Litigating Indirect Purchaser Claims: Lessons for the EU from the U.S. Experience

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THERE HAVE BEEN SIGNIFICANT developments in the last 15 years regarding private enforcement of the European Union antitrust laws, culminating in a Directive issued in November 2014 intended to remove some of the barriers to private antitrust actions in the Member States. The Directive establishes that any person who has suffered harm caused by a competition law infringement, including indirect purchasers, may claim full compensation for that harm. It applies to both follow-on and stand-alone actions. The Directive creates a rebuttable presumption that cartel infringers cause harm; provides for a passing-on defense; establishes a presumption that an overcharge is passed on to indirect purchasers; and allows claims to be brought by indirect purchasers at all levels of the distribution chain.

The Directive also provides for limited discovery that was not previously available in most EU jurisdictions, allowing the parties to seek disclosure of “specific items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible” relating to their claims and defenses. That discovery may well turn out to be critical in quantifying the degree of pass-on in both direct and indirect purchaser actions in the EU.

The Member States were obliged to implement the Directive into their legal systems by December 2016, but to date not all have done so. Implementation of the Directive is likely to result in an increase in the number of direct and indirect purchaser cases brought in the EU Member States. Most of the cases to date have been follow-on cases alleging cartel infringements. Many have been direct purchaser cases in which overcharge tracing issues are not nearly as complicated as they are in multilevel indirect purchaser cases.

This article focuses on indirect purchaser claims and considers how those claims are likely to be litigated in the Member State courts under the Directive. It reviews the indirect purchaser litigation experience in the United States and, based on that experience (and recognizing that there are differences between the U.S. and EU systems), offers a number of suggestions for improving the management of indirect purchaser actions in the EU. Some of the suggestions may not be fully consistent with all of the elements of the system contemplated by the Directive, and others may require a revisiting or narrowing of certain of the principles identified by the European Court of Justice (ECJ) in its limited jurisdiction to date addressing private damage claims.

The goal of the article is to stimulate further discussion on the effective management of indirect purchaser actions in the EU Member State courts, while simultaneously assuring that the procedures for adjudicating such actions satisfy the principle of effectiveness articulated by the ECJ in its 2006 decision in Manfredi v. Lloyd Adriatico Assicurazioni SpA.

EU Framework

The existing framework for private enforcement of antitrust damage claims in the EU can be traced back to the ECJ’s Manfredi decision and its earlier decision in Courage v. Crehan, both of which recognized a broad right to sue by anyone injured by an infringement of Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). In Manfredi, the ECJ declared that all actions taken by Member States were subject to the twin requirements of equivalence and effectiveness, specifically:

[I]n the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to prescribe the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favorable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). 6

The European Commission issued a Green Paper in 2005 and a White Paper in 2008 addressing issues related to the
creation of a distinctly European system of private redress for competition law infringements. The Green Paper focused on “private enforcement,” while the White Paper spoke almost exclusively about the goal of “full compensation.”

At other times Commission officials spoke of the desire to avoid a “culture of litigation” and abusive litigation practices thought to be prevalent in the United States. Class actions were the principal perceived abuse. In an effort to avoid this abuse, when the Commission issued a “Recommendation” in 2013 addressing collective redress issues, it recommended that the Member States allow “representative entities” having a “direct relationship” to the rights claimed to have been violated to bring collective actions for competition law infringements, but only on an opt-in basis. The Commission recommended against contingency fees and third-party funding of such actions.

The Directive also authorized the Commission to issue “guidelines . . . on how to estimate the share of the overcharge passed on to indirect purchasers.” The Commission responded in October 2016 with a report of more than 300 pages entitled “Study on the Passing-On of Overcharges,” intended to provide the basis for a subsequent Commission “guidance” document for judges in the EU Member States on how to quantify, calculate, and trace overcharges in indirect purchaser damages cases. Based on this report, it seems reasonable to assume that the Commission’s “guidance” will endorse a broad right to damages by all claimants in the distribution chain, including consumers.

The Commission’s report indicates that the right to damages may potentially include overcharge claims by purchasers of products containing price-fixed ingredients or components, regardless of their value and relationship to the price of the ultimate finished product (e.g., price-fixed microchips contained in computers purchased by consumers or vitamins purchased by a manufacturer of soup or breads incorporating such vitamins). Direct purchasers conceivably could sue in one Member State, while first-level indirect purchasers might sue in another Member State. A collective action on behalf of first-level indirect purchasers might be brought in one Member State, while individual claims on behalf of others at the same or later level of distribution might be pending in other Member States.

In such a scenario, defendants might well find themselves subject to discovery on pass-on damage issues in multiple jurisdictions simultaneously. And it is not inconceivable that in a case involving a distribution chain with multiple levels, a court in one Member State might find that 60 percent of an overcharge was passed on from the first level indirect purchasers to the second, while a court in another Member State might find that the overcharge passed on was only 30 percent. Without some coordinated ground rules and filters for weeding out claims that are either too small (individually or collectively) or too complex to be adjudicated efficiently, either from a case management or cost perspective, there is a risk that Member State courts will be overwhelmed by the sheer number and complexity of such cases. There is also the risk that in an effort to provide a damage remedy to all claimants who can trace their injury to an infringement, the resulting remedy will be ineffective because it may overcompensate or undercompensate the claimant, resulting in more or less than “full compensation,” which is viewed as the guiding principle of EU private damage analysis.

Some European commentators have criticized the U.S. private litigation system as abusive, claiming that the costs and burdens of U.S.-style discovery, a plaintiff-friendly opt-out class action system, the absence of a “loser pays” rule, and the possibility of trial before runaway juries have all contributed to a toxic “culture of litigation” that the measures introduced by the Directive seek to avoid. Despite the claimed shortcomings of the U.S. private enforcement system, U.S. courts, beginning with the Supreme Court’s Associated General Contractors decision, have developed sensible mechanisms for identifying certain categories of indirect claims that are susceptible to dismissal at an early stage, and for effectively managing those that have been permitted to proceed. Some of these techniques merit consideration by EU competition policy makers and are addressed later in this article.

The Illinois Brick Rule in the United States

In the United States, not all claims—even those by direct purchasers—can be pursued under Sections 1 and 2 of the Sherman Act. Federal courts recognize that some claims are derivative of the claims of superior plaintiffs, some claims can potentially result in duplicative recoveries, and some claims are too remote to be actionable. Thus, even injuries that are directly traceable to an antitrust violation may not be sufficient to confer antitrust standing.

Of most significance, in 1977, in Illinois Brick Co. v. Illinois, the U.S. Supreme Court held, on policy grounds, that pass-on arguments could not be used offensively, and that consequently, indirect purchasers could not sue for damages under the federal antitrust laws. The majority opinion was influenced by the Court’s 1968 opinion in Hanover Shoe, in which it held that pass-on was not a defense in a Sherman Act suit seeking overcharge damages. In Illinois Brick, the Court declared that given its decision in Hanover Shoe, pass-on could not be used offensively or defensively and only direct purchasers were entitled to the full amount of an overcharge.

The Illinois Brick opinion relied on two pillars: deterrence and pragmatism. Although allowing direct purchasers to recover all of an overcharge, even if it was completely passed on, might result in windfalls and the wrong persons recovering the overcharge, the Court determined that the disgorgement of ill-gotten gains from wrongdoers was more important than assuring full compensation to the right victims. With deterrence as the primary goal, direct purchasers were best situated to detect overcharges. The Court also was concerned about the possibility of inconsistent judgments,
and potentially subjecting defendants to duplicative damage liability.17

Despite Illinois Brick, direct purchaser standing is not automatic under U.S. antitrust law. Direct purchaser plaintiffs must still demonstrate that they have standing under the test established by the Supreme Court in Associated General Contractors of California, Inc. v. California State Council of Carpenters (AGC).18 There the Court identified five factors to be considered in deciding if a plaintiff has standing to sue under the federal antitrust laws: (1) the causal connection between the violation and the plaintiff’s harm, and whether the harm was intended; (2) the nature of the injury, including whether the plaintiff is a consumer or competitor in the relevant market; (3) the directness of the injury, and whether the damages are too speculative; (4) the potential for duplicative recovery, and whether the apportionment of damages would be too complex; and (5) the existence of more direct victims.19

The Indirect Purchaser Experience in the United States

Following Illinois Brick, almost half the states adopted so-called Illinois Brick-repealer statutes allowing indirect purchasers to assert pass-on claims under state antitrust law. In 1989, in ARC America, the Supreme Court held that the Illinois Brick-repealer statutes were not preempted by the Sherman Act.20

The complexity of a distribution chain, particularly when the defendants manufactured ingredients, raw materials, or components of the products purchased by the class, and the difficulty of proving uniform pass-on of alleged overcharges at each level of the chain through common proof, have been major stumbling blocks to indirect purchaser class actions, often resulting in dismissal of the claims21 or the denial of class certification.22 For those and other reasons, indirect purchaser class suits at times settle for relatively small amounts compared to the size of direct purchaser class settlements in the same case. Some U.S. indirect purchaser settlements provide for a cy pres payment (often to a public agency or nonprofit organization) when distribution to class members is impracticable or settlement funds are not claimed.

As a result of the passage of the Class Action Fairness Act of 2005 (CAFA), indirect purchaser actions brought under state law are frequently removed to federal court and often consolidated with direct purchaser cases for coordinated pretrial Multi-District Litigation (MDL) proceedings in a single federal court. Despite the resulting efficiency, one of the unintended consequences of this coordination is that federal court in the Northern District of Illinois is illustrative. Supreme Auto Transport LLC v. Arcelor Mittal23 was brought under the antitrust laws of 21 states on behalf of a class of purchasers of consumer products containing steel (including refrigerators, dishwashers, ovens, automobiles, and air conditioners), seeking overcharges resulting from an alleged conspiracy by steel manufacturers to limit production. The district court dismissed the suit, relying on AGC, which the court believed essentially had been adopted by federal and state courts in all of the states involved.24

Specifically, the district court held that the plaintiffs’ claims as indirect purchasers ran afoul of four of the five AGC factors. First, the complaint did not acknowledge the role of the direct purchasers of the steel, who manufactured and sold the steel-containing products to resellers, who ultimately sold the finished products to the class. Second, the more immediate victims were in a better position to maintain an antitrust suit. Third, it was implausible to claim that the defendants’ motive was to inflate the price of steel-containing products from which they did not profit. Finally, calculating damages for the class would be highly speculative because the products contained materials other than steel that could not easily be segregated and priced after the fact.25

Crrouch v. Crompton Corp.,26 another example, involved consolidated appeals of two class actions brought under the North Carolina antitrust statute, one by purchasers of products containing price-fixed rubber chemicals, and the other by consumers who allegedly paid overcharges on retail purchases made on credit card transactions. Relying on AGC, the state court dismissed the two actions because of the difficulties of proof, complexity of damage apportionment, the trivial amount of consumer recoveries, the enormous burden on the court, and the futility of a cy pres award.27

There have been other indirect purchaser claims dismissed on remoteness grounds or because individual issues outweighed class issues, although some have withstood dismissal and have been certified.28 There do not appear to be any indirect purchaser cases where an individual plaintiff or class prevailed at trial.

The EU Guiding Principles: “Full Compensation” and “Effectiveness”

In contrast to the overarching goal of deterrence in the United States, the European Commission’s 2008 White Paper and its 2014 Directive make it clear that the only legitimate purpose of an EU private damage action is “full compensation.” The Commission and the courts of EU Member States do not recognize deterrence as a goal to be accomplished through private enforcement. The EU dichotomy between public and private actions—between deterrence and compensation—makes it unlikely that the EU would ever adopt an Illinois Brick rule and limit overcharge recoveries to direct purchasers.

But how far should the availability of damage recoveries go? In Courage, the ECJ announced a broad “effectiveness”
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rule for a damages remedy that on its face would allow all claimants injured by a competition law infringement to seek damages. The ECJ stressed that “[t]he full effectiveness of [Article 101 TFEU] and, in particular, the practical effect of the prohibition laid down in [Article 101(1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.”

The ECJ’s language in Courage raised a critical question: if purchasers other than direct purchasers may sue for damages under EU law to meet the twin goals of full compensation and effectiveness, should all indirect purchasers be entitled to sue, regardless of how big (or small) their claim and regardless of how distant or attenuated their claim is from the alleged wrongdoing?

In the absence of guidance from the Commission or the EU courts, there will be inevitable tensions between the principles of “full compensation” and “effectiveness.” Allowing claimants at every level of a distribution chain to pursue damage claims, no matter how small and however difficult to trace, with all of the attendant costs on the judicial system, could make the private antitrust remedy less “effective.” To meet its goal of effectiveness, the Commission may need to narrow some indirect claims that the EU courts might otherwise permit on the basis of Courage and Manfredi.

The ECJ in Manfredi indicated that there might at least be a causation limit: “It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited.” Surprisingly, the 2014 Directive does not say anything about the nature of the causal relationship necessary to support a claim under Manfredi, but leaves causation to national law. Under the national laws of most EU Member States, causation has always been an essential element of a claimant’s damage claim, and claims have been rejected for failure to establish causation.

Recommendations for the EU from the U.S. Experience

A number of questions remain unanswered regarding potential limits on indirect purchaser claims under EU law. In particular, should claims be permitted by consumers who may have suffered pass-on injury but who have no receipts to prove their purchases? Should recoveries be allowed in collective actions where the amount of any individual claim is less than the cost of administration (processing the claim and distributing funds to eligible class members)? Should the same rules apply to single products that move through the distribution chain unchanged as opposed to integrated products containing a price-fixed component? What happens when an integrated product containing a price-fixed component is used to provide a service (such as transportation on an airplane with price-fixed rivets)? Should passengers be allowed to sue for that portion of the ticket price attributable to the price-fixed rivets? Can pass-on be reliably calculated in downstream markets where there may be high levels of competition and notoriously small margins, as in supermarket sales? Would disgorgement ever be a more appropriate remedy than overcharge damages (as adjusted for pass-on), or would this run afoul of the EU rule that damages must be exclusively compensatory? Are there circumstances when cy pres recoveries should be allowed as a matter of last resort?

In addressing these issues, there may be lessons to be learned from the U.S. experience that can benefit judges and competition policy makers in Europe confronted with the challenge of developing an effective system of private antitrust redress. U.S. courts and antitrust enforcers continue to address many of the same tradeoffs that are currently being debated in Europe: whether certain indirect claims are too remote, or particular plaintiffs are not “efficient enforcers”; the costs imposed on the judicial system when indirect purchaser claims are permitted; the ability of the system to provide meaningful redress to consumers; and how to prove pass-on damages without imposing huge pre-trial discovery burdens.

The following suggestions are derived from the U.S. experience. While recognizing that some suggestions may not be entirely consistent with existing ECJ law on private rights of action (as well as national law governing discovery), they may nonetheless assist the European Commission in its preparation of the damages “guidance” document still to be issued and the Member States in developing an effective framework for the management of indirect purchaser claims in and across their respective jurisdictions.

The suggestions below take account of the ECJ’s admonition in Manfredi that private antitrust redress in the Member States must comply with the principle of effectiveness, i.e., the remedy must not be “practically impossible” or “excessively difficult” to pursue. While the European courts have provided little additional guidance on the meaning of effectiveness, procedural rules that increase the cost of pursuing claims (such as the “loser pays” rule) or prevent claimants from pursuing such claims (such as the prohibition of third-party funding) could run afoul of this principle in some circumstances.

1. Consider creating a European MDL mechanism for coordinating direct and indirect purchaser cases brought in the courts of different Member States. An MDL mechanism would make private remedies more effective in the Manfredi
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sense by allowing plaintiffs to share discovery materials and reducing pre-trial discovery costs. At a minimum, a document depository could be established so that defendants are not obliged to comply with overlapping and potentially duplicative discovery requests in multiple jurisdictions. Duplicative discovery requests can be burdensome even if discovery in most EU jurisdictions is more limited than in the United States. If a Community-wide mechanism is not feasible because of sovereignty concerns, consideration could at least be given to creating MDL mechanisms for coordinating and/or consolidating related private claims brought within a single Member State.

2. Consider the appointment of a special master to oversee and coordinate discovery on pass-on issues. The use of special discovery masters is common in the United States, saves judicial time, and can lead to consensual resolution of disputes among the parties and other efficiencies in the discovery process, regardless of how limited discovery may be under the Directive. These benefits also could be achieved from the use of discovery masters. The Directive does now include provisions for discovery of a wide variety of relevant documents.

3. Consider the appointment of a special economic master to assist the court in evaluating expert economic reports regarding the amount of pass-on at different levels of the distribution chain. Special economic masters have been used by U.S. courts to assist in the evaluation of expert testimony. Depending on the complexity of the economic evidence submitted by the parties, and depending on the economic sophistication of judges and their willingness to engage (and the parties’ willingness to accept) a special economic master, their retention may result in more focused and nuanced evaluation of such evidence, thus providing greater reliability to judicial findings on pass-on and economic issues. While courts in some EU jurisdictions, such as Germany and the UK, typically appoint their own economic experts to assist in the evaluation of evidence at trial, that is not the practice in all jurisdictions. In those jurisdictions where the court is asked to resolve conflicting expert testimony, the appointment of a special economic master would not necessarily avoid a “battle of the experts,” but likely would result in more reliable fact-finding on pass-on and other complex economic issues.

4. Consider adopting a “remoteness” test for some indirect purchaser claims. Courts could consider whether some claims should be disallowed on the basis of remoteness or other pragmatic considerations, including judicial economy, efficiency, and fairness to defendants. Such a test could be modeled after the AGC test in the United States, and would not allow certain indirect purchaser claims, such as one where there are other indirect purchasers who suffered more direct injury (thus promoting the deterrent function of private enforcement while avoiding some problems in tracing pass-on), or where the indirect purchaser claim is particularly attenuated. The “causal relationship” language in Manfredi could be interpreted to require a proximate cause kind of causal relationship rather than a more tenuous “but for” link to the alleged harm. While causation has traditionally been a matter of individual national law, and some EU jurisdictions may reject claims on remoteness grounds, there may be utility in establishing a uniform causation test similar to the AGC test.

5. Consider limiting recovery to the claims of direct and first-level indirect purchasers. Direct and first-level indirect purchasers are likely to have substantial claims, and limiting claims to these purchasers would be less problematic than tracing pass-on through an entire distribution chain. Direct purchasers arguably are in the best position to detect collusive behavior by their suppliers. First-level indirect purchasers may also be similarly situated. Claims by these purchasers can be pursued individually (or through aggregation with other large purchasers) without the need to bring a collective action. To the extent that deterrence is accepted as a proper coordinate goal of private enforcement, actions by these purchasers are likely to have a greater deterrent effect than actions brought by purchasers with smaller claims further down the distribution chain. Adoption of this proposed rule (and other rules for limiting the right to sue where causation/tracing issues are particularly difficult, or the anticipated recovery would be below a certain threshold) likely would require legislative or judicial overruling or limiting of the broad right to claim damages established by the ECJ and reaffirmed in the Directive.

6. Consider a rule that limits indirect purchaser claims involving products that are raw materials, ingredients, or components of other products. Indirect purchaser cases often involve finished products containing allegedly price-fixed raw materials, ingredients, or components. The cost of tracing and quantifying the pass-on through the distribution chain to the finished product, as well as the small amount that may legitimately be claimed by individual purchasers of the finished product, may justify denying them recovery in appropriate situations. If this is too extreme a rule, consideration could be given to a rule that would not allow indirect claims by purchasers of the finished product when the value of a price-fixed input, for example, is less than 10 percent of the value of the finished product.

7. Consider not allowing indirect purchaser claims when the value of any individual claim is less than a specified
threshold amount. Perhaps cost-benefit analysis could be applied in deciding whether some indirect purchaser claims are too small to be litigated. Limiting judicial remedies for indirect claims below a certain threshold would undoubtedly exclude a number of such claims, particularly consumer claims. A provision could be made for an alternative redress mechanism, such as the creation of a small claims tribunal to hear such claims. For example, a 50 Euro threshold might eliminate many indirect purchaser claims by consumers, but it is not clear that consumers would pursue claims in this amount in any event, particularly if their only options were to pursue the claim individually or as part of an opt-in class where they would potentially be liable for the payment of a defendant’s legal fees under the “loser pays” rule.

8. Consider eliminating the “loser pays” rule in indirect purchaser cases. Given the small value of individual recoveries in many indirect purchaser cases, the “loser pays” rule may be a powerful deterrent to the bringing of such claims in those jurisdictions where the rule is strictly applied. If the Commission and EU Parliament want to encourage indirect purchaser claims as a matter of public policy, and if it can be demonstrated that the “loser pays” rule discourages the pursuit of such claims because of the disparity between the potential recovery and the costs associated with bringing the claims, then the argument could be made that the rule violates the principle of effectiveness.

9. Consider eliminating lost sales as a measure of damages in follow-on cases. In the United States, most direct purchaser cases involve overcharge calculations. Additional damages based on lost sales typically are not calculated. The data and discovery needed to quantify such losses can be significant, and some of that data, particularly in the context of downstream indirect purchaser claims, will have to come from third parties who are strangers to the action and should not be burdened with the costs and diversion of discovery. Overcharges plus interest (which in the EU runs back to the date of the infringement) should provide sufficient compensatory damages for any purchaser, direct or indirect, who can establish injury as a result of an infringement. Even if lost sales were included as an element of damages, only claimants who are resellers (which would exclude consumers) should be entitled to such damages.

10. Consider establishing rebuttable presumptions for the amount of overcharge passed on and the amount of overcharge retained at different levels of a distribution chain. The Directive creates a rebuttable presumption that cartel infringers cause harm and that indirect purchasers are presumed to suffer pass-on if they can show that they purchased from a direct purchaser who suffered an overcharge. The amount of the pass-on at any particular level is not the subject of any presumption under the Directive, however, and will need to be established through litigation. Consideration could be given to the use of rebuttable presumptions with specified pass-on amounts to simplify damage analysis and incentivize settlements in indirect purchaser cases. Creating a rebuttable presumption, for example, that 50 percent of an overcharge was absorbed by the direct purchaser, might be sufficient to incentivize direct purchasers to settlement.

A 25 percent rebuttable presumption might have the same effect for first-level indirect purchasers. If not challenged by the defendant, it would permit direct purchaser and first-level indirect purchaser claims to be resolved efficiently because the amount of the overcharge would not be disputed, and in cases where there was a finding of infringement, the defendant could not dispute liability. The disadvantage of such a procedure is that the presumption may not have any empirical support, thus either contributing to windfalls or undercompensating plaintiffs who choose to rely on the presumption. The precise amounts of the overcharge presumption could be refined over time as the Commission and national competition authorities developed more reliable data on the amount of overcharge at different levels of the distribution chain and in different kinds of cases.

11. Consider the possibility of determining the overcharge at the direct purchaser level in collective actions and treating that amount as total damages for all purchasers in the distribution chain, both direct and indirect. Once the total amount of the overcharge at the direct purchaser level is determined in a collective action where other purchasers in the distribution chain are also claiming damages, counsel representing direct purchasers and all indirect purchasers could attempt to allocate the overcharge among the different levels of the distribution chain in a manner satisfactory to all. This is how class action settlements are allocated among different levels of purchasers in Canada. The court could also appoint a special economic discovery master to assist in deciding on the appropriate allocations. Because a defendant ordinarily has no interest in how a settlement fund is allocated, it would simply deposit the fund with the court and permit the different levels of claimants and the court to determine the allocations.

12. Consider a first-resort rule requiring parties to estimate overcharges using publicly available data before seeking discovery from third parties. Because the tracing of pass-on through different levels of a distribution chain is data intensive, and because most of that data may be available only from third parties (thus incurring costs on parties who have no stake in the litigation), a first-resort rule requiring estimates using public data might lead to settlement, or at least a narrowing of further discovery, if the estimates yield numbers the parties are willing to accept as preliminary calculations. Potential data sources include data compiled by government agencies, trade associations, or other industry sources. To the extent available, financial disclosure documents and other public data for direct purchasers and first-tier indirect purchasers might also be consulted.

To minimize the discovery burden on third parties, even in the case of limited discovery from such parties, courts might consider whether they could persuade the parties to agree on a single neutral economic expert to calculate pass-
on and overcharge issues. The expert could submit requests for information to the parties as well as third parties, avoiding third parties being served with discovery requests.

13. Consider carefully tailored use of cy pres as a last resort remedy in collective actions brought by end user consumers. The U.S. experience with cy pres awards has been mixed at best, so there are reasons cy pres may be a less than optimal remedy. Cy pres is also inconsistent with EU notions of compensation, since overcharged claimants obtain no monetary recovery. On the other hand, when faced with the choice of allowing wrongdoers to keep the fruits of their wrongdoing or having the funds go to organizations that might arguably benefit the victims, policy makers might conclude that a cy pres recovery is the lesser of two evils. In situations where the product goes through a distribution chain unchanged, and where there has been a determination of the amount of pass-on to end user consumers, a narrowly tailored cy pres award may merit consideration. In such circumstances, a cy pres award would have the benefit of disgorging ill-gotten gains, promoting deterrence, and potentially advancing the public good.

The MasterCard Decision

Many of our recommendations and the policy reasons underlying them are consistent with the landmark decision of the UK Competition Appeal Tribunal (CAT) earlier this year in the MasterCard case. The plaintiff in that case brought a collective action seeking to represent a class of approximately 46 million consumers claiming damages of more than £14 billion. The plaintiff claimed that all class members suffered injury because MasterCard had overcharged retailers through the imposition of an unlawful multilateral interchange fee, and the overcharge had been passed on to consumers, whether those consumers paid by cash or card. However, the CAT denied the application for a collective proceedings order. Stressing that damages for competition law breaches must be compensatory, the CAT held that the consumer claims were not “suitable for an aggregate award of damages,” and “there [was] no plausible way of reaching even a very rough-and-ready approximation of the loss suffered by each individual claimant from the aggregate loss calculated.”

Specifically, the CAT held that even if aggregate damages could be proved reliably, there was no feasible way of allocating those damages among class members on a reliable basis. They patronized many thousands of different retailers, and they received different levels of loyalty rewards and other benefits paid by card-issuing banks. The CAT also noted that much of the data needed to prove pass-on would come from third parties, making it extraordinarily difficult to prove the amount of pass-on to each class member.

If the CAT’s decision is affirmed on appeal (assuming that permission to appeal is granted) and followed in other EU jurisdictions, it could stand as a formidable obstacle to the maintenance of unduly complex indirect purchaser claims by consumers. As the CAT’s decision illustrates, proving aggregate damages and the amount of pass-on in actions brought on behalf of consumers will likely require discovery of economic data and other materials that the parties to the litigation may not possess. Given the ongoing claims in the UK against MasterCard brought by claimants at different levels of the distribution chain, all litigants would benefit from a mechanism to coordinate discovery and establish a central document depository.

Conclusion

The future of private antitrust litigation in the EU will require the courts to balance the dual principles of compensation and effectiveness. How that balance will be struck with respect to indirect purchaser claims remains to be seen.

Both goals might be met through a standing requirement that limits damages in certain cases to the first level of indirect purchasers, particularly in cases involving integrated components or complex purchasing patterns through multiple or varied distribution channels. To prevent the wrongdoer from benefiting in such cases, the damages suffered by more remote claimants possibly could be ascertained by a small claims tribunal charged with determining, to borrow from Judge Roth’s felicitous language in Merricks, an appropriate “rough-and-ready approximation” of their losses.

Rebuttable presumptions of the percentage of pass-on for different levels of indirect purchasers might also provide a more flexible approach. The EU would still be developing its distinctive system of private redress, preserving its own notion of pass-on as a defense, while allowing the evolution of rules differentially accounting for differing impacts at different levels of distribution.

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7 Id. at 3. In Europe deterrence it is generally considered the sole function of public enforcement. Damage recoveries, however, may approach or even exceed governmental fines. The combined effect, therefore, should increase deterrence.
11 “The governing principle of damages for breach of competition law is restoration of the claimants to the position they would have been in but for the breach.” Merricks v. MasterCard, [2017] CAT 16, at 35.
15 Illinois Brick Co., 431 U.S. at 745–47.
16 Id.
17 Id. at 730–31, 737 n.18.
19 Id. at 537–46.
24 Id. at *3–5.
25 Id. at *4–5.
27 See id. at *20–28.
30 2006 E.C.R. 1-6641, at I-6659 (emphasis added).
31 See, e.g., German Federal Court of Justice (BGH), Judgment of 12 July 2016, KZR 25/14, NJW 2016, 3527, 3531 (with further references); Higher Regional Court of Munich (OLG München), Judgment of 21 February 2013, U 5006/11 Kart, BeckRS 2013, 05429.
35 Id. at 31, 33.
36 See, e.g., the Judgments in the retailer claims in Sainsbury’s Supermarkets Ltd v. MasterCard Incorporated and Others, [2016] CAT 11, and Asda Stores Ltd & Ors v MasterCard Incorporated & Ors, [2017] EWHC 93 (Comm’n).