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A Fleet Without a Captain?  
Taking Stock of European  
Antitrust Litigation Post EU  
Directive

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E.CA Economics

## A Fleet Without a Captain? Taking Stock of European Antitrust Litigation Post EU Directive

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### I. INTRODUCTION

Private antitrust enforcement and cartel damages actions are on the rise, with a concentration of damages actions in the United Kingdom, Germany, and the Netherlands.<sup>2</sup> To facilitate this development, the EU Directive on Antitrust Damages was adopted and signed into law in November 2014 and Member States will need to implement it in their legal systems by December 27, 2016.<sup>3</sup> The EU Directive introduces a number of changes to achieve its main aims, which are effective compensation of victims of antitrust infringements and optimization of the interaction between public and private enforcement.<sup>4</sup> It will lead to partial harmonization of national law, and thereby incentivize a broader, pan-European coverage of legal action.

The EU Directive, together with a recent judgment by the Court of Justice<sup>5</sup>, substantially bolster the scope of civil redress by formally introducing the concepts of “passing-on” and “umbrella effects” at European level. We argue that while these are economically correct concepts, in line with the paradigm of effective compensation for every victim of antitrust infringements, in a context of a partially harmonized, multi-jurisdictional environment the complexity of litigation will increase significantly. Different national approaches to collective redress add further complexity.

From an economic point of view there is a single total damages amount related to a pan-European cartel, which is distributed along the supply chain in dependence of pass-on and customer substitution effects. Quantification thereof is an exact but stochastic science. Quantification of partial components and multidimensional divisions add further challenges to the empirical work (and thereby transaction costs). The vision behind the EU Directive, to

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<sup>2</sup> J. Almunia, *Antitrust litigation—The way ahead*, MLex seminar: Damages Litigation: A new frontier for Europe (2014), [http://europa.eu/rapid/press-release\\_SPEECH-14-713\\_de.htm](http://europa.eu/rapid/press-release_SPEECH-14-713_de.htm), date accessed: 01/07/2015.

<sup>3</sup> Directive 2014/104/EU. The Directive entered into force on December 25, 2014, twenty days after its publication in the *Official Journal of the European Union*.

<sup>4</sup> H.W. Friederiszick, *The Damages Lie in the Details: Why the Proposed Directive Fails in Harmonizing Incentives to Sue Across the European Union*, 8(1) CPI ANTITRUST CHRON. (August 2013).

<sup>5</sup> Judgment of the Court in Case C-557/12, ¶34, 5 June 2014.

incentivize parallel damages actions throughout Europe—that is to have parallel assessments of the single total damages amount—requires a balancing of the risk of over- or under-compensation due to cross-national claims on the one hand and increasing transaction costs in a decentralized framework on the other hand.

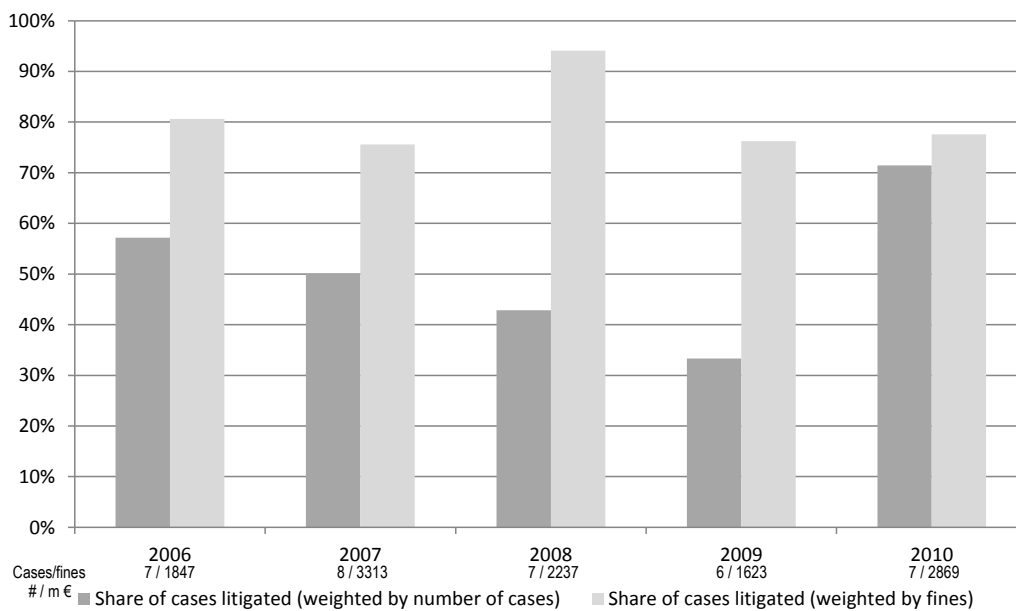
Overall, the multi-jurisdiction landscape in Europe, paired with partial, but incomplete harmonization across Europe and correct, but complex economic damages concepts are likely to lead to interlinked multinational damages actions in Europe. It will require—in addition to legal instruments to assure cross country consistency—pro-active and well trained national judges to steer this fleet to its common goal: an effective, but balanced private litigation system in Europe.

In the following we first describe the current litigation activity throughout Europe. We focus here on all follow-on claims related to European cartel cases with a EU Commission decision dated between 2006 and 2010. Thereafter, we describe briefly the various components for quantification of damages (passing-on, quantity and umbrella effects and calculation of interests) and the relevant legal concepts for multinational claims. Finally, we discuss the particular challenges in the context of multinational claims.

## II. TAKING STOCK—LITIGATION PROCEEDINGS IN EU CARTEL CASES

In the following we have looked at cases with decision dates between the beginning of 2006 and the end of 2010. A focus on this time interval seems sensible as these cases seem most likely to be relevant for private antitrust enforcement. Our analysis presents necessarily a snapshot, in that it does not cover cases that might come forward in the future or cases where there are only settlements proceedings. The following Figure 1 depicts for each year the share of cases for which at least one litigation has been initiated, both unweighted and weighted by total fines.

**Figure 1 - Share of cases for which damages proceedings have been initiated, order according to EU decision date**

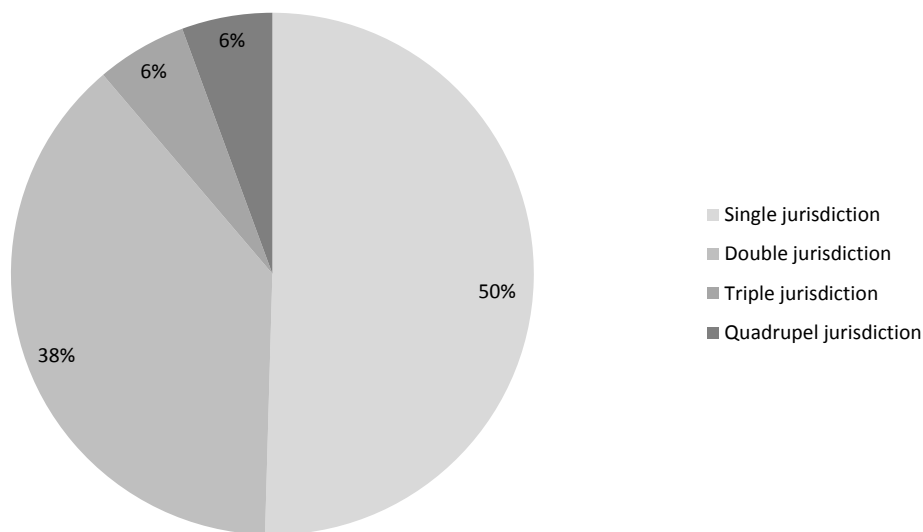


Source: E.CA research, based on EU Commission website, MLex, Concurrence, GCR, and web research (including CDC website) and business contacts. Total number of decisions and sum of fines shown below graph for each year; individual fines rounded to 0.1 million EUR. Does not include cases closed on administrative grounds. Some included damages proceedings might have ended already.

We observe that for close to 60 percent (4 out of 7) cases decided in 2006 damages proceedings have been initiated. This share declines somewhat until 2008; however, one should be careful not to attach too much weight to this observation because this is due to a single case difference. Over the whole period litigation seems to focus on cases with comparably high fines. This seems intuitive given that graver infringements (which, all else equal, result in high levels of harm and fines) can be expected to lead to higher damage payments later on. For 2009 we observe a focus on few cases with relatively high fines. Finally, we observe substantial litigation activity for a large number of 2010 decisions (most notably for *Airfreight*, COMP/39.258, and *LCD*, COMP/39.309).

Figure 2 below shows the number of jurisdictions involved if there is follow-on damages litigation. As can be seen, in half of all cases we observe single jurisdiction and in nearly 40 percent of cases double jurisdiction. For only two cases we observe litigation in three or four jurisdictions (*Airfreight*, COMP/39.258, and *Elevators & Escalators*, COMP/38.823, respectively).

Figure 2 - Number of European Jurisdictions if litigated

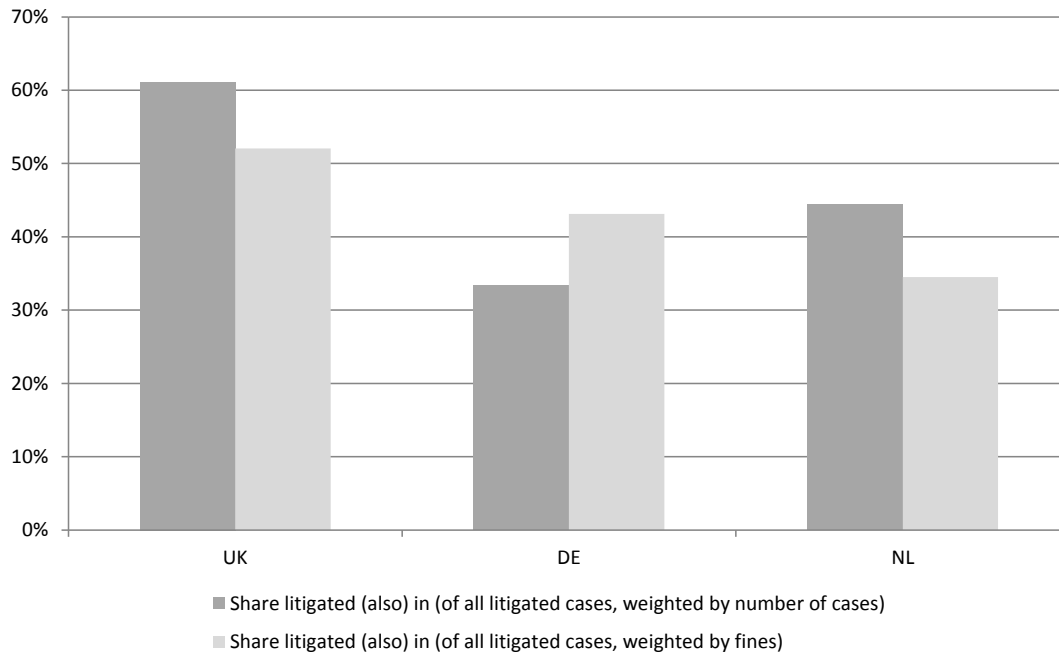


Total: 18 cases

Source: E.CA research, based on EU Commission website, MLex, Concurrence, GCR, and web research (including CDC website) and business contacts. Does not include cases closed on administrative grounds. Double jurisdiction has been rounded down such that total adds up to 100 percent.

Finally, the following Figure 3 confirms the earlier observation that follow-on litigation is concentrated on the United Kingdom, Germany, and the Netherlands.<sup>6</sup>

**Figure 3 - Share of cases (also) litigated in the United Kingdom, Germany and the Netherlands**



Source: E.CA research, based on EU Commission website, MLex, Concurrence, GCR, and web research (including CDC website) and business contacts. Does not include cases closed on administrative grounds.

The EU Directive is a step towards harmonization and, thereby, will establish potentially less regional concentration of cases in the future. It will most likely also result in a larger number of parallel claims than currently observed.

### III. ELEMENTS OF DAMAGES CLAIMS—PASSING-ON, QUANTITY, AND UMBRELLA EFFECTS AND INTERESTS

Both the EU Directive and a recent judgment by the Court of Justice bolster the scope of antitrust damages action in Europe substantially. Whereas the EU Directive puts the topic of passing-on and its implementation into national law firmly on the European agenda, the Court of Justice's ruling widens the scope of civil redress substantially by making claims on the basis of umbrella effects possible.

Conceptually, the damage for a downstream firm in a supply chain buying cartelized inputs at prices above the prices that would have prevailed in the market had the cartel not been in existence ("but for" prices) can be split into three components:<sup>7</sup>

<sup>6</sup> Note, however, that this analysis is of limited explanatory power as it does not take into account the extent (value of claims) of proceedings in each country.

<sup>7</sup> T. Van Dijk & F. Verboven, *Quantification of damages*, ISSUES IN COMPETITION LAW AND POLICY (W.D. Collins, ed. 2007). H.W. Friederiszick & E. Fugger, *Quantification of harm to competition by national courts and competition agencies*, background note for the OECD Secretariat to the Competition Committee,

1. The decline in profits due to the downstream firm buying the input at higher cartelized prices (the “overcharge”).
2. A potential increase in profits if the downstream firm increases its prices as a result of higher input costs. This attenuates the damage suffered (“passing-on effect”).
3. In the case of passing-on, the downstream firm sells fewer of its products than it would have (but for the cartel) leading to lost profits from units no longer sold (the “output or quantity effect”).

The sum of overcharge and passing-on effect is known as the “profit loss on actual sales” whereas the sum of all three effects (i.e. the sum of overcharge, passing-on, and output effect) is referred to as the “total profit loss.”

The EU Directive acknowledges all of these components by covering the right to compensation for actual loss (*damnum emergens*) and for gain which the claimant has been deprived of (loss of profit, *lucrum cessans*), plus the payment of interest.<sup>8</sup> To avoid overcompensation in case of passing-on, Member States are required to lay down procedural rules to ensure that compensation for actual loss does not exceed the overcharge harm suffered.<sup>9</sup> Note that actions for damages are, in principle, possible along the whole supply chain.<sup>10</sup>

The consideration of passing-on allows indirect purchasers to claim damages alongside direct purchasers in Europe, but also enables the defendant to invoke a passing-on defense in case of claims.<sup>11</sup> This treatment of passing-on is in contrast to the situation in the United States, where indirect purchasers cannot generally claim damages.<sup>12</sup> As we will highlight later, damage actions in Europe can therefore lead to complex questions regarding not only the quantification of total harm but also its distribution along the supply chain.<sup>13</sup>

Regarding vertical distribution, economic theory can provide some broad guidance on the level of pass-on to be expected in different market settings. For example, pass-on is likely to vary significantly depending on whether increases of input cost affect the whole industry or only specific firms (that would mean by the market share covered by the cartel). The amount of firm-specific pass-on is, in general, lower than industry-wide pass-on of costs. Pass-on will also differ by market structure and many economic models indicate that pass-on of industry-wide cost

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DAF/COMP(2011)1. Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, 11.6.2013

<sup>8</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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, henceforth “The Directive” ¶12 and Article 3.

<sup>9</sup> *Id.*, Article 12(2).

<sup>10</sup> *Id.*, ¶44.

<sup>11</sup> *Id.*, Article 13.

<sup>12</sup> The current U.S. situation is the result of the Supreme Court decisions in *Hanover Shoe*, *Illinois Brick*, and *ARC America*. Indirect purchasers do not have the right to claim damages (*Illinois Brick*) though in *ARC America* (1989) the Supreme Court legitimized suits in state courts. Various states have passed specific *Illinois Brick* repealer laws. F. Verboven & T. van Dijk, *Cartel Damages Claims and the Passing-on Defense*, 57(3) J. INDUS. ECON. 457-491 (2009).

<sup>13</sup> Though we note that the EU Commission is expected to issue guidance for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser. The Directive, Article 16.

changes tends to increase with the intensity of competition. The degree of pass-on will, furthermore, depend on the responsiveness of supply and demand conditions.<sup>14</sup> Ultimately, however, quantification of harm along the supply chain and passing-on will be an empirical question that needs to be assessed on a case-by-case basis.

Empirical analyses typically require access to relevant documents and data, an area which is also included in the EU Directive following some uncertainty due to the Court of Justice's ruling in the *Pfleiderer* case in 2011.<sup>15</sup> The EU Directive stipulates that courts should be able to order (proportionate) disclosure of evidence where a claimant has presented a reasoned justification; disclosure can include confidential information. However, courts should have effective measures to protect such information at their disposal. Importantly, leniency statements and settlement submissions cannot be disclosed at any time to protect the overall working of the leniency regime.<sup>16</sup>

The awaited Court of Justice decision in the elevator cartel case on whether cartel members can be made liable for "umbrella pricing" was published in June 2014. The judgment is in line with the paradigm that where there is a causal relationship between harm and infringement anyone can claim compensation for harm suffered. The decision was in response to a reference made by the Austrian Supreme Court on whether cartel members can be held liable for damages by downstream firms that did not purchase from the cartel directly but might still have paid higher prices for their inputs because of competitors raising their prices (umbrella pricing).

In its assessment the Court of Justice reasoned that:

Consequently, the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it 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. It is for the referring court to determine whether those conditions are satisfied.<sup>17</sup>

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<sup>14</sup> Verboven, F. and T. van Dijk, *Cartel Damages Claims and the Passing-on Defense*, J. IND. ECON. 457-491 (2009). Jeremy I. Bulow & Paul Pfleiderer, *A note on the effect of cost changes on prices*, J. POL. ECON. 182-185 (1983). E. Glen Weyl & Michael Fabinger, *Pass-Through as an Economic Tool: Principles of Incidence under Imperfect Competition*, 121(3) J. POL. ECON., (2013). E. Glen Weyl & Michael Fabinger, *Pass-Through and Demand Forms*, unpublished (2012). For a recent literature review regarding pass-through see the study by RBB Economics, *Cost pass-through: theory, measurement, and potential policy implications, A report prepared for the Office of Fair Trading* (2014).

<sup>15</sup> Ruling of the Court of Justice in June 2011 (C-360/09). The Court broadly ruled that it is up to national courts to decide under which conditions to grant access to leniency procedure files.

<sup>16</sup> The Directive, Article 6(6).

<sup>17</sup> Judgment of the Court in Case C-557/12, ¶34, 5 June 2014.

The Court therefore affirms, if the conditions above apply, the existence of umbrella effects and that the causal link between harm suffered and the cartel infringement cannot be broken just because goods are bought from a third party.<sup>18</sup>

From an economic perspective umbrella effects arise when price increases of cartelized products lead to a diversion of demand to non-cartelized substitute products.<sup>19</sup> This increased demand for substitute products will typically lead to higher prices for these products. As a result, even downstream firms buying inputs from non-cartelized firms will be subject to higher prices.<sup>20</sup> Umbrella effects tend to positively depend on the degree of substitutability between products (closer substitutes will trigger a larger response in demand) and the size of the cartel (a cartel with a small coverage is likely to lead only to moderate price increases and therefore less diversion). As with passing-on, the relevant case specific questions will rely heavily on empirical analysis.

In line with the EU Directive, the Court of Justice's ruling strengthens civil damages redress for violations of competition law. However, it remains to be seen (i) how umbrella effects will be quantified in practice, (ii) which level of proof will be required, and (iii) for which products they will be held to apply—for example, only a small group of nearly identical products or a broader category of substitute products.<sup>21</sup>

Finally, the EU Directive also stipulates calculation of the appropriate interest. Guidance, however, is provided at a relatively high level and leaves significant leeway with respect to implementation. For example, interest rates might vary, simple or compound interest might be used, and the time period for which interest is calculated might differ, which can lead to substantial differences in total interest payments.<sup>22</sup>

Overall, while the EU Directive offers clarity on many important economic concepts for the quantification of damages, still significant differences in its application within national legal systems remain. Furthermore, even without differences in the efficiency of judicial systems there remains substantial leeway in how individual damage components can be weighted, resulting potentially in substantial variations in expected damages across jurisdictions.<sup>23</sup> Differences are

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<sup>18</sup> Steptoe & Johnson, *EU Endorses Umbrella Pricing Theories in Cartel Damage Claims* (2014) available at <http://www.stepto.com/resources-detail-9646.html>, last accessed 07/01/2015.

<sup>19</sup> R. Inderst, F.P. Maier-Rigaud, & U. Schwalbe, *Umbrella Effects*, 10(3) J. COMPETITION L. & ECON. 739-763 (2014).

<sup>20</sup> Note that from an economic perspective umbrella effects can even arise if customers cannot switch to alternative suppliers. If the firms subject to the cartel's price increase pass-on some of this increase this will lead to higher demand for firms competing with these indirect purchasers.

<sup>21</sup> Note that at cartelized prices products can become substitutes that would not at competitive price levels be considered to be (close) substitutes.

<sup>22</sup> Note that the Directive stipulates in Paragraph 12 that interest should be due from the time when the harm occurred until the time when the compensation is paid. See Friederiszick, *supra* note 4, for an example showing the relevance of different concepts for total damages.

<sup>23</sup> For an example of the treatment of the passing-on defense and calculation of the appropriate interest, see Friederiszick, *supra* note 4.



also likely to remain due to the differences in the speed or expertise of the judicial system or national variations in the implementation of the EU Directive.<sup>24</sup>

#### IV. CHOICE OF JURISDICTION, JOINT AND SEVERAL LIABILITY, AND COLLECTIVE REDRESS

Multinational cartel damage claims, often with parallel filings in multiple jurisdictions, are nothing new to Europe. For instance, in the *Gas Insulated Switchgear* cartel case, a cartel related to the equipment for electricity production, various national energy firms and grid operators pursued their interest in various jurisdictions in parallel, e.g. NationalGrid in the United Kingdom and TenneT in the Netherlands. Broadly, jurisdiction can depend on the defendant's or the claimant's place of business, the country in which the infringement took place, or the place where the damages were incurred.<sup>25</sup> This variety in potential grounds for establishing jurisdiction provides plaintiffs with some room for maneuver in deciding where to bring a case. This is particularly the case given the general rule of joint and several liability the EU Directive stipulates, which in principle allows a targeting of individual cartel members.<sup>26</sup>

With increased harmonization the number of parallel filings in different national Member States will—most likely—increase. This will require mechanisms and proceedings to allow cross-national recognition of partial settlements and preceding court judgments. The EU Directive attempts to establish such a system by providing guidance on compensation claims, a requirement of procedural means like joinder of claims, and its support for “once-and-for-all” settlements.

Looking at collective redress, there is a widely varying situation due to Member States' different legal traditions, as for instance described in “Towards a European Horizontal Framework for Collective Redress”:

Major differences in the mechanisms have to do with their scope, their availability to representative organisations or individuals as claimants, their availability to businesses and in particular SMEs, how the claimants group is formed (‘opt-in’ or ‘opt-out’), how an action is financed and how an award is distributed.<sup>27</sup>

And, for example, regarding the “opt-in” versus “opt-out” approach to compose the represented group:

The ‘opt-in’ model is used by most Member States that provide for collective redress. The ‘opt-out’ model is used in Portugal, Bulgaria and the Netherlands (in

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<sup>24</sup> Gibson Dunn, *The EU Adopts the Damages Directive: The Emergence of an EU Level Playing Field in Private Antitrust Actions* (2014), available at <http://www.gibsondunn.com/publications/Pages/EU-Adopts-Damages-Directive--Emergence-of-EU-Level-Playing-Field.aspx>, last accessed 01/07/2015.

<sup>25</sup> The “Brussels I” regulation (Council Regulation No 44/2001) lays down rules governing the jurisdiction. A recast version (Regulation No 1215/2012) applies since January 1, 2015.

<sup>26</sup> The Directive, Article 11 (1). There are some specific exceptions for SMEs and immunity recipients. See Article 11 for details.

<sup>27</sup> Commission Communication, *Towards a European Horizontal Framework for Collective Redress*, COM/2013/0401 final.

collective settlements) as well as in Denmark in clearly defined consumer cases brought as representative actions.<sup>28</sup>

Although the EU Commission finally issued a recommendation of common, non-binding principles for collective redress mechanisms in June 2013,<sup>29</sup> the area of collective redress is developing further along national initiatives: The “Loi Hamon” was enacted in March 2014 in France introducing the possibility of group actions.<sup>30</sup> In the United Kingdom the proposed Consumer Rights Bill<sup>31</sup> is expected to introduce a new “opt-out” collective redress regime, subject to a number of safeguards, as a complement to the existing “opt-in actions” to address ineffectiveness.<sup>32</sup> Germany, in its 2013 amendment to the German Act against Restraints of Competition, in contrast strengthened only representative injunction redress<sup>33</sup> by granting standing to certain consumer and business associations.<sup>34</sup>

As described elsewhere, litigants are also exploring other ways to bundle claims:

Even where national law does not foresee special collective redress mechanisms or where they are not available for the particular case, litigants are exploring ways to bundle their claims, for example by selling and assigning them to an entity which then sues in its own name and on its own account. Several of such actions against alleged cement, paraffin wax, hydrogen peroxide, and sodium chlorate cartel members are pending in the Netherlands, Germany and Finland.<sup>35</sup>

In Germany, however, this practice faced a recent blow: Follow-on damage claims by Belgian special purpose vehicle Cartel Damage Claims (“CDC”) in the Federal Cartel Office’s cement case have been dismissed by the Dusseldorf District Court in Germany. CDC which “paid the cement purchasers a fixed Euro 100 fee and undertook to share between 65% and 85% of any damages obtained”<sup>36</sup> sought compensation for at least Euro 131 million but crucially failed to demonstrate sufficient funding for court and defense fees should it lose the litigation.

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<sup>28</sup> *Id.*

<sup>29</sup> EU Commission recommendation “on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law,” C(2013)3539.

<sup>30</sup> Note that these are very different from class actions in the United States. See White & Case, *The new group actions law in France—A cause for concern for companies?*, INSIGHT ANTITRUST (2014).

<sup>31</sup> The Bill had its third reading in the House of Lords on December 8, 2014. It is intended to come into force on October 1, 2015, available at <http://discuss.bis.gov.uk/consumerrightsbill/>, last accessed: 01/07/2015.

<sup>32</sup> Indeed there has only been one collective action taken on behalf of U.K. consumers since they were introduced in 2002. Safeguards include, for example, a process of judicial certification. Matthew O’Regan, *Changes to the private litigation regime in the UK: are more collective damages actions on the way?* available at <http://kluwercompetitionlawblog.com/2014/05/06/changes-to-the-private-litigation-regime-in-the-uk-are-more-collective-damages-actions-on-the-way/>, last accessed: 01/07/2015.

<sup>33</sup> Compensation can be claimed by a consumer association only to the benefit of the treasury which then in turn can decide to distribute it to consumers (see German Competition Act §34a).

<sup>34</sup> S. Rützel, S. Wilske, & A. Fritzsche, *Collective Redress in Cartel Damages Actions—Recent Developments in Europe*, (2013) available at <http://whoswholegal.com/news/features/article/30916/collective-redress-cartel-damages-actions-recent-developments-europe>, last accessed: 01/07/2015.

<sup>35</sup> *Id.*

<sup>36</sup> Cleary Gottlieb, *Düsseldorf Court Dismisses CDC Damage Claims in Antitrust Follow-on Action*, available at <http://www.cgsh.com/de/dusseldorf-court-dismisses-cdc-damage-claims-in-antitrust-follow-on-action/>, Alert Memorandum, (8 January 2014).

V. DISCUSSION

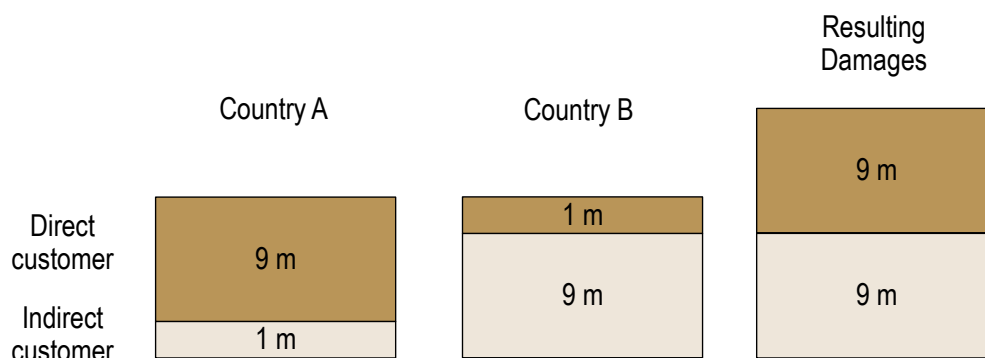
Private antitrust enforcement and cartel damages actions for European-wide cartels are currently still concentrated in a few European countries, namely the United Kingdom, Germany, and the Netherlands. The EU Directive aims for a change by partially harmonizing national practice. If successful this may increase the number of claims pending at various national courts related to the same legal infringement.

From an economic point of view there is a single total damages amount related to a pan-European cartel, which is distributed along the supply chain in dependence of passing-on and customer substitution effects. Quantification thereof is an exact but stochastic science. Quantification of partial components and multi-dimensional divisions—as foreseen by the EU Directive and recent EU court decisions through the introduction of passing-on, quantity, and umbrella effects—adds further challenges to the empirical work.

In addition to the stochastic and potentially unbiased variation in the cross-national quantification of damages, which—inevitably—will occur, the introduction specifically of passing-on and the umbrella effect will create a tension between the various national proceedings. This is due to the adversarial incentives of claimants along the supply chain. We will explain that based on two highly stylized examples:<sup>37</sup>

1. **Example 1 (passing-on):** A direct customer is located in country A, whereas the indirect customer is located in country B. The affected commerce is in both cases 100 million Euro. In country A we assume a finding of 10 percent overcharge and 10 percent passing-on, whereas in country B we assume a finding of 10 percent overcharge and 90 percent passing-on. Such findings would, for example, be in line with the direct customer arguing for little passing-on in country A and the indirect customer arguing for high passing-on in country B. Overall the cartelist would pay an amount of 18 million Euro—much more than the 10 percent overcharge.

Figure 4 - Illustrative damage estimation

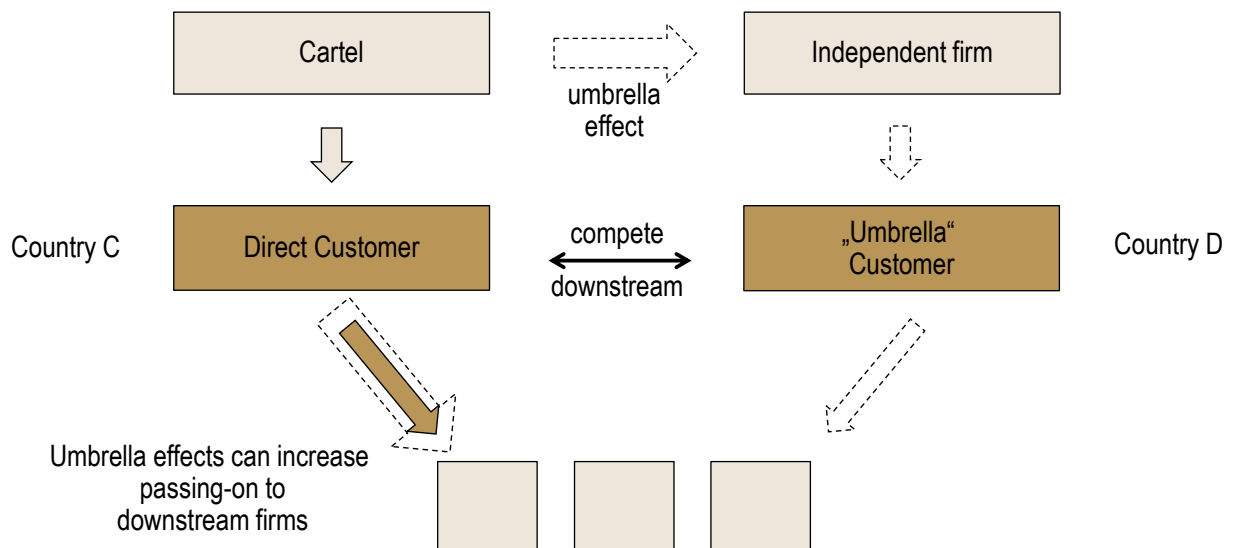


Source: E.CA Economics

<sup>37</sup> The examples are for descriptive purposes only, and exhibit very strong, simplifying assumptions.

2. **Example 2 (umbrella effect & passing-on):** A direct downstream customer of the cartel is located in country C and a direct “umbrella-customer” is located in country D. Both customers initiate proceedings. We then assume that the direct customer in Country C has an incentive to argue for a low umbrella effect of the cartel. This is because low umbrella effects upstream would tend to limit passing-on downstream and therefore lead to a higher damage estimate for the direct customer.<sup>38</sup> In contrast, the umbrella-customer in country D has an incentive to argue for high umbrella effects as her damage will increase with the strength of the umbrella effect. Note, however, that whereas there are opposing views regarding the strength of umbrella effects, both will argue for a low pass-on in general.

Figure 5 - Umbrella effects and passing-on



Source: E.CA Economics

As these examples show, the inclusion specifically of passing-on produces diverging interests between claimants. In an environment of forum shopping, and some remaining structural differences in national systems, conflicting judgments are to be expected. Whether the mechanisms and proceedings that allow cross-national recognition of partial settlements and preceding court judgments—as foreseen by the EU Directive—are sufficient to attenuate those tensions, remains to be seen.

Overall, the multi-jurisdiction landscape in Europe, paired with partial but incomplete harmonization across Europe and correct, but complex economic damages concepts, is likely to lead to interlinked multinational damages actions in Europe. It will require—in addition to legal instruments to assure cross country consistency—pro-active and well trained national judges to steer this fleet to its common goal: an effective but balanced private litigation system in Europe.

<sup>38</sup> Low umbrella effects upstream imply that the downstream competitors to the direct customer, who are themselves customers to the umbrella-customer, have no or little increase in their costs. As a result the direct customer can only pass-on little of the (in the extreme case firm-specific) overcharge due to the competitive conditions.