occurred.

By not providing a clear framework on foreseeability and remoteness, and leaving this issue to national rules of causality, the Directive does not facilitate the task of national courts.50 However, an effective competition policy requires specific rules to remove procedural impediments that are rooted in national systems.51 One of the problems is that, although a certain degree of uncertainty is unavoidable as evidence is never perfect, the law does not admit the probabilistic nature of factual assessments.

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42 Ashton/Henry, supra note 39 at 39.


44 On the general problem of coherence in the context of competition law enforcement, see Katri Havu, Quasi-coherence by Harmonisation of EU Competition Law-related Damages Actions?, in: Jan Smits/Pia Letto-Vanamo (eds), Coherence and Fragmentation in European Private Law, Munich 2012, p. 25 ff.

such as causation in most European countries. Such a problem does not exist in the U.S., where courts allow the market share of the defendant to be used as a means of giving a statistical probability of liability, if the identity of the defendant is difficult to ascertain.\textsuperscript{57}

b. From the Perspective of Direct Purchasers

A rebuttable presumption that price overcharges were fully passed on to end purchasers would reduce the total number of claims brought by direct customers. Such a presumption would, in turn, negatively affect the effective enforcement of competition law.

There is also doubt as to whether the Directive’s solution is in line with the CJEU’s case-law (see the \textit{Courage},\textsuperscript{49} \textit{Manfredi},\textsuperscript{48} \textit{Pfleiderer}\textsuperscript{50} and recently \textit{Kone}\textsuperscript{51} judgments). Even though, in these cases, it did not specifically deal with the passing-on issue, the Court stated that any individual has the right to claim damages for loss caused to him or her by conduct which is liable to restrict or distort competition. This case-law lends support to the proposition that direct purchasers, who might lose profits despite the passing-on, should be able to sue. Hence, a direct purchaser could, in the same case, fail to be awarded compensation for \textit{actual loss} on the basis that he passed the over-charge on to successive downstream purchasers (e.g. end-consumers), but succeed in full with his claim for \textit{loss of profit} on the basis that, due to the increased price, sales dropped compared to what they would have been in the absence of the illegal overcharge.

c. From the Perspective of Indirect Purchasers

The solution proposed in Article 14 of the Directive, which governs the presumption in favour of indirect purchasers to the effect that the direct purchaser has passed on the entire overcharge to the indirect purchaser, does not seem realistic.\textsuperscript{52} According to Article 14(1), the rule is that the burden of proving the existence and scope of pass-on shall rest with the indirect purchaser. However, Article 14(2) reads that the indirect purchaser shall be deemed to have proven that a passing-on to him occurred, \textit{where he has shown that the defendant has committed an infringement of competition law} (Article 14(2)(a)), that the infringement resulted in an overcharge for the direct purchaser of the defendant (Article 14(2)(b)), and that he (indirect purchaser) has purchased the goods or services that were object of the infringement (Article 14(2)(c)).

However, where there is no prior competition authority decision,\textsuperscript{53} indirect purchasers cannot easily find the evidence necessary to prove the infringement which gave rise to an overcharge.\textsuperscript{54} Such evidence is often held exclusively by the opposing party – or by third parties – and is not sufficiently known by indirect victims or consumers. Even if Article 5 of the Directive provides that Member States must ensure that national courts can order \textit{proportionate disclosure} of evidence in competition law cases from defendants, claimants or third parties and, as such, aims to address the ‘information asymmetry’, particularly in cross-border situations, the possible application of this rule by national courts is far from simple. Particularly in cases where the cartelised product has been processed into another product, it is almost impossible to prove passing-on owing to the numerous economic factors which influence the pricing at the downstream level, so that the causal link between the infringement and the passing-on can only rarely be established.

What is more, indirect purchasers would still have to bear the burden to substantiate and prove a

\textsuperscript{46} This is the situation in Switzerland, for instance. See BGE/ATF 133 III 462.


\textsuperscript{49} CJEU, \textit{Manfredi} [2006] ECR I-6619, para. 56.


\textsuperscript{51} CJEU, \textit{Kone AG and Others} [2014] ECR I-0000 para. 22.

\textsuperscript{52} European Law Institute (ELI), \textit{supra} note 32.

\textsuperscript{53} Even if administrative authorities possess large staffs of economists, competition boards often cannot start investigating the allegations of suspected conduct before the end of the infringement. From the point of view of Swiss law, see Walter A. Stoffel, Spezifitäten des schweizerischen Wettbewerbsrechts: Rückblick und Ausblick, in: Marc Amstutz/Inge Hochreutener/Walter A. Stoffel (eds), Die Praxis des Kartellgesetzes im Spannungsfeld von Recht und Ökonomie, Zurich 2011, p. 142.

claim, especially the amount of their individual damage, as well as the lack of evidence regarding this.

2. Access to Justice

In the field of competition law, an improved access to justice requires collective redress as an instrument to strengthen private enforcement of damages claims (2.1). The Commission’s recent Recommendation on Common Principles for Collective Redress Mechanisms is an attempt to balance diverging interests in this regard, but it also raises concerns about its application (2.2).

2.1 Collective Redress Mechanisms

In the absence of any class action mechanism, indirect purchaser’s claims are too small to justify any enforcement efforts, especially in cases where they buy online from other countries.55 To convince individuals and small businesses who have suffered fairly low damage to bring individual actions and deter corporate wrongdoers, on 11 June 2013, the EU Commission issued a non-binding Recommendation, which puts forwards opt-in collective actions.56 In this type of class action, instead of being automatically included in a class action and bound by the result that the named plaintiffs achieve, which would be the case with an opt-out class-action,57 victims actively choose to join their individual claims for a particular harm into a single damages action.58

Of particular importance, the Recommendation permits Member States to have in place collective redress systems, which is supposed to create an effective compensation mechanism in cases where unlawful practices result in a relatively small amount of damage for a large group of consumers.59 Another key feature of the Recommendation is that it will increase deterrence while forcing companies to consider their options more carefully before they take the risk of severe punishment by way of damages.60

The collective redress system is particularly crucial in the field of competition law, as anti-competitive practices can often result in relatively small amounts of damage to individuals and significant amount of damage to the society at large.61 According to the Recommendation, only entities that have been designated in advance or entities that have been certified on an ad hoc basis by Member States’ national authorities or courts for a particular representative action should be allowed to initiate representative collective actions.62 The Recommendation expressly provides that in advance designated entities should have a non-profit making character and should be able to demonstrate that there is a link between their activities and the infringement in question and have sufficient capacity in terms of financial resources, human resources and legal expertise, to represent multiple claimants.63 It is not clear whether these requirements apply also to ad hoc certified entities.64

In cases where different entities claim to represent mass tort victims or consumers, national courts should develop adequate selection criteria. However, since the case management of mass disputes differs from the case management of ordinary claims, it may

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55 Büyüksagis, supra note 17 at 65.
57 In an opt-out system, a potentially affected person who falls within the definition of the group will be deemed to be bound by the final judgment without being required to take any positive step. If such a person does not want to be bound by the judgment, he should take a positive step to leave the group. See Rachael Mulheron, The Case for an Opt-out Action for European Member States: A Legal and Empirical Analysis, Colum. J. Eur. L. 2009, 415 ff.
59 For a critical assessment, see European Law Institute (ELI), Statement of the European Law Institute on Collective Redress and Competition Damages Claims, Section I, Vienna 2014.
61 Reardon, supra note 2 at 400 ff; Silvia Pietrini, L’action collective en droit des pratiques anticoncurrentielles, Brusels 2012, N 116 ff; Jochen Bernhard, Kartellrechtlicher Individualschutz durch Sammelklagen, Tübingen 2010, p. 63.
happen that judges in civil law regimes find themselves in an awkward predicament. In order to address this issue, some authors propose training programs for judges who will be dealing with collective redress actions.65

2.2 Possible Practical Issues

A possible implementation of collective redress mechanisms draws attention to the (in)efficacy of opt-in and opt-out regimes (a) as well as to the need for consolidated actions (b). In Switzerland, a reflection on Article 125(c) SCPC is also necessary from the case management perspective (c).

a. Opt-in vs Opt-out

While ensuring that class members join litigation of their own free will, opt-in collective actions put forwards by the Commission’s Recommendation present some advantages and, to some extent, prevent class action abuse.66 The latter is a well-known phenomenon in the U.S., where opt-out is the standard.67 In 2005, in order to ensure more adequate procedural safeguards in class actions, Congress passed the Class Action Fairness Act, which requires that, at the federal level, the class consist of at least one hundred plaintiffs to be certified, greater restrictions on the use of, and fees collected from, coupon settlements, and easier removal of state class actions to federal court.68 At EU level, the U.S. model of collective redress (opt-out regime) was avoided to prevent misuse of class actions.69 The U.S. Chamber of Commerce had indeed warned its European counterparts of the risks associated with excessive litigation.70

Some doubts remain nevertheless regarding the appropriateness of the opt-in principle instead of the opt-out.71 In the U.S., where an opt-out regime allows a representative claimant to bring a case on behalf of all members of a class affected, less than two in a thousand class members exercise the right to exclude themselves from the case.72 The results of the statistical analysis of actual experience under Nordic laws show that only 5 to 10 per cent of European consumers would opt-in,73 whereas over 95 per cent would not opt-out.74 On the one hand, these experiences reveal the inefficacy of opt-in regime compared to opt-out regime. On the other hand, since in most European countries one becomes a plaintiff only by having manifested one’s intention to bring a claim, introducing an opt-out regime would constitute a radical reform of the civil justice system, and therefore may not be the best mechanism to offer an immediate solution.75

b. The Necessity of Consolidated Actions

A collective redress mechanism should avoid contradicting results in multiple proceedings by plaintiffs who are at different levels of the distribution chain (e.g. direct purchasers, indirect purchasers) and possibly in different countries. The CJEU has repeatedly stated that, when laying down the applicable rules

65 See e.g. Ianika Tzankova, Managing the Mass: From Case Managing Mass Disputes to Designing Claim Resolution Facilities, working paper presented at the UNIDROIT/ELI Conference in October 2013 in Vienna, Austria.
67 See the U.S. Federal Rules of Civil Procedure 20(a)(1) and 23.
69 Almanis (supra note 60).
75 Opt-out regime is unknown in most countries in Europe. For a recent analysis from different perspectives, see Willem van Boom/Gerhard Wagner (eds), Mass Torts in Europe, Cases and Reflections, Berlin/Boston 2014.
for the enforcement of Community law rights, Member States are under a Community law obligation to respect both the principle of equivalence and the principle of effectiveness.\textsuperscript{76} In the White Paper and the accompanying staff working paper, the Commission followed the same approach.\textsuperscript{77}

In a decision handed down on 1 October 2009, the Berlin Court of Appeals provided two important parallel judgments on damages claims of cartel customers.\textsuperscript{78} It held that both direct customers as well as indirect customers may claim damages against members of a cartel. Cartel members may not invoke the so-called passing-on defence in relation to their direct customers, even if the direct customers might have passed on a price increase to the indirect customers. Rather, direct customers and indirect customers are so-called joint creditors (\textit{Gesamtgläubiger}) in terms of § 428 BGB.\textsuperscript{79} In a similar way, in its decision of 28 June 2011, the German Federal Court of Justice (\textit{Bundesgerichtshof} – \textit{BGH}) mentions the possibility of joining direct and indirect purchaser in one legal action.\textsuperscript{80} The BGH acknowledges that this – ein quasi gesetzliches Schuldverhältnis des Innenausgleichs – may be difficult in the case of dispersed harm but discounts this argument by stressing the fairly low probability of action by these “rationally apathetic” victims.\textsuperscript{81}

At EU level, consolidating the claims of all injured parties into a single and centralized proceeding, designating a lead claimant, and then allocating damages to participating parties would:

1. expand compensation to all parties, including indirect purchasers;
2. combine decentralized damages claims before national courts with a centralized and coherent calculation of total damages;\textsuperscript{82}
3. reduce litigation complexity and its associated administrative costs by eliminating parallel litigation and forcing all causes of action into one suit; and
4. eliminate the risk that cartel members might face excessive liability where they lose a legal action against a direct purchaser and are later again sued by indirect purchasers.\textsuperscript{83}

Since the interests of direct and indirect purchasers may be disparate, the procedural mechanism should allow to subdivide the group, e.g. along the various levels of the distribution chain, and to provide for separate representation of each of the subgroups where their interests clash.\textsuperscript{84}

c. Reflections on Article 125(c) SCPC

In Switzerland, one might wonder whether the consolidation of the claims of all injured parties into a single proceeding can be based upon the existing legal regime.\textsuperscript{85} Indeed, Article 125(c) of the Swiss Civil Procedure Code (SCPC) allows courts to order the joinder of separately filed actions if certain conditions are met.\textsuperscript{86} I think that, in the context of competition law enforcement, which normally involves a considerable number of plaintiffs who have nothing in common other than the fact that they all purchased


\textsuperscript{77} White Paper, supra note 16, para. 2.6.

\textsuperscript{78} Kammergericht [District Court] Berlin, Transportbeton II, WuW 2010, p. 189 ff. See also Lübbig/Mallmann, supra note 20 at 167.

\textsuperscript{79} § 428 BGB: “If more than one person is entitled to demand performance in such a way that each may demand the entire performance but the obligor is only obliged to effect the performance once (joint and several creditors), the obligor may at his discretion effect performance to each of the obligees. This also applies if one of the obligees has already sued for performance” (translation provided by the German Federal Ministry of Justice).

\textsuperscript{80} Case KZR 75/10, WuW 2012, p. 57 ff; BB 2012, p. 75.

\textsuperscript{81} Wagner-von Papp/Fedtke, supra note 20 at 249.


\textsuperscript{83} A similar idea can be found in Austrian law; see Raoul Hoffer/Isabelle Innerhofer, Passing-on-Defence, ÖBl 2013, p. 257 ff.

\textsuperscript{84} Bulst, supra note 28 at 81.


\textsuperscript{86} Renato Bornatico, Article 125 ZPO, In: Karl Spühler/Luca Tenchio/Dominik Infanger (eds), Basler Kommentar, Schweizerische Zivilprozessordnung, 2\textsuperscript{nd} edn Basel 2013, N 15.
a particular good, the application of Article 125(c) does not seem the best choice, at least not from the case management perspective.

This rule should be completed with an effective procedural mechanism to accomplish the ends of both consumer compensation and deterrence against future infringements. If a single party opts out of a consolidated hearing and brings a stand-alone suit, he would undermine many of the benefits consolidation is designed to achieve. Accordingly, a direct or an indirect purchaser may bring the private competition action, after which other parties claiming injury may join. No other action, however, may be initiated against the defendant for the same illegal conduct, and all parallel actions would be preempted. In Switzerland, such a concept needs to be discussed in depth, particularly in light of the possible res judicata effects of consolidated actions and the constitutional boundaries of these effects.

IV. Conclusion

In many European countries, actions for infringements of competition law are still severely hampered by the fact that national courts consider it a precondition for antitrust standing that the infringement be targeted at the victim. The new EU Directive on Antitrust Damages Actions contains a range of detailed rules aiming at removing practical obstacles to compensation for all victims of infringements. According to the new regime, consumers and undertakings which have been harmed by an infringement should be entitled to compensation for their actual and consequential loss. Denying standing to indirect purchasers would mean excluding claims of such purchasers that have actually been harmed by a cartel, and be contrary to the case-law of the CJEU as well as national laws. From this perspective, the new Directive's objective of ensuring that victims of infringements – regardless whether they are direct or indirect victims – obtain compensation should be praised. The Commission's Recommendation, which aims to create an effective compensation mechanism in cases where unlawful practices result in a relatively small amount of damage for a large group of consumers, is also a significant step in building a strong private enforcement regime.

However, despite its advantages, the new regime is not free of criticism. In the context of indirect purchaser litigation, the Directive presents a lack of precision when addressing issues such as foreseeability and remoteness of damage, and about the burden of proving passing-on, which seems to be placed upon indirect purchasers. Besides, the Recommendation on collective redress suffers from vagueness. It does not provide judges with tools that allow them to develop adequate selection criteria in cases where different entities claim to represent mass tort victims or consumers.

At the national level in Switzerland, there is plenty of room for scepticism as to whether the existing general rules of tort law or the provisions on agency without authority could provide a functional framework to guide courts which have to face the complexities surrounding private competition litigation. Removing existing barriers to effective redress for victims of antitrust requires specific statutory provisions to be enacted. Merely granting standing to indirect purchasers according to the general rules of liability does not create enough of an incentive for them to bring a damages claim, just like the simple right to marry does not create enough of an incentive to get married.

An effective competition policy requires some additional substantive and procedural mechanisms designed to facilitate indirect purchasers' access to compensatory justice. I have tried to demonstrate that two specific measures might provide a better perspective on a possible private enforcement reform strategy:

1. It would be appropriate to limit the application of the passing-on defence to exceptional cases. In complex market structures and sophisticated interconnected supply chains, a possible application of the passing-on defence will only further complicate the situation from the perspective of courts, direct purchasers and indirect purchasers.
2. In order to eliminate the risk that cartel members might face excessive liability, courts should be able to **consolidate the claims of all injured parties (direct and indirect purchasers) into a single proceeding**. Parties should be in a position to choose to join the action as members of the class at any point up until damages have been quantified, even once liability has been established. The plaintiff should be bound by the outcome of the litigation, as long as he does not affirmatively opt-out.

Such a solution would balance the interests of both parties. On the one hand, it would increase indirect purchasers’ motivation to sue. On the other hand, it would eliminate the risk that cartel members might face excessive liability where they lose a legal action against a direct purchaser and are later sued by indirect purchasers.