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Fixing the damages – expected effects of the application of the Damages Directive

EU Competition Day – Sofia, 31 May 2018

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Introduction – where do we come from?



- 2001 *Courage v Crehan* judgment (C-453/99)
- 2005 Green Paper on damages actions
- 2008 White Paper on damages actions
- 2013 Recommendation on collective redress
- 2013 Communication on quantifying harm
- Directive 2014/104/EU 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 ([2014] O.J. L 349/1) – hereafter: DD
- 2016 study on the passing-on of overcharges

Transposition - status



- Transposition by 27 December 2016 (Article 21)
 - 7 Member States complied with the deadline
 - 18 Member States transposed within 2017
 - 3 Member States transposed in 2018
- Process complete: all Member States have transposed the DD in national law, but:
 - Completeness check, prior to decision on the status of infringement procedures
 - Conformity check, leading to possible actions for non-correct transposition

Damages actions – pending cases



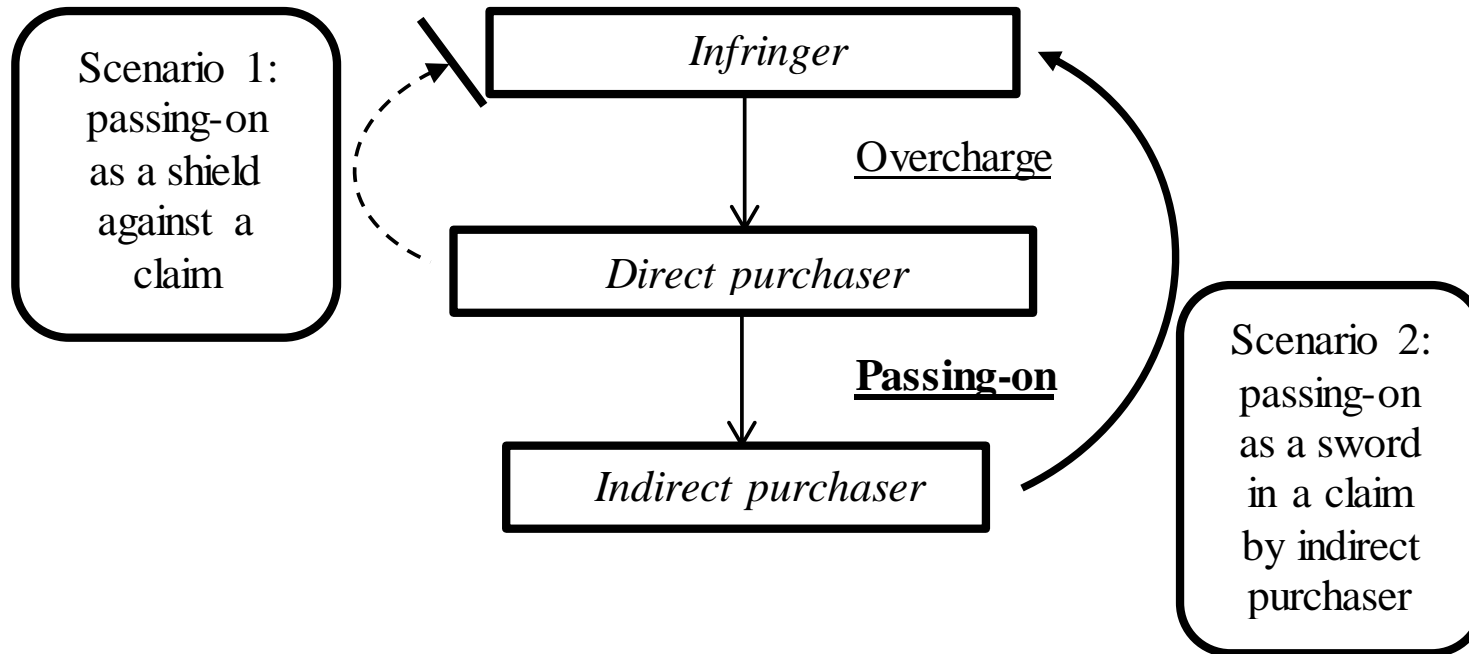
- C-637/17, **Cogeco v. Sport TV Portugal**
 - Follow-on from PT NCA dominance case (sports channel)
 - Limitation periods and binding effects of NCAs' decisions
- C-724/17, **Vantaan v. Skanska/NCC/Asfaltmix**
 - Follow-on of national asphalt cartel in Finland
 - Liability and the notion of undertaking under EU (101 TFEU) vs national law, and in public vs private enforcement?
- E-01/17, **Nye Kystlink v. Color Line**
 - ESA follow-on action (exclusivity clause)
 - Equivalence/effectiveness of limitation periods
- E-06/17, **Fjarskipti hf. v. Síminn hf.**
 - Ability to invoke Art. 54 EEA to claim compensation
 - Effect of final decision by competition authority

Passing-on guidance



- Article 16 – Guidelines for national courts: « *The Commission shall issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser* »
- Purpose of the Guidelines:
 - Summarize the legal framework
 - Explain the role of economic theory
 - Provide an overview of approaches for quantification
 - Give examples of evidence needed for quantification

Passing-on guidance



Passing-on guidance



- Legal framework:
 - The right to full compensation
 - Presumptions in the context of passing-on
 - Proportionality of disclosure requests
 - The court's power to estimate
- Role of economic theory:
 - Provide a framework for assessing evidence (e.g., explain the incentives of firms to pass-on or not)
 - Assist judges when deciding on disclosure requests (e.g., explain why certain evidence are relevant)
 - Form a basis for discerning the credibility and reliability of different economic explanations (e.g., eliminate implausible explanations of passing-on effects)

Passing-on guidance



- Preferred approach for quantification: comparator based methods
 - Time counterfactual: overcharge vs non-overcharge period (pre- or post-infringement)
 - Market counterfactual: main product and comparator (similar product unaffected by overcharge)
- Alternative methods: connection between cost changes and prices to estimate pass-on rate
 - But assumes that changes in input costs are reflected in prices, which is not necessarily the case
 - But assumes that costs increases are all passed on at identical rate, whereas the input affected by overcharge may be of limited value

Confidentiality guidance?



- Under DD disclosure rules, national courts to:
 - balance interests in confidentiality vs access to evidence
 - protect confidentiality of disclosed information and ensure non-disclosure of certain submissions
- Notice on the protection of confidential information (based Article 5§4 DD)?
 - Standards and conditions for the protection of confidential information under Charter, TFEU and secondary EU legislation (DD and others)
 - Overview of protection systems available in EU Member States and good implementation practices
 - Non-binding practical and flexible solutions easy to implement and adjust to specific situations

Conclusion: what's next?



- More private enforcement?
- Better deterrence?
- Convergences and/or divergences in transposition and implementation?
- Collective redress?
- Spill-over effects beyond competition law?
- Report to the European Parliament and Council by 27 December 2020

Back up slides



Collective redress

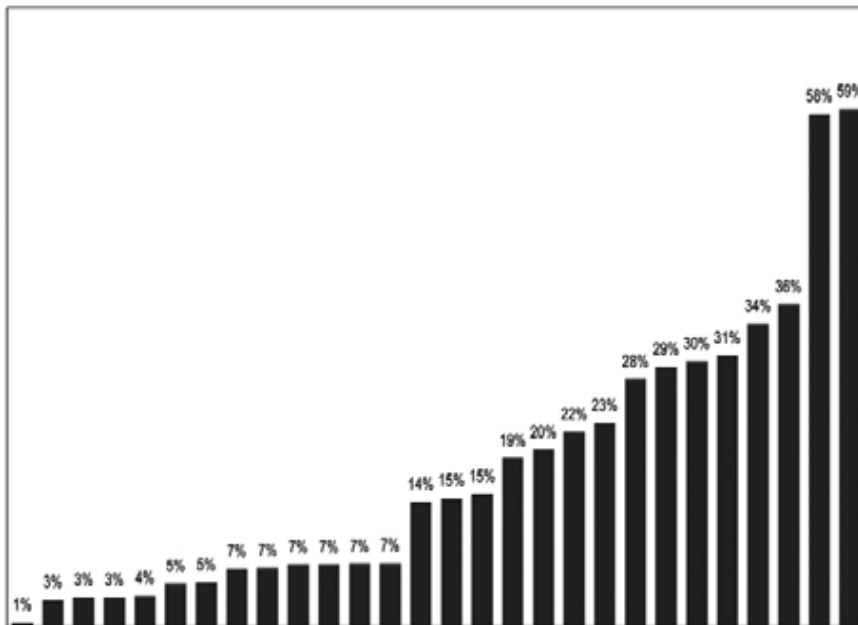


- At least 16 Member States already foresee some mechanisms/proceedings for collective damages actions for competition law infringements.
- Proposed Directive on representative actions as part of the New Deal for Consumers (11 April 2018): does not cover competition law
- Once sufficient experience of the DD implementation has been gained, the Commission will assess the need to take further action

Quantification of overcharges



■ Range of overcharge:



■ Quantification:

Method	#
Comparison over time	14
Comparison with an unaffected market	4
Cost based and financial methods	5
Regression analysis / econometrics	0
Simulation models	0
Other methods	5