

Passing-on Damages and Community Antitrust Policy

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An Economic Background

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1. Introduction

If ever actions for damages do become a vital mechanism of competition law enforcement in the Community, national courts will frequently be required to scrutinize damages claims and judge whether such claims are based on sound analysis and aligned with existing competition policy. Consequently, important questions must be addressed and resolved in a homogenous way in order to maintain a level playing field.¹ An example of present interest is the contradictory judgments in the German lower courts regarding the plaintiffs' need to prove that they belong to a group of persons whose protection is a purpose of the provision of competition law that has been infringed (the “protective purpose” requirement).²

The aim of this article is to draw specific attention to the anticipated “passing-on” problem. The passing-on defence is used by an antitrust defendant to argue that the claimant did not suffer loss on the grounds that he passed on the illegal overcharge to the next purchaser. Correspondingly, the question of whether the alleged violator’s indirect purchasers should be able to take legal action against him on the basis of the fraction of harm passed through to them is called offensive use of passing-on (or the indirect purchaser’s rule). These questions

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¹For an overview see D. WOODS, A. SINCLAIR & D. ASHTON, “Private enforcement of Community competition law: modernisation and the road ahead”, (2004) 2 EC Competition Policy Newsletter, pp.33-36.

²The judgements of the District Courts of Mannheim and Mainz (LG Mannheim Az. 7 O 326/02; LG Mainz, Az. 12 HK.O 55/02) are not compatible with the judgement of the District Court of Dortmund (LG Dortmund, Az. 13 O 55/02). The judgement of the Karlsruhe Higher Regional Court, which is a decision on appeal against the judgement of the LG Mannheim, let the question open (OLG Karlsruhe, Az. 6 U 183/03).

deserve a large amount of consideration and debate due to their major policy implication on antitrust enforcement in general.

In this article the issues mentioned above are approached by an attempt to perceive the EC antitrust damages remedy in an economic context. By presenting and discussing in-depth the so-called optimal deterrence model - a well known and in the US heavily debated economic analysis of antitrust enforcement - an appropriate foundation for how to perceive and apply the antitrust damages remedy will be put forward. Subsequently, in the light of the optimal deterrence model, the legal questions connected with economics of passing-on will be considered.

The reasoning in this article is subject to the following assumptions. For simplicity, damages claims are assumed to have been filed independently of and prior to public enforcement investigations.³ Thus the potential amounts of administrative fines are not taken into consideration in the analysis.⁴ Further, cases for damages can be brought for several offences. This article is mainly concerned with overcharging by cartels/monopolists.

1.1 Current State of the Debate

It is widely acknowledged that the use of Articles 81 and 82 EC in private litigation as a basis for claiming damages has been extremely rare in the Community.⁵ However, while some gladly anticipate the floodgates of antitrust damages actions to be opened⁶ as a result of the

³ As to how accurate this assumption corresponds to the real world, today and in the future, see *infra*, accompanying text to note 14 and further.

⁴ The impact of potential administrative fines on the analysis of efficient private enforcement could be studied and dealt with through the concept of “decoupling” as developed by e.g. Schwartz and Polinsky (see W.F. SCHWARTZ, *Private Enforcement of Antitrust Laws: An Economic Critique*, American Enterprise Institute for Public Policy Research, 1981; A.M. POLINSKY, “Detrebling versus Decoupling Antitrust Damages: Lessons from the Theory of Enforcement” (1986) 74 *Geo. L.J.* 1231).

⁵ The 2004 comparative report, *Study on the conditions of claims for damages in case of infringement of EC competition rules*, which was ordered by the Commission and produced by Ashurst, identified only eight successful damages awards for breach of EC competition law since the inauguration of the EC antitrust enforcement system in 1962. As to awards under national competition law, the report found a similar limited number of successful actions, namely sixteen awards on the basis of national law and four awards on the basis of both national and EC competition law. The report is published on the website of Competition DG, http://www.europa.eu.int/comm/competition/antitrust/others/private_enforcement/comparative_report_clean_en.pdf.

⁶ See C. KOOB, D. VANN & A. ORUC, “Development in private enforcement of competition laws – introduction” in C. CAMPBELL (ed.), *Private Antitrust Litigations 2004: in 16 jurisdiction worldwide*, p.3, *Global Competition Review*, 2003; C.A. JONES, “Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check”, (2004) 27 *W.Comp.*1, pp.13-17.

Courage judgement⁷ in combination with the reform brought about by Regulation No. 1/2003⁸, others believe that the antitrust damages remedy is neither necessary nor desirable in the Community⁹. Furthermore, concerns have been expressed as to whether the *Courage* judgement and Regulation No. 1/2003 are sufficient to bring about a major change and remedy the current meagre situation of private enforcement in the Member States.¹⁰

While the ECJ, through the *Courage* judgement, cut the Gordian knot as to whether or not damages were available under EC competition law¹¹, the Prodi Commission made clear by its statements and undertaken activities that it was a strong supporter of increased damages actions. Commissioner Monti was actually preparing to launch a Green Paper in which potential ways of overcoming the obstacles to private enforcement would have been proposed.¹² Whether some sort of Community remedy legislation will come into being during the next few years is uncertain today and depends of course on the priorities and views of the new Commissioner. Nevertheless, the total underdevelopment of actions for damages for breach of EC competition law cannot be disregarded and the question of how to facilitate

⁷ Judgment of 20 September 2001, in case C-453/99, *Courage v. Crehan*, [2001] E.C.R. I-6314.

⁸ Council Regulation (EC) No. 1/2003 of December 16th 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] O.J. L1/1.

⁹ See W.P.J. WILS, "Should Private Antitrust Enforcement Be Encouraged in Europe?", (2003) 26 W.Comp.3, 473, pp.480-486, where he, assuming that the goal of antitrust enforcement is to ensure that the antitrust prohibitions are not violated, argues that public enforcement is inherently superior to private enforcement and that damages can't even fulfil a supplementary role for the purpose of the deterrence objective. See further F.G. JACOBS, "Enforcement of EEC Antitrust Law", (1984) 82 Mich.L.Rev.1364, where, then Professor, now Advocate General, Jacobs listed several objections to the practice of national courts taking final decisions in damages actions based on EC antitrust rules. Two decades later however, in subsection 104 of his Opinion of 22 May 2003 in Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK-Bundesverband v. Ichthyol-Gesellschaft Cordes*, not yet reported, AG Jacobs expresses the view that if a violation of Article 81 EC is shown, both damages and injunctive relief will as a matter of Community law be available to anyone suffering loss as a consequence of such infringement, subject to such national procedural rules as are compatible with the principles of equivalence and effectiveness.

¹⁰ See e.g. E. PAULIS & C. GAUER, "La réforme des règles d'application des articles 81 et 82 du Traité" (2003) 11 Journal des tribunaux droit européen 65; W.P.J. WILS, "Regulation 1/2003: A remainder of the main issues" in D. GERADIN (ed.), *Modernisation and Enlargement: Two Major Challenges for EC Competition law*, Intersentia, forthcoming 2005; J.S. VENIT, "Brave New World: The Modernization and decentralization of enforcement under Articles 81 and 82 of the Treaty", (2003) 40 C.M.L.Rev.545; C.D. EHLERMANN & I. ATANASIU, "The Modernisation of EC Antitrust Law: Consequences for the Future Role and Function of the E.C. Courts", (2002) 2 E.C.L.R.72.

¹¹ For an overview of the "pre-*Courage*" positions, see e.g. JACOBS, "Enforcement of EEC Antitrust Law", *supra* note 9; J. TEMPLE LANG, "EEC Competition Actions in Member States' Courts - claims for damages, declarations and injunctions for breach of Community antitrust law" in B.E. HAWK (ed.), Fordham Corporate Law Institute, 1984; R. WHISH, "The Enforcement of EC Competition Law in the Domestic Courts of Member States" in L. GORMLEY (ed.), *Current and Future Perspectives on EC Competition Law: a tribute to Professor M.R. Mok*, Kluwer Law International 1997; C.A. JONES, *Private Enforcement of Antitrust Law in the EU, UK and USA*, Oxford University Press, 1999; N. WAHL, *Konkurrensskada: Skadeståndsansvar vid överträdelse av EG:s konkurrensregler och den svenska konkurrenslagen*, Jure, 2000. See also Opinion of 27 October 1993, in case C-128/92, *Banks v. British Coal*, [1994] E.C.R. I-1209, AG van GERVEN.

¹² See the speech of former Commissioner Monti "Modernisation: What does the future hold?", delivered in Bruges, 10 June 2004 Available on DG Competition's website.

damages actions will continue to constitute a discussion topic in the immediate future of EC competition policy.¹³ In this respect, it is worth mentioning that commentators have pointed out evidentiary difficulties in the Member States as one of the main reasons for the striking difference with the situation in the United States (US), where damages actions account for approximately 90% of the total antitrust enforcement.¹⁴ The incentives to litigate would undoubtedly increase if so-called discovery procedures, where a party to a procedure is entitled to require the opposing party to disclose all relevant documents in its possession, were available. Contrary to the US where private plaintiffs benefit from liberal discovery rules, such liberal rules do not exist in the Member States - with the exception of Cyprus, Ireland and the United Kingdom.¹⁵ Improvement of such investigation methods in the Member States' laws of procedure would make it more likely that harmed parties would bring competition suits on their *own* initiative. It is submitted that the introduction of discovery-like proceedings would entail a shift in the nature of damages actions, from the current piggybacking on prior proceedings of public authorities to a more independent and dynamic remedy, which actually increases detection and brings new and undiscovered offences to light.¹⁶

2. Rationale for Antitrust Damages

The purpose of this section is to contemplate the damages remedy in an economic context. The first subsection surveys the background and possible objectives of antitrust damages. In the succeeding subsections the optimal deterrence-model is presented and discussed.

2.1 Background and Possible Objectives

The harm that restriction of competition imposes on society is usually illustrated by comparing the outcome of a monopoly market with the outcome of a competitive market.¹⁷ In

¹³ That outcome of that debate depends however on the ultimate objective that one chooses to attribute to private enforcement and damages actions. See *infra*, accompanying text to note 18 and further.

¹⁴ See e.g. A. JONES & D. BEARD, "Co-contractors, Damages and Article 81: The ECJ finally speaks", (2002) 5 E.C.L.R.246, p.256; B.J. RODGER, "Private Enforcement and the Enterprise Act: An Exemplary System of Awarding Damages", (2003) 3 E.C.L.R.103, p.113.

¹⁵ *Study on the conditions of claims for damages in case of infringement of EC competition rules*, *supra* note 5, p.61. The Swedish legislator is contemplating the introduction of a similar procedure (*bevisundersökning*), see Statens Offentliga Utredningar 2004:10, pp.103-125.

¹⁶ But *cf.*, WILS *supra* note 9, at p.480, who believes that an "American-style discovery would probably be undesirable because of its high cost and the risk of discovery being abused to obtain competitors' business secrets" [footnote omitted].

¹⁷ See e.g. MARTIN, *Industrial Economics: Economic Analysis and Public Policy*, Prentice Hall, 1993, pp.27-40; F.M. SCHERER & D. ROSS, *Industrial Market Structure and Economic Performance*, Houghton Mifflin, 1990, pp.19-29.

a monopoly resources are misallocated, income is redistributed from consumers to producers and aggregate economic welfare is reduced. A purely economic analysis, to which the author of this article subscribes, considers competition law as concerned with protecting and enhancing economic efficiency and maximizing overall social wealth. Accordingly, the economic rationale for prohibiting overcharging by cartels/monopolists is not that they charge too high price or that they redistribute income, but that they restrict output, causing a loss to consumers without an offsetting gain to producers.

As to antitrust enforcement, two possible objectives can be identified: deterrence and/or corrective justice.¹⁸ Through deterrence, i.e. by creating a credible threat of detection and sanctions the aim is to ensure that the antitrust prohibitions are not violated and that the anticompetitive effects which are meant to be avoided are indeed avoided. Another possible goal of enforcement is the pursuit of “justice” through punishment and compensation. Once an antitrust violation has taken place, the idea is to punish the infringer and, if possible, make him compensate those who have innocently suffered the economic consequences of his violation. Insofar as *private* enforcement is concerned, these two components are intertwined and the question as to which of these objectives should prevail over the other has been and will continue to be subject to academic debate.¹⁹

It is submitted that in the context of the EC antitrust damages remedy, deterrence is the ultimate objective and that compensation is of secondary importance, although indispensable as a complement to the deterrence objective.²⁰ This view is based on the fundamental objective of EC competition law²¹ and the reasoning of the ECJ in *Courage*²². The view is further supported by various Commission policy statements.²³ Although the statements

¹⁸ Cf. JONES, *supra* note 6, p.16, who also mentions restoration of competition.

¹⁹ See *inter alia*: W.P.J. WILS, *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics*, Kluwer Law International, 2002, section 2.2.4; K. ROACH & M.J. TREBILCOCK, “Private Enforcement of Competition Laws”, (1996) 34 Osgoode Hall L.J. 461, p.498; SCHWARTZ, *supra* note 4, pp.31-32; JONES, *supra* note 6, pp.16-17.

²⁰ *But cf.* JONES, *supra* note 6, *passim*. See also L. KOLBYE, “The New Commission Guidelines on the Application of Article 81(3): An Economic Approach to Article 81”, (2004) 9 E.C.L.R.566, pp.566-567.

²¹ According to Article 3.1.g EC the Community’s activity shall include the institution of a system *ensuring* that competition in the internal market is *not distorted*.

²² *Courage v. Crehan*, *supra* note 7 at §§ 26-27. *But cf.* JONES, *supra* note 6, p.17.

²³ See e.g. following speeches by former Commissioner Monti: “Private litigation as a key complement to public enforcement of competition rules and the first conclusions on the implementation of the new Merger Regulation”, delivered in Fiesole, 17 September 2004, pp.2-3; “International Antitrust – A Personal Perspective”, delivered in New York, 7 October 2004, p.3; MONTI, *supra* note 12, p.9. All available on DG Competition’s website. See further e.g. Thirteenth Report on Competition Policy, 1984, p.136; White Paper on Modernisation, *supra* note 5,

normally include both objectives, without explicitly giving priority to one over the other, they are illustrative of the Commission's eagerness to be relieved of some of the burden of antitrust enforcement without lowering (and maybe even increasing) the probability of detection. In the Notice on complaints the Commission declares:

“The fact that a complainant can secure the protection of his rights by an action before a national court, is an important element that the Commission may take into account in its examination of the Community interest for investigating a complaint”²⁴

The compensation objective is a tool to increase private parties' motivation to be vigilant and monitor other actors' anti-competitive behaviour on the market. By having economic incentives to take action the claimants should induce potential infringers to refrain from illegal behaviour. Thus, compensation functions as a first-step or short-term objective, serving the long-term and ultimate goal of antitrust enforcement: deterrence. Consequently, even if the day-to-day work of applying and implementing antitrust damages involves much “compensation”, it is deterrence that shall be borne in mind when the law is construed and policy choices are to be made.

2.2 Economic Theory of Enforcement

The optimal deterrence model (OD-model), assuming that enhancing economic efficiency ought to be the exclusive goal of antitrust enforcement, springs from Becker's economic approach to property crime.²⁵ Nobel Prize laureate Becker claims that criminals act in their own interest as best they can given their knowledge of the likelihood of apprehension and conviction, and the severity of punishment. Becker argues that since criminals act “rationally”, the aim of legal sanctions shall be deterrence. Because few criminal laws are self-enforcing, they require expenditures on conviction and punishment to deter violators. In Becker's opinion, the ideal sanction would make illegal conduct unprofitable whenever condemning the conduct would cost less than allowing the conduct to continue. Stated differently, only economically inefficient violations shall be deterred. Consequently, Becker concludes that even if enforcement costs are zero, it is still not desirable to deter all violations because some offences – where the gain to the offender exceeds the harm to the victim – are efficient.

passim; Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty, [2004] OJ C101/5, sections I-III.

²⁴ Notice on the handling of complaints, *supra* note 23, §17 (footnote omitted).

²⁵ G.S. BECKER, “Crime and Punishment: An Economic Approach”, (1968) 76 J. Pol. Econ. 169.

2.2.1 Optimal Deterrence Model

Becker's utilitarian concept of punishment (deterrence of inefficient offences as the main goal of legal sanctions) has had an influential impact on studies of enforcement of all kinds of laws. With reference to Becker's work, Landes put forward the OD-model in 1983.²⁶ The OD-model determines the adequate amount of antitrust damages by comparing the allocative inefficiency (dead-weight loss) of a conduct with its productive efficiency (cost savings). A simple graph illustrates the concepts (see FIGURE 1). Assume that industry marginal cost, MC_0 , is equal to the supply curve under competition; the competitive output and price is then Q_0 and P_0 .

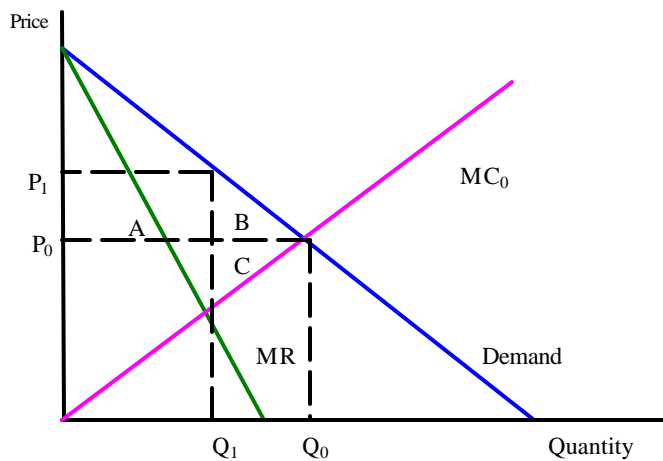


FIGURE 1 – Market Power, Allocative Inefficiency and Wealth Transfer

Assume further that a cartel/monopolist with marginal revenue MR would reduce output to Q_1 (where MR , intersects with marginal cost, MC_0) and raise price to P_1 . Assume that the conduct would impose a total dead-weight loss of 10€ (5€ for triangle B and 5€ for triangle C) and an aggregate overcharge of 11€ (rectangle A). The dead-weight loss B is borne by consumers and represents resources that are lost because they are denied to consumers but do not show up as gains to the cartel/monopolist either. The dead-weight loss C is borne by the cartel/monopolist and represents the additional profit the cartel/monopolist would have earned by selling $Q_0 - Q_1$ at price P_0 . The overcharge A is also borne by the consumers and represents transfer of wealth from them to the cartel/monopolist. The net harm to consumers is thus 16€ (area A+B).

²⁶ W.M. LANDES, "Optimal Sanctions for Antitrust Violations", (1983) 50 U. Chi. L. Rev. 652.

In our example a damage award of 10€ (equal to the social cost) would obviously be too low to deter, since the cartel/monopolist would still make a net profit of 1€. The OD-model's rule for determining the optimal damage award is that *damages shall equal the net harm to persons other than the violator*.²⁷ The net harm to everyone *but* the violator is, in this case of monopoly pricing, the above mentioned 16€ (triangle C is not included since it is harm to the violator).

Damages of 100€ would certainly deter as well, but that would not yield a beneficial outcome for society according to the OD-model. In line with Becker's theory, the OD-model argues that the purpose of sanctions is to deter inefficient offences, not efficient ones.²⁸ Consequently, the OD-model takes into account potential cost savings of the cartel's/monopolist's conduct. To illustrate (see FIGURE 2)²⁹: Assume that by forming a cartel the members reduce their production cost function from MC_0 to MC_1 .

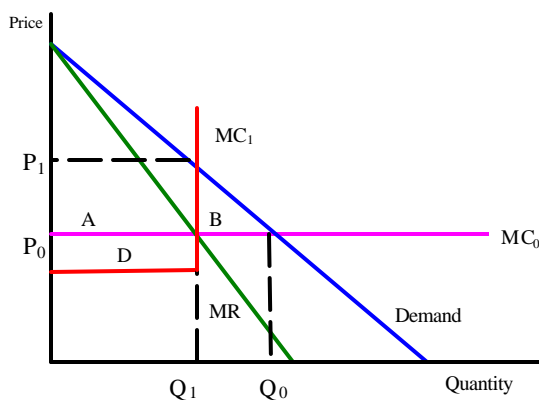


FIGURE 2 – Market Power, Allocative Inefficiency and Productive Efficiency

The production cost savings are represented by the rectangular D. If D is greater than B, say D is 6€ when B is 5€, then the cartel's offence is efficient according to the OD-model because the cost savings are greater than the dead-weight loss (society gains 1€). Since the total gain of the cartel would be 17€, a verdict greater than 17€ would deter its formation, and the outcome would be inefficient (over-deterrence), deterring a socially beneficial cartel.

²⁷ Ibid., p.656.

²⁸ Ibid., p.655.

²⁹ Ibid., p.654.

2.3 The Critique of Optimal Deterrence Model

Hovenkamp criticizes the OD-model for ignoring the harms imposed on the offender's competitors.³⁰ He rejects the idea of basing the amount of damage award on the difference between allocative inefficiencies and productive efficiencies. He argues that the concept of "social cost" of monopoly should be wider than the one used by the OD-model.

2.3.1 Calls to Widen the Concept of Social Costs

Hovenkamp claims that monopoly gives rise to three elements of social costs.³¹ In addition to the conventional dead-weight loss under the demand curve, the "wealth transfer" from consumers to producers might also be considered as a social cost. From Hovenkamp's perspective, the overcharges do not represent wealth transfer, but are to be considered as wasted resources.³² According to Hovenkamp and others³³, the area A in FIGURE 1 and FIGURE 2 represents a welfare cost since it approximates the costs of rent-seeking (money inefficiently spent on retaining or attaining a monopoly position) that the monopolist or aspiring monopolist incurs.³⁴

It is submitted that even if the costs of rent-seeking were to be included in the notion of social costs, that would not have any impact on the application of the OD-model. Recall that under the OD-model it is irrelevant how cartel members or monopolists spend their profits, since the optimal damage award equals net harm to the community *excluding the violator*. Whether the violator spends the transferred wealth on rent-seeking or not does not affect the estimation of the optimal damage. In other words, irrespective of whether the overcharge is considered as wealth transfer or social cost, the OD-model will not take it into account when determining the optimal damage award.

More importantly for the OD-model debate, Hovenkamp identifies a true potential failing of the OD-model. He contends that the OD-model ignores inefficient costs imposed on the

³⁰H. HOVENKAMP, "Antitrust's Protected Classes", (1989) 88 Mich.L.Rev. 1.

³¹Ibid, pp.13-20.

³²Ibid, p.16.

³³See R.A. POSNER, *Antitrust Law: An Economic Perspective*, University of Chicago Press, 1976, p.11, G. TULLOCK, "The Welfare Costs of Tariffs, Monopolies and Theft, (1967) 5 W.Econ. J. 224, p.231.

³⁴HOVENKAMP, *supra* note 30, p.16.

offender's competitors during exclusionary practices.³⁵ The competitors' lost profits and investments are not transferred to the monopolist or cartel as monopoly overcharges are. Accordingly, these losses are, as Hovenkamp defines them, not clearly related to any of the cost or revenue functions included in a demand curve.³⁶ Hovenkamp gives an extreme example to illustrate his theory that rent-seeking practices by a monopolist/aspiring monopolist are liable to impose other social costs than the traditional dead-weight loss:

“[S]uppose that the world market contains two aircraft manufacturers, each of which owns a single plant. The chief executive officer of one of the firms creates a monopoly by visiting the other firm's plant one night with a can of gasoline and a match, and burning it down. In this case [the traditional dead-weight loss] is indeterminate; [the social cost of rent-seeking] is the cost of the match, the gasoline, the opportunity cost of the CEO's time, and the risk and expected consequences of getting caught. At the very least, [additional social cost of the exclusionary practice] is the cost of the destroyed plant, inventory, and perhaps goodwill, of retraining employees whose jobs have been lost, and of reliance interests lost by broken contracts³⁷.”

Hovenkamp concludes that the OD-model, by focusing on allocative inefficiency and productive efficiency, does not deter offences where competitors are forced out of the market. In such cases, investments made by competitors in for example advertisement, specialized plants, research and development etc. will become wasted resources.³⁸ To illustrate: assume that the traditional dead-weight loss of a conduct is 20€ the overcharge is 40€ and the cost savings are 25€. The OD-model would set the damage award to 60€ (40+20). The offence will then go on since the firm will make a net profit of at least 5€ (40+25-60). If the conduct in addition forces a competitor to exit the market, resulting in his investments worth 7€ being wasted, then the offence is, according to Hovenkamp, inefficient for society and the OD-model will fail to deter it.

2.4 Development of the Optimal Deterrence Model

The OD-model has been defended and developed by Page in his two articles *The Scope of Liability for Antitrust Violations* and *Optimal Antitrust Penalties and Competitors' Injury*.³⁹

³⁵ Ibid. pp.17-20.

³⁶ Ibid, p.18.

³⁷ Ibid. p.18 (footnote omitted).

³⁸ Ibid, p.20.

³⁹ W.H. PAGE, "Optimal Antitrust Penalties and Competitors' Injury", (1990) 88, Mich.L.Rev. 2151; W.H. PAGE, "The Scope of Liability for Antitrust Violations", (1985) 37 Stanford L.Rev. 1445.

Page rebuffs Hovenkamp's criticism by stressing that welfare losses or social costs of antitrust violations have a *causal link* to the output restriction.

2.4.1 Social Costs and Restriction of Output

Page points out that while the traditional dead-weight loss under the demand curve has a demonstrable causal link to monopolistic output restriction, competitors' lost of investments lack such verifiable causality, even when a cartel/monopolist through predatory campaign forces competitors out of the market and then sets a pure monopoly price.⁴⁰ Page gives the example of social costs (in addition to the traditional dead-weight) resulting from output restriction, by considering the model of pricing by a cartel that has a dominant market share but nonetheless shares the market with a non-conspirator ("fringe firm") who has higher marginal cost than the cartel members.⁴¹ In such a market, the less efficient fringe firm is a price taker and adjusts (increases) its output to meet the price set by the cartel (so-called umbrella pricing). Accordingly, the cartel's output restriction causes increased production from the less efficient infringe firm, which, consequently, leads to increased production costs. This productive inefficiency is a social cost according to Page, because it has a causal link to the output restriction of the cartel.⁴² Yet, Page emphasizes, this productive inefficiency (competitor's increased costs) can not be considered as compensable losses for the competitor since he does not incur any actual harm.⁴³ The costs are in reality totally covered by the overcharges paid by consumers due to the umbrella pricing.

2.4.2 Social Costs and Exclusion of Competitors

Page admits that if the cartel members successfully force the fringe firm out of the market, the dead-weight loss of the pure monopoly will be greater than the sum of the dead-weight loss and the productive inefficiency associated with umbrella pricing.⁴⁴ In addition, the exclusion results in loss of the excluded firm's revenues. However, these lost revenues, which are transferred to the cartel, are not an additional social cost of the exclusion. Page explains:

"The fringe firm loses the stream of rents it would have garnered from pricing under the dominant firm's umbrella. But its fixed costs have already been incurred; they are bygones, not an additional

⁴⁰ PAGE, "Optimal Antitrust Penalties and Competitors' Injury", *supra* note 39, p.2154.

⁴¹ *Ibid.*, pp.2155-2156.

⁴² PAGE, "The Scope of Liability for Antitrust Violations", *supra* note 39, p.1466.

⁴³ PAGE, "Optimal Antitrust Penalties and Competitors' Injury", *supra* note 39, p.2156.

⁴⁴ *Ibid.*, p.2156.

cost of the monopolistic practice. Moreover, if the firm's output drops to zero, its variable costs are actually saved by the exclusionary practice."⁴⁵

The welfare loss of *the exclusion* is thus the lost value associated with the units of output that the fringe firm would have produced, minus the savings in production costs.

The losses that an *ongoing predatory pricing campaign* imposes on a fringe firm are, Page states, the result of reduced revenues and not increased production costs.⁴⁶ These losses constitute wealth transferred to the consumers. The only social cost associated with predatory pricing during the predatory campaign itself is, according to Page, the increase in production beyond the level at which consumers are willing to pay the marginal cost of producing the good.⁴⁷ That cost is however entirely borne by the predator, who is the one producing the marginal units.

Even when the predatory campaign aims at *raising a competitor's costs*, Page teaches us to make a distinction between social costs and the competitor's harms.⁴⁸ Presuming that a cartel or a dominant firm is able to increase its competitor's marginal cost (e.g. by denying access to economy of scale), the victim's output will decline and consequently so will the overall market output. The welfare loss is the lost value associated with the units of output that that would have been produced but the predatory campaign. As to the competitor's increased cost per unit (productive inefficiency), Page claims that this social costs will roughly be offset by the competitor's cost savings from reducing its output.⁴⁹ Page concludes therefore that the effect of raising competitor's costs is damaging not because of its effect on the costs but because of the effect of the reduction in the competitor's supply elasticity on the predator's monopoly power.⁵⁰

2.4.3 Proxies for Social Costs

Although having established that competitors' losses are not to be considered as welfare losses, Pages states that those costs should nevertheless in some instances be compensable as antitrust damages. Not because competitor's costs represent social costs in themselves, but

⁴⁵ Ibid., p.2157.

⁴⁶ Ibid., p.2158.

⁴⁷ Ibid., p.2158.

⁴⁸ Ibid., pp.2158-2160.

⁴⁹ Ibid., p.2160 n.33.

⁵⁰ Ibid., p.2160.

because they can be substitutes to the demonstrable costs of monopoly.⁵¹ To determinate whether competitor's losses are to be compensated, Page uses the concept of proportional variety - whether the kind of harm alleged varies in proportion to the inefficiency associated with the practice. The concept of proportional variety is however not limited to determining compensable harms of competitors, but is used to determine compensability of any alleged harm regardless the victims' position in the production chain. For instance, since the harm that a monopolistic overcharge imposes on consumers is proportional to the allocative inefficiency of the offence (both are created by the same output restriction), the harm is compensable under the OD-model, even though it constitutes a wealth transfer and not a social cost.

In a market where a cartel controls less than the entire market, fringe firms will increase their output until their marginal cost equals the cartel price. Consequently, their consumers will also pay an overcharge (umbrella pricing). According to Page, it is the same output restriction allowing the cartel to set the dominant firm price that also allows the fringe to set its price at the same level.⁵² Thus, the overcharges paid by the fringes' consumers are causally related to the allocative inefficiency associated with the cartel and are therefore compensable. Consequently, under the OD-model, also the fringe's consumers have right to claim damages from the cartel/monopolist.

As to competitors, the OD-model recognizes, under the concept of proportional variety, their right to be compensated for exclusionary practices.⁵³ If a fringe firm is excluded from a market, the restriction of output in that market will correspond directly to the elimination of the fringe firm's output. The expected returns to the fringe firm on those units of production should therefore, according to the OD-model, be compensable.⁵⁴ Not because the harms to the competitor constitute social costs, but because they are causally linked to the monopolistic output restriction, and therefore serve as a reasonable proxy for the welfare loss associated with the output restriction. The same reasoning is applied to predatory strategies that raise the competitors' costs.⁵⁵ Since the total market output is reduced due to the reduction of a fringe's output, the expected profits on lost fringe sales should be compensable

⁵¹ PAGE, "The Scope of Liability for Antitrust Violations", *supra* note 39, pp.1462-1482.

⁵² *Ibid.*, pp.1466-1467.

⁵³ *Ibid.*, p.1473.

⁵⁴ PAGE, "Optimal Antitrust Penalties and Competitors' Injury", *supra* note 39, pp.2163-2164.

⁵⁵ PAGE, "The Scope of Liability for Antitrust Violations", *supra* note 39, pp.1475-1478.

2. 5 Conclusions Regarding Optimal Deterrence Model

The OD-model claims, in line with Becker's economic theory of enforcement, that antitrust law should be about safeguarding overall social welfare. Furthermore, the OD-model measures the overall social welfare in allocative and productive efficiency. These two variables must sometimes be traded off against each other. The OD-model aims to maximize social welfare by making monopoly-creating conduct unprofitable only if allocative efficiency losses exceed productive efficiency gains. Critics have been concerned with the OD-model's notion of social costs and its consequences regarding compensation to those who have suffered from exclusionary practises. The advocates of the OD-model do admit that, under the standard of proportional variety, certain losses sustained by competitors of a cartel should be compensable. However, the OD-model does not seek to protect or compensate competitors. Competitors' acknowledged right to recover for certain harms sustained is purely instrumental, aiming at safeguarding the overall social welfare.

It is conceivable that under existing EC case law it may not be permitted to sever the damage award from the private harm in such a radical and far-reaching way that the OD-model prescribes.⁵⁶ However, one need not on that account reject the OD-model when reflecting on the construction of an EC private antitrust enforcement system. The OD-model is useful in that it, by rigorously focusing on distinguishing the efficient outcomes of a conduct from the inefficient outcomes of the same conduct, provides a constructive approach for identifying compensable effects of anti-competitive conducts. The allocative inefficiency, "the little triangle" under the demand curve, is the essential and what shall be protected. The complexity lies in measurability and ability to prove. The fact that demand and output diagrams easily illustrate allocative inefficiencies is not of much help in quantifying concrete harms. Furthermore, the little triangle will not be of any help for proving the case of "customers" who are willing to pay the competitive price, but not the cartel price, and are thus forced either to buy less desirable substitute goods, or simply to reduce their total purchases.

⁵⁶ "The full effectiveness of Article [81] of the Treaty and, in particular, the practical effect of the prohibition laid down in Article [81(1)] 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" *Courage v. Crehan, supra* note 7 at § 26 (emphasis added).

Therefore, the wealth transfer and/or competitor's loss will in practice be the starting point of calculating damage awards. That shall be regarded as an imperfect substitute to the allocative inefficiency assessment, not as a rejection of the idea that it is the allocative efficiency that shall be protected.

3. Antitrust Damages and Passing-on

In section 2 an economic context was drawn up in which EC antitrust damages could be perceived. This section deals specifically with the passing-on problem. The first subsection presents the basic economics of passing-on. Legal responses to the passing-on problem are presented in subsections 3.2 and 3.2. In subsection 3.4 the OD-model is applied to the passing-on issue.

3.1 Economics of Passing-on

Since the production of goods or services frequently involves a number of intermediate firms, all upstream cost savings or increases are to a certain degree passed on to the downstream market. This phenomenon is called passing-on or pass-through and is relevant to various aspects of competition law, including efficiencies appraisal in merger control⁵⁷ and in the application of art. 81.3 EC⁵⁸. The pass-through dilemma for a damage claim analysis consists of determining the identity of those damaged and the extent of the damages. This is due to the fact that an upstream anti-competitive behaviour, such as price-fixing, is likely to spill-over into several markets, causing monetary injury in the production chain, before ultimately falling in part on the consumers. Tracing everyone who is damaged by anti-competitive behaviour and the extent of the damages is analogous to the problem in public finance theory of determining the impact of a tax or a subsidy.

When a government imposes a tax or subsidy on a consumer good, price usually does not rise or fall by the full amount of the tax or subsidy. The incidence of a tax or subsidy is usually split between producers and consumers. The fraction each group ends up paying or receiving

⁵⁷ See the Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2004] O.J. C31/5, at §§ 79-84.

⁵⁸ See the Commission Guidelines on the application of Article 81(3) of the Treaty, [2004] O.J. C101/97, at §§ 95-104.

depends on the relative elasticities of supply and demand.⁵⁹ FIGURE 3 illustrates the consequences of a specific tax, T , imposed regardless of whether the tax is collected from the producer or the purchaser. P_0 and Q_0 represent the market price and output before the tax is imposed. P_b is the price the buyers pay, and P_s is the *net* price that seller receive after the tax is imposed. Basic economics teaches us that given a certain price, the demand curve indicates the quantity that buyers are willing to purchase. Similarly, given a certain price the supply curve specifies the quantity that suppliers are willing to sell. Therefore, once the tax is imposed the new equilibrium will be where the market output, Q_1 , corresponds to a price of P_b on the demand curve, and a price of P_s on the supply curve, such that the difference $P_b - P_s$ is equal to the tax, T .

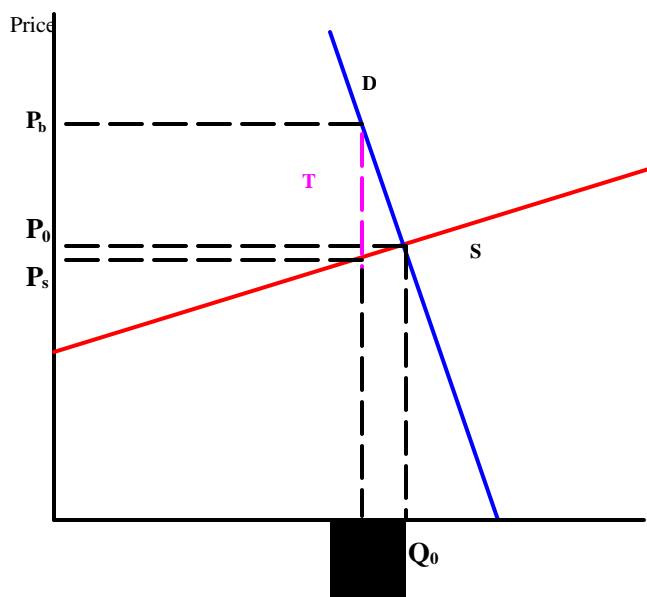


FIGURE 3 - Impact of a Tax When Demand is Very Inelastic Relative to Supply

In FIGURE 3 it is obvious that the burden of the tax falls mostly on the buyers. This is due to the fact that the demand is relatively inelastic and supply is relatively elastic. Stated differently, it takes a relatively large increase in price to get buyers to reduce the demand by even a small amount, whereas only a small price decrease is needed to reduce the quantity sellers supply. FIGURE 4 shows the opposite case.

⁵⁹ See, R.S. PINDYCK & D.L. RUBINFELD, *Microeconomics*, Prentice Hall, 1998, pp.318-325.

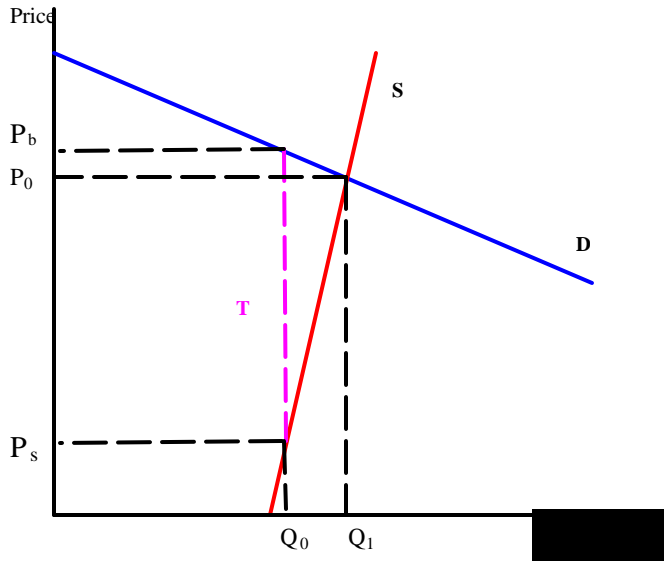


FIGURE 4 – Impact of a Tax When Demand is Very Elastic Relative to Supply

Consequently, by knowing the supply elasticity (E_s) and the demand elasticity (E_d) one can predict who will bear the greatest burden of a tax. Mathematically the concept is expressed in the following equation: pass-through fraction for buyers = $E_s / (E_s - E_d)$.

The same analysis can be applied to determine the burden of a production cost increase that an upstream cartel collusion imposes on its direct and indirect customers. The cartel and the overcharge are simply replaced for the government and the tax.

3.1.1 Passing-on in Monopoly Markets

The above reasoning, showing that pass-through fraction depends on supply and demand elasticity, is only valid under a competitive market. The pass-through fraction is different under a monopoly market. FIGURE 5 illustrate the standard textbook monopoly model. The monopolist has a horizontal marginal cost function (MC) and faces a linear, downward-sloping demand curve (D). Instead of setting competitive price (P_c) and output (Q_c) where marginal cost equals demand, the monopolist maximizes its profits by setting monopoly price (P_m) and output (Q_m) where marginal cost equals marginal revenue (MR). Now suppose that due to a cartel collusion in the upstream market (e.g. the price of an essential input is unlawfully inflated), the monopolist's production cost increases by I , causing the MC curve moving up to MC_I . The equation mentioned in the previous subsection would predict the pass-

through fraction to 1, i.e. the increase of production cost due to upstream cartel collusion would be entirely borne by the customers of the downstream monopolist (the indirect customers of the cartel).

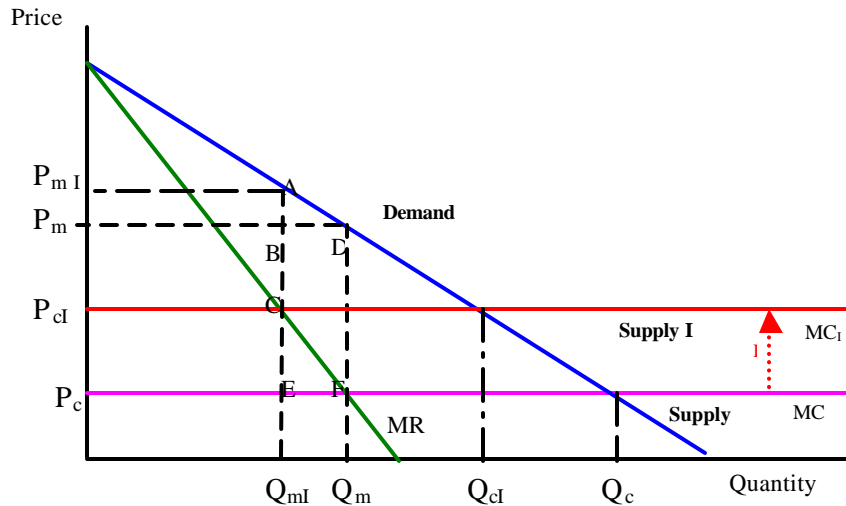


FIGURE 5 – Cost Pass-Through by a Monopolist

This would have been true, as FIGURE 5 indicates, if the monopolist would have acted as if it was a price taker, i.e. always setting price and output where its marginal cost equals market demand (P_c and Q_c before the cost increase - P_{cI} and Q_{cI} after cost increase). However, being profit driven a monopolist will set price and output where its marginal cost curve intersects its marginal revenue curve (P_m and Q_m before the cost increase and P_{mI} and Q_{mI} afterwards). As illustrated in FIGURE 5, pass-through fraction will not be 1, since the price increase does not equal the cost increase ($P_{mI} - P_m \neq I$). In fact the pass-through fraction will be 0.5, i.e. the cartels indirect customers bear half of the cost that the collusion imposed.⁶⁰ The downstream monopolist's harm due to upstream collusion is the difference between rectangle D-B-E-F and rectangle A-B-P_m-P_{mI}. Consequently, the rectangle A-B-P_m-P_{mI} represents the harm to the monopolist customers (the cartel's indirect customers).

⁶⁰ For mathematical proof of the exact calculation of fraction and how the figures change if the demand curve is not linear see microeconomic textbooks such as H.R. VARIAN, *Intermediate Microeconomics: A Modern Approach*, Norton, 1999.

3.1.2 Long-Run Effects of Pass-Through⁶¹

A complete reasoning regarding the pass-through fraction must also take the time factor into account. In the long run, intermediate firms will adjust to the new conditions of higher input costs and lower sales. They might substitute against the overcharged factor of production. Substitution depends on technical characteristics of the industry. In general, the longer the overcharge persists, the easier will it be for the producers to overcome technical and practical obstacles. Consequently, as time passes the burden of the overcharge becomes smaller because less of the factor is used in the production, but a larger proportion of the remaining burden is borne by the ultimate consumers. Naturally, the short run perspective is more important because price-fixing conduct is most profitable during the time interval before direct and indirect customers can find substitutes.

3.2 Legal Response to Passing-on in the US⁶²

Two Supreme Court rulings, the first in 1968 in *Hanover Shoe*⁶³, the second in 1977 in *Illinois Brick*⁶⁴, have reduced the potential complexity of damages claims. In the *Hanover Shoe* ruling the Supreme Court disallowed the defensive use of pass-through on the argument that failing to prevent it would unduly lengthen and complicate antitrust cases and disperse private incentives to seek injury recovery. As a result, irrespective of the question to what extent the direct purchaser indeed incurred any damages, by *Hanover Shoe* it is entitled to ask the defendant's overcharge. In the 1977 *Illinois Brick* decision the Supreme Court created a legal symmetry by also rejecting any offensive use of the passing-on argument. The plaintiff was denied compensation and the precedent was set that only direct purchasers of antitrust violators can sue for damages. The prime legal argument for denying indirect purchasers standing to sue in *Illinois Brick* relates to a multiple liability problem created by *Hanover Shoe*. Since the direct purchaser is entitled to the full overcharge by the latter standard, allowing indirect purchasers to sue for further money as well would effectively multiply the total liability of the defendant far over the appropriate deterrence level.

⁶¹ For more in detail development see: COOTER, "Passing On The Monopoly Overcharge: A Further Comment On Economic Theory", (1981) 129 *U.Pa.L.Rev.*1523, B. RUDDEN & W. BISHOP, "Gritz and Quellmehl: Pass It On", (1981) *E.L.Rev.* 243 at p.252.

⁶² See P. AREEDA & D.F Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, Vol. II, Little Brown, 1990, pp.183-198.

⁶³ *Hanover Shoe Co. v. United Shoe Machinery Corp.*, 392 US 481 (1968).

⁶⁴ *Illinois Brick Co. v. Illinois*, 431 US 720 (1977).

3.3 Legal Response to Passing-on in the EC

From the author's point of view, there exists no legal response yet to the question of passing-on antitrust damages in the Community. None of the Member States has any antitrust case law concerning the indirect purchaser's right to damages, and only three have antitrust case law where the passing-on defence has been dealt with.⁶⁵ Under most of the Member States' national laws damages in general have a restitutive-compensatory function.⁶⁶ Presumably, criminal laws serve as deterrence tools. Unless some sort of guidelines or policy choices are provided, either by the judicial or the legislative arm of the Community, national courts will most probably use analogy and apply general principles of their national tort laws when they have to deal with passing-on of antitrust damages. Accordingly, this implies that, currently, offensive as well as defensive passing-on would *de facto* be accepted in the national courts of the Community.

However, it is submitted that there exists a fundamental difference between smashing a car window and charging unlawfully inflated prices. In the former situation an actual monetary damage occurs, which must be repaired by the mandatory transfer of assets from the offender to the victim. In the latter case, apart from the dead-weight loss, no actual loss occurs, instead assets are re-allocated. Therefore, as explained at length above⁶⁷, a restitutive-compensatory approach to antitrust damages is not appropriate.

The ECJ has in several proceedings regarding unlawful taxes and administrative charges touched upon the concept of passing-on.⁶⁸ In these cases the Court has accepted the defendants' (Member States and the Community) ability to invoke the principle of "unjust enrichment". By invoking the principle of unjust enrichment the defendants sought to avoid repaying unlawfully collected taxes and administrative charges that the plaintiffs had passed through to ultimate consumers.

⁶⁵ *Study on the conditions of claims for damages in case of infringement of EC competition rules*, *supra* note 5, pp.78-79.

⁶⁶ *Ibid.*, 77.

⁶⁷ See *supra*, Section 2, Rationale for Antitrust Damages.

⁶⁸ See e.g. case 68/79, *Just v. Danish Ministry for Fiscal Affairs*, [1980] E.C.R. 501; case 130/79, *Express Dairy v. IBAP*, [1980] E.C.R. 1887; case 238/78, *Ireks-Arkady v. Council and Commission*, [1979] E.C.R. 2955; joined cases C-192/95 to C-218/95, *Comateb and Others v. Directeur général des douanes et droits indirects*, [1997] E.C.R. I-165.

The interesting question is whether the ECJ will follow the US antitrust approach to the problem of passing-on in antitrust private litigations when it has not done so in litigation against the Community and its Member States. As to the *Hanover Shoe* rule, AG van Gerven has argued that EC case law implies that the passing-on theory is available for defensive use under EC antitrust laws.⁶⁹ Jones and Wahl disagree with the view of the Advocate-General and claim that there are no legal barriers for the ECJ to forbid passing-on defence in antitrust litigations.⁷⁰ Jones states, with the support of Wahl, that existing EC case law on passing-on is not of any relevance to the antitrust field.⁷¹ They claim that applying the passing-on defence in cases when the plaintiff is recovering unlawfully paid taxes is accurate, since compensation is the one and only purpose of such actions. In antitrust law however, they argue, the effectiveness of EC antitrust law must prevail.

With respect to the *Illinois Brick* rule, Wahl and Jones disagree. Jones claims that an adoption of this rule is incompatible with EC law in that EC antitrust law does not permit the same severe limitation of *locus standi* as does US law.⁷² Furthermore, Jones states, an imported *Illinois Brick* rule would result in an intolerable disparity between the scope of the remedy and the substance of directly effective rights under EC antitrust laws.⁷³ Wahl, in favour of a similar legal symmetry as developed by the US Supreme Court, does not see any contradiction between the direct effect of a rule and the limitation of *locus standi*, as long as the effectiveness of EC law is preserved.⁷⁴

3.4 Optimal Deterrence Debate and Passing-on

Given the inherent dynamism of EC case law, it is conceivable that if the ECJ ever rules on the question of passing-on in an antitrust damages claim, the judgment will be based more on policy consideration and less on austere application of law. Therefore, one may disregard the diverse analyses – provided by van Gerven, Jones, Temple Lang and Wahl – of what outcome current EC law principles imply and instead turn back to the above described OD-model for an alternative reasoning.

⁶⁹ Opinion of AG van GERVEN, *supra* note 11.

⁷⁰ WAHL, *supra* note 11, pp.366-369, JONES, *supra* note 11, p.195.

⁷¹ JONES *supra* note 11, p.196, WAHL, *supra* note 11, p.242.

⁷² JONES *supra* note 11, p.192. See also J. TEMPLE LANG, "General Report on the Application of Community Competition Law on Enterprises by National Courts and National Authorities", speech delivered in Stockholm 3 June 1998, p.44. Available on DG Competition's website.

⁷³ JONES *supra* note 11, pp.192-193.

⁷⁴ WAHL, *supra* note 11, pp.241-245.

The *Hanover Shoe* and *Illinois Brick* pair of rulings has been heavily debated at length in the US.⁷⁵ In particular a great deal of hostility exists towards the *Illinois Brick* ruling and legislation to repeal *Illinois Brick* has been passed in a number of federal states.⁷⁶ While those who see antitrust solely in terms of economic efficiency tend to approve *Illinois Brick*, those who are concerned with compensating victims generally disapprove. Exponents of the OD-model have, not surprisingly, defended both rulings on economic grounds. In line with what later on would be developed as the OD-model, Landes and Posner show little concern as to the equity argument that ultimate customers (i.e. those who suffer the net harm in contrast to direct customers who pass through a certain fraction of the harm) should be entitled to claim damages. They emphasize the deterrence impact of the passing-on rulings:

“[t]he most important consideration from the standpoint of deterrence is not who receives the proceeds of any judgment levied against the antitrust violator, but that there be adequate incentives to bring suit and prosecute it to judgment.”⁷⁷

They argue that even if end-consumers are those ultimately harmed, their purchases may be small and their incentives and resources to sue for damages limited compared to direct purchasers. Further, they stress that direct purchasers typically have superior information on the effects of any anti-competitive acts of their suppliers, which also enhances deterrence. Finally, Landes and Posner also argue, in line with Becker’s economic theory of enforcement, that the social costs of litigations must be taken into consideration. From that perspective it makes sense to put all monetary incentives with the direct purchaser, since that is likely to reduce transaction costs compared to a situation with many fragmented indirect cases. Also, any costs involved in coordinating class action suits must be reduced when the incentive to file a private damages claim is placed in a single hand. Moreover, tracing everyone who is damaged by anti-competitive behaviour and calculating the extent of individualized damages in all submarkets would require courts to perform multiple, long and complicated analyses involving a large number of interested parties, which would be prohibitively costly.

⁷⁵ See e.g. R.G. HARRIS & L.A. SULLIVAN, “Passing on the Monopoly Overcharge: A Comprehensive Policy analysis” (1979) 128 U.Pa.L.Rev.269; W.M. LANDES & R.A. POSNER, “Should indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*”, (1979) 46 U.Chi.L.Rev.602; R.G. HARRIS & L.A. SULLIVAN, “Passing on the Monopoly Overcharge: A Response to Landes and Posner”, (1980) 128 U.Pa.L.Rev.1280; W.M. LANDES & R.A. POSNER, “The Economics of Passing On: A Reply to Harris and Sullivan”, (1980) 128 U.Pa.L.Rev.1274; G.J. BENSTON, “Indirect Purchasers’ Standing To Claim Damages In Prize Fixing Antitrust Actions: A Benefit/Cost Analysis of Proposals To Change The Illinois Brick Rule”, (1986) 55 Antitrust L.J.213.

⁷⁶ P. AREEDA & H. HOVENKAMP, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, suppl., Little Brown, 1990, pp.385-388.

⁷⁷ LANDES & POSNER, (1979) *supra* note 75 , p.608. (footnote omitted)

As far as the author is aware, there exist no unchallenged studies that in a reliable manner show whether there is a structural break in antitrust litigations after *Hanover Shoe* and *Illinois Brick*. Stated differently, excluding all factors but the prohibitions of using passing-on theory for offensive as well as for defensive purpose, has antitrust litigations increased or decreased? Scholars of contrary opinions tend to make references to different studies that only verify the firm beliefs of the scholar who referred to it.⁷⁸ One must therefore conclude that the empirical approach to the theory of antitrust passing-on remains inconclusive.

An interesting contribution to the theory and debate of pass-through problematic in antitrust law has been put forward recently.⁷⁹ The hypothesis, called “Illinois Walls”, accepts the potential of the *Illinois Brick* rule to reduce the costs of legal procedures and increase private incentives to bring anti-competitive practices to light. Nevertheless, it claims having identified a potential anti-competitive effect of the same ruling. The authors construct a model and study circumstances under which firms may use *Illinois Brick* to put up an “Illinois Wall” in order to shield themselves from private damages claims. They find that the *Illinois Brick* rule may facilitate upstream firms in engaging horizontally in a collusive arrangement, with concealed side-payments to their direct purchasers that discourage them from filing suit. An example is given of such an ‘Illinois Wall’, in which downstream firms are given part of the upstream cartel profits through a symmetric rationing of their inputs at low prices.

“By symmetrically selling to each of the downstream firms only a limited amount of inputs, the cartel creates a scarcity on the market for final consumer products that is beneficial to the downstream firms, yet creates a consumer detriment.”⁸⁰

Consequently, the authors call for an empirical study of the matter in order to find out whether the Illinois Walls theory corresponds to the real world.

4. Conclusions and Final Remarks

If one attributes antitrust law the objective of corrective justice, as might be done *de facto* by national courts when applying general principles of national tort law on antitrust cases, one

⁷⁸ See e.g. Jones who refers to a study of Sarris where it is submitted that direct purchasers do not have incentive to sue cartels and break up a “cosy” business relationship, JONES, *supra* note 11, p.197. *Cf.* Wahl who refers to studies that “proves” inefficient enforcement in those US states where the Illinois Brick rule has been repealed, WAHL, *supra* note 11, p.312 n.16.

⁷⁹ M.P. SCHINKEL, J. TUINSTRAS & J. RUEGGEBERG, *Illinois Walls*, working paper, Universiteit van Amsterdam, 2004.

⁸⁰ *Ibid.*, p.5.

faces severe problems in calculating and awarding actual damages awards. Basic economics implies that price-fixing conduct in one market does not solely harm the actors in the subsequent downstream market. The surge of the anti-competitive behaviour inflicts harm upon actors in an indeterminable number of submarkets. The net effect varies depending on the time scope, the nature of competition in the downstream markets and on the proportion of demand-supply elasticity in those markets. It is a nearly impossible task to accurately identify, at reasonable cost, the “righteous” victims and the inflicted harm upon them respectively.

The reality of the economics of passing-on involves fewer problems for those who perceive antitrust law and enforcement as a deterrence tool in order to enhance overall social efficiency. Such an approach has been the starting point of this article. Accordingly, this article considers the passing-on problematic in light of the OD-model reasoning. Since the optimal deterrence approach disregards the issues of equity and righteousness, it tackles the passing-on problematic by accepting any solution whatsoever that is liable to maximize deterrence and the effectiveness of antitrust enforcement. It is assumed, but not proven due to lack of conclusive empirical studies, that the prohibition of using offensive as well as defensive passing-on arguments is the most effective solution.

This is however not a new way of thinking in the academic debate on EC law. Already in 1981, Bernard Rudden and William Bishop criticized the ECJ for admitting the passing-on argument in cases regarding unlawfully collected taxes and administrative charges.⁸¹ Similar to the line of arguments presented above, they based their criticism on deterrence theory and on the desirability of reducing adjudication costs.

A decade ago professor Hovenkamp wrote: “Today the most important debate about the basic principles in antitrust is between those who believe that allocative efficiency should be the exclusive goal of the antitrust laws and those who believe that antitrust policy should consider certain competing values”.⁸² The future Community approach towards the passing-on question will have a decisive impact on the basic principles of EC competition policy. If efficiency, overall social welfare and minimum transfer costs are to determine competition policy, then it is submitted that the Community must take initiatives to follow the symmetry

⁸¹ RUDDEN & BISHOP, *supra* note 61, p.255-256.

⁸² HOVENKAMP, *Federal Antitrust Policy: The Law of Competition and its Practice*, West, 1994, pp.71-72 (footnotes omitted).

of the passing-on solution adopted under US law. If corrective justice and the solicitude for small and medium sized enterprises are to prevail, then at least offensive, but arguably also defensive, passing-on should be encouraged.