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Tackling pass-on in cartel cases: a comparative analysis of the interplay between damages law and economic insights

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ABSTRACT
Thinking in terms of supply chains, a crux with a view to antitrust damages is the fact that calculations (of market participants and hence also within legal proceedings) do not stop at the bilateral trader relation but go beyond this two-sided interaction. More often than not victims of antitrust violations pass-on part or all of the harm, to the next level in the supply chain. Under certain conditions this is beneficial for the victim and has to be subtracted from the original amount of damage. Legal benchmarks apply and economics knowledge is of the essence. Focussing on damage stemming from a cartel agreement this paper will first sketch the economic conditions for passing-on. Next, a comparative analysis of recent jurisprudence on passing-on in three jurisdictions (Germany, the Netherlands and Spain) is carried out. It can overall be shown that to successfully tackle cartel cases involving passing-on the potential of an interdisciplinary approach between law and economics needs to be exploited far more than it is currently done.

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KEYWORDS Pass-on; comparative competition law; trucks cartel; causation; adjustment of profits

1. Introduction

Taking a cartel agreement as an exemplary case of an antitrust violation, from a purchaser's point of view (who is not the final consumer) the interplay between three main damage components is legally relevant and economically founded: the overcharge he or she paid because the cartel is seeking

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to optimize its profit and, therefore, increases prices,[1] the pass-on rate if he or she transferred part or all of this overcharge to the next level of the supply chain and a volume effect – because at higher prices the own purchasers buy less which regularly results in some lost profit. Expressed in terms of the main goal of the European Antitrust Damages Directive (the Directive) and, hence, the European Member States (MS) antitrust damages regimes, namely full compensation,[2] this dynamic leads to the following total damage calculation per purchaser as stressed by the Guidelines 2019 drafted by the European Commission:[3] "overcharge" – "pass-on" + "volume effect". Being true to the goal of full compensation MS damages regimes are to avoid both over- same as under-compensation.[4] Any victim is to be put in the situation he or she would have been in but for the infringement. To account for damage that is passed on along the supply chain the so-called passing-on defence needs to be fine-tuned. To do so in the appropriate circumstances the interaction between economic insights and the law needs to be optimized. Only in the interplay between law and economics can the conditions under which the benefit derived from passing on damage is to be subtracted from the original amount be successfully determined. Economic insights teach us not only when it is likely that a pass-on occurs but also that it might be accompanied by additional negative consequences for the purchasers – mainly volume effects. Thus, the enforcement response must take these into consideration, too. The focus of this paper lies upon pass-on as such rather than the accompanying volume effect.

Focussing on damage stemming from a cartel agreement this paper will first sketch the economic conditions for pass-on. Next, a comparative

[1]Other measures to the same ultimate effect are possible, too – eg agreements on quantities, distribution of customers etc. This paper deals with the effect of so-called hardcore cartels that are shown to considerably disturb competition in markets and focuses on a price cartel for illustrative purposes.

[2]Recital 3 ff. and Art. 1 (1) 1st sentence & Art. 3 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national laws for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1; Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013 (Proposal for a Directive), 13; the cartel damages regimes in the European Member States are geared towards this goal already before the implementation of the Directive, see BJ Rodger, M Sousa Ferro and F Marcos, 'A Panacea for Competition Law Damages Actions in the EU? A Comparative View of the Implementation of the EU Antitrust Damages Directive in Sixteen Member States' (2019) 1 Maastricht Journal 18.

[3]Communication from the Commission, Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, 2019 (Commission, Guidelines 2019), 18; see also RBB Economics/Cuatrecasas Gonçalves Pereira (2016) "Study on the Passing-on of Overcharges", European Commission (Pass-on Study 2016); see also R Noble and R Lauer, 'Pass-on and Volume Effects in Private Damages Actions: An Economic Perspective' (2018) 4 Competition Law & Policy Debate 30, 36.

[4]The Directive makes this very clear in its Art. 12 (2).

analysis of pertinent jurisprudence on pass-on in three jurisdictions (Germany, the Netherlands and Spain) is carried out. A focus will be put on the follow-on damage claims raised in relation to the truck cartel.[5] Pass-on is in general increasingly raised by defendants (and also by claimants).[6] The developments in the MS are not unaffected by European legislation, in particular the provisions in the rather recent Directive. Whereas the current cases are dealt with according to laws dating back from before the implementation phase (even if some judgements mention the Directive), future cases will more and more be subject to revised regimes. Therefore, as a final part this paper looks briefly at the changes the implementation of the Directive will bring about for comparable cases.

2. Economics of pass-on

There is a sound economic relationship between an overcharge that purchasers need to pay for their input factor or a product they will resell and pass-on.[7] Any purchaser pursues profit maximization.[8] This is true in the light of any price increase and, hence, clearly also if this price increase is the consequence of a violation of competition law.[9] It can generally be expected that a company considers a cost increase in its calculations.[10] The purpose of this decision is to compensate for losses in its profit margin.[11] In as much as there is little doubt on the general existence of pass-on, there is, however, no such thing as a typical pass-on rate.[12] The possibilities of pass-on are in particular unrelated to the level at

[5]*European Commission*, Summary decision of 19 July 2016, AT.39824 – Trucks.

[6]J-F Laborde, 'Cartel Damages Actions in Europe: How Courts Have Assessed Cartel Overcharges (2018 ed.)' (2019) 1(1) Concurrences 8; think of an indirect purchaser that is, of course, not directly affected by the overcharge but by the passing-on of such an overcharge. The use of passing-on as a "sword" is beyond the scope of this paper. It is obviously true that the amount that is passed on is the same no matter which side you consider it from – from the purchaser or seller perspective.

[7]See for more details RBB Economics (2014), "Cost pass-through: theory, measurement, and potential policy implications", a report prepared for the Office of Fair Trading (RBB Economics 2014 report), 17, starting on 122 also re empirical research; Commission, Guidelines 2019; see also FW Bulst, *Schadensersatzansprüche der Marktgegenseite im Kartellrecht* (Baden-Baden 2006) 281.

[8]B Durand and I Williams, 'The Importance of Accounting for Passing-on When Calculating Damages that Result from Infringements of Competition Law' (2017) 79 ERA Forum 81.

[9]R Inderst and S Thomas, *Schadensersatz bei Kartellverstößen. Juristische und ökonomische Grundlagen und Methoden* (2nd edn 2018) 296.

[10]ibid 296; Bulst (n 7) 286; U Schwalbe, 'Lucrum Cessans und Schäden durch Kartelle bei Zulieferern, Herstellern von Komplementärgütern sowie weiteren Parteien' (2017) 157 NZKart 159; RG Harris and LA Sullivan, 'Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis' (1979) 269 University of Pennsylvania Law Review 276: "passing on of overcharges is not the exception: it is the rule. […]".

[11]Durand and Williams (n 8) 85: "Whereas the overcharge reduces the profit margin earned per unit of output sold, the effect of passing-on is to increase that profit margin".

[12]*European Commission*, Practical Guidelines 2013, 50.

which a purchaser is located in a supply chain. It has to be assessed for each level individually. There are a number of decisive factors that determine the pass-on rate, however.[13] A pass-on decision is taken in the light of the demand curve whose price elasticity will determine how many customers will refrain from buying as a consequence of pass-on.[14] The following criteria that in the end all affect the demand curve are relevant:[15] If all purchasers on a market are affected by the cartel price, then the intensity of competition seems to be the most relevant criterion for the pass-on possibilities.[16] In a competitive market with prices being equal to marginal costs, pass-on can even be expected to be full – at 100%.[17] This is an extreme case that is often labelled "perfect competition" to simplify.[18] The result is intuitive because if the market price equals the marginal costs, all the companies (that all paid the cartelized price) have to increase their own prices because they have to earn at least their marginal costs to stay on the market. In reality there will be no such thing as "perfect competition" in markets. The other extreme case is the monopoly situation. A monopolist maximizes profits – hence also in the light of having bought a cartelized product.[19] In this exercise a monopolist will not necessarily pass-on the whole overcharge.[20] It could be shown that in a simplified scenario the monopolist will always pass on 50% of the overcharge.[21]

[13]MA Han, MP Schinkel and J Tuinstra, 'The Overcharge as a Measure for Antitrust Damages' [2008–08] Amsterdam Center for Law & Economics Working Paper Series 18: There is, furthermore, no simple calculation method.

[14]*European Commission*, Practical Guidelines 2013, 51; J Haucap and T Stühmeier, 'Wie hoch sind durch Kartelle verursachte Schäden: Antworten aus Sicht der Wirtschaftstheorie' (2008) 413 Wirtschaft und Wettbewerb 421; Schwalbe (n 10) 159; Inderst and Thomas (n 10) 303.

[15]The criteria mentioned in *European Commission,* Study on the Passing-on of Overcharges, 2016 are in essence congruent with ibid 298; Durand and Williams (n 8) 82 summarizes: "how widely firms are affected, the nature and intensity of competition on the relevant downstream market, the type of cost affected and the relationship between price and quantities demanded and supplied".

[16]Schwalbe (n 10) 159; Haucap and Stühmeier (n 14) 421; Inderst and Thomas (n 9) 298; *European Commission*, Practical Guidelines 2013, 51.

[17]Inderst and Thomas (n 9) 298; Van der Veer, Jan Peter and A Lofaro, 'Estimating Pass-on' (2010) 2 The CPI Antitrust Journal 3; Noble and Lauer (n 3) 32 for a short summary of the main relations; B Neurohr, 'A Tractable Cost Pass-Through Benchmark' (2016) 36 Economics Bulletin 1603; in that vein already Harris and Sullivan (n 10) 279, 283; R Cotterill, L Egan and W Buckhold, 'Beyond Illinois Brick: The Law and Economics of Cost Pass-Through in the ADM Price Fixing Case' (2001) 18 Review of Industrial Organization 45, 50; Commission, Guidelines 2019, 15.

[18]This is a market scenario based on a number of strong assumptions. Some economic contributions are more precise and argue based upon a market with Betrand competition (again resting upon a number of presumptions) where competitors compete heavily with the result that they also produce at marginal costs, see about this Martin Hellwig, 'Private Damage Claims and the Passing-on Defense in Horizontal Price Fixing caes: An Conomist's Erspective' in J Basedow (ed), *Private Enforcement of EC Competition Law* (Alphen aan den Rijn 2007) 128. For the purpose at hand it is crucial that producers only earn their marginal costs. To simplify further assume that such costs are constant for every unit.

[19]*European Commission*, Practical Guidelines 2013, 51.

[20]Van der Veer, Jan Peter, and Lofaro (n 17) 3; Inderst and Thomas (n 9) 441.

[21]For the assumptions, see Hellwig (n 18), Inderst and Thomas (n 9), 299, 603; Noble and Lauer (n 3) 32.

The results for oligopolies lie in between.[22] The pass-on rates, hence, regularly range from 50% to 100%.[23] These are as said the more realistic cases. One can tentatively say that the pass-on rate increases with the intensity of competition.[24] Market coverage of the cartel can be varied.[25] This factor determines in how far all purchasers on the after market are affected by the cartelized price.[26] The higher the market coverage, the more likely it is that a purchaser passes on damage.[27] The Oxera-study differentiates between "firm-specific" and "industry-wide" overcharges in this context.[28] With the latter pass-on is more likely *ceteris paribus*. If the market is, furthermore, competitive, there as said can be a full pass-on.[29] If only one company is affected on a competitive market, pass-on is expected to be zero.[30] Its competitors limit the possibilities of pass-on.[31] Purchasers would buy from them instead. Further parameters are the following: Fixed price calculation mechanisms in an industry can prevent pass-on in the short term.[32] Long term contracts might inhibit pass-on.[33] The same is true for strategic interactions between competitors.[34] The duration of the infringement is a decisive factor,[35] same as the frequency of transactions.[36] There might be a purchaser that has market power.[37] The type of cost that the overcharge affects might have an effect, too – meaning fixed or variable costs. Likewise it will affect the pass-on options if the cartelized input factor accounts only for a

[22]Van der Veer, Jan Peter, and Lofaro (n 17) 3.
[23]Pass-on Study 2016, 48.
[24]Inderst and Thomas (n 9) 299.
[25]Commission, Guidelines 2019, 41; R Inderst and S Thomas, 'Pass-on bei entgeltlicher Nutzungsüberlassung auf nachgelagerten Märkten' (2018) 158 NZKart 244; Inderst and Thomas (n 9) 302.
[26]*European Commission*, Practical Guidelines 2013, 50.
[27]; Pass-on Study 2016, iii, 31; *European Commission*, Practical Guidelines 2013, 51.
[28]Oxera, 'Quantifying Antitrust Damages – Towards non-Binding Guidance for Courts' (Oxera report 2009) x, 117; Durand and Williams (n 8) 82.
[29]Pass-on Study 2016, iii; Haucap and Stühmeier (n 14) 421; Noble and Lauer (n 3) 33: "the level of pass-on and the degree of competition are likely to be positively correlated if an infringement affects competitors alike"; Oxera report 2009, 117; *European Commission*, Practical Guidelines 2013, 51; note Durand and Williams (n 8) 82: "More precisely, this assumes that the unit costs of supply do not vary with the overall volume supplied. More generally, the extent of passing-on of industry-wide overcharges in the textbook perfectly competitive environment is predicted to depend on the relative price sensitivities (elasticities) of supply and demand, and can be less than 100%".
[30]Oxera report 2009, x; *European Commission*, Practical Guidelines 2013, 50; regarding a less extreme case Van der Veer, Jan Peter, and Lofaro (n 17) 3; Durand and Williams (n 8) 81.
[31]Van der Veer, Jan Peter, and Lofaro (n 17) 3: "pass on can be expected to be small".
[32]Oxera report 2009, 121; Commission, Guidelines 2019, 14.
[33]Inderst and Thomas (n 25) 160.
[34]Durand and Williams (n 8) 82; Inderst and Thomas (n 9) 301. More and more research is available regarding so-called umbrella effects. It might be that competitors do not reap off the costumers but increase their prices, too, under the umbrella of the cartel.
[35]Inderst and Thomas (n 9) 309; Durand and Williams (n 8) 82.
[36]*European Commission*, Practical Guidelines 2013, 51.
[37]Oxera report 2009, 121; Pass-on Study 2016, iv.

small portion of the total costs.[38] The type of good has an effect.[39] Last but not least an important factor for the profitability of pass-on is the volume effect. A price increase leads to a reduction in demand as determined by the demand curve. This reduction in demand under normal circumstances means some lost profits.[40] The pass-on decision ultimately determines the volume effect that a purchaser can expect.[41] Typically pass-on and volume effect are illustrated as two separate damage components. The volume effect can be calculated by multiplying the experienced reduction in sales with the profit margin that the company would have had per unit in the situation but for the infringement. Where there is pass-on, there is typically a volume effect.[42] The volume effect can, furthermore, be of a considerable amount.[43] Again the precise quantification depends on a large number of factors and is regarded as a major challenge from an economic point of view.[44] However, it does not take away that its general existence is well founded. Back to looking at pass-on in isolation: Pass-on is overall very heterogeneous.[45] Apart from 50% to100% range, there can be cases where pass-on is below 50%. Strong indicators would be low market coverage and a highly competitive market. The pass-on effect can also be higher than 100%.[46] There is some empirical research which confirms the variability of the pass-on rate.[47] It was, for instance,

[38]Inderst and Thomas (n 9) 307.

[39]Inderst and Thomas (n 25) 159.

[40]In essence only under the extreme scenario that the price elasticity of demand was perfect there would be no lost profit or under the extreme scenario in which producers were selling at marginal costs which the cartelized input factor would become a part of there is no lost profit because producers did not have a profit margin in the "but-for-scenario" to start with, see for details Inderst and Thomas (n 9) 441.

[41]*European Commission*, Practical Guidelines 2013, 52; ibid 439; Oxera, comments on 2011 draft guidance, 4. It is acknowledged that the decision of the cartelists and the volume effect they expect because of the price agreement is a very decisive factor here.

[42]Inderst and Thomas (n 9) 453, 454; Pass-on Study 2016, 50; Pass-on Study 2016, 196: "When a claimant passes on part or all of an overcharge, it will almost invariably lose sales volumes and will suffer harm in the form of the lost profit margins that would have been earned on those sales"; Van der Veer, Jan Peter, and Lofaro (n 17) 4: "Again, economic theory offers some useful insights into the likely magnitude of the output effect under different scenarios", *European Commission*, Practical Guidelines 2013, 49; Durand and Williams (n 8) 86: "If a firm increases its prices, then the volume of its sales will fall compared to the scenario in which those prices are unchanged. Passing-on will therefore result in the loss of the profit that would have been earned on those lost sales volumes"; Schwalbe (n 10) 157; Inderst and Thomas (n 9) 452.

[43]Schwalbe (n 10) 158; Van der Veer, Jan Peter, and Lofaro (n 17) 4: "[…]in a downstream market characterized by imperfect competition, the output effect can be very significant".

[44]Inderst and Thomas (n 9) 456.

[45]ibid 297; Noble and Lauer (n 3) 35.

[46]Durand and Williams (n 8) 85; RBB Economics 2014 report, 26; Pass-on Study 2016, 181 in the footnote: "In general, pass-on need not be 'all-or-nothing'. Economics suggests that pass-on can range from 0% to 100% and, in theory, can even be greater than 100%"; Commission, Guidelines 2019, 36. These cases seem to present a particular challenge to legal dogmatics.

[47]RBB Economics 2014 report, 17, 122; see also Frank Maier-Rigaud, C.-Philipp Heller and Philip Hanspach, 'Zur Weiterwälzung von Preisaufschlägen' (2019) 11 WuW 561–68, 561.

confirmed that the industry-wide pass-on is indeed higher than the firm-specific one.[48] Also a pass-on of more than 100% was found.[49] Again it holds true that the variability does not take away the fact that the existence as such is very certain from an economic point of view. The legal system can, hence, not avoid dealing with pass-on and consequently volume effects, that are as shown heavily interlinked, in the quest for coming as close as possible to the goal of full compensation.

3. Legal treatment of pass-on

Various European MS have accepted the challenge of dealing with pass-on in antitrust cases. The jurisprudence is mainly rather recent and shall be elaborated upon in the following:

3.1. Germany

3.1.1. General approach

In the German legal system pass-on is treated as a matter of "Vorteilsausgleichung" (adjustment of profits) and, hence, requires consideration once the damage that occurred has been determined.[50] So the amount that was passed on does not reduce the original damage amount in the sense that this damage is regarded as never having occurred in the first place. This also means that the overcharge can be claimed separately without any need from the claimants' side to refer to pass-on.[51] The concept of "Vorteilsausgleichung" reflects the prohibition of unjust enrichment. A victim that passed on damage may not profit from this behaviour. The burden of proof for this action, however, rests upon the defendant.[52] "Vorteilsausgleichung" becomes relevant when one event, one infringement, leads to both positive and negative effects.[53] In order for the positive effect to be

[48]RBB Economics 2014 report, 26: "There is, however, no clear evidence about the difference in magnitude between industry-wide and firm-specific cost pass-through […]".

[49]RBB Economics 2014 report, 126; Noble and Lauer (n 4) 35.

[50]See para 33c (1) 1 GWB (*Gesetz gegen Wettbewerbsbeschränkungen* – Law against Restraint of Competition); for details BGH judgment of 28.6.2011, KZR 75/10; Immenga/Mestmäcker/Emmerich, 5. ed. 2014, GWB § 33, para 61; A. S. Steinhardt, *Die Verwirklichung des Effektivitätsgrundsatzes im Rahmen von privaten kartellrechtlichen Schadensersatzansprüchen im internationalen und europäischen Kontext* (Berlin, 2018) 86; *Bornkamm/Tolkmitt* § 33c GWB in Langen/Bunte, Kartellrecht Kommentar, Band 1 – Deutsches Kartellrecht, 13. ed., 2018, Luchterhand Verlag, para 15; J-U Franck, *Marktordnung durch Haftung* (Tübingen 2016) 557; Inderst and Thomas (n 9) 350.

[51]S Thomas, 'Schadensverteilung im Rahmen von Vertriebsketten bei Verstoß gegen europäisches und deutsches Kartellrecht' (2016) 180 ZHR 45, 48.

[52]Instead of all BGH judgment of 17.10.2003 – V ZR 84/02, NJW-RR 2004, 79, para 17.

[53]MüKoBGB/Oetker, 8. ed. 2019, BGB § 249, para 231.

deductible, there has to be a causal link between this benefit and the infringement. The theory of adequate causation is pertinent.[54] Secondly, it can only be accounted for the benefit if this is in line with the purpose of the compensation rule, this means that the deduction may neither unduly burden the claimant nor unreasonably favour the defendant.[55] The most pronounced judgement regarding the operation of pass-on in competition law is the so-called "ORWI"-judgment – a follow-on litigation related to the carbonless paper cartel.[56] The Supreme Court *Bundesgerichtshof* (BGH) confirms also for competition cases that the burden of proof of showing the benefit (here in the form of pass-on) rests with the defendant. The defendant has to make this plausible with reference to the general market conditions on the after market, in particular with reference to the price elasticity of demand, the price development and the product characteristics.[57] The BGH furthermore restricts the scope of the passing-on defence by making it particularly hard for the defendant to invoke it. The judges to that effect ruled specifically on the role of the volume effect: A defendant that would invoke a passing-on defence had to establish that passing on the overcharge did not result in any detriment to the purchaser, in particular a reduction in demand.[58] The non-existence of the volume effect according to the BGH is an element of "Vorteilsausgleichung" that the defendant needs to show.[59] Additionally, only under very narrow circumstances would German law require a so-called "sekundäre Darlegungslast" from the victim, i.e. an obligation for the victim to disclose information whenever the burden of proof is actually with the other side but the information can – simply put – for good reasons not be provided by the party in charge. In very limited cases the victim would, hence, need to aid in proving the damage. In terms of procedure this must mean that any volume effect would need to be calculated against the amount that was passed on and only the remaining sum could then be subtracted from the overcharge amount. In practice no procedure until today has ever actually followed all these steps. The BGH also acknowledges that a price increase on the after market might be due to factors other than a cartel, e.g. the particular businessman's capabilities

[54]Bulst (n 7) 124 ff; not all agree with that, see MüKoBGB/Oetker, 8. ed. 2019, BGB § 249, para 246 with further references.
[55]Settled case-law, instead of all BGH judgment of 16.5.1980 – V ZR 91/79, BGHZ 77, 151, para 16.
[56]BGH judgment of 28.6.2011, KZR 75/10, BGHZ 190, 145.
[57]BGH judgment of 28.6.2011, KZR 75/10, BGHZ 190, 145, para 69.
[58]This contribution will not deal further with this damage component or with other potential negative consequences.
[59]Appreciative of this outcome Thomas (n 51) 67; Inderst and Thomas (n 9) 361.

or pre-existing price-setting ranges.[60] Showing a mere price increase on a cartel's after market is, therefore, not sufficient for the proof of causation. Factors that help to determine that there was pass-on are the price elasticity of offer and demand, the duration of the infringement and the intensity of competition. These factors partially overlap with the first "list" that the court gives (as said "price elasticity of demand, the price development and the product characteristics"). Both sets of factors taken together encompass some of the main economic parameters that were set out above.[61] Also, the BGH's lists do not seem to be closed lists. The court specifically refers to the case in which most purchasers are affected by the cartel – thus the wide coverage scenario – and the situation that their customers have no or only few possibilities of avoiding them.[62] This "and" construction seems a bit redundant from my point of view. In such a scenario, the court sets out that the causal link between the cartel and pass-on can generally be given if there was "workable competition on the after market" (*wenn der Wettbewerb auf dem Anschlussmarkt ansonsten funktionsfähig war*). Above it was indeed outlined how wide cartel coverage and intense competition are strong indicators for a high pass-on rate. Note that German law knows a general competence for courts to estimate damage if the exact quantification is disproportionately difficult[63] under the condition that the necessary leads are given to the court (according to § 287 [1] of the German Civil Procedural Code – *Zivilprozessordnung* [ZPO]). This competence is also applicable in the context of pass-on. Overall the BGH, hence, clearly referred to some of the economic criteria that determine the success of pass-on. It likewise shows awareness of the potential existence of detrimental volume effects. It, furthermore, highlights a scenario that comes close to the exemplary case outlined above in which the scope of the overcharge is "industry-wide" and the after market is a competitive market – conditions favourable to pass-on.

3.1.2. Recent case-law

Lower German courts have recently refused to accept the passing-on defence in a number of different cases and for a variety of reasons. One focus was laid on the question whether the after market was actually a

[60] BGH judgment of 28.6.2011, KZR 75/10, BGHZ 190, 145, paras 46 with further references.
[61] Thomas (n 51) 55.
[62] BGH judgment of 28.6.2011, KZR 75/10, BGHZ 190, 145, para 47.
[63] OLG Düsseldorf judgment of 14.5.2008 – VI-U (Kart) 14/07, WuW/E DE-R 2311, para 45: "soweit deren exakte Ermittlung unverhältnismäßig schwierig ist".

competitive one, referring back to the BGH judgment.[64] The LG (*Landgericht* – District court) Berlin argued like this, for instance, in the context of the lift cartel when stating that the subsequent lease of a subway station would not fulfil this criterion.[65] The court argues that there is no competition, neither on the supplier nor on the consumer side. The court, then goes on to acknowledging, however, that such a non-existence of a market (in its definition) does not exclude the occurrence of pass-on. Other courts followed a similar reasoning. LG Dortmund does in follow-on litigation in the context of the German railway cartel not regard the subsequent sale of tickets for tram and subway as a market activity.[66] It is acknowledged also by this court that the non-existence of a market (as they define it) as such does not exclude pass-on. This approach has been criticized from a legal and an economic point of view.[67] It is argued that the ORWI-judgment is interpreted too narrowly by the German lower courts if they argue that the non-existence of a competitive after market excludes pass-on as such.[68] Indeed in the ORWI-judgment referred to above this market situation is also to my understanding presented as an exemplary case which combines conditions that are favourable to pass-on. This specific passage of the judgment is partly also interpreted as a statement of prima facie evidence.[69] However, the BGH does thereby not pronounce itself about the monopoly situation or other market conditions under which competition is severely limited. It does not exclude that pass-on could occur under those market conditions as well. The economic insights presented above illustrated that pass-on can also go hand in hand with market power.[70] Indeed, some of the courts immediately recognize this, however, do not elaborate upon other market conditions in depth because pass-on falls through in their view for another reason. As a side-note, the apparent uneasiness of the courts to accept pass-on in regulated markets as such is not justified from an economic point of view either.[71]

[64] *Roth* in: Jaeger/Kokott/Pohlmann/Schroeder, Frankfurter Kommentar zum Kartellrecht, 93. Lieferung 04.2019, § 33c GWB, para 30 refers to come courts that do it correctly and others that misinterpret the BGH ruling in his view; this reasoning can be traced back to BGH judgment of 28.6.2011, KZR 75/10, BGHZ 190, 145, para 47.
[65] LG Berlin judgment of 6.8.2013–16 O 193/11 Kart, NZKart 2014, 37, para 60.
[66] LG Dortmund judgment of 21.12.2016 – 8 O 93/14 Kart, juris, paras 128.
[67] Monopolkommission (2018), XXII. Hauptgutachten der Monopolkommission gemäß § 44 Abs. 1 Satz 1 GWB (Monopolkommission Hauptgutachten 2018) 310.
[68] ibid 314: "Das Vorliegen eines wettbewerblich geprägten Anschlussmarktes muss im Rahmen der Prüfung somit vielmehr als verstärkender Faktor und nicht als notwendige Bedingung verstanden werden".
[69] ibid 55: The BGH seems to work with the tool of a prima facie evidence for the benefit of the indirect purchasers.
[70] See also Maier-Rigaud and others (n 47) 563.
[71] See Maier-Rigaud and others (n 47) 561.

A second set of reasoning concerns the missing reflection in prices, the lack of adequate causation. The mentioned judgments go quite in depth about the price calculation mechanisms, thereby seeming to present economic arguments. The LG Berlin elaborates why it saw no immediate relation between the overcharge and the rent paid for the subway station by the lessee by referring among others to a large number of factors that such a price reflects and also the fact that such contracts are concluded on a long-term basis.[72] The court, therefore, excludes the potential causal link of the cartel overcharge with the ticket price paid by the subway passengers. The LG Dortmund argues similarly with a view to the sale of tickets for tram and subway.[73] On appeal the OLG (*Oberlandesgericht* – Higher Court) Düsseldorf, furthermore, focuses on the fact that the defendant had not sufficiently shown that the claimant worked in a cost-covering way to start with which it regarded as a necessary precondition for a successful pass-on.[74] The judgments are criticized for too narrowly interpreting the BGH's judgment in terms of the required causal link.[75] From an economic point of view pass-on can be done in the context of quite a number of business activities. A lot of pass-on is possible independently of which type of costs were affected and how prices were calculated. Hence, from an economic point of view the courts operate too harshly. The LG Hannover is the first court to decide a case regarding the truck cartel. Again, in line with the reasonings just set out, it is quick to rule out a competitive after market when it comes to the communal waste disposal business and the public cleansing service.[76] This court does – at least not explicitly – state its awareness of the fact that competition on the after market is not a necessary condition for pass-on. The LG Dortmund excludes pass-on in the context of the truck cartel in the light of a suing transport company for yet another reason. It argued that even if the business of transportation could be classified as a market activity, there was a lack of congruency between the two markets.[77] It distinguished the cartelized product and the activity that was carried out on the after market. With reference to the ORWI-judgment it argued that pass-on can only apply to cases of selling or further processing of the cartelized

[72]LG Berlin judgment of 6.8.2013–16 O 193/11 Kart, NZKart 2014, 37, para 60. Therefore, ultimately there is no reason to allow for the passing-on defense even if the non-existence of a market (in the definition of the court) does not exclude pass-on.
[73]LG Dortmund judgment of 21.12.2016, 8 O 90/14 (Kart), WuW 2017, 98, para 132.
[74]OLG Düsseldorf judgment of 22.8.2018 – VI-U (Kart) 1/17, juris, para 145; criticized by Maier-Rigaud and others (n 47).
[75]Monopolkommission Hauptgutachten 2018, 310.
[76]LG Hannover judgment of 18.12.2017–18 O 8/17, WuW 2018, 101, para 99.
[77]LG Dortmund judgment of 27.6.2018–8 O 13/17, BeckRS 2018, 13951, paras 111 with further references.

product. From an economic point of view this cannot be backed up. Based upon this reasoning the court also denied the defendants' disclosure request regarding any pass-on activity.

A last set of arguments concerns the value judgment in the context of "Vorteilsausgleichung" – the question of whether the passing-on defence can be denied because it goes against the purpose of the compensation claim in question. More concretely courts have referred to the danger of "rational apathy" with the lower supply chain levels to deny the passing-on defence.[78] They saw a conflict of objectives in terms of the wrong-doer walking free and the unjust enrichment of the purchaser is to be solved in favour of the victim.[79] This is a legal argument. One might generally argue that the economic arguments should mainly be concerned with the question if pass-on in fact occurred whereas for the question whether the defense should actually be granted other arguments might come into play. Economic knowledge is of the essence to determine the whereabouts of damage in interlinked markets. As usual, it is about trade-offs, finding the right balance. It is the law's role to make a normative judgment based on scientific, economic evidence on the facts.

3.2. The Netherlands

3.2.1. General approach

Pass-on is generally regarded to fit well within the Dutch damages law and its ambition to put the claimant in the position as if the infringement never happened.[80] There are two options to consider it – either in the context of Art. 6:95 BW and following (*Burgerlijk Wetboek* – Dutch Civil Code) under the general definition of damage that deserves to be compensated or in the context of "voordeelstoerekening" – the Dutch variant of adjustment of profits (Art. 6:100 BW).[81] In the

[78]LG Dortmund judgment of 27.6.2018–8 O 13/17, BeckRS 2018, 13951, paras 122; LG Frankfurt am Main judgment of 30.3.2016, 2 06 O 464/14, juris, para 160; OLG München judgment of 8.3.2018 – U 3497/16 Kart, NZKart 2018, 230, para 87, similarly LG Stuttgart judgment of 30.4.2018–45 O 1/17, juris, para 64; BGH judgment of 28.6.2011 – KZR 75/10, BGHZ 190, 145, para 75; LG Kiel judgment of 18.4.2019 — 6 O 108/18, NZKart 2019, 435.

[79]LG Kiel judgment of 18.4.2019 — 6 O 108/18, NZKart 2019, 435.

[80]Asser/Sieburgh 6-II 2017/31; BJ Drijber, 'Privaatrechtelijke handhaving van het mededingingsrecht: nieuwe rechtspraak en nieuwe wetgeving' (2016) 124 Ondernemingsrecht 620, 625.

[81]Ton Hartlief, 'Schadevergoedingsrecht' in T Hartlief, AL Keirse, SD Lindenbergh and RD Vriesendorp (eds), *Verbintenissen uit de wet en schadevergoeding* (8th edn 2018), 255, 303; IN Tzankova, MJ Plomp and T Raats, 'Handhaven en balanceren: een tussenstand van privaatrechtelijke handhaving in Europa' [2013] Markt & Mededinging 178, 183; for a summary of both options, see AL Keirse and M van Kogelenberg, 'Schadebegroting bij een doorberekeningsverweer en een bijgestelde maatstaf voor voordeelstoerekening' [2016] Contracteren 97, 102.

context of Art. 6:100 BW damage and benefit have to result from the same event ("eenzelfde gebeurtenis"). There has to be causation in the sense of the conditio sine qua non-formula between the infringement and the resulting benefit.[82] It is noteworthy that the Dutch Supreme Court *Hoge Raad* (HR) rather recently argued actually specifically in a competition law case that there is in essence no difference between both variants.[83] The amount that was passed on both times has to be subtracted if this is "redelijk" (equitable) according to Art 6:98 BW now – that is the equity test that generally applies once the conditio sine qua non formula is satisfied. It was argued that there had been very few differences with the "redelijkheidstoets" (equity test) that Art. 6:100 BW originally presees, anyway. The HR, furthermore, sees no difference in the distribution of the burden of proof.[84] Both times it is possible that the burden of proof for pass-on ultimately rests upon the defendant. This is clearly the case with a view to Art. 6:100 BW but it might also be the result of pass-on being handled via Art. 6:95-97 BW in conjunction with Art. 6:98 BW.[85] Traditionally there were higher legal barriers for a passing-on defence via Art. 6:100 BW.[86] There was a higher likelihood that the causality would have been regarded as interrupted because of an autonomous decision of the victim.[87] In this way it was less readily admitted that a benefit resulted from the same event.[88] This is now overruled. In the light of the economics of pass-on set out above, the view that pass-on is not a deliberate decision taken by a purchaser but directly determined by the market conditions can be substantiated. The new requirements to account for pass-on in Dutch competition law (and beyond), hence, are that:[89]

[82] E-J Zippro, *Privaatrechtelijke handhaving van mededingingsrecht* (Alphen aan den Rijn 2009) 385.

[83] HR judgment of 8.7.2016, ECLI:NL:HR:2016:1483, para 4.4.1; the result is regarded according to W van Boom, 'Doorgeschoven kartelschade: schadeberekening of voordeelstoerekening?: Annotatie' (2017) Ars Aequi 41 on 42 as "verrassend eenvoudig" (surprisingly simple); surprised is also D Stein, 'Doorberekening van kartelschade: Annotatie bij HR 8 juli 2016, ECLI:NL:HR:2016:1483 (TenneT/ABB)' (2017) 8 NTBR 53, 56; not satisfied R Meijer and E-J Zippro, '"Elk nadeel heb z'n voordeel": (bewijslast)problematiek rondom het passingon verweer in kartelschadezaken' [2016] Markt & Mededinging 220, 224; T Hartlief, 'Voordeelstoerekening anno 2017' [2017] Ars Aequi 473, 483: pragmatic and laconic.

[84] HR judgment of 8.7.2016, ECLI:NL:HR:2016:1483, Rn 4.4.4.

[85] See JA Möhlmann and MR Fidder, 'TenneT/ABB: een mijlpaal voor kartelschade én het algemene schadevergoedingsrecht' [2016] Maandblad voor Vermogensrecht 262; Meijer and Zippro (n 83) 222 and Stein (n 83) 58.

[86] Keirse and van Kogelenberg (n 83) 102; Asser/Sieburgh 6-II 2017/99a, 100: "strenger" (stricter).

[87] Representative HR judgment of 10.7.2009, ECLI:NL:HR:2009:BI3402, para 3.7; dazu T Hartlief, 'Vos/TSN: schade, voordeel en schadebeperkingsplicht' [2010] WPNR 92.

[88] AJ Rijsterborgh, '"Een zelfde gebeurtenis" in art. 6:100 BW' [2012] AV&S 59.

[89] Meijer and Zippro (n 83) 224; Jeroen S Kortmann and F Blaauboer, 'Behandeling en bevoordeling door kartelinbreuken: het doorberekeningsverweer na TenneT/ABB' in EM Hoogervorst, C Jansen, M van de Moosdijk and A Knigge (eds), *Kartelschade* (Nijmegen 2019) 101, 115.

> (1) tussen de normschending en de gestelde voordelen dient een condicio sine qua nonverband te bestaan (het dient te gaan om een 'voordeel' dat zonder de normschending niet zou zijn ontstaan); (there has to be a conditio sine qua non-relationship between the infringement and the alleged benefit [it concerns a benefit that would not have emerged but for the infringement])
>
> and
>
> (2) het dient met inachtneming van de in artikel 6:98 BW besloten maatstaf redelijk te zijn dat die voordelen in rekening worden gebracht bij de vaststelling van de te vergoeden schade. (according to the benchmark of Art. 6:98 BW the subtraction of the benefit must be equitable with a view to assessing the damage that needs to be compensated.)

The procedure in which the HR intervenes is one out of two proceedings that TenneT is pursuing – against ABB and against Alstom. As it currently stands in the TenneT/ABB case ABB would have to pay around € 23 million (excluding interests).[90] The overcharge concerned a gas-insulated switchgear installation that TenneT acquired. According to the judge TenneT did not pass on the overcharge that negatively affected its assets in one act but step by step into the fees for its purchasers (the distributors). The court expresses some concerns about generally assuming that any company would pass-on such costs and acknowledges that there is an element of choice. However, this choice is determined by the question which prices the company can ask without losing its competitiveness in the market. Some markets allow for pass-on and others do not.[91] The court, hence, clearly shows its awareness of the importance of the market conditions for pass-on. In the case at hand one cannot speak of a free but rather of a regulated market, where the fees for electricity (that are affected by the pass on) are decided by the state. Therefore, in the case at hand one has to act upon the assumption that causation is given which is why an equity test is in order.[92] Note that the court does see the causal link as such and then moves on to a normative judgment. This reasoning stands in some contrast to the approach of the German courts that are not at ease as regards pass-on in regulated markets. The passing-on defence is not successful for the following reason according to the Dutch court's verdict: The final consumers at the end of the chain that are actually going to suffer the damage are not going to sue – in essence a comparable "rational apathy" argument to the one that

[90]Rechtbank Gelderland judgment of 29.3.2017, ECLI:NL:RBGEL:2017:1724.
[91]Rechtbank Gelderland judgment of 29.3.2017, ECLI:NL:RBGEL:2017:1724, paras 4.15.
[92]Rechtbank Gelderland judgment of 29.3.2017, ECLI:NL:RBGEL:2017:1724, paras 4.15.

some of the German courts consider. Therefore, the court prefers that TenneT keeps "all the compensation" as it is entirely owned by the Dutch state which is why after all the money kind of goes back to the final consumer.[93] Appeal is currently pending. The court of appeal is the *Gerechtshof Arnhem-Leeuwarden* and it requests expert evidence in an interim judgment.[94] To that end it compiles a list of questions, among others concerning pass-on.[95] The question whether the defence can be denied for equity reasons will come up again. There has de facto been pass-on which the claimant does also not deny.[96] All party reports already include obviously differing numbers regarding the pass-on rate.[97] The second procedure TenneT/Alstom is equally not yet final.[98] As it currently stands Alstom is to pay € 14.1 million in compensation (excluding interests). The court has pronounced itself in this procedure before the judgment of the HR was passed which is why the passing-on defence was assessed according to Art. 6:100 BW and rejected for equity reasons.[99] In the court's view Alstom did not sufficiently show why subtracting the benefit would be equitable. Also this court considered that TenneT's customers would not initiate litigation themselves. It is commented upon in the Dutch literature that this argument is legally irrelevant even if in fact true.[100] As said economic arguments can only be used as a support if pass-on effectively occurred or not. The equity correction at hand is still purely done on the basis of Art 6:100 BW and not the new general standard of Art. 6:98 BW. The HR did, by the way, in its judgement not pronounce itself about the question in how far pass-on may be denied if the next purchaser level or the final purchaser level will not sue. The volume effect was, furthermore, not pertinent which is why there was (in essence)[101] no mention of it. Apart from this element there are, generally speaking, similarities between both variants of adjustment of profits in Germany and the Netherlands in the sense that they are both requiring a causal link between infringement and benefit and the equity correction. The burden of proof regarding the pass-on lies with

[93]Rechtbank Gelderland judgment of 29.3.2017, ECLI:NL:RBGEL:2017:1724, parass 4.19.
[94]Gerechtshof Arnhem-Leeuwarden judgment of 29.5.2018, ECLI:NL:GHARL:2018:4876, para 5.17.
[95]Gerechtshof Arnhem-Leeuwarden judgment of 29.5.2018, ECLI:NL:GHARL:2018:4876, starting para 5.22.
[96]Gerechtshof Arnhem-Leeuwarden judgment of 29.5.2018, ECLI:NL:GHARL:2018:4876, para 5.27.
[97]According to the claimants 52–56%; according to the defendants partly 70.1% and partly 87.5%.
[98]The current last word has Gerechtshof Arnhem-Leeuwarden judgment of 28.8.2018, ECLI:NL:GHARL:2018:7753.
[99]Rechtbank Gelderland judgment of 10.6.2015, ECLI:RBGEL:2015:3713.
[100]Drijber (n 80) 626.
[101]It is only once mentioned as a theoretical possibility in Gerechtshof Arnhem-Leeuwarden judgment of 2.9.2014, ECLI:NL:GHARL:2014:6766, para 3.32.

the defendant in both legal systems. The Dutch legal system like the German one knows a judicial power to estimate damages (according to Art. 6:97 BW).

3.2.2. Recent case-law

The Netherlands aims to consolidate all truck cartel litigation before the *Rechtbank Amsterdam* on the basis of Art. 222 Rv.[102] Therefore, there are no judgements yet. It remains still possible that the whole procedure will be transferred to the newly installed Netherlands Commercial Court (NCC).[103] This new court structure can be jointly selected by claimant and defendant. Court language is English. Further requirements are that there has to be an international element in the procedure and the claims value has to be above € 25,000. Procedural costs are higher and at least one Dutch lawyer has to be involved in the procedure on both sides.

3.3. Spain

3.3.1. General approach

Spanish law also knows the principle of unjust enrichment.[104] It traditionally takes a positive stance towards accepting a passing-on defence.[105] The legal institution of *compensatio lucri cum damno* is also known in Spanish law.[106] It requires that the damaging event leads to both damage and a benefit ("ventaja").[107] The causal link with the infringement is again required. Scarcely a mention of an equity control can be found.[108] The

[102]Rechtbank Amsterdam judgment of 15.5.2019, ECLI:NL:RBAMS:2019:3574, para 3.38.

[103]Wet van 12 december 2018 tot wijziging van het Wetboek van Burgerlijke Rechtsvordering en de Wet griffierechten burgerlijke zaken in verband met het mogelijk maken van Engelstalige rechtspraak bij de internationale handelskamers van de rechtbank Amsterdam en het gerechtshof Amsterdam, Stb.m 2018, 474; with it also the Netherlands Commercial Court of Appeal (NCCA) was introduced. The HR remains the final authority.

[104]F Peña López, *La responsabilidad civil por daños a la libre competencia: un análisis de las normas de derecho sustantivo contenidas en el Título VI de la Ley de Defensa de la Competencia, mediante las que se transpone la Directiva 2014/104/UE* (2018) 158; GA Martín Martín, *Competencia, enriquecimiento y daños* (2019) 148 distinguishes the principle of "enriquecimiento injusto" and the legal institution "enriquecimiento sin causa" and shows how the courts do not always differentiate accurately. He is generally very critical of the added value of the legal institution.

[105]Peña López (n 104) 239; about the strengths and weaknesses of the passing on defense: ibid 226.

[106]Velasco San Pedro, Luis Antonio and Carmen Herrero Suárez, 'La "passing-on defence, ¿un falso dilema?' in Velasco San Pedro, Luis Antonio, C Alonso Ledesma, M Echebarría Sáenz, C Herrero Suárez and J Gutiérrez Gilsanz (eds), *La aplicación privada del derecho de la competencia* (2011) 593, 602.

[107]For the context of contract law see TS decision of 19.12.2018, ECLI: ES:TS:2018:13209A; further reading Díez-Picazo y Ponce de León, Luis, Derecho de daños, Madrid 1999; *Yzquierdo Tolsada*, Responsabilidad civil extracontractual, 2015.

[108]E Pastor Martínez, 'Cartelista con esfera reflectante: sobre la passing-on defense' [2019] Boletín Mercantil 9.

conditions for the legal institution are not so clear. It is, for instance, not so evident if the damage that was passed on is counted as never having come into existence in the first place or not – in other words the moment when the subtraction happens is not so clearly defined.[109] Neither it is exactly clear if the causal link is established via a test of adequacy or not. Overall Spanish courts only rarely refer to the legal institution and there is no mention of it in the law.[110] One recent contribution pronounces itself against its existence in Spanish tort law altogether.[111]

The Spanish Supreme Court *Tribunal Supremo* (TS) has like the German BGH and unlike the Dutch HR taken the opportunity to pronounce itself in a competition law case about pass-on in relation to possible negative consequences it entails for the purchasers. Germany and Spain as a consequence have developed similar mechanisms. The Spanish sugar cartel case in essence followed – without referring to it – the main rule established by the German ORWI-judgment.[112] It was much rather inspired by the case-law of the European Court of Justice (ECJ) which, then again, was only referred to once in the ORWI-judgment.[113] The topic of pass-on emerges in European Union law for the first time in 1979 in the *Ireks-Arkady* case (which is not a competition law case).[114] It then receives further attention in the ECJ case-law regarding the entitlement to the repayment of charges levied by a MS contrary to the rules of EU law.[115] In essence a compensation payment of such a charge would – if the recipient actually passed on this charge to the next level – lead to an unjust enrichment. The European Commission

[109]One hint is given by Patricia Vidal Martínez and Agustín Capilla, 'Título VI De la compensación de los daños causados por las prácticas restrictivas de la competencia (artículos 71 a 81)' in J Folguera, A Gutiérrez, J Massaguer and JM Sala Arquer (eds), *In Comentario a la Ley de Defensa de la Competencia (5.ª ed.) y a los preceptos sobre organización y procedimientos de la Ley de creación de la Comisión Nacional de los Mercados y la Competencia* (Cizur Menor (Navarra) 2017) Art. 76, 3 as he argues that the pass-on excludes the damage; Martín Martín (n 104) 189 seems to prefer an early subtraction, too.

[110]ibid 178. Spanish authors often refer to foreign sources when it comes to discussing the legal institution.

[111]Robles Martín-Laborda, Antonio: La inaplicabilidad de la defensa basada en la repercusión del daño (passing-on) a los casos de los cárteles de sobres y camiones. In: *Almacen de Derecho* 9.3.2020.

[112]TS judgment of 7.11.2013, ECLI: ES:TS:2013:5819.

[113]BGH judgment of 28.6.2011, KZR 75/10, para 63 with further references.

[114]EuGH, 4.10.1979, Rs. 238/78, ECLI:EU:C:1979:226 – *Ireks-Arkady*, para 14; see A. Schwietert, *Der effet utile und das Kartellzivilrecht. Die Vorgaben des Unionsrechts bei der Ausgestaltung der Zivilrechtsfolgen des Art. 101 AEUV* (Baden-Baden, 2018), 140; Pass-on Study 2016, 21.

[115]Cp. the judgments EuGH 9.11.1983, Rs. 199/82, ECLI:EU:C:1983:318 – *San Giorgio*, paras 12; EuGH 14.1.1997, Joint cases C-192/95 bis C-218/95, ECLI:EU:C:1997:12 – *Comateb*, paras 20; EuGH 27.2.1980, Rs. 68/79, ECLI:EU:C:1980:57 – *Just*, para 26; EuGH (Fifth chamber) 21.9.2000, Joint cases C-441/98 und C-442/98, Slg 2000, I-7145-7181 – *Michailidis*, para 34; EuGH (Fifth chamber) 2.10.2003, Rs. C-147/01, ECLI:EU:C:2003:172 – *Weber's wine world*, paras 94; Bulst (n 7) 237 ff with further references; G Meessen, *Der Anspruch auf Schadensersatz bei Verstößen gegen EU-Kartellrecht* (Tübingen 2011) 511.

prefers to talk of the "defence of unjust enrichment".[116] According to the ECJ's case-law MS are free to go against such a pass-on but they are under no obligation.[117] The requirements of the defence are two: firstly the proof of pass-on and secondly the proof that there were no negative consequences attached to pass-on. Hence, the volume effect is recognized and hinders in this sense the occurrence of an unjust enrichment partially or totally.[118] In the words of the European Commission pass-on and the de facto resulting unjust enrichment are cumulative conditions in order for a passing-on defence to be considered.[119] The burden of proof in that regard lies with the defendant – it may not be the claimant that has to show that there was no such thing as pass-on.[120] The scope of the burden of proof includes the volume effect.[121] This case-law can be translated to the competition law context.[122] Therefore, it is also true in the competition law context that MS may go against such pass-on situations but they are before the Directive is passed under no obligation.[123] The burden of proof rests upon the defendant.[124] This proof includes the non-existence of the volume effect.[125] This case-law is the basis for the Spanish judgement in which the passing-on defence is permitted in the quest of avoiding unjust enrichment, most prominently in the case "Azúcar II".[126] The Spanish like the German defendant was allotted the burden of proof and had to show the non-existence of a volume

[116]Europäische Kommission, Arbeitspapier zum Grünbuch, 59.

[117]EuGH, 27.2.1980, Rs. 68/79, ECLI:EU:C:1980:57 – *Just*, para 26; EuGH (Fifth chamber), 21.9.2000, Joint cases C-441/98 und C-442/98, Slg 2000, I-7145-7181 – *Michailidis*, para 31.

[118]Representative EuGH, 27.2.1980, Rs. 68/79, ECLI:EU:C:1980:57 – *Just*, para 26; EuGH 14.1.1997, Joint cases Rechtssachen C-192/95 bis C-218/95, ECLI:EU:C:1997:12 – *Comateb*, paras 31; M Ebers, *Rechte, Rechtsbehelfe und Sanktionen im Unionsprivatrecht* (Tübingen 2016), 604; Bulst (n 7) 238; Meessen (n 115) 514.

[119]Europäische Kommission, Arbeitspapier zum Grünbuch, 59.

[120]EuGH (Fifth chamber) 2.10.2003, Rs. C-147/01, ECLI:EU:C:2003:172 – *Weber's wine world*, para 111; Schlussanträge des Generalanwalts Slynn vom 29. September 1987 in den verbundenen Rechtssachen 331/85, 376/85 und 378/85, ECLI:EU:C:1987:391 – *Bianco und Girard*, 1111; ibid 513; HP Logemann, *Der kartellrechtliche Schadensersatz. Die zivilrechtliche Haftung bei Verstößen gegen das deutsche und europäische Kartellrecht nach Ergehen der VO (EG) Nr. 1/2003 und der 7. GWB-Novelle* (Berlin 2009)116; K Schürmann, *Die Weitergabe des Kartellschadens* (Baden-Baden 2011) 57 with further references.

[121]Pass-on Study 2016, 23; ibid 60.

[122]Bulst (n 8) 244; C Heinze, *Schadensersatz im Unionsprivatrecht* (2017) 161, 235; Meessen (n 115) 513; Schürmann (n 120) 37; Europäische Kommission, Arbeitspapier zum Grünbuch, 57; M Strand, *The passing-on problem in damages and restitution under EU law* (2017) 338; Logemann (n 120) 117; *Roth* in: Jaeger/Kokott/Pohlmann/Schroeder, Frankfurter Kommentar zum Kartellrecht, 93. Lieferung 04.2019, § 33c GWB, para 12 with further references; Ebers (n 118) 604 with further references: unclear.

[123]EuGH 20.9.2001, Rs. C-453/99, ECLI:EU:C:2001:465 – *Courage*, para 30; EuGH (third chamber) 13.7.2006, Joint cases C-295/04 bis C-298/04, ECLI:EU:C:2006:461 – *Manfredi*, para 94, 99; Schürmann (n 120) 39; Ebers (n 118) 603; Bulst (n 7) 240; Meessen (n 115) 512; Heinze (n 122) 235.

[124]Europäische Kommission, Arbeitspapier zum Weißbuch, 64; Europäische Kommission, Weißbuch 2008, 9.

[125]Schürmann (n 120) 60; Logemann (n 120) 118.

[126]TS judgment of 7.11.2013, ECLI: ES:TS:2013:5819.

effect.[127] This was argued to be in line with the European requirements and also with Article 217 LEC (*Ley Enjuiciamiento Civil* – Spanish Civil Procedural Code) – the relevant provision for the allocation of the burden of proof.[128] Proving a partial pass-on was likewise regarded as possible.[129] An equivalent to the German "sekundäre Darlegungslast" – the obligation imposed upon the purchasers to cooperate when it comes to disclosing evidence under very narrow circumstances is not evident. In the case at hand the passing-on defence was not granted and the defendant had to pay the full amount of compensation – € 4.1 million – plus interests. The TS carried out an economic analysis. It called the vision to only look at the price increase on the after market simplified.[130] The assessment has to deal with the question of whether the economic damage ("el perjuicio económico, el daño") resulting from the overcharge was passed on.[131] Seen like this the price increase set by the purchaser is a necessary but not a sufficient condition. It has to be assessed on top if any harm remained for the purchaser as can be the case if a volume effect emerges due to pass-on. The defendant carries the burden of showing that there was no such thing as a volume effect.[132] If a volume effect is shown the defensa "passing-on" cannot be granted or at least not in its entirety. It is more generally argued in the literature that pass-on is predictable from the cartelists' point of view which is why the condition of adequate causation is fulfilled.[133] Hence, prior to the implementation of the Directive similarly to the situation in Germany in the event of proving pass-on the case-law gave an advantage to the claimant by relieving him or her of the necessity to prove the volume effect. Again no such case has ever occurred. The Spanish TS does not elaborate much on the market conditions, whereas the German BGH does.

[127]P Hitchings, MA Malo and L Loras, 'Considerations concerning the implementation of the EU competition law damages directive in Spain' [2015] *Concurrences - Revue des droits de la concurrence* 25, 27; Pedro-José Vela Torres, 'Experiencia de la sala primera del tribunal supremo en aplicación privada de la competencia' in JI Ruiz Peris (ed), *La compensación de los daños por infracción de las normas de competencia tras la directiva 2014/104/UE. Directiva y propuesta de transposición* (2016) 53, 71.

[128]TS judgment of 7.11.2013, ECLI: ES:TS:2013:5819, F.D. para 5.1.

[129]F Marcos, 'Damages Claims in the Spanish Sugar Cartel' (2015) 3 Journal of Antitrust Enforcement 205, 224.

[130]TS judgment of 7.11.2013, ECLI: ES:TS:2013:5819, F.D. para 5.3; E Sanjuán y Muñoz, *Valoraciòn de daños en los supuestos antitrust* (2017) 145; Peña López (n 104) 248.

[131]The terms "sobrecoste" and "daño" are no synonyms, vgl. Purificación Martorell Zulueta, 'La cuantificación del daño desde la perspectiva de un experto' in JI Ruiz Peris (ed), *Derecho Europeo de compensación de los daños causados por los cárteles y por los abusos de posición de dominio de acuerdo con la Directiva 2014/104/UE: proyecto europeo "Training of National Judges in EU Competition Law* (2018) 157, 170.

[132]Hitchings, Malo, and Loras (n 127) 27; Vela Torres (n 127) 71.

[133]Peña López (n 104) 231.

3.3.2. Recent case-law

The Spanish lower courts have been rather active with a view to litigation in the context of the truck cartel, denying the passing-on defense throughout. Pass-on finds the first mentioning in a judgment from Zaragoza.[134] The defensa is quickly denied. The judge notices and questions, by the way, the strategy that the defendant on the one hand denies the existence of any overcharge but on the other hand brings the defensa "passing-on". In a next judgment in Valencia the defensa "passing-on" is again denied as it was not appropriately argued.[135] The consecutive judgment from Valencia that is referred to in many of the ensuing judgments is crucial for the latest developments in Spanish case-law.[136] The presiding judge takes the opportunity to distinguish two pass-on situations when assessing a disclosure request:[137] In his view there is on the one hand the classical situation in which a cartelized product is sold on. Such a situation merits disclosure as pass-on is a realistic option. However, for the other situation where the claimant uses the cartelized trucks to carry out transportation services, an own commercial activity, this is not the case. In this second situation the judge regards the claimant as a final consumer with no possibilities of pass-on.[138] There was, hence, no causality that stretched to the prices that the customers paid for the transportation of their goods. To motivate his decision, the judge refers to two German proceedings.[139] There are in the judge's view two different markets without a close link – the market on which the truck selling cartelists act and the market for transportation services. Therefore, any potential actions taken by the claimant on this separate market are beyond the scope of the defensa "passing on".[140] If you wish, the judge makes a differentiation between a market that has a vertical and one that has a horizontal link with the market on which the cartel operates. The defendants had alleged that pass-on had occurred. Indeed, the similarity with the judgment by LG Dortmund is obvious. The two judges even take the same consequence in

[134]Juzgado de lo Mercantil N°. 1 de Zaragoza judgment of 13.12.2018, ECLI: ES:JMZ:2018:4752, F.D. para 3.
[135]Juzgado de lo Mercantil N°. 3 de Valencia judgment of 20.2.2019, ECLI: ES:JMV:2019:34, F.D. para 8.99.
[136]Juzgado de lo Mercantil N°. 3 de Valencia judgment of 13.3.2019, ECLI: ES:JMV:2019:187, later Juzgado de lo Mercantil N°. 3 de Valencia judgment of 7.5.2019, ECLI: ES:JMV:2019:222, F.D. paras 8.98; Juzgado de lo Mercantil N°. 3 de Valencia judgment of 15.5.2019, ECLI: ES:JMV:2019:510, F.D. para 8.92; Juzgado de lo Mercantil N°. 3 de Valencia judgment of 13.9.2019, ECLI: ES:JMV:2019:1002, F.D. paras 7.83.
[137]Juzgado de lo Mercantil N°. 3 de Valencia decision of 17.12.2018, ECLI: ES:JMV:2018:147A.
[138]Juzgado de lo Mercantil N°. 3 de Valencia decision of 17.12.2018, ECLI: ES:JMV:2018:147A, F.D. para 17.
[139]Juzgado de lo Mercantil N°. 3 de Valencia decision of 17.12.2018, ECLI: ES:JMV:2018:147A, F.D. para 18 makes reference to LG Dortmund judgment of 27.6.2018–8 O 13/17, BeckRS 2018, 13951 and LG Hannover judgment of 18.12.2017 - 18 O 8/17, WuW 2018, 101 – both have been referred to above – where it was found that the markets were not identical ("no pueda apreciarse esa identidad de mercados").
[140]Juzgado de lo Mercantil N°. 3 de Valencia decision of 17.12.2018, ECLI: ES:JMV:2018:147A, F.D. para 22.

terms of denying a related disclosure request because of ruling out pass-on in certain circumstances. Whereas the LG Dortmund refers back to ORWI to underpin its reasoning, the Spanish judge quotes the Directive – more precisely Art. 12. The Spanish judge is criticized for discussing this question of legal causality under the wrong heading.[141] From a legal point of view such a pass-on action could be regarded as not foreseeable for the cartelists and therefore fail the test of legal causation. One can immediately remark that this argument is doubtful from an economic point of view given that the cartelists fix their price in anticipation of profit maximizing behaviour along the whole supply chain. The judge acknowledges that from an economic point of view damage can be passed on “ad infinitum”.[142] The Spanish judge rather confidently underlines the precedence that the legal perspective takes over the economic one.[143] This does not seem to be the ideal interplay. Rather, with the help of economics the actual causality can be ascertained, whereas there may be additional legal arguments for disregarding this evidence for specific cases in the context of the limitations possible when checking for legal causality. The Spanish judge also, even if not very concretely, refers to the ORWI and TenneT judgments, same as the English case Sansbury’s.[144] He does not regard the value of economics as absolute.[145]

3.4. Changes brought about by the cartel damages directive

With the Directive the consideration of the passing-on defence becomes a “must” for the MS. The European requirements are to prevail over the pre-existing national solutions. The defendant, when faced with a damage claim for the overcharge, may invoke the so-called passing-on defence (Art. 13), showing that the claimant has reduced his or her damage by passing it on to the next level of the supply chain to reduce the amount of compensation he needs to pay. The burden of proof regarding the pass-on according to the Directive rests very clearly with the defendant. There are no presumptions available to his benefit. However, the court’s

[141]A Robles Martín-Laborda, ‘El alcance de la repercusión del daño (passing-on) derivado de infracciones del Derecho de la Competencia’ (2019) *Almacen de Derecho*.

[142]Juzgado de lo Mercantil N°. 3 de Valencia judgment of 7.5.2019, ECLI: ES:JMV:2019:222, F.D. para 119; there is no established test frame, see Pastor Martínez (n 108) 2.

[143]Juzgado de lo Mercantil N°. 3 de Valencia judgment of 7.5.2019, ECLI: ES:JMV:2019:222, F.D. para 8.108; see also Juzgado de lo Mercantil N°. 3 de Valencia judgment of 30.12.2019, ECLI: ES:JMV:2019:1265, F. D. para 67.ii.

[144]Sainsbury’s Supermarket Vs. Master Card 14.7.2016, 1241/5/7/15 (T).

[145]Pastor Martínez (n 108) 11; Juzgado de lo Mercantil N°. 3 de Valencia judgment of 30.12.2019, ECLI: ES: JMV:2019:1265, F. D. para 67.iii regrading weaknesses of the economic method.

powers to estimate must apply as usual (see Art. 12 [5]). The defendant can use the passing-on defence against any purchaser (except for the final consumer).[146] In case of a partial pass-on, the remaining amount needs to be compensated.[147] With the implementation of the Directive MS differently to before are required to introduce a passing-on defence that fulfils the minimum criteria of the Directive into their national laws. This leaves them overall with a limited amount of flexibility. When it comes to the volume effect the Directive stipulates it as a completely separate action and regulates it only very superficially. It merely states that the provisions set out regarding pass-on are without prejudice to claiming lost profit.[148] More concretely, Art. 12 (3) reads:

> This Chapter shall be without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.[149]

This constitutes a change compared to the previous ECJ jurisprudence on matters of pass-on.[150] The formulations in the Directive in this context seem to favour the defendant far more.[151] Art. 13 makes clear that pass-on is only concerned with the fate of the price overcharge.[152] An emerging volume effect can thus not exclude the passing-on defence.[153] This new regime prevails over the pre-existing national regimes.[154] This requires in particular that the volume effect is considered separately.[155] Note that the first proposal for a Directive also considered pass-on (in its Art. 12 [1]), however, in Art. 12 (2) it was furthermore restricted because: "Insofar as the overcharge has been passed on to persons at the next level of the supply chain for whom it is legally impossible to claim compensation for their harm, the defendant shall not be able to invoke the defence referred to in the preceding paragraph". The fact that this restriction is omitted in the final formulation supports the conclusion that it is rather doubtful if the final Directive leaves scope for such value

[146] Pass-on Study 2016, 4.
[147] D Ashton (ed), *Competition Damages Actions in the EU. Law and Practice* (2nd edn 2018) 53.
[148] See Art. 12 (3).
[149] With "this Chapter" it is referred to Chapter IV – "The Passing-on of overcharges".
[150] It was not pronounced specifically for competition law but the findings of case-law in other legal fields could be translated. See above at 3.3.
[151] Franck (n 50) 575.
[152] Heinze (n 122) 237; Inderst and Thomas (n 9) 355, 364f.
[153] Heinze (n 122) 237, 617; C Kersting and N Preuß, 'Umsetzung der Kartellschadensersatzrichtlinie (2014/104/EU): Ein Gesetzgebungsvorschlag aus der Wissenschaft', 48.
[154] Heinze (n 122) 235 regarding the German "Vorteilsausgleichung".
[155] H Schweitzer, 'Die neue Richtlinie für wettbewerbsrechtliche Schadensersatzklagen' [2014] NZKart 335, 338; Franck (n 50) 575.

judgments.[156] However, the Directive leaves it in the hands of the MS how causation is established.[157] In that regard, if we think of the potential of the criterion of legal causation – requirements of, for instance, adequacy or equity – to restrict the possibilities of finding a causal link some normative adaptation might remain possible.

As a side-remark: Another change that the Directive brings about is the explicit introduction of a (rebuttable) presumption of pass-on to the benefit of the indirect purchaser (cp Art. 14 [2]). It concerns the damage component as such and not its quantity.[158] Suffice it to say here that the introduction of such a presumption to the benefit of the indirect purchaser but not (about the same damage component!) to the benefit of the cartelist, is weak from an economic point of view. It appears, hence, likely, that judges in the future may consider the pass-on presumption indirectly also when assessing a cartelists' passing-on defense.

Regarding the value judgments that courts in various MS have taken in the context of the passing-on defence these options seem more limited after implementation of the Directive. Some German scholars argue that a reasoning about the passivity of the next levels in the supply chain forbids itself after the Directive.[159] As alluded to the Directive, however, leaves a certain scope for additional requirements for causation.[160] Therefore, I would argue that a certain freedom is still given even after the implementation. This freedom is restricted by the principles of effectiveness and equivalence. In particular in the light of the principle of effectiveness one might be able to argue that having the wrongdoer escape liability is the least desirable of outcomes when the goals of full compensation and full liability are traded off. It might indeed be preferable to solve trade-offs in favour of the victims rather than the tortfeasors.[161] Generally speaking predictable criteria would be desirable. What is true for Germany, is also

[156]H-PH Hanson and J Holzwarth, 'Discovering New Spheres of Antitrust Damages Quantification: The European Commission, National Courts, and Guidelines on Passing-on' [2019] CPI Antitrust Chronicle February 1, 6.

[157]Recital 11; this was also recently reaffirmed by EuGH (Fifth Chamber) 12.12.2019, Rs. C-435/18, ECLI:EU:C:2019:1069 – *Otis u.a./Land Österreich*.

[158]The three conditions necessary as a basis for the presumption to kick in (infringement of competition law, overcharge for direct purchaser and proof that the indirect purchaser bought from the [affected] direct purchaser) do not contain economic arguments.

[159]A. Fritzsche, 'Schadensabwälzung – Auslegungsfragen zum Kartellzivilrecht nach der 9. GWB-Novelle' (2017) *NZKart* 630, 635; *Roth* in: Jaeger/Kokott/Pohlmann/Schroeder, Frankfurter Kommentar zum Kartellrecht, 93. Lieferung 04.2019, § 33c GWB, para 27; Inderst and Thomas (n 9) 366.

[160]So auch *Roth* in: Jaeger/Kokott/Pohlmann/Schroeder, Frankfurter Kommentar zum Kartellrecht, 93. Lieferung 04.2019, § 33c GWB, para 38.

[161]Likewise A Petrasincu, 'Kartellschadensersatz nach dem Referentenentwurf der 9. GWB-Novelle' [2016] WuW 330, 331f; Christian Kersting, 'Kartellschadensersatz: Haftungstatbestand - Bindungswirkung - Schadensabwälzung' in C Kersting and R Podszun (eds), *Die 9. GWB-Novelle* (2017) 115, 152; LG Kiel judgment of 18.4.2019 — 6 O 108/18, NZKart 2019, 435.

true for the Netherlands and Spain. The European legislation seems to increase the convergence of the MS jurisprudence. When it comes to disregarding economic arguments by way of a legal reasoning the Directive as such does not give the MS any guidance in how far economic reasonings for causation in fact are to be weighed against normative arguments for legal causation. However, the Commission seeks to train the European judges in economics with the additional guidance it passed. Some conflicts with the Directive are, furthermore, seen between the ORWI- and "Azúcar II"-judgments with a view to allocating the burden of proof that there was no such thing as a volume effect to the defendant side.[162] The volume effect is, however, not the main concern of this paper.

4. Conclusion

Damages in competition are treated as a category of special torts which is why to start with the general tort law system of the MS as enhanced and overridden by the European requirements re pass-on are applicable in cartel cases. The case-law decided according to old law shows that pass-on is almost categorically denied for a number of reasons that are doubtful from an economic point of view. The Directive introduces some specific requirements. However, it does give some leeway to the MS, too. Questions that the Directive does not solve, like causation, are solved in the traditional tort and procedural law. Many current challenges and potential solutions in cartel cases boil down to the question of causation in the broad sense.[163] More than with more "ordinary" torts, however, factual causation for the different damage components of an antitrust violation can be explained by economics – in fact can only be explained by economics. It is this intuition that leads to the necessity of trading off economic insights on causation with legal considerations. Whereas it seems preferable to take a normative value judgment only after the factual economic basis has been established, it is also true that economic proof is costly and an investment in economic evidence whose result will later be disregarded for legal reasons can be considered a societal waste. Furthermore, economic evidence is far from perfect, the result may vary with the data available and the quantification method chosen, and is in that sense

[162]Kersting and Preuß (n 153) 48; T Makatsch and AS Mir, 'Die neue EU-Richtlinie zu Kartellschadensersatzklagen – Angst vor der eigenen "Courage"?' [2015] EuZW 7, 12; Schweitzer (n 155) 337; Heinze (n 122) 219; Peña López (n 104) 248.

[163]This contribution is focused on the question of causation as regards the existence of pass-on as such – it is less concerned with the subsequent and interlinked challenge of actual damage quantification.

often not capable to establish causation beyond any doubt. The array of cases shows how different courts are currently struggling with this trade-off. Clearly, judges are also limited by their naturally missing economic expertise. It, therefore, seems paramount to continue fostering a joint approach between law and economics of causation that allows improving the understanding of market dynamics, to determine the sufficient degree of proof for different types of damage, to develop a legal causation test inspired by economics and a resource-saving approach that not least leads to predictability for the litigants.

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