ANTITRUST DAMAGES ACTIONS: LESSONS FROM AMERICAN INDIRECT PURCHASERS' LITIGATION

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Abstract This article aims to draw policy lessons from the American indirect purchasers' litigation experience for the design of the European private antitrust regime in the light of the European Commission's White Paper on damages actions. The article shows that in multi-level polities procedural aspects of antitrust litigation and judicial cooperation are as crucial as the substantive standards for the success of private enforcement regimes. From this perspective the article criticizes the White Paper for the lack of procedural assessment and urges the Commission to give due consideration to procedural standards and mechanisms of judicial cooperation before taking any legislative action.

I. INTRODUCTION

Compensation of victims of antitrust violations, most notably of consumers, through damages actions deters anticompetitive behaviour, corrects harmful effects of such behaviour on consumer welfare, and consequently constitutes an essential pillar of modern antitrust regimes.[1] Realizing these benefits of private antitrust enforcement, the European Commission has been actively seeking ways to invigorate antitrust damages actions before the national courts and to establish a European private enforcement regime.

In 2004, the Modernisation Regulation decentralized the enforcement of European Union (EU) competition law by transforming article 101(3) of the Treaty on the Functioning of the European Union (TFEU) into a legal

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[1] AI Gavil, 'Federal Judicial Power and the Challenges of Multijurisdictional Direct and Indirect Purchaser Antitrust Litigation' (2000) 69 George Washington Law Review 860. However for discussion of the desirability of private enforcement from the public policy perspective see CA Jones, 'Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check' (2004) 27 World Competition 13; contrast WPJ Wils, 'Should Private Enforcement be Encouraged in Europe?' (2003) 26 World Competition 473.

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exception rule[2] and granting the national courts as well as the national competition authorities the power to apply articles 101 and 102 TFEU in their entirety.[3] Nevertheless, decentralization has not engendered the expected enthusiasm for private antitrust enforcement. For instance, the Ashurst Study conducted shortly after decentralization depicts the current stance of private enforcement in Europe as one of 'astonishing diversity and total underdevelopment'.[4] In order to attract the attention of the European antitrust community to the matter, and to assess various strategies to vitalize private antitrust enforcement, the Commission published a Green Paper on damages actions in 2005.[5] After three years of discussion process, the Commission finally published its widely expected White Paper on damages actions in April 2008.[6]

The Green Paper had concluded that the failure of private antitrust enforcement in Europe was largely due to various legal and procedural hurdles in the national laws governing actions for antitrust damages before national courts.[7] In its White Paper, the Commission sets ambitious goals for the future direction of private antitrust enforcement in Europe and proposes bold actions to address those legal and procedural hurdles. The White Paper opens with proclaiming that 'full compensation' of all victims of infringements of EU competition law will be the 'first and foremost guiding principle' of private enforcement in Europe.[8] In order to achieve the goal of full compensation, the Commission proposes recognition of both indirect purchaser standing and a passing-on defence through legislative action at the EU level.[9] Additionally, in order to overcome litigation costs which are a disincentive to consumers to bring damages actions, and to enhance the choice for individuals between various alternative types of litigation, the Commission proposes strengthening of representative, collective and individual damages actions through EU legislation.[10]

[2] Ex art 81(3) of the Treaty Establishing the European Community (EC Treaty); Council Regulation (EC) 1/2003 of 16 December 2002 on the application of arts 81 and 82 of the EC Treaty (hereinafter the 'Modernisation Regulation') [2003] OJ L 1/1, art 1.

[3] Ex arts 81 and 82 of the EC Treaty; ibid art 6.

[4] Ashurst, 'Study on the Conditions of Claims for Damages of Infringement of EC Competition Rules, Comparative Report' (hereinafter the 'Comparative Report') (31 August 2004) 1.

[5] Commission (EC), 'Green Paper on damages actions for breach of the EC Antitrust Rules' (hereinafter the 'Green Paper'), COM(2005) 672 final, 19.12.2005.

[6] European Commission, 'White Paper on Damages actions for breach of the EC antitrust rules' (hereinafter the 'White Paper') COM(2008) 165 final, 2.4.2008.

[7] ibid 2.

[8] ibid 3.

[9] European Commission, 'Staff Working Paper accompanying the White Paper' (hereinafter the 'Staff Working Paper') SEC(2008) 404, 2.4.2008, 66–67, 98; Commission (EC), 'Staff Working Document Accompanying document to the White Paper, Impact Assessment' (hereinafter the 'Impact Assessment Report') SEC(2008) 405, 2.4.2008, 57.

[10] White Paper (n 6) 4; Staff Working Paper, ibid 19–21, 98; Impact Assessment Report, ibid 57.

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The Commission's choice of compensation of victims, particularly consumers, as the ultimate goal of private enforcement is most welcome as this choice closely parallels the underlying rationale of modern antitrust philosophy, namely protection of consumer welfare. The legislative measures proposed by the Commission, on the other hand, seem to be well suited to serve the goal of full compensation. However, given that an anticompetitive behaviour must affect trade between the Member States in order for articles 101 and 102 TFEU to apply, violations of EU competition law cause damages to consumers and other direct and indirect purchasers located in various parts of the EU. Under these circumstances, the Commission's proposals potentially open the door for the very same anticompetitive behaviour being litigated before various national courts through alternative types of damages actions brought by indirect and direct purchasers. This in turn raises fundamental questions of consistent judicial application of EU competition law[11] and prevention of multiple recovery of the same antitrust damages. If the Commission's proposals are adopted, judicial cooperation and coordinated litigation of related cases will gain crucial importance for the protection of consistency and prevention of multiple recoveries. Nevertheless, the White Paper remains silent when it comes to the procedural aspects of private enforcement.

In the White Paper, the Commission declares that 'the legal framework for more effective antitrust damages actions should be based on a genuinely European approach'.[12] However, such an approach does not necessarily preclude policy learning from other jurisdictions. With more than a century of private enforcement tradition, the US antitrust enforcement regime undoubtedly provides many valuable lessons, both positive and negative, for the design of private enforcement in Europe. In 2002, an Antitrust Modernization Commission was formed in the US to study the federal antitrust regime in general,[13] including the substantive and procedural aspects of private enforcement. In its final report, which was published in 2007, the Modernization Commission proposed important amendments to the current federal policy of passing-on defence and indirect purchaser standing.[14] These proposals by the Modernization Commission imply that a trial and error process has taken place in the US private enforcement regime, and from a pragmatic point of view, this

[11] In the context of this article consistent judicial application does not refer to uniform interpretation of articles 101 and 102 TFEU which is sustained through the preliminary rulings mechanism under article 267 TFEU. Rather, 'inconsistency' is used here to mean inconsistency between national courts as to whether or not to award damages or as regards the amount of awarded damages in related antitrust damages actions. Such inconsistency may emerge because of the application of different standards or because, while applying the same standard, different conclusions are reached regarding the interpretation of technical aspects of damage actions such as the calculation of passing-on.

[12] White Paper (n 6) 3.

[13] Antitrust Modernization Commission Act of 2002, Pub L. No. 107–273, §§ 11051–60, 116 Stat. 1856.

[14] Antitrust Modernization Commission, 'Report and Recommendations' (hereinafter the 'AMC Final Report') (April 2007) <http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf> accessed 28 September 2009.

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process deserves analysis for the purpose of drawing policy lessons for Europe. As explained in detail below, the current initiative for policy change in the US was not provoked by a shift in legal and economic understanding but rather by the diversity between federal and state standards and the lack of effective judicial cooperation mechanisms, which together have produced a chaotic litigation environment. The US experience of indirect purchasers' litigation illustrates that in multi-level polities, particularly where there is diversity between the standards applied by constituent jurisdictions, the procedural aspects of antitrust damages actions and judicial cooperation mechanisms prove as important as the substantive standards for the success of a private enforcement regime. From this perspective, the White Paper's silence regarding the procedural aspects of damages actions appears a strategic mistake.

This article starts with a brief explanation of the law and economics of the passing-on defence and indirect purchaser standing. It continues with analysis of the US experience of indirect purchaser litigation and the *raison d'être* of the current initiative for policy change. Current substantive and procedural standards in Europe are then analysed in the light of the lessons drawn from the US experience. In terms of substantive standards, the article finds only little clarification at the EU level and significant diversity at the national level regarding indirect purchaser standing and the passing-on defence. Likewise, the article finds that under the current EU standards of jurisdiction and conflict of laws the very same anticompetitive behaviour might be litigated before different national courts under different standards. On the other hand, current mechanisms of judicial cooperation do not appear strong and sophisticated enough to support coordinated litigation of related cases to prevent inconsistent application and multiple recoveries. In other words, the article finds that similar circumstances to those which engendered a policy failure in the US currently exist in Europe. Consequently, the article concludes by calling on the European Commission to give due consideration to possible strategies for the improvement of current procedural standards and judicial cooperation mechanisms before taking any legislative action.

II. LAW AND ECONOMICS OF PASSING-ON

All products pass through a production chain before they reach the final consumers. When market forces are superseded in any level of this production chain by anticompetitive behaviour, all customers below that level, including final consumers, may face higher prices and scarce output.

In a very simple example of a production chain consisting of a manufacturer, a retailer and a final consumer, when the manufacturer engages in an anticompetitive activity and subsequently raises his prices, in the first instance the retailer bears the anticompetitive overcharge. Then, when selling the product to the final consumer, the retailer faces a choice between different pricing options. Depending on the market conditions, and most importantly on

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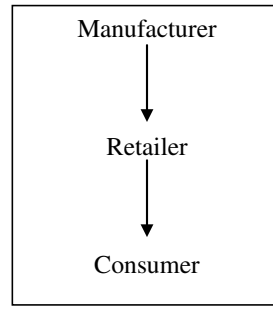


Diagram 1: Example of a production chain.

the price elasticity of demand, the retailer may: absorb the whole overcharge and not reflect it in the prices he charges to the final consumer; pass the whole overcharge to the final consumer by raising the price accordingly; or absorb a part of the overcharge and pass the rest to the final consumer.

In an ideal world, we would expect the private enforcement regime to provide mechanisms whereby both direct purchasers (in the above example the retailer) and indirect purchasers (in the above example the consumer) can claim damages to cover their exact individual economic injuries caused by the anticompetitive activity. This requires recognition of both the passing-on defence and indirect purchaser standing. When the passing-on defence is available, in damages actions brought by direct purchasers the defendants may escape liability upon arguing and successfully proving that direct purchasers have raised their prices responding to the anticompetitive overcharge and subsequently passed the damages on to their customers. When indirect purchaser standing is recognized, indirect as well as direct purchasers may sue the undertakings engaged in anticompetitive activity for damages and the damage award is apportioned by the judiciary between these clusters of plaintiffs based on the proven amount of passing-on.

As has been argued elsewhere, the design of individual elements of a private antitrust enforcement regime involves three essential legal and economic considerations:

1) The *fairness* consideration which requires that every individual including the final consumer is granted access to legal process to claim damages in order to make good any injury they have incurred as a result of anticompetitive behaviour,
2) The *effectiveness* consideration which requires that deterrence of anticompetitive behaviour is recognised as one of the ultimate goals of antitrust damages actions and consequently individual elements of the private enforcement regime are designed to accomplish this objective,
3) Last but not the least, the *efficiency* consideration which requires that antitrust damages actions do not disturb judicial economy by imposing

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an overwhelming burden of economic and factual analysis on the judiciary.[15]

When it comes to the passing-on defence and indirect purchaser standing, the consideration of fairness comes into an unavoidable conflict with the considerations of effectiveness and efficiency. Fairness requires recognition of both the passing-on defence and indirect purchaser standing so that each cluster of plaintiffs would be able to sue the undertakings involved in anticompetitive activity for damages and subsequently, the compensation would be distributed between those clusters based on the amount of passing-on. In this scenario, each cluster of plaintiffs would have access to damages and no cluster would receive any windfall benefits at the expense of the other. Nevertheless, recognition of the passing-on defence and indirect purchaser standing raises some impediments to effectiveness and efficiency. When the passing-on defence and indirect purchaser standing is recognized, successful utilization of the passing-on defence by the defendants would leave the final consumers as the only cluster capable of claiming damages. However, final consumers are believed to be less effective plaintiffs than the direct purchasers. Firstly, although anticompetitive behaviour causes great economic damage to consumer welfare in general, individual consumers suffer only a very small portion of such damage. Secondly, compared to direct purchasers, indirect purchasers enjoy only limited financial means to support the costs of antitrust litigation. Thirdly, as they stand closer in the production chain to the undertakings engaged in anticompetitive activity, direct purchasers benefit from an information advantage, and therefore are believed to be more likely to bring substantial economic evidence before the courts in damages actions.[16]

[15] F Cengiz, 'Passing on Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: what can the EC learn from the US?' (2007) ESRC Centre for Competition Policy Working Paper 07-21 <http://www.uea.ac.uk/polopoly_fs/1.104616!ccp07-21.pdf> accessed 28 September 2009, 8. See also V Sarris, *The Efficiency of Private Antitrust Enforcement: The Illinois Brick Decision* (Garland Publishing, New York and London 1984) 117; Gavil (n 1) 860; BD Richman & CR. Murray, 'Rebuilding the Illinois Brick: a Functionalist Approach to the Indirect Purchaser Rule' (2007) Duke Law School Legal Studies Research Paper Series 155, 3.

[16] However, such close relationship between the undertakings involved in anticompetitive activity may also create disincentives for the direct purchasers to bring antitrust damages actions and impede the effectiveness of a private enforcement regime. Firstly, in some cases, particularly when the upstream market is concentrated, and therefore when they rely on supplies from the undertakings involved in anticompetitive activity, direct purchasers might not be willing to disturb their relationship with their suppliers by bringing a damages claim. In such cases indirect purchasers may prove more effective plaintiffs than the direct purchasers. It has also been proven that the upstream firms are capable of sharing the anticompetitive profit with the purchasers through a tacit sustainable agreement to curb their incentives to sue: See MP Schinkel, J Tuinstra, J Ruggeberg, 'Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion' (2005) Amsterdam Center for Law & Economics Working Paper 2005-02 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=730384> accessed 28 September 2009. For empirical analysis of the effects of indirect and direct purchaser damages actions on the effectiveness of private enforcement regime see ES Snyder, 'Efficient Assignment of Rights to Sue for Antitrust Damages' (1985) 28 Journal of Law and Economics 469; JM Joyce and RH McGuckin, 'Assignment of

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As a result, compared to direct purchasers, final consumers appear as an atomized and diffused group with weaker incentives to sue and therefore, it is questionable whether indirect purchaser damages actions are capable of creating a credible threat against anticompetitive behaviour.[17] Additionally, recognition of the indirect purchaser standing and the passing-on defence requires analysis by the court ex post of complex economic facts, most notably pricing decisions and price elasticity of demand. It should also be noted that in the real world production chains are much more complex than the simple three level example given above. In some cases, one product becomes a component of the other rendering it extremely difficult for the courts even to identify the direct and indirect purchasers. Therefore, it is argued that recognition of the indirect purchaser standing and the passing-on defence would render already complex antitrust litigation extremely burdensome and seriously disturb judicial economy.[18] Due to such conflicts between the considerations of fairness, efficiency and effectiveness, each jurisdiction faces some policy choices between the recognition and rejection of passing-on defence and indirect purchaser standing when designing its private antitrust enforcement regime.[19] This policy decision depends on whether fairness or effectiveness and efficiency is perceived as the main objective of private enforcement in that jurisdiction. Therefore, although they appear substantial from the perspective of fairness, passing-on defence and indirect purchaser standing might be limited or even rejected in some jurisdictions as a strategic policy choice.

III. THE AMERICAN EXPERIENCE OF THE PASSING-ON DEFENCE AND INDIRECT PURCHASER STANDING

Section 4 of the Clayton Act declares that '*any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws

Right to Sue under Illinois Brick: An Empirical Assessment' (1986) 31 Antitrust Bulletin Spring 235.

[17] WM Landes and RA Posner, 'Should Indirect Purchasers have Standing to Sue under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick' (1979) 46 University of Chicago Law Review 602; G Werden and M Schwartz, 'Illinois Brick and the Deterrence of Antitrust Violations—An Economic Analysis' (1984) 35 Hastings Law Journal 629. Contrast RG Harris and LA Sullivan, 'Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis' (1980) 128 University of Pennsylvania Law Review 269. Many jurisdictions design collective redress mechanisms such as class actions or damages actions brought by public bodies in order to overcome such weaknesses of consumer damages actions. However, besides their benefits those mechanisms involve certain costs, disadvantages and complications as well. Substantive analysis of collective redress mechanisms is outside the scope of this article. For a broad overview of the American private antitrust regime from this perspective see F Cengiz, 'The Role of State AGs in the US Antitrust Policy: Public Enforcement Through Private Enforcement Methods' (2006) ESRC Centre for Competition Policy Working Paper 06-19 <http://www.uea.ac.uk/polopoly_fs/1.104496!ccp06-19.pdf> accessed 28 September 2009.

[18] Landes and Posner (n 17).

[19] For the analysis of such options, see Green Paper (n 5) Options 21–24.

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may sue' to obtain treble damages (emphasis added). In other words, the US federal law does not restrict standing in antitrust damages actions to any class of plaintiffs per se. However, since the foundational period of the US private enforcement regime, the Supreme Court has restricted standing in antitrust damages actions for various policy reasons. In the earlier jurisprudence, the Court attempted to address the issues of passing-on defence and indirect purchaser standing from the perspective of 'remoteness' of the injury from the violation. This early approach produced inconsistent judgments and lack of clarification and guidance for the lower courts.[20]

The Supreme Court faced the question of passing-on specifically for the first time in *Hanover Shoe*,[21] an antitrust damages action brought by a shoe producer against the supplier of the machines used in shoe production. In this case, the defendant raised the passing-on defence by arguing that the plaintiff should not be entitled to claim any damages, as he had passed the overcharge on to his customers. The Court approached the question of passing-on mainly from an effectiveness and efficiency standpoint. Firstly, the Court observed that pricing decisions of undertakings are highly individualized and influenced by a wide range of factors which are extremely difficult to analyse ex post.[22] Recognition of the passing-on defence would require analysis of 'virtually unascertainable figures' and such a task would prove 'insurmountable' for the courts.[23] Secondly, the Court observed that recognition of the passing-on defence would automatically leave the final consumers as the only group of plaintiffs entitled to claim damages. In such case antitrust damages actions 'would be substantially reduced in effectiveness' as final consumers generally 'have only a tiny stake in a lawsuit and little interest in attempting a class action'.[24] On these grounds, the Court rejected the passing-on defence.

A few years later, in *Illinois Brick*,[25] the Supreme Court faced the question of indirect purchaser standing which constitutes the other side of the coin. In this case, the State of Illinois, which bought bricks from masonry contractors as an indirect purchaser, sued the brick producers for damages caused as a result of a price-fixing conspiracy. In its analysis the Court observed that 'whatever rule is to be adopted regarding pass-on in antitrust actions, it must apply equally to plaintiffs and defendants',[26] because if indirect purchaser standing were to be recognized in the absence of the passing-on defence, the result would be multiple recovery of the same damages by both direct and indirect purchasers. Therefore, the Court was 'faced with the choice of

[20] EE Pollock, 'Standing to Sue, Remoteness of Injury, and the Passing-on Doctrine' (1966) 32 Antitrust Law Journal 5. Compare *Keogh v Chicago & NW Ry* 245 US 531 (1918); *Ohio Valley Electric Corp v General Electric Co* 244 F Supp 914 (SDNY 1965) and *Commonwealth Edison v Allis-Chalmers Mfg* Co. 315 F 2d 564 (7th Cir 1963).

[21] *Hanover Shoe v United Shoe Machinery Corp* 392 US 481 (1968).

[22] ibid 492–93.

[23] ibid 493.

[24] ibid 494.

[25] *Illinois Brick Co v Illinois* 431 US 720 (1977).

[26] ibid 728.

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overruling (or narrowly limiting) *Hanover Shoe* or of applying it to bar respondents' attempts to use pass-on theory offensively'.[27] Again, the Court approached the matter exclusively from the perspective of effectiveness and efficiency, observing that 'the antitrust laws [would] be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers rather than by allowing every plaintiff potentially affected by the overcharge' to bring damages actions.[28] Secondly, taking an efficiency perspective, the Court referred to *Hanover Shoe* and once again mentioned the complex economic analysis of passing-on which would render already complicated antitrust damages actions completely unmanageable.[29] Consequently, the Court established that indirect purchasers were not entitled to bring damages actions in cases of violations of federal antitrust law.

The *Hanover Shoe* and *Illinois Brick* decisions of the Supreme Court caused an immediate public reaction and an intense debate within the antitrust community since their practical effect was denial of redress to final consumers. Since the *Hanover Shoe* and *Illinois Brick* judgments, various bills have been proposed unsuccessfully to Congress for their legislative overruling.[30] Powerful interest groups such as the American Bar Association produced numerous reports on the matter.[31] However, the strongest resistance to the denial of indirect purchaser standing at the federal level came from the states. In the US, the industrialized northern states in particular enjoy a substantial antitrust enforcement tradition with state antitrust statutes predating the

[27] ibid. The sequence of cases played a dramatic role in the development of American federal policy on the passing-on defence and indirect purchaser standing. As Justice Blackmun observed in his dissent, 'the plaintiffs-respondents in this case . . . [were] the victims of an unhappy chronology': see *Illinois Brick*, ibid, (Blackmun, J dissenting), 765. See also AI Gavil, 'Antitrust Remedy Wars Episode I: Illinois Brick from Inside the Supreme Court' (2005) 79 St. John's Law Review 553.

[28] *Illinois Brick* (n 25) 734–735. Illinois Brick is also perceived as one of the series of cases where the Court established Chicago School rationales into federal antitrust jurisprudence such as *Continental TV, Inc v GTE Sylvania Inc* 433 US 36 (1977) holding that vertical territorial restrictions are not illegal *per se* and *Brunswick Corp v Pueblo Bowl-O-Mat, Inc* 429 US 477 (1977) establishing the 'antitrust injury' standard. Therefore, the Supreme Court's exclusive effectiveness perspective in *Illinois Brick* is explained as an effect of the Chicago School philosophy: see EC Cavanaugh, 'Illinois Brick: A Look Back and a Look Ahead' (2004) 17 Loyola Consumer Law Review 1, 17; Gavil (n 1), 865–866.

[29] *Illinois Brick*, ibid 734–735.

[30] See eg HR 1942, 95th Cong, 2d Sess (1978); S 1874, 95th Cong, 2d Sess (1978); HR 9132, 95th Cong, 1st Sess (1977); HR 8516, 95th Cong, 1st Sess (1977); HR 8359, 95th Cong, 1st Sess (1977); HR 2004, 96th Cong, 1st Sess (1979); HR 2060, 96th Cong 1st Sess (1979); S 300, 96th Cong, 1st Sess. (1979).

[31] 'Report of the American Bar Association Antitrust Law Section Task Force on Legislative Alternatives concerning *Illinois Brick Co v Illinois*' (1997) 46 Antitrust Law Journal 1137; 'Report of the American Bar Association Section of Antitrust Law Task Force to Review Proposed Legislation to Repeal or Modify *Illinois Brick*' (1983) 52 Antitrust Law Journal 841; 'Report of the American Bar Association Section of Antitrust Law Task Force to Review the Supreme Court's Decision in California v ARC America Corp.' (1990) 59 Antitrust Law Journal 273; 'Report of the Indirect Purchaser Task Force, Section of Antitrust Law American Bar Association' (1995) 63 Antitrust Law Journal 993.

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federal ones in some cases.[32] Additionally, consumer redress through antitrust damages actions is a politically sensitive matter for the states. The State Attorneys General, who are the chief legal officers of the states and elected through popular voting in most states, are entitled to bring antitrust damages actions on behalf of consumers under the federal and most of the state laws.[33] Additionally, in terms of their economic functions, the states themselves generally occupy the position of indirect purchaser in the production chain and therefore may be the victims of antitrust violations.[34] For these reasons, the federal policy of eliminating indirect purchaser standing came into direct conflict with state interests. As a response, the states turned to state laws, the most powerful weapon in their arsenal. To date, most states denied the *Illinois Brick* doctrine either by adopting the so-called '*Illinois Brick* repealler statutes', which specifically recognize indirect purchaser standing in antitrust damages actions before the state courts, or through jurisprudence.[35]

In addition to substantial divergence between federal and state laws with respect to indirect purchaser standing, state laws *inter se* also differ dramatically. For instance, whereas some states recognize direct standing of individual consumers, others grant the authority to bring damages actions on behalf of consumers to the State Attorneys General.[36] Likewise, whereas the passing-on defence is available in some states, others simply allow multiple recovery of the same damages by direct and indirect purchasers.[37] This immense diversity between the federal and state standards and state standards *inter se* has resulted in an environment of litigation disorder and forum shopping where the very same anticompetitive activity produces damages actions before various federal and state courts. For instance, public proceedings against Microsoft under Section II of the Sherman Act produced 64 follow-on damages actions before the federal courts and 117 follow-on damages actions before the state courts.[38]

[32] JA Rahl, 'Towards a Worthwhile State Antitrust Policy' (1960) 39 Texas Law Review 753, 753–54; GF Sieker, 'The Role of the States in Antitrust Law Enforcement-Some Views and Observations' (1960) 39 Texas Law Review 873; S Mosk, 'State Antitrust Enforcement and Coordination With Federal Enforcement' (1962) 21 Antitrust Law Journal 358; J May, 'The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History' (1990) 59 Antitrust Law Journal 93, 98.

[33] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub.L. 94-435, 15 USCA § 18(a).

[34] Cengiz (n 15) 19.

[35] American Bar Association Section of Antitrust Law, Indirect Purchaser Litigation Handbook (American Bar Association, 2007) 26; R Folsom, 'Indirect Purchasers: State Antitrust Remedies and Roadblocks' (2005) 50 Antitrust Bulletin 181, 182; KJ O'Connor, 'Is the Illinois Brick Wall Crumbling?' (2001) 15 ANTITRUST 34; JT. Tomlin, DJ Giali, 'Federalism and the Indirect Purchaser Mess' (2005) 11 George Mason Law Review 157. Although in *California v ARC America Corp* 490 US 93 (1989) it was argued that state indirect purchaser laws have been preempted by the federal law, the Supreme Court rejected this argument.

[36] American Bar Association ibid 26; Folsom ibid.

[37] American Bar Association ibid.

[38] Gavil (n 1) 863; RW Davis, 'Indirect Purchaser Litigation: *ARC America*'s Chickens Come Home Roost on the *Illinois Brick* Wall' (1996) 65 Antitrust Law Journal 375, 396; JT

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Needless to say, in addition to resulting in enormous litigation costs particularly for the defendants, this litigation chaos raises very real risks of inconsistent judicial application of antitrust laws and multiple recovery of the same antitrust damages through parallel damages actions. Under such diversity of substantive standards, removal of related cases to a single forum and/or coordinated adjudication of related cases by multiple forums appear as the only mechanisms for avoiding inconsistency and multiple recovery. Unfortunately however, the US procedural law does not provide any strong mechanism for judicial cooperation. Removal and consolidation of related state cases are governed by individual state procedural laws which are as diverse as the federal ones.[39] On the other hand, federal procedural law allows removal of state cases to the federal courts only under two circumstances: firstly, when the state case involves a federal question[40] which is a priori not satisfied in indirect purchaser damages actions due to diverging federal and state policies regarding this matter; and secondly, when 'diversity jurisdiction' exists.[41] Diversity jurisdiction is deemed by federal law to exist under very strict conditions such as diverse citizenship of all class representatives from the defendants in terms of their state of residence, and fulfilment of the minimum amount in dispute requirement (currently slightly more than US$75,000).[42] Although Congress passed the Class Action Fairness Act[43] in 2005 in order to relax the conditions of diversity jurisdiction in class actions, this Act is not expected to dramatically ameliorate antitrust litigation disorder due to the various exceptions it brings to the new standard of diversity jurisdiction.[44] More substantially, however, the Act does not harmonize federal and state standards of the passing-on defence and indirect purchaser standing. In other words, even if related federal and state cases are successfully consolidated before a single federal forum, they continue to be litigated under diverse standards.[45] Under these circumstances, coordination of related federal and state, and various state cases depends on the voluntary efforts of the parties and the courts. In the past, parties in antitrust damages actions entered into agreements for the consolidation of pre-trial proceedings before a single state forum and coordinated litigation of related

Prud'Homme, Jr, ES Cooper, 'One More Challenge for the AMC: Repairing the Legacy of the *Illinois Brick*' (2005) 40 University of San Francisco Law Review 675, 676.

[39] Cengiz (n 15) 22.

[40] 28 USC 1367.

[41] 28 USC 1332 (a).

[42] ibid. See also *Ben-Hur v Cauble* 255 US 356 (1921); *Zahn v International Paper Co* 414 US 291 (1973); *Exxon Mobil v Allapath Services*, *Inc* 125 U.S. 2511 (2005).

[43] 28 USC §§ 1332(d), 1453, 1711–1715.

[44] Professor WB Rubenstein, UCLA Program on Class Actions, 'Understanding the Class Action Fairness Act of 2005' <http://www.classactionprofessor.com/cafa-analysis.pdf> accessed 28 September 2009, 2.

[45] Cavanaugh (n 28) 47–48; AMC Final Report (n 14) 271; Testimony of Mark J Bennett and Ellen S Cooper before the Antitrust Modernization Commission (17 June 2005), 15; Prepared Statement of Professor Andrew I Gavil, before the Antitrust Modernization Commission (27 June 2005) 22.

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state cases.[46] Likewise, in damages actions brought on behalf of consumers, State Attorneys General vigorously coordinate their efforts under the framework of the National Association of State Attorneys General.[47] Nevertheless, such voluntary cooperation initiated only occasionally and by the consent of both sides of the conflict does not always prove effective as the Microsoft example mentioned above clearly illustrates.

In 2002 an Antitrust Modernization Commission was formed in the US to assess the federal antitrust policy in general and report back proposals for amendment to the President.[48] Due to the current litigation disorder in antitrust damages actions, the Commission decided at the outset to include the matter of indirect purchaser damages actions on its agenda. The US Supreme Court and the American antitrust community approached the matters of the passing-on defence and indirect purchaser standing mainly from the perspective of efficiency and effectiveness. The Commission too followed this approach and expressed in its final report that due to their superiority from the perspectives of efficiency and effectiveness, the *Hanover Shoe* and *Illinois Brick* doctrines would still represent the best policy options if things were to be written on a 'clean slate'.[49] Nevertheless, owing to the diversity between standards and the lack of effective judicial cooperation mechanisms, the current situation could best be described as a 'lack of policy'.[50] Despite the denial of standing under federal law, indirect purchasers have access to the private enforcement regime under state laws, and indirect and direct purchaser damages actions regarding the same anticompetitive activity are independently litigated before multiple forums at the expense of consistency and judicial economy.[51] Under these circumstances, ironically, the *Hanover Shoe* and *Illinois Brick* doctrines seem to seriously impede the effectiveness and efficiency of the US private enforcement regime. As a solution to the current litigation disorder, the Commission proposed a package of amendments consisting of:

1) Legislative overruling of the *Illinois Brick* doctrine to the extent necessary for compensation of indirect purchasers under federal law;
2) Legislative overruling of the *Hanover Shoe* doctrine to the extent necessary for the prevention of multiple recoveries; and
3) Adoption of mechanisms for the removal of state indirect purchaser actions to the federal courts and consolidation of all related direct and indirect purchaser actions regarding the same conduct before a single federal forum so that the same forum could decide on liability and the amount

[46] Gavil (n 1) 863; Cavanaugh ibid 30; Prepared Statement of Michael I Denger, before the Antitrust Modernization Commission, (27 June 2005) 12.
[47] F Cengiz, 'Management of Networks between the Competition Authorities in the US and the EC: Different Polities, Different Designs' (2007) 3 European Competition Journal 315, 324–331.
[48] Antitrust Modernization Commission Act (n 13).
[49] AMC Final Report (n 14) 266.
[50] ibid.
[51] ibid.

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of passing-on and subsequently apportion the damage fund between the indirect and direct purchasers.[52]

There is a significant contrast between the American and European rationales when it comes to the objectives of private enforcement. The conventional wisdom in the US perceives effectiveness and efficiency as the main objectives of private antitrust enforcement. The Antitrust Modernization Commission's current initiative for a policy change was not provoked by a shift in such philosophy, but by the chaotic litigation environment created by diverse standards and weak judicial cooperation mechanisms. In the European context on the other hand, as clearly confirmed by the European Court of Justice in *Courage* and *Manfredi*, the doctrine of direct effect requires that it should be 'open to *any individual* to claim damages for the loss caused to him by a contract or by conduct liable to restrict or distort competition'.[53] In other words, in strong contrast to the US federal policy, categorical elimination of indirect purchaser standing for the sake of efficiency and effectiveness would dramatically conflict with the dynamics of the principle of direct effect. In line with the Court's approach to the matter, the European Commission adopted a fairness perspective to antitrust damages actions in its recent White Paper and declared that 'full compensation' of all victims of infringements of EU competition law will be the 'first and foremost guiding principle' of private enforcement in Europe.[54] In the light of such contrast between the American and European rationales for private antitrust enforcement, policy learning from the US in the substantive sense does not appear possible let alone plausible. However, the US experience offers important policy lessons particularly in terms of the design of procedural aspects of private enforcement in a multi-level setting. It clearly illustrates that in multi-level polities, particularly when there is diversity between the substantive standards of constituent jurisdictions, strong judicial cooperation mechanisms, whereby related cases are litigated either by a single forum under a single set of standards or by multiple forums in close coordination, are indispensable for the private enforcement regime to succeed. Otherwise, no matter how plausibly the substantive standards are designed, the result will be a policy failure.

IV. THE EUROPEAN CONTEXT I: SUBSTANTIVE STANDARDS OF INDIRECT PURCHASER STANDING AND THE PASSING-ON DEFENCE

In its White Paper, referring to *Courage* and *Manfredi* as the main sources of authority, the Commission bravely argues that the jurisprudence of the Court of Justice requires recognition of indirect purchaser standing by the national

[52] ibid 267.

[53] Case 453/99 *Courage Ltd v Bernard Crehan* ECR [2001] I-6297, para 26; Case C-295/04 *Vincenzo Manfredi* v *Lloyd Adriatico Assicurazioni SpA* ECR [2006] I-06619, para 61 (emphasis added).

[54] White Paper (n 6) 3.

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laws.[55] However, as argued elsewhere, it is questionable whether these judgments create a universal right of standing for indirect purchasers at the EU level which the national laws are obliged to respect.[56] To begin with, in *Courage* the main question raised by the English national court was not even related to indirect purchaser standing. Rather, in this case the European Court of Justice was asked whether a party to the agreement violating article 101 TFEU was entitled to claim damages under EU law. The Court responded to this question by repeating the general formula of direct effect in the field of competition law as developed in earlier cases such as *BRT Sabam*.[57] In *Manfredi*, on the other hand, the Italian national court raised the question whether individuals who purchased motor insurance from insurance brokers and agents were entitled to sue the insurance companies for the damages caused by a price-fixing conspiracy. In other words, in this case, the European Court of Justice faced the very specific question of whether the principle of direct effect requires standing to be granted to indirect purchasers in damages actions where there has been a violation of article 101 TFEU. In response the Court observed that, as confirmed in *BRT Sabam* and *Courage*, in principle it must be open to any individual to exercise his rights under the EU law to the full extent.[58] The Court thus held that '. . . *any individual* can claim compensation for the harm suffered where there is a *causal relationship* between the harm and agreement or practice prohibited under Article 81 EC [now article 101 TFEU]'.[59] However, in its reasoning the Court neither mentioned the concept of indirect purchaser standing nor went into the specific aspects of judicial assessment of passing-on. The Court's reasoning in this case appears an example of a perfect combination of the principle of direct effect with the principle of respect of national procedural autonomy. On the one hand the Court established that national laws should not categorically eliminate indirect purchaser standing, but on the other, it ruled that it was ultimately for the national courts to decide who would enjoy standing under the national standards of causality. Under these circumstances, the *Manfredi* formula falls somewhat short of creating an unambiguous European-wide right of standing for indirect purchasers in damages actions against the violations of articles 101 and 102 TFEU.

The position of EU law is not less complicated when it comes to the passing-on defence. In the past, the Court faced the question of the passing-on defence specifically in cases relating to the extra-contractual liability of the EU[60] and monetary liability of the Member States for breaches of EU

[55] ibid 4; Staff Working Paper (n 9) 15.
[56] Cengiz (n 15) 30.
[57] Case 127/73 *Belgische Radio en Televisie* v *SV SABAM and NV Fonior* [1974] ECR 51.
[58] *Manfredi* (n 53) para 26.
[59] ibid para 61 (emphasis added).
[60] See eg Joined Cases 64 & 113/76, 239/78, 27–28 & 45/79 *Dumortier Freres SA and Others v Council of the European Communities* (Maize Gritz Cases) [1979] ECR 3091; Case 238/78 *Ireks-Arkady GmbH v Council and Commission of the European Communities* (Quellmehl Cases) [1979] ECR 2955.

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law.[61] In both contexts, the Court recognized the existence of passing-on defence. In fact, in the context of extra-contractual liability of the EU, the Court went even further and analysed statistical pricing data to calculate the amount of passing-on. Some authors argue that the Court's jurisprudence in these contexts implies the existence of a universal passing-on defence under EU law which is also applicable in the field of antitrust damages actions.[62] However, such argument does not seem convincing under the dramatically different margins of sensitivity of national procedural autonomy in the field of antitrust damages actions on the one hand and EU and Member State liability on the other. Although they stem from the doctrine of direct effect, antitrust damages actions are litigated before the national courts under the substantive and procedural standards of national laws. Extra-contractual liability of the EU, on the other hand, is explicitly regulated by the TFEU[63] and the European Court of Justice enjoys exclusive jurisdiction in this field. Likewise, although being adjudicated by national courts, the liability of Member States in cases of breaches of EU law stems from the doctrine of direct effect with the very precise objective and subjective conditions of such liability firmly established in the Court's jurisprudence.[64] In other words, the margin of sensitivity of national procedural autonomy in the context of antitrust damages actions is much tighter than that in the contexts of EU and Member State liability.

The Court has not yet faced the question of passing-on defence in the context of damages actions against the violations of EU competition law. However, in *Courage* and *Manfredi* the Court faced the question whether under the national laws plaintiffs could be denied damages in actions against the violations of articles 101 and 102 of the TFEU if the award of damages would result in unjust enrichment. In these cases the Court showed utmost deference to national procedural autonomy and held that, so long as the principles of *equivalence* and *effectiveness*[65] are respected, 'Community [now

[61] See eg Case192/95 *Societe Comateb v Directeur General Des Douanes et Droits Indirects* [1997] ECR I-165; Joined Cases 441-42/98 *Kapniki Michailidis AE v Idryma Koinonikon Asfaliseon (IKA)* [2000] ECR I-7145.

[62] T Eilmansberger, 'The Green paper on Damages Actions for Breach of the EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement Through Legislative Action' (2007) 44 Common Market Law Review 431, 474; N Reich, 'Horizontal Liability in EC Law: Hybridization of Remedies for Compensation in case of breaches of EC Rights' (2007) 44 Common Market Law Review 705, 712; see also the Opinion of Mr Advocate General Van Gerven in Case 390/98 *H.J. Banks & Co. Ltd* v *British Coal Corporation* [1994] ECR I-1209.

[63] Art 340 TFEU.

[64] Joined Cases 6 &9/90 *Francovich and Bonifaci v Italy* [1991] ECR I-5357; Joined Cases 46 &48/93, *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport*, ex parte: Factortame Ltd and others [1996] ECR I-1029.

[65] Principles of *equivalence* and *effectiveness* are EU law principles developed by the Court of Justice which establish that the national laws governing the actions brought by individuals in exercise of their directly effective EU rights shall not be less favourable than those governing similar domestic actions (*equivalence*) and that they shall not render the exercise of directly effective EU rights practically impossible or excessively difficult (*effectiveness*). See Case 33/76

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EU] law does not prevent national courts from taking steps to ensure that the protection of the rights guaranteed by the Community [now EU] law does not entail the unjust enrichment who enjoy them'.[66] In other words, in accordance with the tight margin of national procedural autonomy in the field of antitrust damages actions, the Court left the question of unjust enrichment to be settled by the national courts under their respective national laws. Questions of passing-on defence and unjust enrichment rest on essentially similar rationales. Both stem from the fairness consideration, although the passing-on defence concerns whether an individual should be entitled to claim damages he has not actually incurred, whereas unjust enrichment concerns whether an individual should be entitled to claim damages under conditions which do not fully justify the damage award.[67] The only practical difference is that passing-on defence involves technical analysis of much more complex economic and econometric data by the judiciary. That difference aside, it is not hard to imagine that the Court of Justice's position would not be dramatically different in the matter of passing-on defence than its position in the matter of unjust enrichment.

As a conclusion, the Court of Justice seems to have left the questions of passing-on defence and indirect purchaser standing to be settled by the national courts under the national laws. Due to the insufficient number of antitrust damages actions brought to date, national courts have not yet fully clarified the positions of national laws on these matters. The Ashurst study concluded that the passing-on defence and indirect purchaser standing appear at least theoretically possible in most of the Member States, however, with some strong reservations.[68] Particularly in jurisdictions where the existence of a direct causal link between the harm and the harmful conduct is required, such as Austria, Cyprus, Ireland, Italy, Luxembourg and Malta, indirect purchaser standing could prove problematic.[69] For instance, under the 'protective purpose of the norm theory' (*Schutznormtheorie*), the German and Austrian national courts have in the past required that the 'plaintiff be a person or belong to a definable group of persons against whom the infringement has specifically been directed' for damages to be awarded.[70] Under this reasoning, German national courts rejected damage claims by the victims of international vitamins cartel, whereas such claims were accepted by the English national courts.[71] In 2005, with the 7th amendment, specific rules were incorporated to

Rewe v *Landwirtschaftskammer fuer das Saarland* [1976] ECR 1989; Case 45/76 *Comet* v *Produktschap voor Siergewassen* [1976] ECR 2043; Case 68/79 *Hans Just* v *Danish Ministry for Fiscal Affairs* [1980] ECR 501; Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595. Note that, this principle differs from the 'consideration of effectiveness' discussed in the text at n 15.

[66] *Courage* (n 53) para 30; *Manfredi* (n 53) para 94.

[67] Cengiz (n 15) 32.

[68] Comparative Report (n 4) 6.

[69] ibid 78.

[70] ibid 38.

[71] Mainz District Court, decisions of 15 January 15 2004, Cases 12 HK.O 52/02, 12 HK.O 55/02 and 12 HK.O 56/02 [2004] NJW-RR 478; Mannheim District Court, decision of 11 July 2003,

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the German Act against Restraints of Competition (*Gesetz Gegen Wettbewerbsbeschränkungen-GWB*). Under the new rules, lower courts tend to accept the passing-on defence, whereas the dominant wisdom in German antitrust community supports its rejection on efficiency grounds.[72] Likewise, after the amendment, indirect purchaser standing in antitrust damages actions appears problematic in Germany, as the new rules specifically grant standing only to individuals from the downstream market directly affected by the anticompetitive agreement or conduct in question.[73]

In the light of this brief review, it can be concluded as regards the passing-on defence and indirect purchaser standing the jurisprudence of the Court of Justice provides insufficient guidance and national laws are as diverse as the state laws of the US. The European Commission signals that it favours harmonization of national standards through EU legislation which will recognize both the passing-on defence and indirect purchaser standing.[74] Although such proposal of the Commission seems plausible under the lessons drawn from the US in terms of preventing the inconsistency and multiple recoveries, it nevertheless raises two significant caveats. Firstly, the Commission is likely to face some serious national resistance if it takes such legislative initiative. Some national competition authorities have already emphasized in their responses to the Commission's Green Paper that harmonization of national standards at this stage would be an unacceptable infringement of national autonomy and would conflict with the principles of subsidiarity and proportionality.[75] Likewise, it is argued that full-scale harmonization in the field of competition law is undesirable as it might result in spill-over effects on the entire national legal regimes of civil remedies with unforeseen consequences.[76] Secondly, the prospect of adoption without resistance aside, it is

Cases 7 O 326/02, published in [2004] GRUR 182; Karlsruhe Court of Appeal, decision of 28 January 2004, Case 6 U 183/03, published in [2004] WuW DER 1229, all cited in C Ryngaert, 'Foreign-to-Foreign Claims: the US Supreme Court's Decision (2004) v the English High Court's Decision (2003) in the Vitamins Case' (2004) 25 European Competition Law Review 611, 615. Compare to *Provimi Ltd* v *Aventis Animal Nutrition SA*; *Trouw (UK) Ltd* v *Rhodia Ltd*, *Provimi Ltd* v *Roche Products Ltd*, *Trouw (UK) Ltd v Roche Products Ltd*. [2003] 2 All E.R. (Comm.) 683.

[72] U Boge, K Ost, 'Up and Running, or is it? Private Enforcement—The Situation in Germany and Policy Perspectives' (2006) 27 European Competition Law Review 197, 200.

[73] ibid 200–201.

[74] White Paper (n 6) 8; Staff Working Paper (n 9) 98.

[75] Office of Fair Trading, 'Response to the European Commission's Green paper, Damages Actions for Breach of the EC Antitrust Rules' (2006) <http://www.oft.gov.uk/shared_oft/reports/oft_response_to_consultations/oft844.pdf> accessed 28 September 2009, 2; Comments of the Federal Ministry of Economics and Technology and the Federal Cartel Office on the Green paper of the EU Commission, 1–2.

[76] F Marcos, and A Sánchez Graells, 'Towards a European Tort Law? Damages actions for breach of the EC antitrust rules: harmonising Tort Law through the back door?' presented at the IV International Congress of European Private Law Beyond the CFR, Lleida (Spain), 25–26 October 2007 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028963> accessed 28 September 2009; F Cengiz and K Wright, 'Strategies for a European Judicial Network From the Perspective of Competition Policy' presented at the *UACES Conference, Exchanging Ideas on*

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questionable whether harmonization of national standards alone would provide a sufficient safeguard against a potential litigation chaos producing inconsistent judgments and multiple recoveries. The Commission intends not only to invigorate indirect and direct purchaser damages actions but also to strengthen redress mechanisms for consumers, such as opt-in class actions and damages actions brought by representative entities on behalf of consumers.[77] Although the measures proposed by the Commission are compatible with the protection of consumer welfare rationale of competition policy, they potentially open doors for the very same anticompetitive behaviour being litigated through various parallel indirect and direct purchaser actions. Under this complex litigation scenario, procedural aspects of damages actions and cooperation between national courts will gain utmost importance even in the presence of harmonisation of national standards. The lessons drawn from the US suggest that in order to avoid inconsistency and multiple recoveries in such a complex litigation environment, a single court or multiple courts in coordination should adjudicate related parallel actions under a single standard, rule on the amount of passing-on and apportion the damage fund between various plaintiffs. This brings into question the EU standards of jurisdiction, conflicts of laws (particularly in the case of failure of the Commission's efforts at harmonisation), removal and consolidation of cases before a single court and the mechanisms for judicial cooperation.

V. THE EUROPEAN CONTEXT II: CURRENT PROCEDURAL STANDARDS AND UNADDRESSED QUESTIONS

In the EU, the issue of jurisdiction in civil and commercial matters is governed by the Brussels I Regulation[78] which is also applicable in cases of conflicts regarding the violations of articles 101 and 102 TFEU. As a general rule, the Brussels Regulation determines the domicile of the defendant as the main forum of jurisdiction.[79] However, the Regulation also attributes alternative jurisdiction to various forums which may come into play in cases involving violations of EU competition rules. Firstly, in matters of tort, *delict* or *quasi-delict*, the courts where the harmful event occurred, or may occur, enjoy alternative jurisdiction.[80] The Court of Justice interprets this alternative rule of jurisdiction in a broad manner so as to confer jurisdiction on the courts of the place where the damage occurred as well as the courts of the place where

Europe 2008 Rethinking the European Union, 1–3 September 2008, <http://www.uaces.org/pdf/papers/0801/2008_Cengiz.pdf> accessed 28 September 2009, 9.

[77] White Paper (n 6) 4; Staff Working Paper (n 9) 19–21, 98; Impact Assessment Report (n 9) 57.

[78] Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter 'Brussels I Regulation') [2001] OJ L 12/1.

[79] ibid art 2(1).

[80] ibid art 5(3).

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the event giving rise to it took place.[81] Likewise, the position of the Court regarding jurisdiction in cases of libel through press suggests by analogy that in a hypothetical violation of the EU competition rules, indirect and direct purchasers would be able to bring damages actions before the courts of the Member States where the product which is the subject of the violation is distributed and sold.[82] Secondly, in Member States where criminal remedies are foreseen for the violations of competition law, the criminal court seised may also claim jurisdiction for the adjudication of damages actions regarding the violation to the extent that national law gives jurisdiction to such courts over commercial and civil matters.[83] Thirdly, in disputes regarding operations of a branch, agency or establishment, the Brussels Regulation confers alternative jurisdiction on the courts of the place where such branch, agency or establishment is situated.[84] Last but not least, a defendant may be sued in the courts of the place where any of the defendants reside provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.[85] Considering that most violations of articles 101 and 102 TFEU affect various geographical markets, involve various co-conspirators, branches and subsidiaries and harm a large number of indirect and direct purchasers dispersed around Europe, it is not hard to imagine that under the current standards of jurisdiction a hypothetical anticompetitive activity of medium scale would give rise to multiple parallel actions brought before various national forums.

The Brussels Regulation foresees rules of *lis pendens* for removal and consolidation of related cases before a single judicial forum. According to such rules, the court first seised enjoys exclusive jurisdiction in related actions, and consequently other courts are obliged to decline jurisdiction in favour of such court only in proceedings involving *the same cause of action and the same parties*.[86] On the other hand, national courts enjoy discretion to decline jurisdiction in favour of the court first seised when cases litigated before multiple courts are 'so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.[87] As indirect and direct purchaser damages actions would potentially involve different plaintiffs and also different

[81] Case 21/76 *Handelskwekerij G J Bier BV v Mines de potasse d 'Alsace SA* [1976] ECR 1735, para.11.

[82] Case 68/93 *Fiona Shevill and Others v Presse Alliance SA* [1995] ECR I-415.

[83] Brussels I Regulation (n 78) art 5(4).

[84] ibid art 5(5). The Court of Justice's broad interpretation of this provision suggests by analogy that this provision would also apply to the acts of subsidiaries in the context of competition law infringements. See eg Case 33/78 *Somafer v Saar-Ferngas* [1978] ECR 2183; Case 439/93 *Lloyd's Register of Shipping v Campenon Bernard* [1995] ECR I-961.

[85] Brussels I Regulation (n 78) art 6(1). For liberal interpretation of this provision by an English court see *Provimi* (n 71).

[86] Brussels I Regulation, ibid art 27.

[87] ibid art 28(3).

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defendants particularly in the context of anticompetitive agreements, the rules of *lis pendens* do not strictly prevent parallel litigation of related cases before multiple national courts. In the past, some national courts considered matters such as the extent of relatedness, the stage reached in each sets of proceedings, and the proximity of each court seised to the subject-matter of the case in the exercise of their discretion as to whether or not to suspend their proceedings and decline jurisdiction in favour of the court first seised.[88] Additionally, exercise of such discretion and consequent suspension of proceedings requires information exchange mechanisms between the courts through which parallel cases adjudicated by other national courts are brought into the attention of all courts seised in related matters. Although the general logic suggests that it would be in the interest of the defendant to alert the courts and initiate removal to avoid litigation costs arising from parallel proceedings, it might not always be the case in antitrust damages actions. For instance, the White Paper does not propose harmonization of national civil remedies against anticompetitive behaviour, and in the presence of diversity of such remedies adjudication of related damages actions before a single court might not be in the defendant's interest if the law applied by that court foresees imposition of punitive damages. Under these circumstances, information exchange between the judiciary and judicial dialogue appears of utmost importance for the effective operation of the rules of *lis pendens*.

If the Commission's efforts at harmonization fail, in the presence of diversity between the national standards, rules of conflicts of laws will gain crucial importance for the prevention of inconsistency and multiple recoveries in parallel direct and indirect purchaser damages actions. The Rome II Regulation,[89] which came into force in January 2009, determines the rules of conflicts of laws in non-contractual matters in the EU. The Regulation foresees a special rule for cases involving restrictions of competition and declares that in such cases 'the law of the country where the market is, or is likely to be, affected' shall apply.[90] The Rome II Regulation has been in force for nearly a year now, and to the author's knowledge the Court of Justice has not yet found the opportunity to clarify this special rule of conflict of laws. However, given that an anticompetitive agreement or practice must affect trade between the Member States in the first place for articles 101 and 102 TFEU to apply, it is not hard to imagine that under the current standard of conflict of laws multiple national laws would come into play in a hypothetical network of related

[88] P Stone, *EU Private International Law* (Elgar European Law, Cheltenham, 2006) 100.

[89] Council Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (hereinafter 'Rome II Regulation') [2007] OJ L 199/40.

[90] ibid art 6(3)(a). According to art 6(3)(b) in cases where multiple national laws come into play, the plaintiff has the choice to employ *lex fori* (the law of the forum) instead, provided that such forum is the domicile of the defendant and among the markets affected by the violation in question. However, since under the current standards of jurisdiction multiple defendants are likely to bring parallel cases in multiple forums, this provision falls short of solving the problem.

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actions brought by direct and indirect purchasers against the same anti-competitive activity.

This brief review shows that under the current EU rules of procedure, the very same violation of articles 101 and 102 TFEU might give rise to various parallel actions adjudicated by multiple forums under multiple substantive standards. Under these circumstances, coordinated adjudication of related cases appears as the only possible mechanism for prevention of inconsistency and multiple recoveries. Likewise, the current rules of *lis pendens* leave the issue of removal and consolidation of cases largely to the discretion of the courts and presuppose the existence of information exchange mechanisms between them. In addition to these practical considerations, judicial dialogue is of crucial importance for the emergence of a common competition litigation culture and harmonized jurisprudence across Europe through voluntary judicial action. Since the 1999 Tampere Summit,[91] various measures have been adopted for the smooth operation of cross-border litigation in the European Union,[92] which include inter alia the Council decision of 2001 establishing a judicial network in civil and commercial matters.[93] These measures enable national courts to exchange judicial and extra-judicial materials, collect evidence including witness depositions on behalf of each other and exchange such information through central receiving and transmitting authorities appointed by the Member States. The judicial network, however, does not comprise national courts themselves but rather central contact points designated by the Member States. The network is at an embryonic stage and its only notable success so far has been cutting 'the time taken to process requests' for the exchange of materials 'via its direct relations between the contact points'.[94] In other words, the existing EU measures do not provide mechanisms for direct dialogue between the national courts.

The White Paper addresses neither the procedural aspects of private antitrust enforcement nor judicial cooperation. It assumes that the existing EU measures provide sufficient safeguard against inconsistency and multiple recoveries and consequently, it limits itself to calling for national courts to make

[91] At the 1999 Tampere Summit, the European Council reiterated the goal of creating a Union of freedom, security and justice and firmly established that action would be taken at the EU level to facilitate judicial cooperation as a means of achieving this goal. See the Presidential Conclusions of Tampere Council, 15–16 October 1999. <http://www.europarl.europa.eu/summits/tam_en.htm> accessed 28 September 2009.

[92] Council Regulation (EC) 1348/2000 of 29 May 2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters [2000] OJ L 160/37; Council Regulation (EC) 1206/2001 of 28 May 2001 on Cooperation between the Member States in the Taking of Evidence in Civil or Commercial matters [2001] OJ L 174/1.

[93] Council Decision (2001/470/EC of 28 May 2001 establishing a European Judicial Network in Civil and Commercial Matters [2001] OJ L 174/25.

[94] Report from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the Application of Council Decision 2001/470/EC establishing a European Judicial Network in Civil and Commercial Matters COM(2006) 203 final, 16.5.2006, 5.

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full use of such measures 'in the case of joint, parallel or consecutive actions brought by purchasers at different points in the distribution chain'.[95] Instead of strengthening links among the national courts, the Commission follows a rather different strategy in the White Paper and proposes measures to strengthen links between the national courts and competition authorities in order to obtain greater consistency. Most notably, the Commission suggests that final and positive decisions of national competition authorities be given binding force in subsequent damages actions across Europe regarding the same anticompetitive activity.[96] Besides raising the very sensitive question of judicial independence, it is unclear how such a measure would protect consistency in cases of parallel indirect and direct purchaser actions which involve technical questions such as calculation of passing-on and distribution of damages between plaintiffs which the national competition authorities do not necessarily address in their decisions. Nor does the general judicial dialogue between national courts and the European Court of Justice under the preliminary rulings mechanism[97] appear sufficient for the prevention of inconsistency and multiple recoveries in the context of antitrust damages actions. Firstly, if the Commission's efforts at harmonization fail, national courts will not be able to direct specific questions of passing-on to the Court of Justice, given that the preliminary rulings mechanism can only be initiated as regards questions of EU law: in the absence of harmonization, questions of passing-on will continue to be regulated by national laws. Secondly, the preliminary rulings mechanism is designed to maintain dialogue between the Court of Justice and national courts *inter se*, and therefore, even in the case of harmonization it would not be well suited for initiation of dialogue between national courts for the resolution of technical aspects of parallel damages actions in a consistent manner.

Under this analysis, the lack of assessment of the procedural aspects of antitrust damages actions in the White Paper appears a strategic mistake. In order to prevent the emergence of a chaotic litigation environment such as resulted in a policy failure in the US, the Commission should asses the current EU standards of procedure and possible strategies to improve those standards in the context of antitrust damages actions before taking any legislative initiative.

The first question which the Commission must address is whether it would be plausible to amend the Brussels I Regulation to adopt a special rule of

[95] White Paper (n 6) 8.

[96] 'The Commission suggests the following rule: national courts that have to rule in actions for damages on practices under art 81 and 82 on which *an NCA* [*national competition authority*] in the ECN [European competition network] has already given a *final decision* finding an infringement of those articles, or on which *a review court* has given a *final judgment* upholding the NCA decision or itself finding an infringement, *cannot take decisions running counter* to any such decision or ruling.' (emphasis in original) ibid 6.

[97] Article 267 TFEU.

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jurisdiction for antitrust damages actions so that related direct and indirect purchaser actions are adjudicated by a single court. If the Commission reaches a positive conclusion regarding this question after its assessment, work allocation rules of the European Competition Network (ECN), which was formed between the European Commission and the national competition authorities, could be taken as a model in the formulation of such special rule. These work allocation rules determine the competition authority with the closest 'material link' to the violation in question as a well-placed authority to investigate violations of articles 101 and 102 TFEU.[98] Such a material link is deemed to exist when three cumulative conditions are met: first, when the anti-competitive activity in question has substantial effects on competition within the territory of the competition authority, or is implemented within or originates from its territory; second, when the authority is able to bring the entire infringement to an end effectively; and third, when it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement.[99] A special rule of jurisdiction for antitrust damages actions designed along the same lines would attribute jurisdiction to the national court with the closest geographical connection to the victims of the violation, the market in question, and evidence to prove liability and calculate the amount of passing-on. Consequently, it would satisfy the considerations of fairness, effectiveness and efficiency at the same time.[100] Additionally, the Modernisation Regulation provides a mechanism for cooperation between the national courts and competition authorities whereby competition authorities may submit written and oral observations to the national courts regarding application of articles 101 and 102 TFEU.[101] If the rule of jurisdiction in antitrust damages actions is designed under the suggested formula, public and private enforcement efforts against the same violation would overlap in the same Member State in most cases. In such case, cooperation between the national courts and competition authorities would also function more effectively, and competition authorities could ease the burden of national courts by providing information and evidence for the resolution of the technical aspects of antitrust damages actions such as the calculation of passing-on.

The second question which the Commission must address is whether it would be desirable and plausible to amend the Rome II Regulation in order to further define the rule of conflict of laws and appoint a single national law as the applicable law in the context of antitrust damages actions. Particularly in

[98] The work allocation rules of the ECN, however are regulated by a soft-law measure, and therefore are subject to the discretion of national competition authorities. See Commission Notice on Cooperation within the Network of Competition Authorities [2004] OJ C 101/43, 2.1.Principles of Allocation.

[99] ibid para 8.

[100] This rule would not conflict with the principle of procedural fairness either, as procedural fairness requires protection of the weaker party of the conflict in question which happens to be the plaintiff (rather than the defendant as usual) in the context of antitrust damages actions, in particular in indirect purchaser actions.

[101] Modernisation Regulation (n 2) art 15(3).

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the event of the failure of the Commission's efforts at harmonization, the application of a single set of standards in parallel actions will gain crucial importance for consistency in antitrust damages actions. If the Commission reaches a positive conclusion regarding this question after its assessment, the most plausible strategy would be designation of the law of country with the closest material link with the violation in question as the applicable law, in line with the rule of jurisdiction suggested above. Under such formulation, the national court of jurisdiction would apply its own national law (*lex fori*), in other words the law with which it is most familiar. Additionally, under such formulation the law of the country of jurisdiction would in most cases correspond with the law of the country where the harmful event occurred (*lex loci delicti commissi*), and as a result, the application of conflicts of tort laws rules would not be disturbed.

The third question which the Commission must address concerns possible strategies for the improvement of judicial cooperation and dialogue between national courts *inter se*. Currently, there are strong links connecting the national courts to the EU institutions and to the national competition authorities in the context of antitrust damages actions. Apart from the preliminary rulings procedure, whereby national courts direct their questions regarding interpretation of the EU competition rules to the Court of Justice, under the Modernisation Regulation the Commission may employ a variety of mechanisms such as *amicus curiae* briefs and oral and written observations to clarify technical aspects of EU competition law before the national courts.[102] Additionally, as mentioned above, under the Modernisation Regulation national competition authorities also enjoy channels of communication with the national courts.[103] In contrast, the current structure of the European judicial network does not provide direct communication between national courts *inter se*. However, besides being of crucial importance for the development of a common culture and jurisprudence of antitrust litigation across Europe, dialogue and communication between national courts carries indispensable practical value for consistent adjudication of antitrust damages actions. For instance, under the current rules of procedure, effective utilisation of rules of *lis pendens* requires information exchange between the national courts. From this perspective, the Commission should assess possible ways of improving the European judicial network so as to provide direct communication between the courts. Again, some aspects of the ECN could be taken as a model in such quest. For instance, in the context of the ECN, competition authorities enter into direct communication with each other through an interactive database where new investigations are registered with essential information regarding

[102] Modernisation Regulation (n 2) art 15, see also Commission Notice (EC) on the cooperation between the Commission and the courts of the EU Member States in the application of EC Treaty arts 81 and 82, [2004] OJ C101/54, paras 15–35.

[103] See text to (n 101).

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the subject of the investigation.[104] This information can be tracked by other competition authorities and is updated once the authority conducting the investigation takes a final decision.[105] Creation of such a database in the context of the European judicial network would provide a foundation for the emergence of direct communication between the national courts and support effective utilisation of rules of *lis pendens* by alerting national courts to parallel damages actions regarding the same anticompetitive activity taking place across the EU.[106]

VI. CONCLUSIONS

Actions for damages constitute an essential pillar of modern antitrust regimes, as these actions deter anticompetitive activity and provide redress to consumers. Therefore, the European Commission's efforts to invigorate damages actions before national courts for violations of EU competition law are welcome. Likewise, the choice of full compensation particularly for final consumers as the main objective of the European private enforcement regime is compatible with the protection of consumer welfare rationale of modern antitrust philosophy. However, as the American experience of indirect purchaser litigation strongly illustrates, in multi-level polities, procedural standards and mechanisms of judicial cooperation are as important as the substantive standards for the success of private enforcement regimes. From this perspective, the lack of procedural assessment in the White Paper appears a strategic mistake. The Commission should consider the current EU standards of jurisdiction, conflicts of laws and judicial cooperation and possible strategies to improve these standards before taking any legislative action. Although the Commission's hesitance to touch upon these questions owing to their close connection with national procedural autonomy is understandable, some proposals of the Commission, most notably those on substantive harmonization and attributing binding force to the decisions of competition authorities, are no less controversial from the perspective of national procedural autonomy.

[104] This database is called 'ECN Interactive'. The information is supplied by national competition authorities under Modernisation Regulation, (n 2) art 11.

[105] Under the Modernisation Regulation Member States are under a duty to submit to the Commission copies of the national court decisions applying articles 101 and 102 TFEU. See Modernisation Regulation, ibid, art 15(2). The Commission publishes those decisions on its website <http://ec.europa.eu/comm/competition/elojade/antitrust/nationalcourts/> accessed 28 September 2009. However, this mechanism is not suitable to alert the courts about the parallel cases litigated before other national courts, since only final judgments are communicated to and published by the Commission. Additionally, some studies reveal that the current database of national judgments is incomplete. See Kathryn Wright, 'European Commission Opinions to National Courts in Antitrust Cases: Consistent Application and the Judicial-Administrative Relationship' (2008) ESRC Centre for Competition Policy Working Paper 08-24, <http://www.uea.ac.uk/polopoly_fs/1.104682!ccp08-24.pdf> accessed 28 September 2009.

[106] Cengiz and Wright (n 76) 11.

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