UNIVERSITÀ DEGLI STUDI DI TRENTO
FACOLTÀ DI GIURISPRUDENZA
Dottorato in Studi Giuridici
Comparati ed Europei

Corso di Dottorato in studi Giuridici Comparati ed Europei

XXVII ciclo

Tesi di Dottorato

Causation in private enforcement of competition law: a comparative analysis of divergent national approaches

Relatore
Prof. Giuseppe Bellantuono

Dottorando
Claudio Lombardi

Anno accademico 2013 - 2014

UNIVERSITÀ DEGLI STUDI DI TRENTO
FACOLTÀ DI GIURISPRUDENZA
Dottorato in Studi Giuridici
Comparati ed Europei

Candidato: Claudio Lombardi

Causation in private enforcement of competition law: a comparative analysis of divergent national approaches

Relatore: Prof. Giuseppe Bellantuono

Anno accademico 2013 - 2014

Indirizzo specialistico in Diritto privato, privato comparato e commerciale

XXVII ciclo

Esame finale: 17/03/2015

Commissione esaminatrice:

Prof. Maurizio Borghi, Università di Bournemouth
Prof. Stefano Bastianon, Università di Bergamo
Prof. Renzo Riccardo Cavalieri, Università Cà Foscari Venezia
Prof. Peter Behrens, Università di Amburgo, Europa-Kolleg Hamburg

To Ayan
and my family

Table of contents

Introduction 1

I. Causation in competition law damages actions 3

1.1. Empirical analysis of competition law damages actions in European Union: the importance of researching causation 4

1.2. The causal connection in competition law damages actions 7

1.3. Causation theories: a primer 12

1.4. Causation in fact 15

1.5. Categories of conditions for causal connection 18

1.6. Legal causation and the selection of damages 19

II. Comparative analysis of causation in national courts 23

2.1. Germany 24

2.2. France 25

2.3. Italy 28

2.4. England 31

2.5. Causation in the US antitrust case law 34

2.6. Economic analysis of the different approaches to causation 36

III. Causation in the European Union competition law and decisions 41

3.1. Causation in the Court of Justice of the European Union decisions 42

3.2. Causation in the European Union competition law 45

3.3. Principle of equivalence and effectiveness as (positive) limits to the national rules on causation . 47

3.4. The objectives of the Directive 104/214 and of articles 101 and 102 48

3.5. The right to full compensation in the Directive on antitrust damages claims 51

3.6. Scope of competition law damages and causation 53

3.7. Convergence of different causation regimes: the effects of a diverse set of legal frameworks 57

3.8. Causation and EU law 59

IV. Causal uncertainty in damages claims for competition law infringement 63

4.1. Balance of probabilities by national courts 64

4.2. The use of probability and the creation of risk 68

4.3. Loss of chance 71

4.4. Lost chances in national antitrust case law 74

4.5. Probability, causal uncertainty and competition 81

4.6. Causal proportional liability and multiple tortfeasors 82

4.7. The single economic entity and the causal contribution to the harm 86
V. Proof of causation and standards of proof in competition damages actions 91
5.1. Proving causation in national courts 93
a. Civil law jurisdictions 94
b. Common law jurisdictions 97
5.2. Proving causation in the antitrust case law 98
5.3. Standards of proof, judges persuasion and causal uncertainty in competition law 100
5.4. Proving the uncertain causation 103
5.5. Inferences and legal presumptions 104
5.6. Econometrics and the 'calculation' of causation in EU competition law 107
5.6.1. When 'but-for' becomes 'if then': the counterfactuals 111
5.6.2. The two different uses of economic tools for causation 114
5.6.3. The use of counterfactuals and the presumption of damage in the case law 117
VI. Indirect claimants and causal uncertainty in damages actions for competition law infringements 121
6.1. Indirect purchasers and the passing-on of an overcharge 122
6.1.2 Passing- on as a matter of causation 125
6.1.3. Passing-on in non-competition law cases and the CJEU 131
6.1.4. Passing-on in national courts: a comparative overview 133
6.1.5. The regulatory framework for passing-on in Europe 143
6.1.6. Passing-on of the overcharge in the 'Damages Directive' 146
6.1.7. How the passing-on works in the Directive: a game of opposing presumptions 150
6.1.8. Heads of damages and computation of cartel damages in passing-on 154
6.2. Indirect purchasers aggrieved by 'umbrella effects' 156
6.2.1. What is an umbrella price 157
6.2.2. The reference for a preliminary ruling of the Austrian Court 159
6.2.3. Causation and umbrella effects 159
6.2.4. On the application of national law 160
6.2.5. Legal causation, consequential damages and the burden of proof 161
6.2.6. Umbrella actions following the Kone case 163
Conclusion 165
Bibliography 167

Abstract

Competition law damages actions are often characterised by the uncertainty of the causal connection between the infringement and the harm. The anticompetitive damage consists in a pure economic loss caused by a market distortion. Here, the complexity of the market structures, combined with the interdependence of individuals' assets, fuel this causal uncertainty. The recently adopted Damages Directive, in line with the decisions of the Court of Justice of the EU, established a regime based on the compensatory principle, consequently giving central importance to the definition and to the assessment of the causal connection between the infringement of competition law and the harm suffered. Surprisingly, the Directive provides no guidance to the assessment of the causal connection. By consequence, national courts apply domestic principles of causations, which are deeply rooted in their legal traditions. This thesis first addresses the concept of causation in competition law damages actions, discussing the main and more relevant approaches in tort law theory. Therefore, it describes the different solutions for the assessment of causation in competition law adopted by national courts and critically analyses the approach laid down by the European Union law and Courts. In order to examine in depth the reasons of the causal uncertainty in competition law damages actions, it delves into the analysis of the proof of causation and of the use of econometrics. The underlying comparative analysis serves, from a practical perspective, to observe how judges engage the problem of causal uncertainty in competition damages actions, while, from a theoretical standpoint, it addresses and complements the research of appropriate approaches.

Introduction

Liability for compensation of private damages in European competition law is the result of the judicial interpretation of Articles 101 and 102 TFEU, which were designed for the public antitrust enforcement. The European Court of Justice introduced the principle of right to compensation for violation of competition law with the two seminal cases *Courage*[1] and *Manfredi*[2]. In the latter, in particular, the Court stated that "*any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited*"[3]. The principle was then clinched into the recently approved Directive 104/2014 on competition damages actions[4]. The compensatory principle is based on a corrective justice regime where the duty to repair the damage burdens only the subjects that have caused the damage.

The European Union law, however, provides few or no guidance to the judge in the assessment of the causal connection. The CJEU's decisions together with the Directive, confer the right to stand to any individual harmed by the infringement, but do not deal with the instantiation of causation. It follows that, in accordance to Article 3, Regulation 1/2003, national courts have to apply their domestic laws of obligations, within the limits traced by the principles of effectiveness and equivalence. The claimant in actions for damages has therefore to prove the breach of law, the damage and the causal connection between the two, mainly relying on the applicable national laws of substance and procedure.

The analysis of antitrust litigation in Europe reveals that only a minority of cases are based on claims for compensation of damages. Of these cases, a very small proportion is initiated by indirect purchasers or subjects aggrieved by deadweight

[1] Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others ECR I-06297 (2001).

[2] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA ECR [2006] I-06619 (2006).

[3] Ibid., para. 61.

[4] *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance*, 349AD.

losses. The fil rouge connecting these situations is the causal uncertainty of the claim that makes the assessment of liability particularly complex. Surprisingly, no attention was given by the academia to the causal connection between the infringement of competition law and the damage[5].

Damages caused by antitrust infringements are pure economic losses protected by EU and national laws. As such, one might not doubt the fact they are indemnifiable, but the causal connection with the infringement rests in a covert of thick uncertainty. An antitrust infringement, by definition, restricts or distorts the competition in the relevant market and, potentially, all individuals acting in the same market may be affected by it. Direct purchasers may claim the disgorgement of overcharges paid and indirect purchasers the compensation of the overcharge passed-through the supply chain. While competitors aggrieved by exclusionary conducts may claim compensation for market foreclosure and lost chances, to mention just few. The consumer or undertaking who sees her assets diminished in value would base her claim on a loss of welfare caused by the antitrust infringement. The problem of causation has a long and diversified history that shaped different approaches in the Member States legal doctrines. Hence, national courts tend to assess this connection adopting different standards.

This thesis first addresses the concept of causation in claims for damages for infringement of competition law, discussing the main and more relevant approaches in tort law theory (I). Therefore, it discusses the different approaches for the assessment of causation in competition law in national courts (II). Then, it describes and critically analyses the approach adopted by the European Union law and Courts to causation (III). In the fourth chapter, it delves into the fundamental issues of causal uncertainty in competition law damages actions (IV), to which it follows the analysis of the standards of proof for causation (V). It will then focus on particular cases of causal uncertainty that have a primary role in competition law litigation (VI). A conclusion follows.

[5] The only example being, up to the moment, Hanns A. Abele, Georg E. Kodek, and Guido K. Schaefer, "Proving Causation in Private Antitrust Cases," *Journal of Competition Law and Economics* 7, no. 4 (2011): 847–69.

I. Causation in competition law damages actions

The European Union law grants the right to claim for damages to anyone who was harmed by an antitrust infringement, be they consumers, undertakings or public authorities[1]. This is the legacy of the *Courage*[2] and *Manfredi*[3] cases and also the text of the recently adopted Directive 104/2014[4]. However, this should not be equated to a call for unlimited responsibility of antitrust infringers. The decision-maker, in each specific instance, has to verify the existence of a "*causal relationship between the harm suffered and the prohibited arrangement*"[5]. It is, indeed, through the filter of causation that national courts select the damages that are compensated for the infringement of EU competition law. Despite this, the attention of scholars has generally focussed on the right to stand and on the quantification of damages[6]. The Damages Directive solved, once and for all, the doubts regarding the right to stand, according it to any legal or natural person who has suffered a harm caused by a violation of competition law. On the other hand, the Directive explicitly avoids dealing with causation and leaves its definition to the Member States laws of obligation. Competition law damages actions show a marked causal uncertainty. Meaningfully, the impact study ordered by the Commission in 2007 pointed out that "*it seems that the success of a claim in the EU*

[1] Article 1 *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance*, 349AD.Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA [2006] ECR I-06619.

[2] Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others [2001] ECR I-06297.

[3] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA [2006] ECR I-06619.

[4] *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance*, OJ L 349 5.12.2014, 1–19.

[5] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA [2006] ECR I-06619, para 17.

[6] Ever since the adoption of Regulation 1/2003 academic research has tried to analyse and define such requirements. Scholars have tried to explain the proof of the antitrust infringement, to smooth the hurdles for the quantification of the damages and to proposed solutions to several procedural rules. The quantification of damages may become particularly complex in antitrust litigation, because of the deep use of econometrics and economic theories. However, judges generally have the power to estimate the amount of damages, avoiding therefore their precise calculation.

would be dependent on whether the plaintiff is actually able to prove causation"[7]. Despite this, causation in competition law litigation continues to be one of the most underexplored topics on both sides of the Atlantic[8]. From this comes the need to identify a proper theory of causation for antitrust litigation[9].

1.1. Empirical analysis of competition law damages actions in European Union: the importance of researching causation

The analysis of empirical data on national litigation shows that where the causation link is more difficult to be found, the action is not proposed or is, in many cases, quashed by the judge[10]. For instance, only a minority of the actions submitted in the domestic systems are purported by indirect purchasers and the majority of them have been rejected by national judges. Moreover, the relatively low success rate in follow-on claims shows the difficulties encountered by private parties in proving that the damage to the market is causally linked to a precise prejudice suffered[11]. When the

[7] Centre for European Policy Studies (CEPS), Erasmus University Rotterdam (EUR) and Luiss Guido Carli (LUISS), 'Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios' <http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf> accessed 8 May 2014, 36.

[8] See in the U.S., Michael A. Carrier, "A Tort-Based Causation Framework for Antitrust Analysis," *Antitrust Law Journal* 77 (2011): 991; similarly observe for the EU, Ioannis Lianos and Damien Geradin, *Handbook on European Competition Law: Substantive Aspects* (Edward Elgar Publishing, 2013); Ioannis Lianos and Christos Genakos, "Econometric Evidence in EU Competition Law: An Empirical and Theoretical Analysis," *CLES Research Paper Series 06/12*, October 1, 2012, available at http://papers.ssrn.com/abstract=2184563.

[9] This is the observation made in the only paper published, at present on the topic: Hanns A. Abele, Georg E. Kodek, and Guido K. Schaefer, "Proving Causation in Private Antitrust Cases," *Journal of Competition Law and Economics* 7, no. 4 (2011): 847–69.

[10] I based my empirical analysis on some investigations already done in the field of private enforcement of competition law. I added updates and integrations but, above all, I analysed the aggregate data with reference to causation that none of these works have ever taken into consideration.

[11] See, for instance, in France: Tribunal de Commerce de Nanterre, Arkopharma v. Hoffmann La Roche, 11 May 2006; Tribunal de Commerce de Paris, Laboratoires JUVA v. Hoffmann La Roche, 26 January 2007; Cour d'Appel de Paris, SNC Doux Aliments Bretagne etc v. SAS Ajinamoto Eurolysine, no. 07/10478, 10 June 2009; Cour de Cassation, Doux Aliments v Ajinomoto Eurolyne, no. 09-15816, 15 June 2010. In Italy, recently: Tribunale di Milano, Brennercom Spa v. Telecom Italia Spa, no. 14802/2011, 3 March 2014; Tribunale di Milano, Brennercom Spa v. Telecom Italia Spa, no. 22423/2010

national competition authority has already proven the anticompetitive behaviour, the claimant only needs to substantiate the damage and the causative link. While the claimant holds generally all the information necessary to prove the harm, the thorniest hurdle rest with the causation requirement.

The studies undertaken show that, at least in the period 1999-2014, the majority of claims are proposed by direct purchasers, while only a small part of these actions have been proposed by other classes of claimants, such as indirect purchasers. The reasons of this poor representation may be of different nature. The information asymmetry between parties and the hurdles to access relevant evidences may have played a role. A second factor may be the uncertain right to stand for such classes of claimants in some jurisdiction, until the recent decisions of the CJEU and enforcement of the Damages Directive. Moreover, consumers may be discouraged from bringing a claim for competition law damages, given that there is no common collective redress[12] system in Europe and that the existing ones produce insufficient results[13]. Finally, indirect purchasers, counterfactual buyers and other subjects who claim similar losses, may find particularly difficult to substantiate causation. This volatility translates into a rather consistent uncertainty of the causal link between the loss and the infringement.

Some studies inform that part of these damages are not left uncompensated, since parties often prefer settlement agreements or arbitration proceedings, above all in follow on actions[14]. However, even taking into consideration these settlements, the damages caused by antitrust infringements to these private parties appear to be in great part uncompensated. Moreover, the preference of these subjects for settlements

---

27 December 2013; Tribunale di Milano, OkCom Spa v. Telecom Italia Spa, no. 76568/2008, 13 February 2013; Tribunale di Milano, Teleunit Spa v. Vodafone Omnitel Spa, no. 75623/2008, 1 October 2013. In England: JJB Sports Plc v Office of Fair Trading [2004] CAT 17, [2005] Comp. A.R. 29; Healthcare at Home v Genzyme Ltd [2006] CAT 29; Napp Pharmaceuticals Holdings Ltd v Director General of Fair Trading [2002] CAT 1; Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors (Rev 1) [2008] EWCA Civ 1086.

[12] Consumers are often indirect purchasers of goods or services subject to the infringement and their interest to claim for damages independently is generally frustrated by lack of knowledge about the underlying antitrust infringement and the litigation costs as compared to the value of goods or services purchased.

[13] Towards a Coherent European Approach on Collective Redress, SEC(2011) 4.2.201, 4 February 2011.

[14] See UK Report in Barry Rodger, *Competition Law, Comparative Private Enforcement and Collective Redress Across the EU* (Kluwer Law International, 2014).

procedures over judicial claims are a further clue of their attempt to avoid the representation of uncertain elements of the action, first of all, causation.

The empirical analysis is developed with reference to four European Member states, in particular United Kingdom, Germany, Italy and France. The choice hinged on reasons of dimension of their economies, number of cases and diversity of the approaches adopted by national courts. In all four selected countries, the majority of actions use competition law as a defence, generally to oppose the nullity of the contract that the claimant wants to enforce[15]. In this regard, the European Commission estimates that only 25% of the final cartel and antitrust prohibition decisions taken in the period 2006-2012 were followed by private damages actions[16].

Therefore, despite the active role of antitrust authorities that have found and fined tens of infringement each year, private enforcement of competition law is mainly used as a counterclaim by defendants. The ratio of success in private claims is consistently higher for counterclaims than in damages claims based on competition law[17]. The low percentage of follow-on damages actions and, in general the scarce representation of damages claims, sided with the low success ratio show that damages claims are deterred by the procedural and substantial hurdles of domestic procedures.

As noted, in follow-on claims the plaintiff is relieved from the burden of proving the antitrust infringement, having to substantiate only damage felt and causation. Therefore, without taking into consideration possible procedural mistakes of the claimant, we have to believe that the main hurdle for claimants resides in the causation.

Among the analysed jurisdictions, the UK is the one with the highest success rate for damages claims, although it is still below a sufficient threshold. In UK the success rate is indeed about 40%, with only 32 cases where one of the litigants successfully claimed the application of competition law, in the period 2009-2014[18]. Of these 32 cases, however, 25 were active claims that ended successfully. Moreover, only

[15] Ibid. See also the national Reports attached for the interested countries.

[16] *Commission Staff Working Document Accompanying Document to the White Paper on Damages Actions for Breach of the EC Antitrust Rules - Impact Assessment*, 2008 para 52.

[17] German Report, Rodger, *Competition Law, Comparative Private Enforcement and Collective Redress Across the EU*, 21.

[18] UK Report, ibid., 13.

two of all the follow-on claims before the CAT, have ended in a final judgment. Between them, only one was successful[19]. The United Kingdom, however, is an exception among the analysed countries since the success rate of damages actions resulted in any case to be the highest, at least if taken into consideration damages actions ended up with a settlement, since damages awards by courts have been extremely rare. In Italy, for instance, in the period 1999-2012 there have been 133 decisions by courts concerning the application of competition law, of which 54 were stand-alone and 44 follow-on (the remaining 35 being non-classified).

Notwithstanding these signs and despite the fact that some studies already admonished about the perilous nature of causation in private claims based on competition law[20], the attention of regulators and experts has been focused on aspects of the antitrust actions other than the causal link[21].

1.2. The causal connection in competition law damages actions

Causation can be approached as a unitary topic, mostly from an epistemological point of view[22]. However, as already remarked in philosophy, causation is "*one word [but] many things*"[23]. At the eyes of the lawyer, the link between a conduct and a specific event is not necessarily the result of a deterministic model for which causation is the conjunction between the two. Causation in the law is a particularly elusive

[19] UK Report, ibid., 21.

[20] See, for instance, Centre for European Policy Studies (CEPS), Erasmus University Rotterdam (EUR), and Luiss Guido Carli (LUISS), "Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios", 36; *Green Paper - Damages Actions for Breach of the EC Antitrust Rules SEC (2005) 1732 COM/2005, 672*, 2005, 62; *Commission Staff Working Document Accompanying Document to the White Paper on Damages Actions for Breach of the EC Antitrust Rules - Impact Assessment*; *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*, 2013, paragraph 4.2.

[21] Such as the related but different topic of the information asymmetry which is capable to preclude the substantiation of infringements

[22] Helen Beebee, Christopher Hitchcock, and Peter Menzies, *The Oxford Handbook of Causation* (Oxford University Press, 2009); Jon Williamson, "Causal Pluralism versus Epistemic Causality" *Philosophica-Gent* 77 (2006): 69.

[23] Nancy Cartwright, "Causation: One Word, Many Things" *Philosophy of Science* 71, no. 5 (2004): 805–20.

concept whose definition is influenced by the extent and importance of the other elements of the non-contractual obligation.

a. Causation and the anticompetitive harm

In antitrust litigation, the assessment of causation is in first instance influenced by the rule of law it triggers and by the type of harm claimed. Infringements of Articles 101 and 102 TFEU may cause two different kinds of effects. Firstly, they often bring about the imposition of a price overcharge on all the units actually sold. Secondly, they may cause the so-called lost-volume effect, which is a dead-weight welfare loss[24]. European Union law does not exclude any of these damages as a matter of principle. The Directive has recently confirmed the strict adherence of EU law to the principle of compensation, excluding from its application punitive, multiple and similar damages[25]. By consequence, both the harm for price overcharge and for lost-volume effect (without comma) obliges the tortfeasor to compensate actual loss and loss of profits, plus the payment of interests[26].

The damage caused by an antitrust infringement is a pure economic loss, as it arises from the infringement without connection to personal injury or property damage. Although some European countries are still discussing about the compensable nature of pure economic losses[27], when these losses are caused by antitrust infringements they may be compensated in all the Member States as they originate from the violation of a statutorily protected interests (articles 101 and 102 TFEU). However, they keep the typical traits of causal uncertainty surrounding pure economic losses. The damage in antitrust infringement consists indeed in a loss of welfare; the person aggrieved by the

[24] For a description of loss-volume effect in competition law see Kai Hüschelrath and Heike Schweitzer, *Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives* (Springer, 2014), 127.

[25] Article 3 (3).

[26] Article 3 (2).

[27] For instance, to some extent, United Kingdom and Germany; see Mauro Bussani and Vernon Valentine Palmer, *Pure Economic Loss in Europe* (Cambridge University Press, 2003); Vernon V. Palmer and Mauro Bussani, *Pure Economic Loss: New Horizons in Comparative Law* (Taylor & Francis, 2009); Jef De Mot, "Pure Economic Loss" in *Tort Law and Economics*, ed. Michael Faure (Edward Elgar Publishing, 2009), 201.

infringement has to demonstrate that she would be better off but-for the competition law restriction. The claimant has to show that the diminution of her assets, as a consequence of higher prices paid, lost chances or dead-weight losses, was caused by the antitrust infringement and not by other market factors. The particularly difficult task of ascertaining such causative link is effectively summed by Benson who, with reference to pure economic losses taking place on the market, observes that "*[T]he fact that every individual is somewhere and is making use of some external objects, with the result that he or his property is put into relation with them and is subject to being affected by conduct that affects them, is an inevitable incident of being active in the world . . . [considered as] beings who exist in space and time and who are inescapably active and purposive, persons are necessarily and always connected in manifold ways with other things which they can affect and which in turn can affect them as part of a causal sequence*"[28].

b. Causation and the type of anticompetitive conduct

From the point of view of the behaviour causing harm, it is possible to differentiate between harm from exclusionary conduct and harm from exploitative abuses and cartels[29].

The first type of anticompetitive conduct aims at foreclosing the market to other competitors and new comers[30]. This target can be pursued through both a cartel and the

[28] Benson, Peter, "The Basis for Excluding Liability for Economic Loss in Tort Law" in *Philosophical Foundations of Tort Law*, ed. David G. Owen, 1995, 443; Bussani and Palmer, *Pure Economic Loss in Europe*, 4 footnote n. 2.

[29] For a thorough overview of the discipline see Phillip Areeda and Herbert Hovenkamp, *Fundamentals of Antitrust Law* (Aspen Publishers Online 2011), 6-23; Jürgen Basedow and Wolfgang Wurmnest, *Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid* (Kluwer Law International 2011); Robert Pitofsky, *How the Chicago School Overshot the Mark: The Efect of Conservative Economic Analysis on U.S. Antitrust: The Effect of Conservative Economic Analysis on U.S. Antitrust* (Oxford University Press 2008), p. 142 ss; Gustavo Ghidini, Marcello Clarich, Fabiana Di Porto e Piergaetano Marchetti, *Concorrenza e mercato. Rassegna degli orientamenti dell'autorità garante (2009)* (Giuffrè Editore 2010), 21.

[30] Basedow and Wurmnest, *Structure and Effects in EU Competition Law*.

abuse of a dominant position[31], for example by fixing predatory prices. In these cases the injured parties are those who, as a consequence of the unlawful behaviour, have been excluded or foreclosed from the market. However, a number of different causes can concur to the exit of such undertakings from the relevant market. The causal link therefore has to establish with a certain degree of probability that it is the antitrust infringement that caused the foreclosure of the competitor, not other concurring factors.

In this connection, causation responds also to the need of avoiding that the injured party is unjustly enriched by the claim. For instance it can happen that a competitor claims that its exit from the market causally depends on the anticompetitive behaviour of another firm when, instead, it would have in any case happen. Other events interrupt the chain of causality, making the antitrust infringement ineffectual for the causation of the damage. In these cases, therefore, the damages are not awarded, given the compensatory nature of the proceeding and the lack of a direct causal link between the unlawful behaviour and the damage. Moreover, the risk embedded in the exercise of an economic activity cannot be reversed on the antitrust infringer[32] in absence of a causal nexus (i.e. in those cases where, even if the cartel would have not been set, the damage would have happened).

In the second type of anticompetitive conducts, amounting to an exploitative behaviour through unlawful agreements or abuse of dominant position, the infringer fixes a price, which is overcharged. The damage consists in the overcharge itself multiplied for the number of purchases. Depending on the type and length of the market chain, the anticompetitive conduct can involve different subjects at the same time. The number of damaged parties can increase uncontrollably, from direct purchasers of the goods or services to indirect purchasers, to whom the overcharge is passed on through the market chain. The line of injured parties can be extended till the final consumer who - as a last user - receives the good or service. Here is touchable the temptation for the judge to identify the proof of the anticompetitive behaviour with the evidence about the existence of a damage, skipping therefore the assessment of causation.

[31] Michele Roma 'Abuso escludente mediante contratto' in Antonio Catricalà, *I contratti nella concorrenza* (UTET Giuridica 2011), chapter 6, 246 ff.
[32] Pietro Trimarchi, *Causalità e danno* (Giuffrè, 1967).

Finally, national law of obligations have to be interpreted in accordance with the European Union law that they trigger (c.d. duty of consistent interpretation)[33].

If so, we should ask what characteristics identify the causation for antitrust infringement. European jurisdictions generally reconnect the illicit antitrust behaviour to the general rules on non-contractual liability[34]. It would therefore come natural to state that the same rules that find application in tort law have to be enforced in competition law litigation. However, damages for infringements of competition law proved to have peculiarities, which distinguish them from other torts. Antitrust infringements very often impact on sophisticated supply chains working in highly complex market structures[35], which make the identification of causative links particularly difficult.

This chapter sorts out the analysis of causation into three different parts. Firstly, it examines the different theories used for assessing the causative link in competition law. Since European competition law jurisdictions draw these principles from domestic tort laws, the analysis will be initially centred on the explanation of the most relevant aspects of these approaches. Secondly, the causation in antirust is revised with reference to the anticompetitive behaviour. Here it is described the link connecting the behaviour to the damage (cause in fact or material cause). In this regard, the chapter also considers the different categories of conditions used in the causal inquiry. Thirdly, it comments on the different approaches to legal causation. This part regards the analysis of the types of damages that can be linked to the antitrust infringement. In other words, the analysis here tends to frame the concept of causation in order to find the limits of the potentially vast recoverable damages that might spawn from the antitrust infringement.

[33] Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law: Cases and Materials* (Cambridge University Press, 2010), 296.

[34] See further chapter III for a comparative overview of the different approaches.

[35] David Ashton and David Henry, *Competition Damages Actions in the EU: Law and Practice* (Edward Elgar Publishing 2013), 39.

1.3. Causation theories: a primer

A meta-approach to causation aims at the creation of general rules able to identify appropriate links for any relation of agency-effect[36]. Question arises, however, on whether a specific agency is cause of some other events, or only their occasion, a mere condition, or part of the circumstances in which the cause operated[37]. In this regard Hart and Honoré wonder if there are any principles governing the selection of the set of conditions of events or if it is arbitrary, irrational, the mere survival of the metaphysical beliefs in the superior 'potency' possessed by some events[38]. While causal uncertainty cannot be fully displaced, correct use of theories on causation can help to unravel the connections between antitrust infringements and private damages. Without any pretention to be exhaustive, the following chapter aims at describing these theories and the approaches on causation that are particularly relevant for the analysis of antitrust infringements.

Causation expounds three main functions: is forward looking, backward looking and explanatory and, finally, attributive[39]. The first function tends to a description of the conditions that lead to certain results. Therefore, it focuses on the studies of conditions in order to give predictions about outcomes and foster prevention[40]. The second function relates instead more closely to the language and reasoning of law. Causation serves indeed to spot from a given set of conditions the one that can explain an event or a class of events[41]. The third function is attributive as well as the second and serves to attribute responsibility to a specific agent[42].

Outside the law, two seminal approaches have founded the entire scientific and philosophical speculation: the empirical method of Hume and the metaphysical forged

[36] Julian Reiss, "Causation in the Social Sciences: Evidence, Inference, and Purpose" *Philosophy of the Social Sciences* 39, no. 1 (2009): 20–40.
[37] HLA Hart and Tony Honoré, *Causation in the Law* (Oxford University Press 1985), 112.
[38] Ibid., 17.
[39] Antony Honoré, "Causation in the Law" in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Winter 2010, 2010, available at http://plato.stanford.edu/archives/win2010/entries/causation-law/.
[40] Ibid.
[41] Ibid.
[42] Ibid.

by Kant[43]. Of them, only the former developed into the legal discourse[44]. For Hume causation can only be established in terms of empirical regularities involving classes of events, by calling "*to mind their constant conjunction in all past instances"*[45]. John Stuart Mill further built on this elaboration of regularity theories prosing a system of inductive inference for causal reasoning[46].

The subsequent philosophical and scientific doctrine developed on these basis a number of other theories and definitions, such as the counterfactual, for which it is a cause "*something that makes a difference, and the difference it makes must be a difference from what would have happened without it*"[47], the statistical model[48], the 'structural equation modelling'[49] and others[50]. However, they all have in common the research of an explanation of existing links between facts, while they differ in the means of research and on the description they give of the same connection.

Differently the lawyer is not content with finding connection between events because only legally relevant antecedent can determine the event and therefore become cause of it. Since Collingwood[51] the quest of a specific notion of causation related to

---

[43] John David Collins, Edward Jonathan Hall, and Laurie Ann Paul, *Causation and Counterfactuals* (MIT Press, 2004).

[44] Despite the attempt to create comprehensive theories of causation explaining its function in order to attribute responsibility in history, law and other disciplines, lawyers have doubted that such definitions can be effective. Michael S. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford University Press, 2010).

[45] In this well-know excerpt Hume observed that "*Without further ceremony, we call the one cause and the other effect, and infer the existence of one from that of the othe*r", David Hume, *A Treatise of Human Nature*, 1817., 87/61.

[46] The most diffuse canon advanced by Mill is the "Direct Method of Difference" for which "*If an instance in which the phenomenon under investigation occurs, and an instance in which it does not occur, have every circumstance save one in common, that one occurring only in the former; the circumstance in which alone the two instances differ, is the effect, or cause, or a necessary part of the cause, of the phenomenon*" John Stuart Mill, *A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation* (Harper & Brothers, 1858)., p. 455.

[47] David Lewis, "Causation" *The Journal of Philosophy*, 1973, 556–67.

[48] See in particular the the 'Neyman-Rubin Model', Donald B. Rubin, "Causal Inference Using Potential Outcomes" *Journal of the American Statistical Association* 100, no. 469 (2005).

[49] Roy J. Epstein, *A History of Econometrics* (North-Holland Amsterdam, 1987).

[50] John Losee, *Theories of Causality: From Antiquity to the Present* (Transaction Publishers, 2012).

[51] R. G. Collingwood, "Causation in Practical Natural Science" *RG. Collingwood, An Essay on Metaphysics. Revised Edition. R Martin, Ed*, 1940, 286–312.

legal responsibility has become independent. In other words, the role of the independent conception of legal theory of causation is to define the meaning of the word cause (and its several synonyms) in statutes, regulations and judicial decisions[52].

Compared to other disciplines[53], causation in law requires the analysis of only some circumstances that are valuable for detecting the causal connection. In other words, only some items of the event are legally relevant to the causation of the damage. For instance, in case of a cartel the fact that the tortfeasor sold the good subject to infringement to the claimant and that an overcharge was applied to the market price are certainly relevant aspects of the agency, while information about the characteristics of that good or its colour may have no standing for establishing causation. These remarks are important to understand the hurdles that national judges and authorities have to overcome in deciding about causation in antitrust cases, where the burden of proof is very often rooted in highly complex econometric theories whose interpretation of economic causality often and easily overlaps with the one of legal causation[54]. For the same reason it is fundamental to understand the use of the causal theories in tort law in order to consciously apply them in competition damages actions.

The difficulty to define causation is exacerbated by the different legal traditions of civil and common law countries, which show quite distant definitions of material and legal causation. This problem can well explain the reason for the adoption of a rather general definition of causation in the *Draft Common Frame of Reference* (DCFR) on *Principles, Definitions and Model Rules of European Private Law*[55], slightly deepened in the Principles of European Tort Law (PETL)[56].

---

[52] Ibid.

[53] Included economics that in competition law plays a fundamental role, see further para 6.6.

[54] For an analysis of the differences between causality and causation see further para 6.6.

[55] Article 4:101 "*General rule*

(1) A person causes legally relevant damage to another if the damage is to be regarded as a consequence of that person's conduct or the source of danger for which that person is responsible.

(2) In cases of personal injury or death the injured person's predisposition with respect to the type or extent of the injury sustained is to be disregarded." Draft Common Frame of Reference (DCFR) on Principles, Definitions and Model Rules of European Private Law, Available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf.

[56] Helmut Koziol et al., *Principles of European Tort Law (PETL): Text and Commentary* (Springer, 2005).

Despite the different legal backgrounds, both civil law and common law countries deploy a two-stage inquiry approach to causation, where firstly the judge establishes the existence of material causation between the events submitted to the court and their effects. Secondly, the judge has to select the causes which are legally relevant for the causation of the damage[57], delimiting the damages that the defendant is bound to compensate.

1.4. *Causation in fact*

The factual connection between the defendant's conduct and the harm is generally established on the basis of the '*conditio sine qua non'* test or of probability theories.

The but-for test (or *conditio sine qua non*) is probably the most immediate among the different approaches, since it compels the ruling out of the fact under scrutiny[58]. An act is the cause of an injury if the injury would have in any case happened, but-for the conduct of the defendant[59]. In other words, the but-for test "*asks the question -- would the accident have occurred but for the defendant's negligence? If*

[57] For an introduction to the two-stage causation framework, see, among the others, Cees Van Dam, *European Tort Law* (Oxford University Press, 2013); Richard W. Wright, "Causation in Tort Law" *California Law Review*, 1985, 1735–1828; Håkan Andersson and Bénédict Winiger, *Digest of European Tort Law. 1, 1,* (Wien: Springer, 2007); William Lloyd Prosser, *Prosser and Keeton on the Law of Torts* (West Pub. Co., 1984); Simon Deakin, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford University Press, 2012); Fowler Vincent Harper, Fleming James, and Oscar S. Gray, *The Law of Torts* (Little, Brown, 1986); Robert E. Keeton, *Legal Cause in the Law of Torts* (University Microfilms, 1986); Walter Gerven, Jeremy Lever, and Pierre Larouche, *Tort Law* (Hart, 2000); Forschungsstelle für Europäisches Schadenersatzrecht Wien and Österreichische Akademie der Wissenschaften Forschungsstelle für Europäisches Schadenersatzrecht, *Digest of European Tort Law* (Springer., 2007); Jaap Spier, Francesco Donato Busnelli, and European Centre of Tort and Insurance Law, *Unification of Tort Law: Causation* (The Hague; London; Boston: Kluwer Law International, 2000); Steven Shavell, "An Analysis of Causation and the Scope of Liability in the Law of Torts" *The Journal of Legal Studies*, 1980, 463–516; William M. Landes and Richard A. Posner, "Causation in Tort Law: An Economic Approach" *The Journal of Legal Studies*, 1983, 109–34.

[58] Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford University Press 2012), p. 235; William Lloyd Prosser, *Prosser and Keeton on the Law of Torts* (West Pub Co 1984); Cees van Dam, *European Tort Law* (Oxford University Press 2013); Håkan Andersson and Bénédict Winiger, *Digest of European Tort Law. 1, 1,* (Springer 2007).

[59] Wright, "Causation in Tort Law" 1775.

the answer is that the accident would have occurred even without the defendant's negligence, there is no causation"[60]. Despite its clarity, this test contrasts with solutions of common sense when over-determination and joint determination are involved. The most diffuse example to show this downside of the theory is the one of the two men both shooting at the same time at the victim, a third man, who dies. Given that both shots would alone be fatal, the application of the but-for test brings to the paradoxical result for which neither the first nor the second shot would be cause of the victim's death. The same problem would reappear in other instances of multiple causes. In competition law damages actions, it may happen, for instance, that the exclusionary conduct of two undertakings, each of them individually capable of foreclosing the competitor, are deemed as non-causes of the harm.

There are different theories on how to overcome this hurdle. The counterfactual reasoning of the but-for test is based on generalisations that are the main critical points for those who support NESS (necessary element of a sufficient set) theory[61]. This test has been designed by Hart and Honoré[62], and later refined by Wright[63] who pointed out that an act is a cause of an injury if it is a "*necessary element of a set of conditions jointly sufficient for the result*"[64]. In other words, this test "*states that a particular condition was a cause of a specific consequence if and only if it was a necessary element of a set of antecedent actual conditions that was sufficient for the occurrence of the consequence*"[65]. The NESS test draws on J.S.Mill's notion of a jointly sufficient set of conditions and uses the logic of conditions, mixing sufficient and necessary elements of the event in order to select the material cause of the event. The result is that the decision maker has to employ causal generalisations in order to assert the singular

[60] Supreme Court Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd., [1997] 3 S.C.R. 1210

[61] Hart and Honoré, *Causation in the Law.*

[62] Ibid.

[63] Is the same Wright who acknowledges about the creation of the theory by Hart and Honoré (see Causation in Tort law, p. 1774), but then changes view stating that "*The NESS account often is erroneously equated with Hart and Honoré's account of a 'causally relevant factor' and John Mackie's account of an INUS condition*", Wright Richard W., 'The NESS Account of Natural Causation: A Response to Criticisms', *R. Goldberg, ed., Perspectives on Causation* (Hart Publishing 2011), available at SSRN: http://ssrn.com/abstract=1918405, 2.

[64] Wright, "Causation in Tort Law".

[65] Ibid., 1774.

causal judgment[66]. A further result is that each set of conditions can be a cause or not of a specific event, while no gradation is admitted. The NESS test would help to solve the typical conundrums spotting when 'too many conditions' are present. By turn, however, this test is limited to a specific set of circumstances to find application.

The opposers of this theory[67], as well as of the other 'counterfactual' theories based on causal generalisations[68], note that the NESS test hinges on causal generalisation[69] that cannot be applied when organic processes, such as the decision-making activity by human beings, are at stake, since such processes do not conform to settled patterns[70]. This doctrine proposes quantitative or scalar approaches which measure the extent of causation of an event rather than a certain causal link[71]. In particular, for instances of multiple causes coexisting in the causation of the same event, these scholars created the quantitative theory according to which an agency is a cause of

[66] In this regard, Wright observes that the critics cannot be moved against the NESS approach because "*Contrary to Hart and Honoré's account, the NESS account insists that singular instances of causation always consist of the complete instantiation on a particular occasion of one or more causal laws, and that identification of a singular instance of causation always implies that such complete instantiation has occurred. The implication may be based on direct particularistic evidence of the existence of one or more of the required conditions, or, as is always true for the unknown conditions in the causal laws and generally true for many (sometimes all) of the known conditions, is inferred from particularistic evidence of the network of causal relationships that encompasses the particular occasion*" (Wright Richard W., "The NESS Account of Natural Causation: A Response to Criticisms.", 7).

[67] See, among others, Moore, *Causation and Responsibility*; Collins, Hall, and Paul, *Causation and Counterfactuals*.

[68] On this equation of the NESS test to counterfactual theories, Wright responds noting that "*the analysis is (or should be) a real-world 'covering law' matching of actual conditions against the required elements of the relevant causal generalisations rather than a counterfactual 'possible worlds' exploration of what might have occurred in the absence of the condition at issue*" (Wright Richard W., "The NESS Account of Natural Causation: A Response to Criticisms.", 7, note 14).

[69] Generalizing theories are effectively explained by Hart and Honoré who note that "*the generalizing theories insist that, if a particular act or event is a cause of something, its status as a cause is derived from the fact that it is of a kind believed to be generally connected with an event of some other kind*" therefore they differ from individualizing theories because they "*concentrate on the selection of one from among a set of conditions of an event as its cause, they select a particular condition as the cause of an event because it is of a kind which is connected with such events by a generalization or statement of regular sequence*" (Hart and Honoré, *Causation in the Law*, 465).

[70] Moore, *Causation and Responsibility*.

[71] Ibid.

a harm if it is involved in[72] or contributes to[73] the damage to a greater or less extent. Based on this theory, the agency must be a substantial factor of the damage in order to be legally a cause of it[74]. This selection takes place thanks to the use of probability, statistics or other scientific laws. These theories have also been labelled as individualizing theories as opposed to the generalizing such as the but-for test[75]. Without embracing such approaches, Trimarchi instead advanced the idea that judges should gauge liability on the basis of the relevance of the different causal variable within the damage[76].

In application of the NESS theory, the actual loss and the lost profits are factually linked to the anticompetitive conduct, if the exploitative abuse or the exclusionary conduct was a necessary element among all the market conditions in order to cause the damage. Differently, for the individualising theories, it is enough to state that the anticompetitive conduct contributed to a certain extent to the damage.

1.5. Categories of conditions for causal connection

A different point of view in the causal enquiry analyses causation through the logic of conditions. A first 'distinction' is between necessary and sufficient conditions[77]. An action is a necessary condition if the harm would not have occurred if the action had not taken place (*conditio sine qua non*)[78]. An action is a sufficient condition of a harm, if that type of action is always followed by that type of harm (*causa efficiens* or *causa*

[72] Jane Stapleton, "Law, Causation and Common Sense" *Oxford Journal of Legal Studies* 8, no. 1 (1988): 111–31.

[73] Moore, *Causation and Responsibility*.

[74] Honoré, "Causation in the Law", para 3.1.

[75] Individualizing writers are generally content as well with the examination of a set of conditions, but they then believe in the selection of an event that 'contributed to' the production of the event.

[76] Trimarchi, *Causalità e danno*., 94.

[77] The relation of a necessary condition is transitive, in the sense that if the event A is a necessary condition of the event B, and B is a necessary condition of C, thus A is a necessary condition of C. This transitiveness make possible to stretch factual causation theoretically at infinite. See Jan Hellner, "Causality and Causation in the Law'" *Scandinavian Studies in Law* 40 (2000): 119, on which is based most of what follows on the theory on conditions.

[78] Ibid., 122.

causans)[79]. This system of conditions is useful in order to explain the weight of control of the agent over the events. On this point Hellner observes that the actions corresponding to a sufficient condition exercise positive control over the action[80]. Differently, necessary conditions mark the presence of a negative control over the action[81]. The two conditions contribute to explain the type and extent of control of the agent over the action.

Competition law litigation is based on the formulation of hypothetical scenarios having the scope to illustrate a counterfactual universe through economic laws[82]. A number of coexisting conditions influence the assets of every individual active on the market. By consequence, a loss of welfare might be caused by any of them. For instance, in case of damages caused by the exit of a competitor from a monopolised relevant market, the abuse of dominant position may be a sufficient condition but not a necessary one of the damage. The exit of the undertaking might depend indeed on structural inefficiencies of the company.

Peczenik built on the logic of conditions, in order to make it useful tool for the assessment of the proof of causation. If the action is both a sufficient and a necessary condition of the harm, we have a strong causation[83]. On the other side, Peczenik observes that when the action is a sufficient condition that participated with other conditions to the causation of the event, and therefore is not necessary, we would talk about weak causation[84].

1.6. Legal causation and the selection of damages

The effects originating from a specific agency are different and possibly diverse. All of them are *de facto* linked to the agency but not necessarily should be attributed to

[79] Ibid., 123.
[80] Ibid, 121.
[81] Hellner, "Causality and Causation in the Law",122.
[82] The theory of conditions shows its utility when the judge has to select the cause among different conditions observed by experts witnesses through economic and econometric analysis.
[83] Aleksander Peczenik, *Causes and Damages* (Juridiska fören., 1979), 6.
[84] Ibid.

the agent. The legal causation is the second stage of the causal enquiry and has the function of limiting the compensable damages[85]. The criteria for delimiting such consequences are different. While some jurisdictions refer to the concept of remoteness, others focus on specific characteristics of the damages[86] or at the scope of the infringed rule. Hence, while in English law the cause should not be too remote[87], in US the leading principle for courts is the one of a proximate causation[88]. Civil law countries show a wide range of approaches, which span from the direct and adequate causes to the scope of the rule theory, and the 'causal regularity' theory[89].

However, the difference between factual and legal causation can be particularly faded to the extent that the limit between the two may become extremely difficult to ascertain[90]. Moreover, some authors maintain that the concept of legal causation hides public policy reasons behind a curtain of 'generalizing theories'. This was the view of the so-called legal realists[91], also called causal minimalist[92], who stated that there is only one causal issue in tort law that is the causation-in-fact, while all other aspects are mere instruments in the hands of judges to exercise broad discretion in their own decisions[93].

[85] Roberto Pucella, *La causalità "incerta"* (Giappichelli, 2007).

[86] Honoré, "Causation in the Law", reports proximate, adequate, direct, effective, operative, legal and responsible causes.

[87] Deakin, Johnston, and Markesinis, *Markesinis and Deakin's Tort Law*, 254 ff.

[88] John C. P. Goldberg and Benjamin Charles Zipursky, *The Oxford Introductions to U.S. Law: Torts* (Oxford University Press, 2010).

[89] Wien and Schadenersatzrecht, *Digest of European Tort Law*; Van Dam, *European Tort Law*.

[90] Alex Broadbent, "Fact and Law in the Causal Inquiry" 2009.

[91] For an overview of the different positions, see Wright, "Causation in Tort Law.", 1738 ff.

[92] Stapleton, "Law, Causation and Common Sense".

[93] Causal minimalists, in other words, believe that the only causal theory is the one that finds the straight connection between agency and damage, while all the others comprehend policy reasoning that are unknown to causal connection. See Leon Green, *Rationale of Proximate Cause* (Rothman Reprints, 1927); Leon Green, *Judge and Jury* (Vernon law book Company, 1930); Harper, James, and Gray, *The Law of Torts*; Prosser, *Prosser and Keeton on the Law of Torts*; Henry W. Edgerton, "Legal Cause" *University of Pennsylvania Law Review and American Law Register*, 1924, 211–44; Charles O. Gregory, "Proximate Cause in Negligence: A Retreat from' Rationalization'" *The University of Chicago Law Review*, 1938, 36–61; Clarence Morris, "On the Teaching of Legal Cause" *Columbia Law Review*, 1939, 1087–1109.

The responses to these critiques, and in defence of the two-stage causal test, have been of two types. Firstly, facing the failure of courts to deal with causation as a mere material and policy-neutral account, some authors noted that causation-in-fact is permeated by policy considerations[94]. Secondly, Hart and Honoré rightly noted that common-sense judgments are characterised by nonlegal causal language, which is fundamental not only for the description of the cause-in-fact but also for most of the proximate-cause issues[95]. Therefore, theorist such as Hart and Honorè[96] and Moore[97], believe that legal causation can fruitfully borrow from other disciplines the items and reasoning to delimit causal grounds respectively ordinary usage and metaphysics of causation. Moreover, it should be noted that the scope of legal causation is to set a limit to liability that, otherwise, would be uncontrollably at the mercy of factual connections. These limits, if not present in nature, have to be found in common sense or, in alternative, in the broader scope that the rule of law intends to pursue.

All in all, the division between factual and legal causation is not a neat one. However, critics to a division of the assessment of causation become rather misleading, if we think at factual and legal causation as two phases of a process rather than two independent concepts. Moreover, in this regard, we should think that causation is a link between facts, not a fact itself. Hence, the two-stage process is a method useful to test under different perspectives the relevance of the conditions of the harm.

In competition law damages actions the distinction between cause-in-fact and legal cause becomes even thinner but, paradoxically, particularly important. Every anticompetitive conduct, be it an abuse of dominant position or a cartel, may bring about several different effects on the assets of market actors, all of them factually linked to the infringement but not necessarily legally compensable. For instance, an exploitative conduct, which effects into a price overcharge, may cause an actual loss together with a possible loss of profits for a reduction in sales, to the undertaking that uses those products as part of its output. Possibly, the damaged purchaser might complain about a lost chance caused by the higher cost of its outputs or by a missed

[94] Wex S. Malone, "Ruminations on Cause-in-Fact" *Stanford Law Review*, 1956, 60–99.
[95] Hart and Honoré, *Causation in the Law*, 26; Wright, "Causation in Tort Law" 1740.
[96] Hart and Honoré, *Causation in the Law*, 93.
[97] Moore, *Causation and Responsibility*.

purchase of a particular good, due to the higher expenditure caused by the cartel. Moreover, due to the lost profits, the purchaser would foreseeably reduce the production and the purchase of other goods from her suppliers. The supplier of this undertaking would be, by consequence, damaged by the infringement as well, as but-for the overcharge they would have sold more units. Now, the level of factual causation in all the different heads of damages listed is theoretically the same since the competition law infringement is a necessary cause of the damage. However, there are sound reasons to severe from a causal perspective the damages due to the overcharge paid on the price to, for instance, damages caused to the direct purchasers for buying alternative goods or for lost chances.

To this problem, the European Member States' tort law regimes respond with different solutions, that the following chapter analyses with reference to the four selected jurisdictions.

II. Comparative analysis of causation in national courts

National courts have generally embraced the two-fold account for causation in virtually all Member States[1]. However, the different national tort law systems seek this objective in different ways. National judges enforce competition law rules largely relying on their domestic laws of obligations. However, many of the usual divides deployed in comparative tort law fail to describe some of the peculiarities of competition law litigation, especially with reference to causation. The first reason is that, the legal traditions of some national systems struggles to accept, from a substantive point of view, the pure economic loss as a compensable head of damage. The traditional comparative division between civil law and common law jurisdictions here loses importance. Indeed, while German law, together with English and US law has always wondered about the possibility to compensate 'pure economic losses', arguing about their vagueness and remoteness, in other systems, such as in France, these losses do not even constitute an autonomous category and are generally deemed compensable as lost chances[2]. Differently, the standard of proof of the causative link is still deeply entrenched in the traditional divide which opposes common law to civil law countries. Aware of this diversity, the European Group on Tort Law opted for a rather comprehensive rule in drafting the Principles of European Tort Law (PETL), relying on the foreseeability of the harm, risk rules and the scope of the liability[3].

[1] Cees Van Dam, *European Tort Law* (Oxford University Press, 2013), 308.

[2] Mauro Bussani and Vernon Valentine Palmer, *Pure Economic Loss in Europe* (Cambridge University Press, 2003).

[3] Art. 3:201, *European Group on Tort Law*, *Principles of European Tort Law*, 2005, available at http://www.egtl.org/: "*Scope of Liability*

Where an activity is a cause within the meaning of Section 1 of this Chapter, whether and to what extent damage may be attributed to a person depends on factors such as

a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity;

b) the nature and the value of the protected interest (Article 2:102);

c) the basis of liability (Article 1:101);

d) the extent of the ordinary risks of life; and

e) the protective purpose of the rule that has been violated."

2.1. Germany

The German law of obligations has been defined as "*narrow in tort but wide in contract*"[4]. This definition refers in particular to the ban of pure economic losses as compensable damages, unless they are not consequence of the infringement of a statutorily protected interest. This is one of the reasons that explain the early adoption of a specific Statute on antitrust enforcement, amended in 2005 with the adoption of the 7th Amendment to the Law against Restraints of Competition[5] (ARC). Article 33(1) of the ARC provides that whoever causes harm by negligent infringement of competition law shall be liable for compensation. The ARC however provides no special rules on the assessment of causation. Therefore, the general principles of tort law find application.

The German civil code first introduced the adequate causal theory approach[6] ("Adäquanztheorie"), in order to filter the damages compensable after the application of the *conditio sine qua non test*. A cause is therefore adequate "*if it has in a general and appreciable way enhanced the objective possibility of a consequence of the kind that occurred. In making the necessary assessment account is to be taken only of (a) all the circumstances recognisable by an 'optimal' observer at the time the event occurred, (b) the additional circumstances known to the originator of the condition*"[7]. The 'enhancement' of objective possibility of damage, soon became an objective probability of causation of a certain event[8]. The adequate causal theory is flawed by its abstract nature that detaches the analysis from the concrete role of agency in the production of

[4] Bussani and Palmer, *Pure Economic Loss in Europe*, 148.

[5] *Siebtes Gesetz Zur Änderung Des Gesetzes Gegen Wettbewerbsbeschränkungen, Bundesgesetzblatt (BGBl.) 2005, Part I, 1954-1969*, 2005.

[6] Initially postulated by Carl Ludwig von Bar, *Zur Lehre von Versuch und Theilnahme am Verbrechen* (Hahn, 1859). and Von Kries, Johannes, *Die Principien Der Wahrscheinlichkeitsrechnung*, 1886. Later developed by Träger, Ludwig, *Der Kausalbegriff Im Straf- Und Zivilrecht* (Marburg - Elwert, 1904). And refined by Guido Calabresi, "Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr." *The University of Chicago Law Review*, 1975, 69–108.

[7] BGH 23 October 1951, BGHZ 3, 261VersR 1952, 128. The translation is derived from B. S. Markesinis and Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (Hart Publishing, 2002).

[8] Anthony M. Honoré, "Causation and Remoteness of Damage" in *International Encyclopedia of Comparative Law*, ed. A. Tunc, vol. 6, XI (Tübingen: Mohr Siebeck, 1983), para 80.

the event[9]. However, this theory produced a useful intuition that the cause has to be "apt" to generate the damage.

Challenged by the downsides of the *Adäquanztheorie*, German theorists formulated another approach, then called the 'scope of the rule'[10] theory or 'legal policy theory'[11] ("*Schutzzweck der Norm*"). This approach maintains that the injury claimed, in order to be compensable, should be protected by the specific rule of law that was infringed[12]. For instance, bad maintenance of a public street triggers the responsibility of the authority which owes a specific duty of care for damages to persons who are involved in a car accident caused by the bad maintenance. On the other hand, the authority is not liable, for instance, for claims based on pure economic losses incurred by persons who suffer a delay because of bad maintenance[13]. This is because the scope of the rule is to impose to the highway authority a duty of care of the safety of road users and not a protection against any sort of loss the highway users might incur in.

Other civil law countries prefer instead different approaches to legal causation less clearly hinging on policy reasons.

2.2. France

The French liability system for competition law damages actions is based on general tort law rules. Parties harmed by antitrust infringements can therefore claim damages under Article 1382 of the French Civil Code[14] for which "*Any act of a person*

[9] H. L. A. Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 1985), 465.

[10] This theory is applied within the framework of § 823 II BGB (breach of statutory duty), § 839 (governmental liability), and § 823 I as regards safety duties (Verkehrspflichten), the right to business (das Recht am Gewerbebetrieb), and the general personality right (allgemeine Persönlichkeitsrecht).

[11] In particular this second definition was given by Hart and Honoré, *Causation in the Law*.

[12] It is defined, within the notes to the art. 4:101 of DCFR as "an obligation to make reparation will only arise, if the damage claimed, according to its type and its origin, stems from a sphere of danger which the infringed norm was enacted to protect against" see Christian von Bar, *Non-Contractual Liability Arising Out of Damage Caused to Another: (PEL Liab. Dam.)* (Sellier, 2009)., p. 759.

[13] Van Dam, *European Tort Law*, p. 314.

[14] The statutory basis for damages actions under French law is the general regime for torts, i.e. art.1382 of the French Civil Code. It states the general principle that whoever anyone who caused a damage by his

which causes damage to another makes him by whose fault the damage occurred to make reparation for the damage"[15]. This provision states a general principle for which any act which causes damages by fault obliges the tortfeasor to repair it. For the assessment of causation, French civil courts apply the account of the 'direct cause' of harm, based on Art. 1382 of the French Civil Code. The French system is characterised by a determined reluctance to define causation that remain a vague concept both in case law and in scholarly papers[16].

From a factual perspective, French judges tend to apply the same but-for test used by other national courts. With regard to legal causation two are the main tests for the causal enquiry in case law. The German theory of adequate causation strongly influenced the French laws of obligations, at the beginning of the 20th century, to the extent that French courts often apply a version of the adequate theory deprived of its probabilistic calculus[17]. Differently, other courts simply require the causal link to be certain and direct[18]. The legal causal link is specified by the Art. 1151 of the Code Civil, which although refers to contracts, it is since long being applied to non-contractual obligations[19]. This norm prescribes that only the "*immediate and direct consequences*" of the breach of law are subject to compensation.

All in all, the causal connection between the breach of law and the damage has to be 'direct and certain'[20], where these characteristics do not refer to specific abstract categories but rather tend to limit the judicial application of causation. Generally, French lawyers recur to the commonsense and the 'normal course of things' standard in

---

fault shall be liable and compensate the victim for the loss incurred, which implies three general elements: a fault, a direct and certain damage and a causal link between the fault and the damage.

[15] In the original version "*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer*".

[16] Geneviève Viney and Patrice Jourdain, *Les conditions de la responsabilité* (L.G.D.J., 2006), 335, who refer to « *le refus systématique de tout effort de définition* ».

[17] Jacques Ghestin et al., *Traité de droit civil: Les conditions de la responsabilité* (L.G.D.J., 1998).

[18] Walter Van Gerven, Jeremy Lever, and Pierre Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Hart, 2000), 424; Van Dam, *European Tort Law*, 319.

[19] François Terré, Philippe Simler, and Yves Lequette, *Droit civil: Les obligations* (Dalloz, 1999), 592; Viney and Jourdain, *Les conditions de la responsabilité*, 348; Duncan Fairgrieve and Florence G'Sell-Macrez, "Causation in French Law: Pragmatism and Policy," in *Perspectives on Causation*, ed. Richard Goldberg (Hart Publishing, 2011), 113.

[20] Fairgrieve and G'Sell-Macrez, "Causation in French Law: Pragmatism and Policy," 113.

order to determine the adequacy of a single causal element[21]. These characteristics have to be matched with a particularly strict standard adopted in competition law cases. The requirement of the direct causal link in competition law has been defined as "the main obstacle on which the right to reparation stumbles"[22]. This situation may explain the reasons why the majority of competition law claims concern contractual disputes and the claims for damages are often based on loss of chances.

French scholars have proposed, in the last ten years, two projects of reform of laws of obligations[23]. The first project was submitted to the French Minister of Justice in 2005 and it was coordinated by Prof. Pierre Català (*Català Project*)[24]. The second was prepared by another group of scholars and divided into two draft projects, one devoted to the law of contracts and the other to the non-contractual liability (*Terré Project*)[25]. Both the Català and Terré projects tend to understate the importance of a thorough definition of the causal link, although they deal with it in different manners. While the Català draft simply suggests that the causal link must be proved, the Terré draft devotes the Article 10 to the definition of the causal link. However, also in the latter case, the draft offers a particularly loose definition which introduces the concept of the "*ordinary course of things and without which it would not have occurred*" in order to determine the causal regularity of the link[26]. Both drafts opted for flexibility of the civil liability systems, leaving to the judge ample discretion in the investigation of the causal nexus[27].

This wide definition of causation in law justifies the rather flexible approach adopted by French Courts that have used in some cases also the causal proportional

[21] Ibid., 119.

[22] Louis Vogel, *Les Actions Civiles de Concurrence. Union Européenne, France, Allemagne, Royaume-Uni, Italie, Suisse, États-Unis* (Paris: EPA, 2013), 43.

[23] Olivier Moréteau, "France: French Tort Law in the Light of European Harmonization" *Journal of Civil Law Studies* 6, no. 2 (2013): 15.

[24] Pierre Català, ed., "Avant-Projet de Réforme Du Droit Des Obligations et Du Droit de La Prescription" ((Documentation française, P. Catala ed., 2006). Available in English at http://www.justice.gouv.fr/art_pix/rapportcatatla0905-anglais.pdf and http://www.henricapitant.org/node/73, 2005).

[25] François Terré, ed., *Pour une réforme du droit de la responsabilité civile* (Dalloz, 2011).

[26] Article 10 (1): «*Constitue la cause du dommage tout fait propre à le produire selon le cours ordinaire des choses et sans lequel il ne serait pas advenu*»

[27] Moréteau, "France: French Tort Law in the Light of European Harmonization" 770.

liability approach to justify the causal link[28]. The assessment of causation in competition law damages actions remains however the thorniest issue to substantiate for French lawyers[29]. This situation explains the frequent recourse to the doctrine of loss of chance ("*perte de chance*") which permits to overcome the probation of the certain and direct causal link between the infringement and the damage[30].

2.3. Italy

The Italian theoretical background related to causation has being at the centre of important doctrinal discussions and brisk changes in the case law, with seminal decisions in competition law damages actions that defined the extent of causation.

The causal assessment consists of a two-stage process[31] where, firstly, the judge has to assess the 'natural causality'[32] to ascertain the link between the event and the damage, generally through the adoption of the '*conditio sine qua non*' test[33]. Secondly,

---

[28] Olivier Moréteau, "Causal Uncertainty and Proportional Liability in France" in *Proportional Liability: Analytical and Comparative Perspectives*, ed. Israel Gilead, Michael D. Green, and Bernhard A. Koch, Tort and Insurance Law 33 (De Gruyter, 2013), 141.

[29] Jacques Buhart and Lionel Lesur, "France: Private Antitrust Litigation" *Global Competition Review*, 2014, 60.

[30] See infra par 5.3.

[31] Gorla, Gino, "Sulla Cosiddetta Causalità Giuridica: Fatto Dannoso E Conseguenze" *Rivista Di Diritto Commerciale* I (1951): 46; Angelo Luminoso, "Possibilità O Necessità Della Relazione Causale" *Rivista Giuridica Sarda*, 1991, 533; Francesco Realmonte, *Il problema del rapporto di causalità nel risarcimento del danno* (A. Giuffrè, 1967); Francesco Donato Busnelli and Salvatore Patti, *Danno e responsabilità civile* (G Giappichelli Editore, 2013); Umberto Breccia, *Le obbligazioni* (Giuffrè, 1991); Eugenio Bonvicini, *La responsabilità civile: Responsabilità da accadimento tipico. Parte speciale: Il danno a persona* (A. Giuffrè, 1971); S. M. Carbone, "Il Rapporto Di Causalità" *Alpa-Bessone (a Cura Di), La Responsabilità Civile*, n.d.; Vincenzo Carbone, *Il fatto dannoso nella responsabilità civile* (Jovene, 1969); Valente, "Appunti in Tema Di Fatto, Nesso Causale E Danno" *Diritto E Giurisprudenza*, 1955, 372; Pietro Trimarchi, *Causalità e danno* (Giuffrè, 1967).

[32] The Italian Civil Code does not define the cause-in fact whose definition is borrowed from the Articles 40 and 41 of the Criminal Code, see Guido Alpa, *La responsabilità civile. Parte generale* (Wolters Kluwer Italia, 2010), 326; Marco Capecchi, *Il Nesso Di Causalità: Dalla Condicio Sine qua Non Alla Responsabilità Proporzionale*, III (Cedam, 2012), 18.

[33] Other authors dissent from this view maintaining that the assessment of causation has a unitary nature and is operated before the selection of the compensable damages; see Paolo Forchielli, *Il rapporto di causalità nell'illecito civile* (CEDAM, 1960); Francesco Carnelutti, "Perseverare Diabolicum (a Proposito Del Limite Della Responsabilità per Danni)" *Il Foro Italiano*, 1952, 97–98; Mario Barcellona,

the judge determines the legal causation for detecting and limiting the damages subject to compensation[34].

Italian judges have swiftly transitioned from an account similar to the adequate cause to a more elaborated rule of 'regular causality' ('*regolarità causale'*). Article 1223 of the Italian Civil Code, literally requires the compensable damage to be limited to the direct and immediate effects of the action[35]. This rather restrictive definition was interpreted extensively by proponents of a broader approach who described Art. 1223 as a mere application of the theory of adequacy of the causal conditions[36]. The prevalent opinion supports this view, although scholars have put forward dissenting and alternative approaches[37]. The predominant theoretical approach reframed the provision of Article 1223 going back to its historical roots[38]. The contextualisation of the norm permitted to go beyond the precise wording of the law[39] and even to clearly point out that Italian law admits the award of indirect damages[40].

The approach of Italian courts to Art. 1223 Civil Code is unanimous in stating that it is impossible to establish a unique criterion for the 'immediate and direct effects'[41]. Relying on an extensive interpretation of the law, judges normally consider as

---

Inattuazione dello scambio e sviluppo capitalistico: formazione storica e funzione della disciplina del danno contrattuale (A. Giuffrè, 1980); Roberto Pucella, *La causalità "incerta"* (Giappichelli, 2007)..

[34] Nicolò Lipari et al., *Diritto civile* (Giuffrè Editore, 2009); Gorla, Gino, "Sulla Cosiddetta Causalità Giuridica: Fatto Dannoso E Conseguenze."

[35] Article 1223 civil code : <<*Il risarcimento del danno per l'inadempimento o per il ritardo deve comprendere così la perdita subita dal creditore come il mancato guadagno, in quanto ne siano conseguenza immediata e diretta*>> .

[36] Forchielli, *Il rapporto di causalità nell'illecito civile*.

[37] There are three main views developed by scholars about art. 1223 and the causal requirement. The first, pertaining to a minority view, maintains that the art. 1223 does not set any limit to legal causation and to responsibility, see Adriano De Cupis, *Il danno: teoria generale della responsabilità civile* (A. Giuffrè, 1979), 122; Giovanni Valcavi, "Sulla causalità giuridica nella responsabilità civile da inadempienza e da illecito" *Rivista di diritto civile* II (2001): 409. A second view, developed by Trimarchi, asserts that the art. 1223 demands the analysis of the interest protected by the rule violated in order to determine legal causation, see Trimarchi, *Causalità e danno*, 3.

[38] In particular, using the concept of 'necessary damage' formulated by Pothier: Robert Joseph Pothier, *Traité des obligations, selon les règles, tant du for de la conscience que du for extérieur* (Letellier, 1805).

[39] Paolo Forchielli, *Responsabilità civile* (CEDAM 1983), 50.

[40] Adriano De Cupis, *Il danno: teoria generale della responsabilità civile* (A Giuffrè 1979), 235.

[41] Laura Castelli, "La Causalità Giuridica Nel Campo Degli Illeciti Anticoncorrenziali" *Danno E Responsabilità* 18, no. 11 (2013): 1051.

covered by the Article 1223 Civil Code both direct and indirect damages[42]. The predominant case-law follows the principle of causal regularity, for which legal causation is established when damages are a normal or regular consequence of the event[43]. This approach entails a logic or probabilistic judgement based on which the judge has to rely on 'covering laws' ('*leggi di copertura*') that consist in sufficient scientific or economic evidences which can support the allegation of causation. The recourse to this method allows to avoid the risk of adopting as a benchmark the geographical distance or the time-span in assessing the causal nexus.

In competition law damages actions national courts generally use economic theories and logic inferences in order to determine causation. Courts also use probability in order to gauge the likeliness of an event to happen[44]. This approach allows moreover to build presumptions from economic data[45]. Especially in follow on actions, courts have often used the economic assessments of the Italian Antitrust Authority (AGCM), in order to determine the likeliness of damages to competitors or consumers. When the claimant falls in that class, she benefits of a presumption that revert the burden of proof on to the defendant[46]. For instance, in the case *Allianz v*

[42] For a description of the early case law, see Alessandra Pinori, "Il Criterio Legislativo Delle Conseguenze Immediate E Dirette" in *Il Risarcimento Del Danno Contrattuale Ed Extracontrattuale*, ed. Giovanna Visintini (Milano: Giuffrè, 1984).

[43] Corte di Cassazione civ., 23 December 2010, n. 26042 (rv. 615614), in CED Cassazione (2010); Corte di Cassazione civ., 16 October 2007, n. 21619, in Danno e Responsabilità, 2008, 1, 43 commented by R. Pucella (2008); Corte di Cassazione, 9 April 1963, n 910, in Giuriprudenza italiana, I, 490 (1964); Corte di Cassazione, 3 June 1980, n 3622, in Massiamario Giustizia civile, 6 (1980); Corte di Cassazione civ., 18 July 1987, n. 6325, in Massimario Giuridico italiano (1987).

[44] The use of probability is limited to the formation of the evidence of causation. The Italian law of obligation and case-law do not generally admit the 'causal proportional liability', for which the probability is used in order to determine causation and apportion liability among multiple tortfeasors; see Pucella, *La causalità "incerta,"* 288; Alpa, *La responsabilità civile. Parte generale*, 317; Israel Gilead et al., *Proportional Liability: Analytical and Comparative Perspectives* (De Gruyter, 2013), 199.

[45] See G. A. Benacchio and M. Carpagnano, *I rimedi civilistici agli illeciti anticoncorrenziali. Private enforcement of competition law* (Padova: CEDAM, 2012); Gian Antonio Benacchio and Michele Carpagnano, *Il private enforcement del diritto comunitario della concorrenza: ruolo e competenze dei giudici nazionali : atti del II Convegno di studio tenuto presso la Facoltà di giurisprudenza di Trento, 8-9 maggio 2009* (Wolters Kluwer Italia, 2009).

[46] Aldo Frignani, "La Difesa Disarmata Nelle Cause Follow on per Danno Antitrust. La Cassazione in Guerra Con Se Stessa" *Mercato Concorrenza Regole*, no. 3 (2013): 429–48.

Tagliaferro[47] the Court of Cassation stated that there is a presumption of damage caused by cartels to consumers. The cartelist, however, in order to rebut this presumption, cannot submit general economic data regarding price trends, but has to demonstrate that, in the specific instance, the price imposed to that consumer was higher than the market price due to reasons different from the anticompetitive agreement[48]. The Court argued that the judge can find the causal nexus relying on criteria of 'high logic probability', or through the use of probabilistic presumptions based on the regularity of the causal chain. On the other hand, the law has to guarantee to the defendant the right to rebut this presumption submitting sufficient proof of the interruption in the causal connection[49].

2.4. England

The quest for the causal enquiry is developed through the usual two-stage procedure. The factual connection is established on the basis of the but-for test[50] and the standard for its proof is the 'more probable than not'[51]. The contiguity of the but-for factors to the damage have to be intended as absence of the elements that can severe the link between event and damage[52]. When it is said that a superseding cause 'broke the causal chain' it is intended that there is an intervention in the course of events. It might also happen that an action with adequate causal effect on the damage is overtaken by a subsequent event unrelated to the initial tort. In this case, the defendant is responsible

[47] Corte di Cassazione, Allianz v Tagliaferro, 26 May 2011, n 11610, in Giust. civ. Mass. 2011, 5, 808 (2011), see also Corte di Cassazione Sara Assicurazioni v. G.V., 30 May 2013, n. 13667, not yet published (2013).

[48] The case regards in particular an insurance contract and is part of an important strain of damages actions following the decision of the AGCM, Autorità Garante della Concorrenza e del Mercato, decision 28 July 2000, n. 8546, I377 (2000).

[49] Corte di Cassazione, Allianz v Tagliaferro, 26 May 2011, n 11610, in Giust. civ. Mass. 2011, 5, 808 (2011) par. 5.1.

[50] Simon Deakin, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford University Press, 2012), 223.Barnett v Chelsea & Kensington Hospital Management Committee [1968] 1 All ER 1068.

[51] Richard Goldberg, *Perspectives on Causation* (Hart Publishing, 2011), 23.

[52] William Lloyd Prosser, *Prosser and Keeton on the Law of Torts* (West Pub. Co., 1984), 282 ff.; William Lloyd Prosser, *Handbook of the Law of Torts* (West Pub. Co., 1971), 244 ff.; Michael S. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford University Press, 2010), 102 ff.

only for the injury caused regardless of the consequences created by the subsequent event[53]. Some approaches derive the determination of the causal link from common sense that would justify the limitation of legal responsibility to certain damages. Some authors oppose that this theory is too lax and uncertain[54]. Indeed the criteria set out for determining causation through common sense consist in decision about limitation of liability rather than assessment of de facto causality[55]. In case of multiple causal conditions, English case law resorts to the use of scientific laws which have to ascertain which action in fact caused the damages[56]. The House of Lords in *McGhee* stated that there is a presumption of liability of the person that materially increased the risk of injury, who has also the right of proving the contrary[57].

Finally, there are cases where it is not possible even to define if the case has a single material causation or multiple causes. Here the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd*[58] stated that when it is scientifically impossible to show which of several negligent employers in fact caused the death, it is sufficient for the claimant to demonstrate that the defendant's negligence materially increased the risk of contracting the disease. In the following case *Barker v Corus (UK) plc*[59], the House of Lords added that the liability of the tortfeasors has to be proportionate to the increase in risk they caused.

With reference to legal causation, English judges adopt different accounts to limit responsibility and recoverable damages. English law firstly resorts to the concept of remoteness[60], for which the defendant is responsible only if the damage was a foreseeable consequence of the breach of duty irrespective to its extent[61]. As long as the

[53] Baker v Willoughby [1969] UKHL 8, [1969] 3 All ER 1528.

[54] William Lucy, *Philosophy of Private Law* (Oxford University Press, 2007), 199.

[55] Jeremy Waldron, 'Moments of Carelessness and Massive Loss' in David G Owen (ed), *The Philosophical Foundations of Tort Law* (Oxford University Press 1997).

[56] McGhee v National Coal Board, [1972] 3 All E.R. 1008, 1 W.L.R. 1.

[57] Ibid.; Sarah Green, *Causation in Negligence*, (Bloomsbury Publishing, 2015).

[58] [2002] UKHL 22.

[59] [2006] UKHL 20.

[60] See Honoré, "Causation and Remoteness of Damage", 26 ff.

[61] Re Polemis and Furness, Withy & Co. [1921] 3 KB 560; Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound No.2) [1966] UKPC 1.

damage is foreseeable it does not matter the form it takes, even if it is unusual[62]. By consequence, the law requires the damage to be of the same type of the one described by the rule, no matter how severe it is. The cause is too remote when it was not foreseeable to a 'reasonable man'[63].

The adequate causal theory relies instead on laws of probability in order to assess causation[64]. The agency is cause of the event, in legal terms, only if it considerably increases the objective probability of the outcome[65]. This theory substitutes therefore to the subjective foreseeability an objective requisite that, however, is subdue to an 'assumed epistemic base'[66]. Pursuant to this alternative approach, the harm must be 'within the risk' meaning that the harm has to fall into the type of risk that the liability rule protects[67]. The purpose of the rule of law defines the risk concerned by it, therefore delimiting the responsibility for harm through causation[68].

The judicial application of these principles is effectively described by Mr Justice Popplewell in *Fulton Shipping Inc v Globalia Business Travel*, observing that "*The principle does not, however, mean that a claimant always recovers for the amount of the losses which arise from the breach. Principles of causation mean that his losses may be factually too remote from the breach to be recoverable despite the fact that they would not have been suffered but for the breach. His losses may be too remote in law. Conversely, he may end up better off as a result of the breach than he would otherwise have been, without having to give credit for such benefit against his recoverable loss*"[69].

---

[62] Bradford v Robinson Rentals Ltd [1967] 1 All ER 267; Hughes v Lord Advocate [1963] AC 837; Doughty v Turner Manufacturing Company [1964] 1 QB 518; Smith v Leech Brain & Co [1962] 2 QB 405; Gabriel v Kirklees Metropolitan Council [2004] EWCA Civ 345.

[63] Green, *Causation in Negligence,* 134.

[64] Calabresi, "Concerning Cause and the Law of Torts."

[65] Jobling v Associated Dairies Ltd [1981] UKHL 3.

[66] Moore, *Causation and Responsibility*, 180.

[67] Robert E. Keeton, *Legal Cause in the Law of Torts* (University Microfilms, 1986); Warren A. Seavey, "Mr. Justice Cardozo and the Law of Torts," *Yale Law Journal*, 1939, 390–425; Glanville Williams, "The Risk Principle" *LQ Rev.* 77 (1961): 179.

[68] A theory espoused in Germany by Joseph Georg Wolf, *Der Normzweck im Deliktsrecht: ein Diskussionsbeitrag* (Göttingen: Schwartz, 1962).

[69] Fulton Shipping Inc of Panama v Globalia Business Travel S.A.U. (formerly Travelplan S.A.U) of Spain, EWHC 1547 (Comm) (2014).

2.5. Causation in the US antitrust case law

Causation has been defined in the US as "*one of the most underexplored areas in antitrust law*"[70]. Contrary to what is observed in Europe, the US judge refers to the antitrust regulation in order to define each single aspect of the unlawful behaviour, and causation makes no exception. Therefore, no (at least direct) references to general tort law are made. However, several tests are borrowed from tort law[71] with some variations, allowed mainly by the lack of specific regulation[72].

This premise is fundamental to understand the differing, sometimes even contrasting, approaches adopted by US and EU courts in assessing antitrust causation.

a. Material causation

Causation tests can vary from a "*sole proximate cause*" to a mere "s*ubstantial factor*". It is not possible to find a principle which enjoys priority over the others in the case law because, from a chronological viewpoint, they have being bundling up without the subsequent dismissing the prior.

In *Zenith Radio Corp*.[73] the Supreme Court opened to what is still nowadays the most common approach in cartel litigation, which is to require the plaintiff to substantiate that the agency is a "*material cause of the injury*"[74]. Differently, in the more recent *Methyl* and *Tele Atlas* cases, courts stated, respectively, that the conduct has to be a "*substantial factor of the injury*"[75] and that the plaintiff do not need to "*exhaust*

[70] Michael A. Carrier, "A Tort-Based Causation Framework for Antitrust Analysis" *Antitrust Law Journal* 77 (2011): 991, on which is based most of this comparative analysis.

[71] Such as ""*but for" causation, proximate cause, sole causation, reasonable connection, and increased possibility of harm*" Ibid., 992.

[72] Ibid., 1002.

[73] Zenith Radio Corp. v. Hazeltine Research, Inc. 395 U.S. 100 (1969).

[74] Ibid. 114 n. 9.

[75] In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, 739 F. Supp. 2d 576, 596 (S.D.N.Y. 2010).

all possible alternative sources of injury"[76]. Additionally some courts require that the conduct has to be the "*sole proximate cause*" of the harm[77]. These obiter dicta have been also inflected with different formulations, such as that the conduct has "*materially contributed*" to the plaintiff's harm or that the plaintiff must show "*with a fair degree of certainty*"[78] that "*defendant's illegal conduct materially contributed to the injury*"[79].

Factual causation in abuse of monopoly power cases has shown a similar pattern. In *Microsoft* the Court alleged that it is sufficient for the plaintiff to show that there is a reasonable connection between the conduct and the injury suffered[80]. In the following *Broadcom* case, the Court adopted a particularly flexible causation test since it merely required that the harm has to "*increase the likelihood that patent rights will confer monopoly power*". Finally, in the subsequent *Rambus* case the Court applied an higher standard of causation adopting a 'but-for' exclusive test[81]. The claim was rejected on the basis that since it was at least possible that the defendant would have selected plaintiff's technology, causation was not proved.

In *Costner*, instead, the court dealt with the problem of multiple causes, in particular when antitrust and non-antitrust causes concur in the causation of the damage[82]. The judge accepted the claim even though "*[t]here was evidence that general economic conditions and poor management caused a decline in plaintiff's business*", and taking into consideration that there also was "*evidence that the illegal tying arrangements contributed to the decline*"[83]. In *City of Long Beach v. Standard Oil Co. of California* the Ninth Circuit has attained an opposite result, rejecting the claim for

[76] Tele Atlas N.V. v. NAVTEQ Corp., No. C-05-01673, 2008 WL 4809441, at *22 (N.D. Cal. 2008).
[77] Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 791 (6th Cir. 2002); Nat'l Indep. Theatre Exhibitors, Inc. v. Buena Vista Distrib. Co., 748 F.2d 602, 607 (11th Cir. 1984).
[78] Continental Ore Co. v. Union Carbide & Carbon Corp. 370 U.S. 690, 702 (1962).
[79] Hayes v. Solomon 597 F.2d 958, 978 (5th Cir. 1979) (quotation omitted); see also McClure v. Undersea In dus., Inc., 671 F.2d 1287, 1289 (11th Cir. 1982).
[80] United States v. Microsoft 253 F.3d 34 (D.C. Cir. 2001).
[81] Rambus Inc. v. FTC. 522 F.3d 456 (D.C. Cir. 2008).
[82] Costner v. Blount National Bank n52 578 F.2d 1192 (6th Cir. 1978)
[83] Ibid., 1195.

lack of causation since *"[t]he establishment of price ceilings" did "not in itself mean that the companies' conduct could not have caused the injuries*."[84].

However, three mainstream approaches can be differentiated in the US antitrust panorama: the *Microsoft* with its flexible approach; the *Rambus* with its strict requirements and the *Broadcom* with its particularly lax rule. These are only the main and better explained of the many different canons developed so far. American case law on antitrust causation is indeed drifting in a sea of different approaches. The problem depends firstly on the refusal to build the civil antitrust framework on the more solid basement of tort law[85]. Carrier observes that private antitrust law should gain "*insights by turning to tort law, the law with the most developed causation framework*"[86]. He also proposes an adaptation to the general tort law rules which echoes the newly approved European Directive on damages actions, since he suggests an inversion of the burden of proof when there is a "*reasonable connection between the challenged conduct and the anticompetitive effects*"[87]. The plaintiff would have to show the anticompetitive effects of the unlawful behaviour and the damage would be presumed.

2.6. Economic analysis of the different approaches to causation

The economic lawyers divide the analysis of causation in tort law on the basis of the usual partitioning between strict liability and negligence.

A potential injurer is negligent if, and only if, the cost of precaution is less than the expected accident cost (probability of loss per magnitude of loss)[88]. From an economic point of view the reasonable person standard applies to the cost at which an average reasonable person would avoid a harm[89]. Therefore, if a normal reasonable person could avoid at a cost of 10 a harm which has an expected cost of 8, nobody

[84] 872 F.2d 1401 (9th Cir. 1989), 1408.
[85] See, in this regard, Carrier, "A Tort-Based Causation Framework for Antitrust Analysis.", 1001.
[86] Ibid., 1001.
[87] Ibid., 1006.
[88] This is the so called Learned Hand formula defined in the case *United States v. Carroll Towing Co.* (1997) 159 F. 2d 169 (2d Cir.), 173.
[89] Richard A. Posner, *Economic Analysis of Law* (Wolters Kluwer Law and Business, 2014), 71.

under this rule can be found liable even if an exceptional person could avoid the same harm at a cost of less than 8. Under the reasonable person standard, personal skills and abilities of the injurer are not taken into consideration; hence an exceptional man who can avoid the damage at a lower cost is not liable even if he does not act accordingly. However, Courts find exceptions to this rule mainly in favour of the defendant, in cases where the capacity of avoiding the damage is widely different from the average.

In this regard, the economic analysis gets to the conclusion that causation requirements do not change incentives to take care[90]. In other words, optimal incentives are not influenced by the fact that an undertaking can escape liability for negligence by showing lack of causation. For the economists, therefore, the possibility of an intervening cause does not induce the subject to take excessive precautions.

However, the causation requirement shows two advantages. Firstly, without causation requirement the differences between negligence and strict liability are smoothed over, to the extent that the former accuses the same problem of overdeterrence typical of strict liability[91]. Secondly, causation requirement has a beneficial effect on administrative costs because it reduces the quantity of claims restricting the number of tortfeasors and types of damages subject to compensation[92].

From an economic point of view strict liability is mainly criticised because the victim has no incentives to prevent the damage and all the costs are borne by the injurer who will take the most cost-effective precautions.[93] The behaviour of the injurer does not ensure, however, the minimisation of the social cost of the accident. As a matter of fact, when prevention activities by potential victims are the most efficient method of accident prevention, forcing the injurer to internalise all the costs of prevention has the effect of decreasing the overall efficiency of the system.[94] On the other hand, when a shift in activity level of the potential injurer is not efficient or not feasible, there is an

[90] Steven Shavell, *Foundations of Economic Analysis of Law* (Harvard University Press, 2009), 251.

[91] Steven Shavell, "An Analysis of Causation and the Scope of Liability in the Law of Torts," *The Journal of Legal Studies*, 1980, 465.

[92] Shavell, *Foundations of Economic Analysis of Law*, 321.

[93] John P. Brown, "Economic Theory of Liability Rules" in *Economic Analysis of Law: Selected Readings*, ed. Donald A. Wittman (London: Blackwell, 2003), 38.

[94] Robert Cooter and Thomas Ulen, *Law and Economics* (Pearson Education, Limited, 2013), 336.

argument for strict liability.[95] Starting from this assumption, Shavell demonstrated that strict liability is always efficient for unilateral accidents, which are torts where only injurers (not victims) influence risk by their choice of *care*.[96] As far as the injurer is the only party who can prevent the damage, his total cost correspond to the total social cost. Hence, his activity of minimizing his costs will seek at the same time the minimisation of social costs.[97] Strict liability has also the effect of decreasing litigation costs, since the claimant needs only to prove the damage and the causal connection between the damage and the defendant's action. In some cases, in order to decrease the risk of damage, the injurer prefers to cut back on the scale of activity instead of adopting further precautions.[98] In strict liability regimes, contrary to what happens in negligence, causation boost correct incentives. This is due to the fact that the firm is strictly liable only if the rule of law contemplates the damage as a consequence of the defendant's action or omission. Differently, the firm would have excessive incentives: "*basic incentives to take due care are correct whether or not there is a causation requirement*"[99].

The underlying assumption of these economic studies is that "*[r]ational actors will always be led to act nonnegligently even if they would escape liability when they are not the cause of losses*"[100]. These considerations are determined with regard to the general principle of causation in fact. In relation to the probability approach (50 % + 1), it has being noted that it can lead to either to inadequate or to excessive incentives to reduce risk[101]. The economic doctrine illustrates the downsides of an 'all-or-nothing' approach based on probability, observing that a firm that supplies 20% of the market demand will escape liability for any harm caused by its product. For this reason, that firm will have no liability-related incentives to take precautions[102]. On the other hand, if a firm's market share exceeds 50%, the firm's causal contribution will always be

[95] Posner, *Economic Analysis of Law*, 179.
[96] Shavell, *Foundations of Economic Analysis of Law*, 179–180.
[97] Ibid., 180.
[98] Posner, *Economic Analysis of Law*, 178.
[99] Shavell, *Foundations of Economic Analysis of Law*, 251.
[100] Ibid.
[101] Steven Shavell, "Uncertainty over Causation and the Determination of Civil Liability" *Journal of Law and Economics* 28, no. 3 (1985): 587–609.
[102] Ibid.

deemed to be 'more likely than not' and, therefore, it will be held responsible. This situation, the economic doctrine comments, creates a civil liability burden on that firm that is "*socially excessive*", especially under strict liability regimes[103].

However, it has to be noted that the decision-maker normally resorts to the market share in order to identify the responsible subject, in cases of high causal uncertainty, i.e. only if the injurer-producer is unknown, yet in those cases it is true that the market share will be decisive.[104] Proportional liability differs in that case because the assessment of causation would be replaced by the proportional payment of damages (also based on market shares).

As for legal causation, the economic doctrine argues that allowing parties to escape liability for unforeseeable events does not reduce incentives to reduce risks[105]. These scholars propose an economic analysis of legal rules on causation, which aims at wealth maximization.[106] The economic analysis of law in some cases goes even further in loosening the reasons for the application of the causal terminology and bolsters the idea of placing responsibility on the person best placed to avoid the damage most cheaply[107]. In this way, the decision maker avoids the whole causal assessment. This view, at least in European Union law system, utterly contrasts with the underlying present principles of damages actions. The compensatory principle, indeed, is based on the idea for which the damage is compensable unless it was caused by a person who is held responsible by law. In this equation, therefore, the assessment of causation is inescapable as it does not leave any room to the condemnation of a subject under a different standard, such as the 'best placed subject'. However, on the basis of similar considerations, national courts, followed by the Directive 104/2014, have established

[103] Ibid.

[104] Gilead et al., *Proportional Liability*, 22; Goldberg, *Perspectives on Causation*, 48; Green, *Causation in Negligence*, 75.

[105] Shavell, *Uncertainty over Causation and the Determination of Civil Liability*; William M. Landes and Richard A. Posner, *The Economic Structure of Tort Law* (Harvard University Press, 1987).

[106] William M. Landes and Richard A. Posner, "Causation in Tort Law: An Economic Approach" *The Journal of Legal Studies*, 1983, 111; Shavell, *Uncertainty over Causation and the Determination of Civil Liability*, 116. It is interesting here to compare the almost unlimited discretion for imposing remedies under this conception with the limited scope of the liability if one uses the concept of causation. See Shavell, "An Analysis of Causation and the Scope of Liability in the Law of Torts."

[107] Landes and Posner, "Causation in Tort Law."

presumptions that burden the subject best placed to prove lack of causation for the anticompetitive harm[108].

[108] See paragraphs 6.5 and 7.1.

III. Causation in the European Union competition law and decisions

The European legislator openly states that the issue of causation is not dealt in the Directive on damages actions[1] and that, therefore, its definition is left to the domestic laws of Member States. The only limit fixed by the EU law is the observance of the principles of equivalence and effectiveness, in line with what was already disposed by the CJEU in *Manfredi*[2]. However, there are some principles addressing causation that can be found in European law and case law.

The European Union law fully endorsed the principle for which the right to stand in a claim for infringement of articles 101 and 102 TFEU belongs to "*any individual*"[3]. From a procedural point of view, therefore, there is no limitation as for the standing to sue of subjects damaged by antitrust infringement. These claimants cannot be selected on the basis of individual characteristics, for instance differentiating between direct and indirect purchasers. However, the decision maker has to make sure that the claim for compensation is well founded and has to verify the existence of a "*causal relationship between the harm suffered and the prohibited arrangement*"[4].Therefore, there is no selection of compensable parties but only of compensable damages. In other words, as for the actual formulation of European law principles, no one can be denied access to damages action for antitrust infringement as a matter of right to stand, but the limitation to compensation can be found as a matter of lack of causal connection of the damage to the infringement.

---

[1] *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance*, 349AD.

[2] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, ECR I-06619 (2006).

[3] Ibid., ECR I-06619:para 60; Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others [2001] ECR I-06297, para 26; Case C-199/11 Europese Gemeenschap v Otis NV and Others [2012] published in the electronic Reports of Cases (Court Reports - general), para 41; Case C-536/11, Donau Chemie and Others [2013] not yet published, para 21; *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance*.

[4] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA [2006] ECR I-06619, para 17.

The diverse set of approaches to causation in the European Union did not suffice to the adoption of a common rule, although several voices urged for a major clarification of the issue of causation in competition law[5]. However, some common interpretative principles can be found from the case law of the European courts and from the legislative acts and papers of the European Union institutions, although both showed visible reluctance to give univocal definitions and to deepen into the interpretation of causation.

3.1. *Causation in the Court of Justice of the European Union decisions*

The European Union courts did not develop any precise definition of causation or causal link. However, from its case law it is possible to glean important information on the minimum requirements of the causal nexus for civil liability. Albeit some authors argue that the CJEU has formulated an autonomous theory of causal relationship[6], the definition(s), if existing, are lacking of a consistent and comprehensive approach to causation.

The CJEU case law on causation is abundant with regard to state liability for infringement of Treaty's norms. The approach to causation developed by this case law has been adopted also in issues of horizontal application of EU competition law.[7] Hence, it is meaningful to analyse the matter of causation in European private antitrust enforcement starting from this case law.

---

[5] Centre for European Policy Studies (CEPS), Erasmus University Rotterdam (EUR), and Luiss Guido Carli (LUISS), "Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios," December 21, 2007, available at http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf; *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules*, 2004, available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf; *Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules*, 2008.

[6] Wolfgang Wurmnest, *Grundzüge eines europäischen Haftungsrecht: eine vergleichende Untersuchung des Gemeinschaftsrechts* (Mohr Siebeck, 2003); Klaus Bitterich, "Elements of an Autonomous Concept of Causation in European Community Law Concerning Liability," *Zeitschrift Für Vergleichende Rechtswissenschaft*, 2007, 12–39.

[7] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA [2006] ECR I-06619.

Chronologically, the leading case is *Roquettes frères*[8], which applied a particularly strict rule about the burden of proof of the causal nexus. The Court, facing a case of state liability, decided that the claimant has to prove the "*causal connexion*" between the damage and the measures adopted by the European Community. Moreover, the Court argued that, in order to substantiate the causal link, it is not sufficient for the applicant to supplement its claim with statistical evidences even in a claim for nominal damages[9].

Later in the *Dumortier Frères* case[10], the Court pointed out that the consequence of the misconduct causing the damage has to be direct. The following case law 'forgets' about this particular requirement of the causal link. Indeed, the *Fresh Marine* decision[11] and also the landmark *Francovich* decision[12] require only the presence of a causal link, without assuming it to be direct.

However, this characteristic of the causal link is taken back to life in *Brasserie du Pêcheur*, where the Court sets the three requirements for conferring the right to damages, that are: i) a rule of law which confers rights on individuals; ii) a sufficiently serious breach of that rule; and iii) a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties[13].

However, the Court never delves into the nature of the direct causal nexus that it requires. There is no clear definition of it neither in the EU legislation nor in the case law interpreting it. The Court hinted the need of the adoption of a *conditio sine qua non* test or but-for test[14], and also added that it is not enough to prove causation, as the claimant has to prove also a sufficient proximity between the illegal act and the loss

[8] Case C-94/00 Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities [2002] ECR I-09011, 687.
[9] Ibid., 687-688.
[10] Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 Dumortier Frères v Council [1979] ECR 3091.
[11] Case C-472/00 Commission v Fresh Marine Company A/S [2003] ECR 7541.
[12] Joined cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic [1991] ECR 5357.
[13] Brasserie du Pêcheur and Factortame, para. 51.
[14] Case T-478/93 Wafer Zoo v Commission [1995] ECR II-1479.

suffered.[15] However, the Court also admitted that this way of assessing causation is not sufficient and that it needs to be completed by national laws.[16] Some Advocate Generals argued for the introduction of an adequate causation test, but it has never become jurisprudence.[17]

The CJEU, when dealing with private enforcement of competition law, appears to be more reluctant to give a definition of rules pertaining to the law of obligations. In *Manfredi* the CJEU clearly stated that causation is a fundamental element of the compensation claim, but that it rests with the applicable law to determine the characteristics of this link[18]. The Court further specified that the application of domestic law has to be subordinated to the observance of principles of equivalence[19] and effectiveness[20] of EU law[21].

This decision however, beyond the formulation of the horizontal effect principle, confirms another important fundamental pillar for the following private antitrust enforcement. The Court, indeed, by referring to the requirements of liability developed by previous case law, confirms that the criteria pointed out for state liability are applicable also in competition law. For the first time it was the A.G. Van Gerven, in the case *Brasserie du Pêcheur,* to observe that the three conditions for liability fixed by the

[15] Joined Cases 64 and 113/76, 167, and 239/78, 27–28 and 45/79 Dumortier Frères v Council [1979] ECR 3091.

[16] Joined Cases C-104/89 and C-37/90 Mulder v Council and Commission [1992] ECR I-3061; C-238/78 Ireks-Arkady v Council and Commission [1981] ECR 01719.

[17] Opinion of Mr Van Gerven, Case C-128/92 [1994] ECR I-01209, I–1256; Opinion of Advocate General Kokott Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur [2014] not yet published, available at http://curia.europa.eu/juris/liste.jsf?language=en&num=C-557/12.

[18] At para 64 the Court points out that "*In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed*"

[19] As explained in the Case C-45/76 Comet v Produktschap [1976] ECR 2043.

[20] See Joined Cases C-6/90 and C-9/90 Francovich v Italian Republic.

[21] The Euorpean legislator confirmed this approach stating that in the recently approved *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance* Recital 11.

CJEU should find application also in the actions for breach of competition law[22]. However, it was only with the Manfredi case that this jurisprudential '*renvoi*' was crystallized also in competition law.

3.2. Causation in the European Union competition law

The Green Paper mentioned causation as a necessary requirement of any damages claim. It acknowledged that proof of a causal link between the infringement and a loss "*may be particularly difficult to achieve due to the economic complexity of the issues involved*", and it concluded that the application of the causation requirement "*should not lead to exclusion of those who have suffered losses arising from an antitrust infringement from recovering those losses*"[23]. This position was based on the outcome of the 'Study on the conditions of claims for damages in case of infringement of EC competition rules' (so called *Ashurst* study), which observed that proof of causation was one of the main obstacles to an efficient deployment of competition damages actions[24]. With visible clarity the Ashurst comparative study takes note of the fact that the different reporters informed that the "*[p]roof of causal link is considered as a great obstacle to plaintiffs. This will particularly be the case as regards plaintiffs who are indirect purchasers*"[25].

However, the great flexibility and diversity of approaches to the notion of causal link in the Member States, together with the common case-by-case approach to it, limited an in-depth comparative analysis of causation. Most probably, this aspect discouraged the European legislator to take a position on the issue of causation that,

[22] Opinion of A.G. Van Gerven, Case C-128/92, H. J. Banks & Co. Ltd v British Coal Corporation [1994] ECR I-01209, para 50 "*In its decisions concerning the second paragraph of Article 215 of the EEC Treaty, the Court has inferred from the general principles common to the legal systems of the Member States that the liability of the Community depends on fulfilment of three conditions, namely the existence of damage, a causal link between the damage claimed and the conduct alleged against the institution, and the illegality of such conduct. In my view, those conditions for liability apply as such to actions for breach of directly effective provisions of Community competition law*."

[23] *Green Paper - Damages Actions for Breach of the EC Antitrust Rules SEC (2005) 1732 COM/2005, 672*, 2005.

[24] *Ashurst Study*.

[25] Ibid.

indeed, was just mentioned in the following White Paper[26]. Even the *Commission Staff Working Paper* attached to it, mentioned nothing but the usual warning reported by the Green Paper and the Ashurst study about the particularly complex nature of the proof of causation[27].

These pieces of legislation acknowledge that causation remain one of the thorniest issues in competition law damages actions and they also call for major harmonisation. The Proposal Directive, in particular, highlighted with unprecedented persistence the problem of the diversity of the liability standards in the EU, especially for matters related to assessment and quantification of damages. The Proposal Directive pointed out that this diversity of approaches may cause legal uncertainty for all parties involved in actions for antitrust damages and that "*has created a markedly uneven playing field in the internal market*" and that it "*may cause legal uncertainty for all parties involved in actions for antitrust damages, which in turn leads to ineffective private enforcement of the competition rules, especially in cross-border cases*"[28].

Despite this, even the recently approved Directive decided not to take an explicit stand on this issue. The Directive mentions the causal link only once at Recital (11) to confirm the principle that "*All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence*"[29].

Therefore, the only explicit limits to the application of the domestic notion of causation are the principles of effectiveness and equivalence of EU law. Actually, the Directive poses other adaptations to the application of national laws of obligations through presumptions and legal inferences that certainly influence the formation of the

[26] *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, SEC(2008) 404-406.

[27] *Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules*, 12.

[28] *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*, 2013.

[29] *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance*, Recital (11).

proof of causation. In the following paragraph, I will address the direct limitations set forth with the principles of equivalence and effectiveness.

3.3. Principle of equivalence and effectiveness as (positive) limits to the national rules on causation

The principle of equivalence consists in the enforcement of rules that are not less favourable than those governing similar domestic actions[30]. The principle of effectiveness, on the other hand, makes sure that domestic rules "*do not render practically impossible or excessively difficult the exercise of rights conferred by Community law*"[31].

The CJEU has demonstrated strong intentions to intervene through the application of these rather wide and misty concepts[32], especially to enforce the effectiveness of European laws in order to limit the application of national remedial rules[33]. This interventionist approach of the European Union courts had being described as "*waxing and waning*" in the history of EU law[34], and it seems to be reviving more than ever in competition law remedies. Recently, the CJEU used indeed the principle of effectiveness in order to overcome the application of domestic rules governing causation in the Austrian jurisdiction that would have impeded the compensation of damages caused by umbrella prices[35]. Generally, the principle of effectiveness has been applied with the aim of guaranteeing judicial protection to individual right-holders[36]. In this vein, the position held by the CJEU in Kone becomes more clear as to the defence

[30] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA ECR [2006] I-06619 , para 71.

[31] Ibid., para 71.

[32] Cases C-14/83 Von Colson and Kamann v. Land Nordrhein-Westfalen [1984] ECR 1891; C-222/84 Johnston v. the Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, and C-222/86 UNECTEF v. Heylens [1987] ECR 4097. See also Craufurd Smith, Rachael, "Culture and European Union Law," in *The Evolution of EU Law* (Oxford University Press, 1999), 300 and 307–10.

[33] Eva Storskrubb, *Civil Procedure and EU Law: A Policy Area Uncovered* (Oxford University Press, 2008); Paul Craig and Gráinne de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 2011), 228, referring to cases C-271/91 Marshall v. Southampton and South West Area Health Authority II [1993] ECR I-4367 and C-208/90 Emmott v. Minister for Social Welfare [1991] ECR I-4269.

[34] Craig and Búrca, *EU Law*.

[35] Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG [2014] not yet published.

[36] Craig and Búrca, *EU Law*., p. 424-425.

of individual right to claim for damages. The principle of effectiveness, to a certain extent, becomes therefore a European 'scope of the rule', applied to legal causation. The application of national rules on causation needs therefore to pass this extra filter, that however has only a positive function. In case indeed the domestic rules on causation bring to the rejection of the claim, the judge has to further analyse the claim under the light of the principle of effectiveness and of the European Courts' decisions. Moreover, the effectiveness of EU law has always to go along with the application of the principle of proportionality, laid down in Article 5 of the Treaty on European Union, for which the involvement of the institutions must be limited to what is necessary to achieve the objectives of the Treaties.

The application of these principles has the further aim and consequence of bringing a progressive harmonisation of national remedial rules. Principles of effectiveness, equivalence and proportionality impose indeed to national judges to restrain and modify the applicable law to the extent it is needed to compel with the European rules and principles[37].

3.4. The objectives of the Directive 104/214 and of articles 101 and 102

The Directive on Antitrust Damages Actions (Damages Directive) was signed into law on 26 November 2014. It asks the adoption of "*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*". The Damages Directive states, in line with the CJEU case law, that anyone can claim full compensation of the damage causally connected to the infringement[38]. An infringement of competition law, national and European, which cause an injury to a protected interests of individuals, gives therefore right to reparation against the infringer. As for the assessment of causation, the harm is legally relevant if the loss results from a violation of a right conferred by the law. In other words, the infringement resulted in the violation of an interest worthy of

[37] Walter Van Gerven, "Harmonization of Private Law: Do We Need It?," *Common Market Law Review* 41, no. 2 (2004): 505–32.

[38] Article 2, *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance*.

legal protection[39]. But what are the protected interests for European competition law[40]? And what is the function of competition law in relation to its private enforcement[41]?

The Directive clearly states that its main objective is "*to establish rules concerning actions for damages for infringements of Union competition law*"[42]. These rules should ensure the full effectiveness of Articles 101 and 102 TFEU and the proper functioning of the internal market for undertaking and consumers. The European legislator maintains indeed that these objectives cannot be achieved while applying Member States' laws of obligation. As lately pointed out by the European Commission in its *Impact Assessment of the proposal Directive for Antitrust Damages Actions 2013* "*the differences in the liability regimes applicable in the Member States may negatively affect competition and risk to appreciably distort the proper functioning of the internal market*".[43] The European Parliament held this position also in the approved text of the

[39] Christian von Bar, Study Group on a European Civil Code, and Research Group on the Existing EC Private Law, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)* (sellier. european law publ., 2009), 3030.

[40] For a general description of the goals of competition law see Richard Whish, *Competition Law* (Oxford University Press, 2012); ASCOLA Workshop on Comparative Competition Law, *The Goals of Competition Law* (Edward Elgar Publishing, 2012); Phillip Areeda and Herbert Hovenkamp, *Fundamentals of Antitrust Law* (Aspen Publishers Online, 2011); Okeoghene Odudu, *The Boundaries of EC Competition Law: The Scope of Article 81* (Oxford University Press, 2006).

[41] Wouter P. J. Wils, *Ten Years of Regulation 1/2003 - A Retrospective*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, June 4, 2013), available at http://papers.ssrn.com/abstract=2274013; Charles Alan Wright, "Law of Remedies as a Social Institution, The," *U. Det. LJ* 18 (1954): 376; Ioannis Lianos, "Competition Law Remedies in Europe: Which Limits for Remedial Discretion?," *CLES Research Paper No. 2/2013*, January 1, 2013, available at http://papers.ssrn.com/abstract=2235817; Ioannis Lianos, "Some Reflections on the Question of the Goals of EU Competition Law," *CLES Working Paper Series 3/2013*, January 1, 2013, available at http://papers.ssrn.com/abstract=2235875; Francesco Denozza and Luca Toffoletti, "Compensation Function and Deterrence Effects of Private Actions for Damages: The Case of Antitrust Damage Suits," March 1, 2008, available at http://papers.ssrn.com/abstract=1116324; Maurice E. Stucke, "Should Competition Policy Promote Happiness?," *Fordham Law Review* 81 (January 14, 2013): 2575; Eleanor Fox and Paul Sirkis, "Antitrust Remedies–Selected Bibliography and Annotations," 2005, http://professorgeradin.blogs.com/professor_geradins_weblog/files/fox_and_sirkis_antitrust_remedies_bibliography_and_annotations.pdf.

[42] Recital (49).

[43] *Impact Assessment Report Accompanying the Proposal for a Directive COM(2013) 404, SWD(2013) 203 Final*, 2013, 20.

Directive[44]. Therefore, in order to ensure the full application of the principles of effectiveness and the consistency in the application of articles 101 and 102 TFEU, the EU legislator has resolved that the only and most effective way to achieve this uniformity for the functioning of the internal market is through the enforcement of a specific directive[45]. The Directive 104/2014, in line whit the Proposal, aims at establishing and give effect to the compensation principle and to grant it to anyone who suffered a damage caused by an infringement of competition law, as established by the CJEU in Manfredi[46]. Moreover, the further and collateral objective is to avoid overcompensation[47]. With regard to the different liability regimes, the Directive makes clear that the intent of the legislator is to create a "*level playing field*" where all the undertakings can compete at the same level and the internal market is not endangered by inequalities in the application of EU law[48]. Relying on this background, one could say that the assessment of causation in competition law damages actions has to be contextualised into a system that aims chiefly at compensation, rather than at punishment and deterrence, and at the convergence of the different approaches.

[44] *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance*, Recital (7).

[45] The Directive simply recalls the established case law in defining the principles of effectiveness and equivalence at Article 4: "*In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law. In accordance with the principle of equivalence, national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU shall not be less favourable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national law.*"

[46] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, [2006] ECR I-06619.

[47] *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance*, Recital (13).

[48] Ibid., Recitals (7), (9) and (10).

3.5. The right to full compensation in the Directive on antitrust damages claims

When an infringement of competition law happens, it is often the case that it causes an injury to protected interests of individuals. The injury is legally relevant if the loss results from a violation of a right conferred by the law or the violation of an interest worthy of legal protection[49]. This injury gives right to reparation but against whom and on what basis?

The Damages Directive, as already pointed out, adopts a particularly broad approach with reference to the right of standing. By consequence, the term 'injured party' is referred to any person (natural or legal) that has suffered harm caused by an infringement of competition law[50], and the infringer is broadly defined as "*an undertaking or association of undertakings which has committed an infringement of competition law*"[51]. On the basis of Article 3 (1), therefore, any injured party should be able to obtain full compensation unless the harm was caused by an infringement of competition law[52]. Full compensation, for the Damages Directive, is composed by actual loss and loss of profits, plus interests, as it should "*place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed*"[53].

The Directive presumes that a cartel causes harm via price-effect[54]. The Recital (47) explains that this rule has the aim of remedying the information asymmetry between claimant and defendant and the difficulties in reckoning the amount of damages. This Recital argues that "*Depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel*". This is a rebuttable presumption, although some authors pointed out

[49] von Bar, Research Group on the Existing EC Private, and Study Group on a European Civil Code, *Principles, Definitions and Model Rules of European Private Law*, 3030.
[50] Article 2 (6).
[51] Article 2(2).
[52] Article 3 (1): "*Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm".*
[53] Article 3(2).
[54] Article 17 (2).

that such inversion of the burden of proof brings an 'erosion' of the defendant's right of defence "*so that in this type of actions it seems that the defendant is prevented from proving the lack of «causal link» between the infringement and the alleged harm*"[55].

The Directive limits this rebuttable presumption to cartels, arguing that their 'secret nature' increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the harm[56]. Moreover, the Directive tries to unravel the knot regarding the legal value of decisions of antitrust authorities in the civil proceedings. Article 9 makes clear that when the final decision is taken by the national competition authority or by a review court, it constitutes a conclusive proof of the infringement in the following action for damages. When, instead, the decision comes from an antitrust authority of another Member State, it is "*at least prima facie evidence that an infringement of competition law has occurred*"[57]. These procedural rules certainly influence also the assessment of causation. In cases of follow-on claims based on infringements of Article 101 TFEU, the clamant benefits of a double presumption. Firstly, she does not have to prove the infringement of competition law and submit the NA's decision. On the basis of this decision, moreover, the parties have to presume that a damage was caused both to direct and indirect purchasers.

With these rules, the EU legislator intends, allegedly, to ensure effectiveness to the right to compensation for harm caused by an antitrust infringement. These rules tend not only to ease the burden of proof of the claimant but also to slightly reconcile the different approaches adopted by national systems of law[58]. However, the use of these presumptions can be misleading for claimants who might be tempted to skip the proof of causation which is only indirectly involved in this process. The claimant has in any case the burden of proving that the presumed damage was caused to her business due to specific market operations connecting them to the infringer. For example, if an undertaking claims damages caused by a cartel that fixed higher prices, the claimant needs to submit evidences that the overcharge was applied to her. Similarly, if a firm

[55] Aldo Frignani, "La Difesa Disarmata Nelle Cause Follow on per Danno Antitrust. La Cassazione in Guerra Con Se Stessa," *Mercato Concorrenza Regole*, no. 3 (2013): 447.

[56] Recital (47).

[57] Art. 9 (2).

[58] For a comparative overview of the different approaches see Joaquín Almunia et al., *Private Enforcement of Competition Law* (Lex Nova, 2011), 158 ff.

that assumes to be injured by an abuse of dominant position, which effected into a price squeeze, has to substantiate the specific damage consequence of the exclusionary abuse.

3.6. Scope of competition law damages and causation

Causation in the law is limited in first place by the same rules that place liability on the tortfeasor. For the damage to be compensable is also necessary that the purpose of the infringed rule protects precisely the harmful consequences object of the claim. Once it has being ascertained that the damage corresponds to the legal interests protected by the law, the judge must ensure that that injury is causally connected to the offense.

The antitrust laws have a dual function of protection. On the one hand, they protect the process of competition in the European market[59]. On the other hand, competition law rules ensure the compensation of the damage suffered by those privates affected by distortions of the market[60]. It follows that, as the European Court of Justice considers in Kone[61], the damage that the competition regulation recalls is not only the one directly caused to buyers of the cartel, but also the losses caused to all the other subjects who act in different ways on the same market. Infringers are then responsible toward all persons who have suffered damages causally linked to the anti-competitive behaviour. In causal terms, among the conditions of the event, the judge has to find the ones that are legally relevant and, among them, the conditions that caused a damage which falls into the scope of the rule[62]. The damage, in any possible instance, in order to be compensable as to be of the type that is protected by the rule of law. Therefore if the

[59] With the ultimate goal of fostering consumer welfare, see in this sense Whish, *Competition Law*, 20.Okeoghene Odudu, "The Wider Concerns of Competition Law," *Oxford Journal of Legal Studies*, 2010, 599–613; David Gerber, *Global Competition: Law, Markets, and Globalization* (Oxford University Press, 2010), 164.

[60] There is also another vision, shared by a limited group of scholars, which believes that competition law should promote the general well-being of European Union citizens through the application of morality; this idea is laid down in Christopher Townley, *Article 81 EC and Public Policy* (Bloomsbury Publishing, 2009).

[61] Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG [2014] not yet published, para 33–34.

[62] This passage expressly corresponds to the finding of legal causation in Germany, and is also implied in the assessment of liability in the other systems; for an overview, see chapter III.

assessment is not part of the causal analysis it is attributed to the phase of the assessment of responsibility[63].

In competition law damages actions the judge has therefore to define the scope that European and domestic rules private enforcement pursues. The milestones are once again placed by the cases *Courage* and *Manfredi* were the Court explained what are the characteristics of such scope. European laws and treaties created a legal order, which works in parallel with domestic legal systems of the Member States. Here "*[t]he subjects of that legal order are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal assets. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions*"[64].

However, this still does not tell us what is the scope of the norm and the protected private right of the articles 101 and 102 TFEU. This rules indeed explicitly address the protection of competition, as they punish those conduct "*which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*". The Court in Courage notes that, given the fact that these norms produce direct effects applicable in relations between individuals, they create rights for the individuals concerned which the national courts must safeguard[65], the full effectiveness of articles 101 and 102 would be put at risk if such a protection is not granted. The duty not to create restrictions or distortions within the internal market is therefore completed by the obligation of avoiding damages to private parties caused by the same restrictions. This duty is

[63] Guido Alpa, Mario Bessone, and Zeno Zencovich, "I Fatti Illeciti," in *Trattato Di Diritto Privato*, ed. Pietro Rescigno, 14 (Torino: Utet, 1995), 35; Cees Van Dam, *European Tort Law* (Oxford University Press, 2013); Simon Deakin, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford University Press, 2012).

[64] Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others [2001] ECR I-06297, para 19., which cites the judgments in Case C-26/62 Van Gend en Loos [1963] ECR 1, Case 6/64 Costa v. E.N.E.L. [1964] ECR 585 and Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, paragraph 31.

[65] Ibid. para 23., cites judgments in Case C-127/73 BRT and SABAM [1974] ECR 51, paragraph 16, ('BRT I') and Case C-282/95 P Guérin Automobiles v Commission [1997] ECR 1-1503, paragraph 39.

moreover detailed by domestic rules on civil liability and, where present, specifically on competition law liability.

The limits of the scope of the duty placed on firms, as a matter of causation, is better detailed in the following cases Manfredi[66] and more recently in Kone[67]. The scope of the rule is therefore to ensure compensation of damages that are caused by such infringements. The lack of a punitive scope (at least to the moment) can reasonably be seen as one of the main reasons for the ban of punitive or exemplary damages from the Directive on compensation of damages for infringement of competition law[68]. However, in accordance with the principle of equivalence [69], if it is possible to grant punitive damages in domestic actions, domestic courts should make the same in actions based on European law.

Amongst these classes of compensatory damages, which damage falls within the scope of articles 101 and 102 TFEU, as completed by the domestic rules applicable in each case, it is still matter of discussion. However, the case-law of European courts gives no further clues about the limitation of such damages and the scope of the European laws. What the case law says is that the purpose of private claims under European competition law is compensation. This is in line also with previous case law of the CJEU where, with regard to State liability, the European judges noted that the aim of State liability is compensation, not deterrence or punishment[70].

In Kone the Court of Justice broadened the classes of damages subject to compensation, arguing again on the principle of effectiveness of EU law[71]. We know, therefore, that umbrella effects, not only are (potentially) linked to the event, but the damages arising from them are, by principle, falling within the scope of European law

[66] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA [2006] ECR I-06619.

[67] Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG [2014] not yet published, available at http://curia.europa.eu/juris/liste.jsf?language=en&num=C-557/12.

[68] *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance*.

[69] Damian Chalmers, Gareth Davies, and Giorgio Monti, *European Union Law: Cases and Materials* (Cambridge University Press, 2010), 300.

[70] Case C-470/03 A.G.M.-COS.MET Srl v Suomen valtio [2007] ECR I-2749 .

[71] Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG [2014] not yet published.

and, therefore, may be subject to compensation. Similarly in *Courage v Crehan*, the European Court of Justice stated that the English law rule *ex turpi causa non oritur actio* violated the principle of effectiveness of EU law because it impeded to a subject damaged by an anticompetitive agreement to obtain compensation of such losses[72].

In Manfredi, the Court referred to the definition of effectiveness reported in the Courage case and added that ensuring full effectiveness of European competition law means also to guarantee full compensation of the losses caused by the antitrust infringment[73]. Domestic laws of substance and procedure should not deter the lodging of meritorious cases[74].

Actually this right is declined into two different principles, the first being, *stricto sensu*, the principle of effectiveness, limited exclusively to the protection of Treaty norms, and the second being the principle of effective judicial protection which concerns "*the effectiveness of subjective rights enjoyed by individuals under the Treaty as they are enforced against Member States or private parties*"[75]. However, the Court of Justice's principle of effectiveness tends to encompass both principles, sometimes making it rather ambiguous[76]. On the other hand, the same case law of the CJEU did not develop a definition of the content of the rights that have to be enforced within the principle of effectiveness, of their function, scope and content[77]. Therefore, the principle of effectiveness should draw the limits of the right to compensation for infringement of EU competition law, showing to the domestic laws of obligations when a right to compensation has to be conferred under EU law. But the definition of such right is left to the Member States' laws, as far as they abide to a non-defined EU principle of full

[72] Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others [2001] ECR I-06297, para 26.

[73] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, [2006] ECR I-06619, 95.

[74] Renato Nazzini, "Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law," in *The Outer Limits of European Union Law*, ed. Catherine Barnard and Okeoghene Odudu, 2009, 425.

[75] Michael Dougan, *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation* (Hart Publishing, 2004), 27.

[76] Nazzini, "Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law," 436.

[77] Ibid.

compensation, creating a self-contradictory statement rather than a principle, an oxymoron rather than a rule. An efficient solution, although not fully resolving, is the one suggesting that the legal basis of the right to compensation which *"determines function and content of the right under Community law and the existence and scope of the remedy*" should be analysed "*in conjunction with the principle of effective judicial protection"*[78]. The reach of the principles of effectiveness and equivalence, however, appear to be determined by principles enclosed in ephemeral boundaries that tends more to the expansion of the EU right to compensation, as in Kone, rather than to its restriction.

3.7. Convergence of different causation regimes: the effects of a diverse set of legal frameworks

The endeavour of the EU institutions to harmonise the private enforcement of competition law is notorious. The application of the Regulation 1/2003 highlighted the underlying issue of the parallel application of national laws when domestic courts enforce articles 101 and 102 TFEU. The Article 3, Regulation 1/2003 introduced indeed the principle of parallel application of national competition law, by which domestic rules are used in order to integrate the application of EU competition law. Given the numerous and important differences among national laws of substance and procedure, the European Commission argued that this parallel application of national rules endangers the uniform enforcement of EU laws across the Member States[79]. As pointed out by the European Commission in its Impact Assessment of the proposal Directive for Antitrust Damages Actions 2013, the "*undertakings established and operating in different Member States are exposed to significantly different risk of being held liable for infringements of competition law*"[80]. Therefore, the Commission has clung to the argument by stating that "*the differences in the liability regimes applicable in the*

[78] Ibid.

[79] *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*, 4.

[80] *Impact Assessment Report Accompanying the Proposal for a Directive COM(2013) 404, SWD(2013) 203 Final*, 2013, 20, para 54.

Member States may negatively affect competition and risk to appreciably distort the proper functioning of the internal market"[81]. The process of convergence sponsored by the European institutions aims, in this vein, at harmonizing national private enforcement rules in order to ensure a more level playing field for both infringers and victims of the illegal conduct. It may be argued, in this vein, that the harmonization process backed by the European institutions, should respond also to the EU Treaties' aims and guiding principles. The wider concern of the process of convergence is to ensure equivalence[82] and effectiveness[83] of EU law, that together - in turn - foster the sound functioning of the internal market. It is worth observing that the divergent substantive and procedural standards of liability in Europe may also endanger the application of the constitutional principle of non-discrimination[84]. Moreover, national competition laws have to be checked under Art. 3 TFEU which states that "*[t]he Union shall have exclusive competence in the following areas: (b) the establishing of the competition rules necessary for the functioning of the internal market*".

As pointed out by the Commission, two different undertakings might be judged differently by national courts, even when they are accused of pursuing the same anticompetitive behaviour[85]. Moreover, it has to be observed that the same undertaking operating in more than one Member State and affecting evenly their markets, might be held liable in one Member State but not in the other[86]. This situation is, for the Commission, particularly advantageous for deep-pocketed competitors that can use the wide chances of 'forum shopping' given by the European legislation to choose the

[81] Ibid.

[82] As explained in the Case 45-76 Comet BV v Produktschap voor Siergewassen [1976] ECR I-02043.

[83] Which requires EU law to be interpreted in such a way as to fulfil the Treaty's objectives, see paragraph 4.3; also intended as full effectiveness of EU law or 'effet utile', see Case 199/82 Amministrazione delle Finanze dello Stato v SpA San Giorgio [1983] ECR 3595, para 14.

[84] Case C-208/90 Theresa Emmott v Minister for Social Welfare and AG [1991] ECR I-4269.

[85] *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*, 9.

[86] *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*.

Court that would be more 'favourable' to them[87]. By contrast, injured parties with smaller claims or fewer resources will tend to choose the domestic Court or, more often, to drop the case. The uneven playing field created by such diversity can result in a competitive advantage for some undertaking and a disincentive to the exercise of the rights of establishment and provision of goods and services[88]. Moreover it can negatively affect competition and proper functioning of internal market. As a result, undertakings are discouraged from settling in countries where the right to compensation is more effectively enforced[89].

This conclusion is however a moot point. By fact, indeed, the countries where competition law is more effectively applied are also those where companies are moving their seats. However, the Damages Directive did not give green light to such convergence, preferring a more cautious approach. As a result, undertakings operating in the European territory are subject to different standards of liability for competition law infringements, despite the presence of common antitrust rules. This situation may support, on one hand, a process of regulatory competition among domestic laws of obligation and, on the other, a partial inconsistency of judgments across the European Union.

3.8. Causation and EU law

The harmonisation process of the rules establishing liability for compensation of antitrust damages, involves also the causative link that is recalled several times by the Commission and remain one if its unresolved major concerns. The empirical studies on antitrust litigation in Europe demonstrate that there is a diffuse uncertainty over the substantiation of the causal connection. This uncertainty is common to all the jurisdictions analysed. However, a closer inspection of causal theories and principles

[87] Notable cases being, amongst the others, Cooper Tire & Rubber Co Europe Ltd v Shell Chemicals UK Ltd [2010] EWCA Civ 864 and Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors (Rev 1) [2008] EWCA Civ 1086.

[88] *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*, 9.

[89] *Impact Assessment Report Accompanying the Proposal for a Directive COM(2013) 404, SWD(2013) 203 Final* para 115.

adopted by national courts tells that the uncertainty often hinges on different basis. National courts are accustomed to different ways of approaching the proof of causation, although, they adopt similar solutions, as in the case of passing-on of price overcharges. These solutions are also oriented to the pursue of the principle of effectiveness of EU law and of the obligation to interpret national law in conformity with Community law[90] as interpreted by the EU courts[91]. By consequence, there is a natural, although limited, process of convergence of the solutions regarding the causal enquiry, supported by national courts.

Advocate General Kokott went further than this maintaining in her Opinion to the Kone case that "*the issue of the civil liability of cartel members for umbrella pricing is a matter of European Union law, not national law*"[92] and that the legal conditions for the finding of the causal link have to be found under European Union Law[93]. Her Opinion focuses specifically the problem of causation and, in this analysis, she embraces the concerns of the European Commission related to the diversity of civil liability standards in Europe[94]. This situation, in practice, would justify the formulation of a common concept of causation. A.G. Kokott takes the view that, in the context of non-contractual liability of European Union institutions under Article 340 TFEU, European Union law developed an independent notion of causation that *"[f]or the sake of consistency"* should be applied also in competition law litigation[95]. This criterion, as she acknowledges, is the "*sufficiently direct causal nexus between the harmful conduct and the damage alleged*". She admits that, given the open-endedness of this concept, it would need further specification by the domestic judge. However, the A.G. Kokott

[90] See, inter alia, Joined Cases C-397/01 to C-403/01 Pfeiffer and Others [2004] ECR I-8835, paragraph 113, and the case-law cited.

[91] Case C-453/00 Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren [2004] I-00837.

[92] Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG [2014] Opinion of Advocate General Kokott, para 45.

[93] Ibid.

[94] A.G. Kokott warns that if the legal criteria by which national courts assess civil liability for infringement of articles 101 and 102 TFEU are different "*there would be a risk of economic operators being treated differently*". Therefore, she observes that *"[t]his would not only run counter to the fundamental objective of European competition law, which is to create framework conditions that are as uniform as possible for all undertakings active on the internal market ('level playing field'), it would also be an invitation to 'forum shopping'*" Ibid. para 29.

[95] Opinion of Advocate General Kokott Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG ECLI:EU:C:2014:45 (2014) para 34.

observes that the, in the end, national domestic approaches do not differ show wide discrepancies. Henceforth, and before delving into the specific analysis of causation in the specific case of umbrella pricing, the A.G. Kokott puts forward the, rather supposed, common theory of causation for which "*the criterion of a sufficiently direct causal link is in substance intended, on the one hand, to ensure that a person who has acted unlawfully is liable only for such loss as he could reasonably have foreseen (…). On the other hand, a person is liable only for loss the compensation of which is consistent with the objectives of the provision of law which he has infringed*"[96]. At a closer inspection, this interpretation of the direct causal link is not rooted into CJEU's case law but rather on selected national European causal canons. This theory seemingly bundles the English concept of remoteness to the German theory of the scope of the rule[97]. In confirmation of this view, it may be observed that the European Court of Justice did not follow this approach in its judgement. On the contrary the Court joined the previous case law stating that "*in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU, including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed*"[98]. The Advocate General's call for convergence shades light on an important topic that is the application of a common notion of causation in the law. However, the analysis of national systems shows that the diversity of approaches is rooted into the legal traditions of domestic civil law that is not, at present, a matter of EU law.

[96] Ibid. para 40.

[97] The CJEU predictably did not endorse this theory, and enforced the principle of effectiveness in order to justify the liability of the antitrust infringer for umbrella effects. Ibid.

[98] Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG [2014] not yet published, para 24.

IV. Causal uncertainty in damages claims for competition law infringement

The common thread that connects all the jurisdictions analysed, despite the different theoretical backgrounds, is that courts tend to divide the assessment of causation in a two-stage process where the verification of the conditions of the causal link has a strong empirical base. In actions for infringement of competition law, where the claim for compensation is funded on a pure economic loss, the judge in order to assess the causal link can rely only on economic laws and logical inferences that are at the end expressed in terms of likelihood of the damage to be caused by the defendant's action. From here the importance of analysing how probabilities are used in situations of causal uncertainty in antitrust damages claims.

In abstract, it is possible to have a never ending chain of damages originating from an antitrust infringement. For instance, when a competitor is excluded from the market by an anticompetitive behaviour, there are normally several parties injured by this infringement, other than the foreclosed competitor. There are indeed the contractors, distributors and suppliers of the same competitor, who are normally injured by its exclusion from the market. Moreover, there might be employees who lose their jobs because of this loss of competitiveness. The causal nexus has to establish to which extent the different losses of these subjects can legitimate to claim for damages[1]. The risk of opening the way to compensation to any damage which is sufficiently connected to the infringement is overdeterrence. Moreover it would be contravened the compensatory nature of the antitrust damage.

Theory of causation has to solve also another problem: the injured party cannot be exempted from risks that would in any case bear[2]. Some authors pointed out that this is connected to the 'theory of the aim'[3]. That is to say that liability of the antitrust

[1] William H. Page, "Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury," *The University of Chicago Law Review* 47, no. 3 (April 1, 1980): 467–504.

[2] Laura Castelli, "La Causalità Giuridica Nel Campo Degli Illeciti Anticoncorrenziali," *Danno E Responsabilità* 18, no. 11 (2013): 1052.

[3] Pietro Trimarchi, *Causalità e danno* (Giuffrè, 1967), 69; H. L. A. Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 1985), 477.

infringer covers only the consequences that the specific rule protects, but this protection finds no application when the damage would have in any case happen.

For instance, if a cartel fixes an overcharge to the market price of a good, some consumers might renounce to the purchase. However, not all of them may have renounced because of the increased price, being it involved also external causes such as loss of interest in that good[4]. In these cases judges have to gauge the likeliness or probability of the events in order to infer the causative link.

4.1. Balance of probabilities by national courts

Causal uncertainty imposes to find accounts of causation different from a fully deterministic approach. The regularity theories of causation are those which evolved from the assertion of David Hume that causes are invariably followed by their effects: "*We may define a cause to be an object, followed by another, and where all the objects similar to the first, are followed by objects similar to the second*"[5]. However, it has been noted that, from a philosophic perspective, the limits of human knowledge make impossible to conceive a fully deterministic approach to causation. In this vein, Kneale defined probability as "*the substitute with which we try to make good the shortcomings of our knowledge[…] to the extent of our knowledge is less than we could wish*"[6].

The application of invariable patterns in the resolution of legal disputes deploys limits[7] that might endanger the application of the law. In competition law this statement is even more true given the fact that the damage generally consists in an economic loss and no organic patterns that yields to a specific damage can be found. The limits of

[4] Luigi Prosperetti, Eleonora Pani, and Ines Tomasi, *Il danno antitrust: una prospettiva economica* (Il Mulino, 2009), 225.

[5] David Hume, *An Inquiry Concerning Human Understanding. A Dissertation on the Passions. An Inquiry Concerning the Principles of Morals. The Natural History of Religion* (T. Cadell, 1772), section VII.

[6] William Kneale, *Probability and Induction* (Clarendon Press, 1966), 45.

[7] Neatly explained by David Lewis, *Philosophical Papers, Volume II* (Oxford: Oxford University Press, 1986).

regularity theories have been used, in many areas of tort law, to motivate the adoption of probabilistic approaches to causation[8].

Probability, in this thesis is intended both as a semantic tool[9] and as statistical analysis of reality. Expressions such as probable, likely, possible, apparent, reasonable to think, most likely, credible, plausible and feasible, and the like, are justified by judges in order to assess the *id quod plerumque accidit* or to state a logic inference[10]. Probabilities do not just influence factual inferences but also the argument that serves as a means to substantiate the same fact. Therefore, the words 'reasonably' or 'probably', once entered into the legal jargon and accepted as a benchmark of proof, become a tool for reaching the conclusion also through their semantic structure[11].

Probability is used to investigate singular causal claims as well as general causal claims. General causal claims are those referred to an abstract causal connection between an unlawful event and a damage, for instance "*cartels cause damages via price effect*". Singular causal claims are instead those referred to a specific instantiation: "*the cartel X caused the overcharge, i.e. the damage via price effect*".

Singular causal judgments are however generally framed upon generalisations, where probabilities play a significant role. These generalisations are fundamental to obviate the limitations of human knowledge in assessing with certainty life events.

Probability has to be distinguished from the concept of probabilistic causation, that is the probability to increase the risk of the damage[12]. Although in other branches of tort law this theory has found vast room, in competition law enforcement, on the contrary, it is worth to reflect on the sole application of probability theories in order to gauge the likeliness that an event was caused by a specific set of causes. The use of

[8] Israel Gilead et al., *Proportional Liability: Analytical and Comparative Perspectives* (De Gruyter, 2013), 12 ff.

[9] Stephen E. Toulmin, *The Uses of Argument* (Cambridge University Press, 2003), 69. The author believes that the use of the words 'probable' and 'probability' influences the assertion made to an extent that is variable, depending on the specific situation and background in which it is used.

[10] In this regard, it has to be noted that, taken into consideration the complexity of competition law damages actions, the use of common knowledge appears particularly difficult to be applied to the assessment of causation.

[11] Toulmin, *The Uses of Argument*, 70.

[12] Richard W. Wright, "Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts," *Iowa L. Rev.* 73 (1987): 1001; Gilead et al., *Proportional Liability*, 23.

probability is indeed largely needed because, in many cases, it is uncertain in competition law the NESS inference that links conditions to the event. On the other hand, the unconditioned application of probabilistic cause would bring an uncontrollable extension of liability grounds for competition law infringements.

Authors such as Wright rejected the validity of a probabilistic causation on the basis of the fact that it would lead to award damages also in cases where the result of the action does not happen. Wright notes that "*[a] competing interpretation [of NESS approach], "probabilistic causation" has arisen from the confusion, which, despite its obvious implausibility, continues to attract a growing number of adherents at least among legal academics"*[13]. Differently, Wright admonishes that "*a causal law describes an invariable, non-probabilistic, causal connection between fully specified set of antecedent NESS conditions and some result*"[14]. Wright looks at the probability mainly from its risk related point of view, based on which it is the risk to cause an event to be object of the claim and not the causation of the same event. However, probabilities can be applied in order to weight the different conditions and causes of the event. As seen in the logic of conditions applied to legal causation[15], the judge has generally to decide which of the conditions caused the damage. This choice often hinges on probabilistic evaluations of the event to happen as a consequence of the specific condition. The probabilistic analysis in competition law is, moreover, strictly connected to the use of econometrics in national courtrooms[16].

The generalisation of causal conditions through probabilities[17] can purport several problems in the application of competition law. It might happen, indeed, that the action is not fitted to cause the damage, or that it even decreased the probability of the damage to be produced, but nonetheless it should be accounted as a cause of the injury. A well-known example tells of a golfer who badly slices a golf ball. The ball shoots away toward the rough, but it then bounces off a tree and then into the cup for a hole-in-

[13] Wright, "Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof," 1030.
[14] Ibid., 1043.
[15] See paragraph 2.5.
[16] See paragraph 6.6.
[17] Hitchcock, Christopher, "Probabilistic Causation," in *The Stanford Encyclopedia of Philosophy (Winter 2012 Edition)*, ed. Edward N. Zalta, 2012, available at http://plato.stanford.edu/archives/win2012/entries/causation-probabilistic/.

one[18]. The golfer's slice lowered the probability that the ball would wind up in the cup, yet nonetheless caused this result. The singular causation, in this case, is not explained by any generalising theory founded on probability[19]. In this case, the application of causal probability theories would clearly yield paradoxical results.

The application of a NESS approach presumes the certainty of the sets of conditions that are being applied[20]. In order to obviate to this problem, for some authors, probabilities should be intended as mere indicators of possible reference classes that can be used to build causal generalisations[21]. The use of probabilities, in other terms, is translated into a criterion to choose among different sets of condition for the application of a NESS approach. In this vein, the NESS theory could be sided with the definition given by Cartwright for whom a cause is "*a factor that increases the probability of its effect in every background context*"[22]. Embedding probability into the NESS theory to this extent would allow to use the logic items of the theory of conditions without relying on fully deterministic approaches, above all when the conditions cannot be selected empirically[23]. Moreover, the use of this approach should be limited to the factual analysis of causation[24].

[18] Ibid.

[19] "Probabilistic Reasoning and Evidentiary Value," in *The Dynamics of Thought*, Synthese Library 300 (Springer Netherlands, 2005), 1–10. The flaws of general causation theories have also being highlighted through counterexamples, divided into two categories: cases where causes fail to raise the probabilities of their effects, and cases where non-causes raise the probabilities of non-effects.

[20] Wright Richard W., "The NESS Account of Natural Causation: A Response to Criticisms," in *Perspectives on Causation*, ed. R. Goldberg (Hart Publishing, 2011), available at SSRN: http://ssrn.com/abstract=1918405.

[21] David Papineau, "Causal Asymmetry," *British Journal for the Philosophy of Science*, 1985, 273–89.

[22] Nancy Cartwright, *Hunting Causes and Using Them* (Cambridge University Press Cambridge, 2007).

[23] As the authors of the theory postulate. See Wright Richard W., "The NESS Account of Natural Causation: A Response to Criticisms", 304.

[24] Similarly to what Stapleton states about the NESS account as elaborated by Hart and Honoré and initially developed by Wright; see Jane Stapleton, "Unpacking Causation," in *Relating to Responsibility: Essays for Tony Honoré on His Eightieth Birthday*, ed. Peter Cane, Anthony M. Honoré, and John Gardner (Hart Publishing, 2001), 145.

4.2. The use of probability and the creation of risk

Causal relations are generally intended to be objective features of the world for some branches of knowledge[25]. However, situation of causal uncertainty are an undeniable truth in areas such as competition law, and this uncertainty justifies to some extent the use of probability[26], that takes the shape of an explanation of causal connections through scientific disciplines which interpret probabilities objectively. There are two main streams of interpretation of probability, that are the frequency theory and the propensity theory[27]. The former approach tends to reckon probability based on the number of measurement of a certain event in a particular time lapse[28]. It was initially designed for cases of asbestosis by the US Court of Appeals in *Lohrmann*, noting that "*To support a reasonable inference of substantial causation from circumstantial evidence, there must be evidence of exposure to a specific product on a regular basis over some extended period of time in proximity to where the plaintiff actually worked*"[29].

The second theory finds application, instead, for singular occurrences. Each individual occurrence has clearly no 'frequency history', but might have a particular propensity to yield a specific event in the future[30].

The responsibility for an event is therefore established when the action belongs to a class of events, all characterised by a high probability, intended as frequency or propensity, of causing the harm. The probability method, in its counterfactual

---

[25] Nancy Cartwright, "Causation: One Word, Many Things," *Philosophy of Science* 71, no. 5 (2004): 805–20.

[26] Gilead et al., *Proportional Liability*, 51.

[27] Hitchcock, Christopher, "Probabilistic Causation."Jane Stapleton, "Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims, The," *Brook. L. Rev.* 74 (2008): 1011. Exceptions are the approaches deployed by Suppes, who takes "*probability to be a feature of a model of a scientific theory*": Patrick Suppes, *A Probabilistic Theory of Causality* (North-Holland Pub. Co., 1970) and Skyrms for whom probabilities are subjectives items of a rational agent: Brian Skyrms, *Causal Necessity: A Pragmatic Investigation of the Necessity of Laws* (Yale University Press, 1980).

[28] Richard Goldberg, *Perspectives on Causation* (Hart Publishing, 2011), 17.

[29] Lohrmann v. Pittsburgh Corning Corp Gaf Ac S & Hk782 F. 2d 1156 (1986), 1162.

[30] William M. Goldstein and Robin M. Hogarth, *Research on Judgment and Decision Making: Currents, Connections, and Controversies* (Cambridge University Press, 1997), 145; Goldberg, *Perspectives on Causation*; John Leslie Mackie, *Truth, Probability and Paradox: Studies in Philosophical Logic* (Oxford University Press, 1973), 141.

formulation, is instead founded upon the observation that a specific event had only few chances not to happen.

The explanation of probability is generally integrated by the use of the risk theory[31]. Proof of causation consists, along these lines, in providing evidence that the probability of an event to happen equalled, ex ante, to a risk that was negligible (hence not foreseeable)[32]. The risk' test is applied generally when the claimant is not able to prove the material contribution of the tort to her damage. In such cases, some courts[33] allow claimants to prove that the illicit behaviour has materially contributed to the risk of suffering the damage[34], easing the burden of proof of the claimant. In causal terms this means to substitute the proof of general causation to the substantiation of singular causation of the risk. What is important to note is that the object of the proof switches from the causation of a damage to the creation of a risk. For the risk theory, indeed, causation is given by the same probability of an event to happen. In this regard, some authors criticised the effects of the use of causal generalisations combined with the risk theory. When generalisations are framed in probability terms the risk of a class of events to happen draws to the conclusion that all the events belonging to the same class – and probability - will likely happen, and therefore infer causation. The probative relevance of the statistic proof raises doubts, therefore, when it blindly draws same conclusions for events that have same chances to happen[35].

In this dispute, Pucella wisely expounds that, in practical terms, when the use probability for assessing causal links brings to a re-balance of the burden of proof

[31] Wright, "Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof."

[32] Robert Cooter, "Torts as the Union of Liberty and Efficiency: An Essay on Causation," *Chi.-Kent L. Rev.* 63 (1987): 523; Guido Calabresi, "Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.," *The University of Chicago Law Review*, 1975, 69–108; William M. Landes and Richard A. Posner, "Causation in Tort Law: An Economic Approach," *The Journal of Legal Studies*, 1983, 109–34; Alan Schwartz, "Causation in Private Tory Law: A Comment on Kelman," *Chi.-Kent L. Rev.* 63 (1987): 639; Mario J. Rizzo, "Imputation Theory of Proximate Cause: An Economic Framework, The," *Ga. L. Rev.* 15 (1980): 1007.

[33] See, for instance, McGhee v National Coal Board [1972] UKHL 7, where the Court notes that "*it is a sound principle that where a person has, by breach of a duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause*". However, it did not find further application in courts' judgments.

[34] Cees Van Dam, *European Tort Law* (Oxford University Press, 2013), 328-329.

[35] Wright, "Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof", 1042 ff.

between parties to the advantage of the claimant, this benefit is justified by the legal 'weight' given to the risk created[36].

Therefore, the use of risk theories and probabilities in cases of causal uncertainty might be justified to the extent that it simplifies a burden of proof otherwise extremely difficult. However, the 'risk' of applying such theories in antitrust damages actions consists in the fact that it might take to a substantial by-pass of the assessment of causation. The infringement of competition law coincides already with the creation of a threat for other market players and, therefore, to a risk of damage to them. The assessment would by consequence stop to the finding of the antitrust infringement, as the risk of creating a damage to market actors would correspond to the restriction to the market[37]. But, competition law infringements, as known, may involve and touch the interests of many different subjects at the same time. Hence, while placing a rebuttable presumption of damage might, in some cases[38], be reasonable in order to facilitate the actions for claimants, assuming the damage to private actors from the restriction to the market would equal to an unreasonable impairment for infringers.

In Enron the Court solved this question stating that "*Since a finding of infringement does not require proof that damage has in fact been caused to a rival undertaking, the fact that an infringement has been established does not show, as a necessary implication, that such damage has been caused*"[39].

Differently, the finding of an infringement influences the probability of causation of a damage in cases of uncertainty. Probability becomes a tool to manage uncertainty in the hands of the judge sided with other logical instruments such as inferences and deductions, and, finally, common sense. Allowing such techniques into

[36] Roberto Pucella, *La causalità "incerta"* (Giappichelli, 2007), 71.

[37] A merely speculative damage is for the CJEU inadequate (see the judgment in Joined Cases 5/66, 7/66 and 13/66 to 24/66 Kampffmeyer v Commission [1967] ECR 245) although, in order to bring an action for a declaration of liability, "*imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed*" is enough, see Joined Cases 56/74 to 66/74 Kampffmeyer v. Council and Commission [1976] ECR 711, at paragraph 6; Case C-44/76 Milch-, Fett- und Eier-Kontor GmbH v Council and Commission of the European Communities [1977] ECR 393, at paragraph 8; in Case C-147/83 Münchener Import-Weinkellerei Herold Binderer GmbH v Commission of the European Communities [1985] ECR 257, at paragraph 19; and in Case C-281/84 Zuckerfabrik Bedburg AG and others v Council and Commission of the European Communities [1987] ECR 49, at paragraph 14 .

[38] As the Directive has done for cartels at art. 17.

[39] Enron Coal Services v English Welsh and Scottish Railways [2003] EWHC 687.

the civil proceeding for compensation claims, responds also to policy aims that courts are (indirectly) in charge to apply.

The probabilistic reasoning affects also the approach to the proof of the causal link. For instance, when the proof is given through counterfactuals, the claimant substantiate that the actions yields a particular result showing that if the action had not happen, the damage would have been avoided. In other words, the statement shifts from a standard counterfactual which recites "*if A had not committed the infringement, B would not have been injured*", to the case of indeterministic outcomes, where probabilistic formulation has to be preferred: "*if A had not committed the infringement, B's probability of being damaged would have been only X %*".

However, the over-reliance on scientific or economic concepts in competition law has being criticised from different angles[40]. Moreover, it has to be noted that causal uncertainty is boosted by the use of scientific concepts to the extent that in some cases it even impedes the finding of an etiologic connection[41]. In such cases, some courts resorts to the principle of common sense, in order to determine a judicial truth that, not necessarily has to reproduce the empirical truth. In this vein, Lord Salmon argued that "*The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary commonsense rather than abstract metaphysical theory*"[42].

4.3. Loss of chance

The creation or contribution to a risky situation can impede a particular event to be brought about. The event remains in its 'potentiality' and, therefore, it is measurable

[40] Lianos, Ioannis, "'Judging' Economists: Economic Expertise in Competition Law Litigation - A European View," in *The Reform of EC Competition Law: New Challenges*, ed. Ioannis, Lianos and Ioannis Kokkoris (Kluwer, 2009), Available at SSRN: http://ssrn.com/abstract=1468502 or http://dx.doi.org/10.2139/ssrn.1468502.

[41] Roberto Pucella and Giovanni De Santis, *Il nesso di causalità: profili giuridici e scientifici* (Wolters Kluwer Italia, 2007), 103.

[42] Alphacell Ltd v Woodward [1972] UKHL 4 (UKHL (1972) 1972).

only through probability to happen in a counterfactual universe. The situation that, due to the defendant's action, was not realised, is a lost chance[43].

The lost chances theory predicates that the damage consists in the probability that the claimant had (before the infringement) to avoid the damage. The loss of chance does not refer, therefore, to the final damage and the probability that this might happen. It might also consist instead in a different head of damage[44].

In competition law damages actions, the causative link between, the anticompetitive behaviour and the damage claimed may be assessed through the risk added by the infringement to the loss of chance. Risk and chances are different, but raising the risk of damage might lower the chances to avoid it. However, general class-based probabilities of risk should not be confused with the proof of a loss of chances. Let us take the example of a claimant that, in a follow-on action, maintains to have lost the chance to close a contract because of an exclusionary abuse. In this case, the judge may determine that the abuse raised the risk of such type of contract not to be concluded by competitors. However, the singular causation requires the assessment of the fact that that particular cartel impeded the conclusion of that specific contract.

The lost chance generally refers in tort law to an infringement which caused a loss to reach a rather probable outcome or objective or to avoid an undesired one.

With regard to economic damages, the possible cases of loss of chance are many: inability of the victim to develop business relationships with a customer or to enter a market, to access and exploit a particular technology, to renew a concession contract, to avoid contracting a disproportionate loan or bond[45], to make highly risky investments[46] or, finally, to make an investment on life insurance[47]. A further practical

[43] Peter Cane, *Tort Law and Economic Interests* (Clarendon Press, 1996), 137 ff.; Van Dam, *European Tort Law*, 337 ff.; Jaap Spier, Francesco Donato Busnelli, and European Centre of Tort and Insurance Law, *Unification of Tort Law: Causation* (The Hague; London; Boston: Kluwer Law International, 2000), 141 ff.; Walter Van Gerven, Jeremy Lever, and Pierre Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Hart, 2000), 201 ff.; B. S. Markesinis and Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (Hart Publishing, 2002), 628–629.

[44] Chabas, François, "La Perte D'une Chance En Droit Français, Colloque Sur Les Développements Récents Du Droit de La Responsabilité Civile," *Centre D'études Européennes*, 1991, 131 ss.

[45] All hypothesis mentioned in Cour de cassation, civile, Chambre commerciale, 15 février 2011, 09-16.779, not yet published.

[46] Cour de cassation, civile, Chambre commerciale, 15 September 2009, 08-14.398, not yet published.

[47] Cour de cassation, civile, Chambre commerciale, 15 février 2011, 10-11.614.

consequence of the application of such approach is that it affects the quantum of damage and not necessarily the *an debeatur*. Indeed, if the grievance is accepted by the judge the damage awarded will amount not to the damage but to the loss of chance.

Lost chances should not be confused with lost profits, although they both address a future lost income. The qualification of the damage as loss of chances or lost profits becomes decisive indeed at the moment of calculation of damages. Take as an example a case where the lost profits would amount to 100 with a probability of 80% and to 500 for the remaining 20%. If the damage is qualified as a loss of profits, the damage would be quantified in 100, since that is the amount that 'most probably' (80%) the claimant was going to earn, while the 500 possible loss would remain a neglectable possibility (only 20%). By contrast, if we define the damage as a loss of chances, both opportunities have to be quantified in relation to their chances to be realised. Hence, the damage would amount to 180 (that is 100*80% e 500*20%)[48].

In general terms, while a claim for lost profits focuses on the earning which cease to exist, the lost chances address a future income that exists as a possibility to do business[49]. In antitrust litigation these claims are easily confused by claimants that, as Hovenkamp observes, "*generally claims damages for what may be loosely characterized as lost profits*". The author suggests that in cases such as "*reduction in market share, a smaller markup per unit sold, an existing firm's loss of investment or business assets, or preclusion from entry into a profitable business* (…) *the measure of damages is so imprecise that "loss of the opportunity to do business" would describe the plaintiff's loss more accurately than "lost profits," which suggests a sum that is quantifiable with a fair amount of precision"*[50].

[48] Castelli, "La Causalità Giuridica Nel Campo Degli Illeciti Anticoncorrenziali," 1059; Pietro Trimarchi, *Il contratto: inadempimento e rimedi* (Giuffrè Editore, 2010), 144.

[49] Trimarchi, *Il contratto*, 144.

[50] Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* (Thomson/West, 2005), 678.

4.4. Lost chances in national antitrust case law

European courts have different positions over the indemnifiable nature of such hypothetical damages[51].

In France the concept of loss of chance ("*perte de chance*") is generally used in order to obviate to the shortcomings of legal causation[52]. The lost chance permits to by-pass the proof of a causal connection between action and damage because, for French law, it is an independent head of damage[53]. In this vein the *Cour de Cassation* requires the claimant to prove the lost chance as well as the causal connection between the action and the lost chance[54] also in cases of pure economic loss[55]. The probability of lost chances is calculated as a percentage, that is then compensated.

In competition law litigation the lost chance theory has been used in different cases before French courts. In *SAS Ajinomoto Eurolysine v. SNC Doux Aliments*[56] the decision of the Court of Appeal of Paris was based on a follow-on claim raised by Doux against the price increase of lysine due to the cartel found by the Commission[57]. The European Commission fined several producers of lysine for operating a global price-fixing cartel. Doux, a French poultry producer using lysine in its aliments[58], claimed damages resulting from the cartel price increase. The claimant maintained that as a result of the cartel overcharge it suffered damages due to the cartel price overcharge, to

[51] Van Dam, *European Tort Law*, 337 ff.

[52] Goldberg, *Perspectives on Causation*, 119.

[53] See Cour de Cassation civile, 1re, 12 November 1985, Bull. civ I, no. 298; Cour de Cassation civile, 1re, 7 February 1990, Bull. civ I, no. 39; Cour de Cassation civile, 1re, 3 November 1983, Bull. civ. I, no. 253, on which see Van Gerven (2000), 427. See also Geneviève Viney and Patrice Jourdain, *Les conditions de la responsabilité* (L.G.D.J., 2006); Van Dam, *European Tort Law*; Walter Gerven, Jeremy Lever, and Pierre Larouche, *Tort Law* (Hart, 2000).Gilead et al., *Proportional Liability*, p. 143.

[54] Cour de Cassation req., 17 July 1889, S. 1891. I. 399; Cour de Cassation civ. 1re 14 December 1965, JCP 1966. II. 14753, Cour de Cassation civ. 1re 17 November 1982, JCP 1983. II. 20056, D. 1984. 305, on which see Van Gerven (2000), 428; Cour de Cassation civ. 1re 8 January 1985, D. 1986. 390, comm. Penneau; Cour de Cassation civ. 10 June 1986, Bull. civ. 1986. I. 163; Viney-Jourdain (2006), nr 370; Le Tourneau (2012), nr 1417 ff.

[55] Cour de Cassation crim. 6 June 1990, Bull. crim. 1990. 224, on which see Van Gerven (2000), 200–201. Cour de Cassation civ. 1re 4 June 2007, JCP 2007. I. 185, no. 2, ETL 2007, 276.

[56] Paris Court of Appeal, SNC Doux Aliments Bretagne etc v. SAS Ajinamoto Eurolysine, No 07/10478, 10 June 2009.

[57] Commission Decision Case COMP/36.545/F3 — Amino Acids OJ L 152, 7.6.2001, p. 24–72 (2000).

[58] Doux purchased the lysine from Ceva Santé Animale that, at its turn, directly purchased it from Ajinomoto.

a reduction of profit margins and to loss in competitiveness. The defendant, Ajinamoto Eurolysine, opposed the fact that Doux had passed the overcharge on to its buyers and objected also the expert opinion submitted by the claimant, observing that it was imprecise. The Court of Appeal rejected the passing-on defence and stated that the amount of damages had to be calculated as lost chances due to the reduced competitiveness on the market, to be calculated in the amount of the 30% of the amount claimed[59].

The Court of Cassation considered that the judgement of Court of Appeal lacked legal basis for decisions under Article 1382 of the French civil code[60], by not considering whether the claimant Doux had totally or partially passed-on to its customers the additional costs resulting from the infringement committed by the Ajinamoto, so that the allocation of damages could cause them unjust enrichment. On the other hand, the Court of Appeal violated Article 16 of the French code of civil procedure[61] because did not invite the parties to submit their comments when converted part of Doux's claim in an appeal for lost chances. Moreover, the Court of Cassation objected that the judges must prove the existence of a causal link between the event giving rise to liability and the loss of a chance which should not be presumed, by retaining that the prejudice to Doux consisted of a loss of opportunity to maintain the competitiveness of its products. The fact that the lysine market prices had been subject to erratic fluctuations should not bring the judge to infer that the causal link between the rise in prices and loss of competitiveness of products by Ajinomoto, as the damage

[59] Here the Court of Appeal does not give justification of the damages calculation as it might be the result of a discretionary apportionment.

[60] The general rule for tortious liability in France stating that "*Any act of a person which causes damage to another makes him by whose fault the damage occurred to make reparation for the damage*" (in the original version "*Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé, à le réparer*").

[61] Based on which: "*In all circumstances, the judge must supervise the respect of, and he must himself respect, the adversarial principle. In his decision, the judge may take into consideration grounds, explanations and documents relied upon or produced by the parties only if the parties had an opportunity to discuss them in an adversarial manner.*

He shall not base his decision on legal arguments that he has raised sua sponte without having first invited the parties to comment thereon."

remain purely hypothetical, and therefore violates the principle expressed by the Article 1382 of the French civil code[62].

In at least other two competition law damages actions, French courts have instead successfully granted damages for loss of chances. The first regards a judgment of the Court of Appeal of Versailles facing a claim for damages caused by the selective rebates operated by the defendant[63]. The Court observed that the selective rebates policy benefitted only some competitors causing a loss of chance to the claimant who, potentially, had had more chances to increase the number of sales but-for the infringement.

In a second successful case, a potential buyer of a newspaper stall claimed damages for exclusion from the distribution network of *SNC*, the local incumbent for newspapers[64]. The Court of Appeal granted damages to Mr. Merhi in form of lost chances caused by the fact that the claimant had refused to sign the contract with SNC under potentially illegal clauses imposed by the firm in dominant position.

In England, the notion of loss of chances does not find the same broad application as in France. While, indeed, it has been for long accepted in contractual disputes related to financial losses[65], in tort law disputes courts have been more sceptical[66].

The application of the 'more probable than not' or '50+' rule, impeded a scalar application of the lost chances. British courts tend to be therefore very reluctant to grant damages for loss of chances, especially in medical negligence, where the House of Lords has twice rejected such claims, in *Hotson v East Berkshire Area Health Authority*[67] and *Gregg v Scott*[68]. However, outside the area of medical malpractice, British courts are more prone to accept such claims, in particular in cases of pure economic loss, as for instance the decision in *Allied Maples v Simmons & Simmons*[69]

[62] Cour de Cassation, civile, Chambre commerciale, 10-11.614, not published, 15 février 2011.

[63] Court of Appeal of Versailles, SA Concurrence v. SA Aiwa France, No 01/08413, 9 December 2003.

[64] Court of Appeal of Paris, M. Merhi Bassam v. SNC Société Presse Paris Services – SPPS, No 08/21750, 27 April 2011.

[65] Chaplin v Hicks [1911] 2 KB 786, CA.

[66] Hotson v East Berkshire Area Health Authority [1988] UKHL 1.

[67] Ibid.

[68] Gregg v. Scott [2005] UKHL 2.

[69] Allied Maples Group Ltd v Simmons & Simmons [1995] EWCA Civ 17.

that regards a claim on professional responsibility and company law. With specific regard to competition law damages actions, a future economic loss was generally considered too remote to be accounted as an independent head of damage. In *Crehan v Inntrepreneur Pub Company CPC*[70], the first UK case awarding damages for breach of competition law, Mr Crehan – a pub owner – claimed damages caused by the lease contract with CPC which he maintained to be unlawful for breach of Article 81 (now Article 101 TFUE). In particular Mr Crehan claimed to have felt consistent losses of chances to compete against pubs which were purchasing beers at more competitive prices. Moreover, he reasoned, the loss was flowing from his inability to "shop around for best buys". The Court of Appeal considered that under English law the damages should not be awarded for a lack of causal link. However, in application of the principle of effectiveness, such damages had to be awarded, as the CJEU stated that private enforcement of EU competition law covers also such type of losses[71].

This approach has been reversed in recent times, in particular with the conclusions reached by the Court of Appeal in *Enron v. English Welsh & Scottish Railway* [72]. Here, the claimant sustained a loss of chances caused by the abuse of dominant position of the defendant. The infringement of competition law was practically uncontested, given that the action was a follow-on type and the violation of art. 102 TFEU was already assessed by the Office of Rail Regulation (ORR). Moreover, the British Authority also found out that English Welsh & Scottish Railway (EWS) deliberately tried to endanger Enron position in the relevant market through a discriminatory treatment of the claimant, that was placed at a competitive disadvantage in its contractual negotiations with Edison Mission Energy Ltd (EME). On these basis Enron claimed the abuse of dominant position of EWS deprived Enron of a real or substantial chance of winning a contract for the supply of coal to one of EME's power stations for the period spanning from 2001 to 2004[73]. Finally, for the Court the grievance purported by Enron was also adequately substantiated. The plaintiff claimed

[70] Crehan v Inntrepreneur Pub Company CPC [2004] EWCA Civ 637.

[71] Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others [2001] ECR I-06297.

[72] Enron Coal Services Limited v English Welsh & Scottish Railway [2011] EWCA Civ 2.

[73] Ibid., 74.

damages in form of loss of profits for failing to close an E2E contract with Edison because of the competitive disadvantage caused by the EWS anticompetitive behaviour.

However, the Tribunal, in first instance, observed that Enron, even in absence of the anticompetitive conduct, had few (if any) chances to win the coal contract from Edison. The anticompetitive behaviour, translated in causal language, was therefore a condition of the harm but not necessary and not even probable.

The CAT, endorsing the first instance decision, evaluated the findings of the Authority in terms of causal connection to the harm claimed and observed that "*The finding of competitive disadvantage (which EWS accepts, as it must) means that EWS hindered the competitive position of ECSL in relation to the EME Tender. This is certainly relevant to, but not determinative of, the question of causation. It is relevant because it means that ECSL was impeded in its ability to offer EME competitive rates for coal haulage and supply. It is not determinative because the Decision does not establish that ECSL was well-placed to win a coal supply contract with EME absent the abuse*."[74]. The loss of chance for not winning the contract was therefore not causally connected to the competitive impairment suffered by Enron. However, in this decision the English courts argue around the right to recover lost chances, confirming that it is possible to claim such damages if adequate proof of causal connection is provided.

By the same token, in the case *2 Tavel v Cardiff Bus*[75] the CAT rejected the claims related to loss of a capital asset, loss of a commercial opportunity and for the costs of 2 Travel's liquidation, on the basis of the fact that the infringement was not a necessary condition of the loss. The OFT found that Cardiff Bus had abused of its dominant position in the Cardiff bus market by seeking to force 2 Travel out of that market. However, the CAT rejected the further claims observing that "*We have found that the Infringement would have resulted in additional revenue to the company of £33,818.79. This was a drop in the ocean, and could not have saved the company. We consider the Infringement to be causally irrelevant to 2 Travel's demise*"[76].

[74] Ibid., paragraph 162.
[75] 2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Ltd [2012] CAT 30.
[76] Ibid., CAT:148.

German tort law, instead, generally rejects the application of loss of chances theory, on the basis of the fact that "*If the chance has no economic value, redefining the damage encounters difficulties because the loss of this chance cannot be qualified as recognisable damage which can be compensated*"[77].

German law predicates an all-or-nothing approach that, for the prevalent doctrine, cannot be reconciled with the application of lost chances theory[78]. In competition law damages actions, claimants visibly qualify the head of damage as a loss of profits[79], when possible.

Italian judges, instead, are more willing to accept claims based on lost chances, relying on probabilistic theories of adequate causation[80]. In Italy the lost chance became an independent head of damage through a deep revision of tort rules by the Supreme Court which declared protected by law also the lost possibility to realise a positive outcome in the future[81]. The probability of the positive event to happen, not necessarily has to be more than 50%, as the Italian case law, differently from common law traditions, requires a "*reasonable certainty of a positive probability*"[82].

The Tribunal of Milan treated the issue of loss of chance also in two recent competition law damages actions[83]. In one of these cases, Brennercom, a telecom company, claimed damages with two different actions against Telecom and Tim, two national telecom incumbents. Two was also the number of the correspondent decisions of the Italian Antitrust Authority (AGCM) ascertaining an abuse of dominant position of the national incumbent. Although in none of the AGCM's decision Brennercom was mentioned, the judge deemed reasonable to define both actions as follow-on type.

---

[77] Koziol, Helmut, "Loss of a Chance: Comparative Report," in *Digest of European Tort Law. Vol. 1 : Essential Cases on Natural Causation*, ed. Winiger, Bénédict et al. (Wien: Springer, 2007).

[78] Marc Stauch, *The Law of Medical Negligence in England and Germany: A Comparative Analysis* (Bloomsbury Publishing, 2008).

[79] Recoverable under section 252 of the German Civil Code.

[80] Pucella and Santis, *Il nesso di causalità*. Pucella, *La causalità "incerta."*, 82.

[81] Corte di Cassazione, Montani et al v. Lloyd Adriatico, 25 September 1998, no 9598, in Studium Juris 1999, 81 Danno e resp. 1999, 534; see also Corte di Cassazione civ., 25 May 2007, n. 12243, in Giust. civ. Mass., 2007, 5; Corte di Cassazione civ., 21 July 2003, n. 11322, in Danno e resp., 2004, 567.

[82] Cort di Cassazione, Blasi v. Az. cons. trasp. pubbl. Napoli, 22 April 1993, no. 4725, in Giust. civ. Mass. 1993, 720.

[83] Tribunale di Milano, Brennercom Spa v. Telecom Italia Spa, no. 14802/2011, 3 March 2014 and Tribunale di Milano, Brennercom Spa v. Telecom Italia Spa, no. 22423/2010 27 December 2013.

Brennercom was indeed operating in the same market interested by the Authority's decision, although with geographical limitation given by the fact that its business was mainly (if not solely) based in the Region of Trentino and Alto Adige. Brennercom claimed to have lost reasonable chances to close contracts with potential clients due to Telecom's abuse of dominant position. The claimant therefore observed that, in absence of Telecom's infringement, would have had the chance to acquire more clients and reckoned the damage as a percentage corresponding to the probability of this positive outcome. The Italian court acknowledged that the loss of chances are one of the categories of damages subject to compensation in competition law actions[84]. However, the court quashed the claim from Brennercom in the part related to loss of chances on the ground that the claimant failed to substantiate the possible future chance and its causal connection to the antitrust infringement. In particular, Brennercom did not submit a sufficient proof of the fact that potential clients preferred contracting with TIM or Telecom Italia, depriving therefore Brennercom of the chance to gain a potential client[85]. In general terms, if it is not possible to substantiate a link between damage and event, it would be correspondently complicated to give evidence of the fact that the same behaviour reduced the probability of avoiding the same damage[86].

In some cases the lost chances can however facilitate the burden of proving causation to the claimant[87] in the sense that the claimant can move the ground for the proof from the very complex one of the causal relationship between action and damage to the more immediate one that connect the action to the loss of a chance. The loss of a chance brings the judge to operate a substitution in the causal reasoning: in place of the effects of the infringement, there is the probability of that action to produce the effects.

In competition law possible grounds for claims based on lost chances are numerous. For instance, a firm might claim the loss of the chance to conclude a contract that failed to secure because of the exclusionary infringement of the incumbent.

[84] The court list the compensable damages as: actual loss; loss of profits; lost chances and damage to the company's image.

[85] Court of Milan, Brennercom Spa v. Telecom Italia Spa decision n. 14802/2011, 40 (2014), 40.

[86] To similar conclusions attain the Italian judge also in the cases, Civil Court of Milan, OK Com Spa c. Telecom Italia SpA, 13 February 2013, R.G. 76568/2008 and Corte di Cassazione civ., Telecom v. Sign and others, 16 May 2007, n. 11312; although both refer to loss of profits rather than to a lost chance.

[87] Some Authors such as Jourdain and Viney even maintained that it is a trick to avoid proof of causation; Viney and Jourdain, *Les conditions de la responsabilité*.

Otherwise, a consumer might ask for the damages caused by the loss of chance to purchase a good because of its cartel inflated price.

Modern theories tend to calculate the probability of lost chances as a quota of the final damage, if happened[88]. However, this translation of probabilities in actual damages gives, sometimes, the illusion that probabilities equal certainties, at least from a legal viewpoint. Moreover, the quota of lost chances has a relative weight depending on the position of the damaged party and the final damage. A 30% loss, in terms of future chances of reaching a certain objective, exercises a different power whether the loss takes the chances from 90 to 60 or from 40 to 10. In the latter, case, indeed, the damage is clearly more important since the successful expectations are highly diminished almost to 0, although in both cases the quota amount to a 30 %.

However legal rules do not strictly reflect the application of naked probabilities, to the extent that, above all in highly complicated cases, the search for causal relation becomes the judgment between competing narratives. Moreover policy considerations are of utmost importance, and sometimes the main driver of the decision.

4.5. Probability, causal uncertainty and competition

The take-over from philosophy and legal reasoning should be enough persuasive to devoid from thinking that causation can ever be certain. Causal uncertainty requires therefore the use of reasoning which are not fully deterministic. However, the probabilistic appreciation of causation, if becomes the rule completed by a proportional approach, purports serious problems. First of all, with this approach the probability would become subject to indemnification also when it is very small[89]. Hence, if the probability for a competing firm to conclude the contract 'but-for' the anticompetitive behaviour are ten per cent, the judge should grant a corresponding pro quota damage for the firm has lost a very small, but still a chance. Potentially, every situation would be prone to damages claims.

This approach would, therefore, contrast the general principles of causation developed in tort law traditions for which the high probability of an event to happen,

[88] Gilead et al., *Proportional Liability*, 40.
[89] Ibid., 43 ff.

corresponds to a legal certainty, while a low probability corresponds to non-indemnifiability[90]. Furthermore this method would create a massive recourse to litigation, since all damages would be subject to compensation.

Moreover, probability theories go hand-in-hand with the observation of creation of risk. The probability of an event is indeed often reckoned by courts observing the risk added or created by the action. This risk, in competition law, takes the form of the likelihood of an impairment created on the market. For instance, in case of a claim for damages resulting from the loss of the chance to close a contract, the claimant might want to demonstrate that while without infringement he would have had a 80% chances to close the contract, after the infringement, due to the market distortion provoked, the chances decreased to 30%. However, proportional liability might be used when probabilities are close to a 'turning point' but not sufficient to justify the application of the 'all-or-nothing" approach [91].

4.6. Causal proportional liability and multiple tortfeasors

When an anti-competitive harm is caused by more than one undertaking, typically in case of cartels, a problem of imputation of cartel damages and of liability of each antirust infringer arises. The Damages Directive opted for solution where all the undertakings taking part to the same breach of competition law are jointly (solidary) and severally liable for the harm caused[92]. By consequence, each undertaking is "*bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated*"[93]. The European legislator opted, in this first rule, for avoiding any form of causal apportionment of the damage. The multiple tortfeasors who have caused the anticompetitive harm are each accountable for the whole damage. The infringer who paid the compensation has the right to recover a contribution from the co-infringers. The solution laid down by the

[90] In this vein, the 'all-or-nothing' approach compels that, in case of causal uncertainty, the illegal behaviour of the infringer that may have caused a damage to the claimant is left uncompensated if the probability is lower than a certain threshold.

[91] Gilead et al., *Proportional Liability*, 7; Helmut Koziol et al., *Principles of European Tort Law (PETL): Text and Commentary* (Springer, 2005), Art. 3:106.

[92] Article 11 (1).

[93] Ibid.

Directive endorses the main trend in Member States tort laws, where, in order to avoid inconsistencies of the application of deterministic approaches (such as but-for test or adequate causality) they prefer to account every tortfeasor *in solidum*[94]. Similarly, the PETL states that *"[l]iability is solidary where the whole or a distinct part of the damage suffered by the victim is attributable to two or more persons*"[95].

In order to obviate to the shortcomings of the overdetermined causation cases, it was suggested that in case of multiple defendants, if each action was a sufficient condition of the harm, the but-for test has to be applied to the aggregate of potential causes[96]. These rules are clearly developed in order to make possible and, in any case, ease the burden of proof of the harmed party who seeks compensation.

The apportionment of the damage among the tortfeasors happens in a second moment, subsequent to the finding of the causal responsibility of the cartelists. The defendant, through recourse claims, can seek restoration from the co-infringers. Domestic tort laws regulate this apportionment, which is generally based on comparative fault[97]. By consequence the recourse claim does not have to establish any causation issue, such as the causal contribution of each tortfeasor.

However, the Directive leaves open to the choice of each jurisdiction whether to apply an alternative system of causal proportional liability[98]. At Article 11 (5) the Directive states indeed that "*the Member States shall ensure that an infringer may recover a contribution from any other infringer, the amount of which shall be*

[94] For a comparative overview of the different approaches see Koziol et al., *Principles of European Tort Law* Art 9:101; Christian von Bar, *Non-Contractual Liability Arising Out of Damage Caused to Another: (PEL Liab. Dam.)* (sellier. european law publ., 2009), 945; W. V. H. Rogers and W. H. van Boom, *Unification of Tort Law: Multiple Tortfeasors* (Kluwer Law International, 2004); Luisa Antoniolli and Francesca Fiorentini, *A Factual Assessment of the Draft Common Frame of Reference* (Walter de Gruyter, 2010).

[95] Art 9:101, Koziol et al., *Principles of European Tort Law*.

[96] William Lloyd Prosser, *Prosser and Keeton on the Law of Torts* (West Pub. Co., 1984), 268. Where the author points out that "*When the conduct of two or more actors is so related to an event that their combined conduct, viewed as a whole, is a but-for cause of the event, and application of the but-for rule to them individually would absolve all of them, the conduct of each is a cause in fact of the event*".

[97] Gilead et al., *Proportional Liability*, 25.

[98] Which differs from comparative or contributory negligence where the judge holds all the tortfeasors responsible for the whole harm and, in a second stage outside the assessment of direct causation, apportions the amount of damages.

determined in the light of their relative responsibility for the harm caused by the infringement of competition law". Moreover, the Directive points out that *"[t]he determination of that share as the relative responsibility of a given infringer, and the relevant criteria such as turnover, market share, or role in the cartel, is a matter for the applicable national law, while respecting the principles of effectiveness and equivalence*"[99].

On this basis, it is valid the apportionment of liability among the independent tortfeasors done in accordance with their causal contribution to the risk of harm[100]. Proportional liability is a general term used to refer to the apportionment of liability between defendant and plaintiffs or solely between defendants on the basis of the portion of liability their share in the illegal event[101].

Causal proportional liability systems seek to adjust liability to the extent of its singular contribution to the damage. Therefore, the liability of the defendant equals the probability that he has caused the damage. For instance, if the company D abused of its dominant position excluding other competitors from the market and one of these claims damages deriving from loss of clients, the judge might award damages in proportion to the probability of the loss to happen.

A second application of the proportional liability theory regards the apportionment of liability amongst many tortfeasors. In these cases, every defendant will respond in measure of the amount of its proportional participation to the infringement. Rules of apportionment of liability such as contributory negligence and comparative fault[102] differ from causal proportional liability with multiple tortfeasors. While indeed in the first case, the factual causation is already assessed through conventional means and the apportionment is only a way to distribute the damage among the tortfeasors, in the case of CPL, the apportionment regards the very moment

[99] Recital (37).

[100] Gilead et al., *Proportional Liability*, 2.

[101] Ibid., 5.

[102] See for a comparative analysis of their usage, Van Dam, *European Tort Law*, 309. In this vein, Lord Atkin confessed "*I find it impossible to divorce any theory of contributory negligence from the concept of causation*" Caswell v. Powell Duffryn Associated Collieries [1940] AC 152, 165.

of assessment of causation[103]. The adoption of a causal proportional liability test poses, however, a heavier burden of proof on the claimant while easing the position of the defendants.

Scholars have put forward also a third category comprising the uncertainty of the causation of a future event[104]. In competition law private actions, such a study can deploy a useful role in helping the judge in actions for injunction and to deter future damages[105]. The object of this class of events is therefore an unrealized risk of a potential future harm.

The retrospective application of CPL to past events, fosters instead the pursue of the goals of justice and fairness in tort law, apportioning liability on the basis of the causal contribution of each defendant, who will pay only for what he caused.

Moreover, the proportional liability test allows to overcome the impasse created by the cumulative foreclosure effect of parallel networks. It might happen that a number parallel networks are each of them incapable of hindering the market. However, the aggregate effect of all such networks might foreclose other competitors causing a restriction to the competition[106]. The application of the but-for test to each network, would inevitably bring to the exclusion of any liability, since the single network behaviour is not a sufficient cause of the event. Differently, the causal proportional liability test takes for granted that the damage has necessarily a cause and proceeds directly with the analysis of the causal contribution of each participant.

It is worth to notice that the Directive makes possible the recourse claim only against co-infringers. By consequence, the infringer who pays more than his own share of the harm, would not be able to obtain a contribution from subjects that did not partake to the infringement but were enriched by it. For instance, in case of umbrella

[103] Gilead et al., *Proportional Liability*, 3.

[104] Ibid., 16.

[105] For a comment of the recourse to injunctive relief in competition law see Richard Whish, *Competition Law* (Oxford University Press, 2012), 297 ff.; Sebastian Peyer, "Injunctive Relief and Private Antitrust Enforcement," *CCP Working Paper No. 11-7*, 2011, Available at SSRN: http://ssrn.com/abstract=1861861 or http://dx.doi.org/10.2139/ssrn.1861861; Barry J. Rodger and Angus MacCulloch, "Wielding the Blunt Sword: Interim Relief for Breaches of EC Competition Law before the UK Courts" *European Competition Law Review* 17, 1996: 393–402.

[106] Case C-234/89, Stergios Delimitis v Henninger Bräu AG. [1991] ECR I-935.

pricing, the infringer is not allowed to obtain a contribution from the direct purchaser who followed the umbrella prices but was not part of the cartel. If the domestic tort law provides the suitable means, the cartelist might be able to ask the restitution of that amount to the umbrella buyer.

Finally, causal proportional liability might be an efficient instrument also in some instances where there is only one undertaking who acted through different legal persons forming a group, also called single economic entity.

4.7. The single economic entity and the causal contribution to the harm

It is treat law that a wholly owned subsidiary is presumed to be under decisive control of its parent company with regard to the application of competition law rules[107]. By consequence, the judge may ascribe the infringements committed by the subsidiary to the parent company, as under a direct causal relationship. This presumption is a corollary of the single economic unit theory developed by British courts,[108] and then adopted by the CJEU to competition law[109]. The aim is to bypass the separate legal personality in groups of companies, in order to pursue the parent company hiding behind a 'sham' subsidiary.

Competition law rules (Articles 101 and 102 TFEU) refer, as the subject of their provisions, to 'undertakings'. This term encompasses not only companies, but also associations, cooperatives, professional regulatory bodies and any other business

[107] See Alison Jones, "Drawing the boundary between joint and unilateral conduct: Parent-Subsidiary Relationships and Joint Ventures", in A Ezrachi (ed.) International Research Handbook of Competition Law (Edward Elgar, 2012); Wouter P.J. Wils, "The Undertaking as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons" (2000) 25 ELRev 99 and Cristopher Townley, "The Concept of an 'Undertaking': The Boundaries of the Corporation – a discussion of agency, employees and subsidiaries", in Amato, G., and Ehlermann, C.D. (eds.), EC Competition Law: a critical assessment, (Hart Publishing 2007). In the US, see e.g., Herbert Hovenkamp, "American Needle and the Boundaries of the Firm in Antitrust Law" (August 15, 2010), available at SSRN:http://ssrn.com/abstract=1616625, and Ernest N. Reddick, "Joint Ventures And Other Competitor Collaborations As Single Entity— "Undertakings" Under US Law" [2012] 8(2) European Competition Journal 333.

[108] DHN Food Distributors v London Borough of Tower Hamlets [1976] 3 All ER 852.

[109] Case C-97/08 P Akzo Nobel NV, Akzo Nobel Nederland BV, et al. v Commission of the European Communities OJ C 128.

activity, having or not a legal personality or a corporate form[110]. However, neither the term 'undertaking' nor the concept of single economic unit are defined by European law, not even in 'soft law' provisions. The single economic entity, indeed, is semantically and practically a creation of doctrine and case law. The first definition of undertaking in the European case law hails from the Shell case which describes undertakings as "economic units which consist of a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision [art. 101 TFEU]"[111]. The term undertaking, therefore, refers to the economic activity carried out more than to the subject conducting it. If so, there is a plethora of definitions of 'economic activity' that could be borrowed from the academia and the jurisprudence[112], each of them convincing from an economic point of view. As for the application of competition law, the definition given in *Shell* has being recalled by all the following decisions and is now an established principle. However, when the discourse shifts to the assessment of causation and liability, the mere economic definition of undertaking is not enough. In particular, when the undertaking addressed by the claim is a compound of different legal entities, which is a conglomerate of companies[113], it might be objected a lack of causal contribution to the infringement of one of the companies forming it.

The principle of corporate legal personality introduced the limited liability, as it was created to admit the separation of a legal entity from the individuals who concurred to create it. With the act of incorporation the law sanctions indeed the creation of a legal person. The corporate personality compels, on one side, the capacity to amend rights and obligations and, on the other side, the liability for the infringement of those

[110] See eg. Case 96/82, IAZ International Belgium NV v Commission [1989] ECR 2117; Case C-250/92 Gøttrup-Klim [1994] ECR I-564.

[111] Case T-11/89 Shell International Chemical Company v Commission [1992] ECR II-757, paragraph 311.

[112] See, e.g., Case T-193/02, Piau v Commission [2005] ECR II-209, para 69.

[113] A conglomerate can be defined as a plurality of companies that might act on different level of the supply chain or even in different markets, but where all companies are part of the same corporate group because directly or indirectly owned and directed by a parent company. Usually it consists of a parent company and a number of subsidiaries. Moreover, it normally has an international or global presence.

obligations[114]. Juridical or legal personality is a '*fictio juris*' introduced by law to restrict the liability of firms to their assets. However, the principle of corporate separate legal personality is not as straightforward as it appears in its application, especially when the legal entity is used as a shield or a mere façade. The history of the piercing the corporate veil theory perfectly expounds this difficulty[115]. In some cases, subsidiaries of larger group of companies might be used to shield parent companies and prevent them from liability. In such cases, parent companies use their subsidiaries as instruments to pursue specific illicit aims[116]. The single economic unit principle has been then reinterpreted by European courts in order to fit it with the normative and jurisprudential background of European competition law. Therefore, tracing down its inception from the 'piercing the corporate veil' theory[117], the single economic entity principle has being developed and adapted to the needs of competition law by European courts and Institutions, in particular equating it to the concept of undertaking. The notion of undertaking[118] has being introduced by the European legislator in order to address the economic activities infringing competition law rather than the legal entities.[119] However, it is through the courts interpretation that the definition has being adapted to

[114] Murray A. Pickering, "The Company as a Separate Legal Entity," *The Modern Law Review* 31, no. 5 (1968): 481.

[115] John Dewey, "The Historic Background of Corporate Legal Personality," *Yale Law Journal*, 1926, 655–73; Smadar Ottolenghi, "From Peeping Behind the Corporate Veil, to Ignoring It Completely," *The Modern Law Review* 53, no. 3 (1990): 338–53.

[116] In order to overcome the legal separation of companies used as a shield for illicit operations, the UK jurisprudence, through Lord Denning, outlined the "single economic unit" theory DHN Food Distributors v London Borough of Tower Hamlets [1976] 3 All ER 852. Thanks to this approach, Lord Denning explained in which situation is possible to 'lift the corporate veil' of groups of legal entities and reach the parent company hiding behind a "sham" subsidiary; see Janet Dine and Marios Koutsias, *Company Law* (Palgrave Macmillan, 2014), 25; Dewey, "The Historic Background of Corporate Legal Personality," 658; Ottolenghi, "From Peeping Behind the Corporate Veil, to Ignoring It Completely," 348.

[117] That is still used by national courts separately and in alternative to the 'agency model' and the single economic unit theory.

[118] There are two mainstream interpretation given by the doctrine about the concept of undertaking. The first, also chronologically, is the 'static view' whose main interpreter is Deringer, see Arved Deringer and André Armengaud, *The Competition Law of the European Economic Community: A Commentary on the EEC Rules of Competition (articles 85 to 90) Including the Implementing Regulations and Directives* (Commerce Clearing House, 1968). The second, more recent, is the functional approach, which focuses on the nature of the activity carried out by the entity concerned, see Alison Jones and B. E. Sufrin, *EC Competition Law: Text, Cases, and Materials* (Oxford University Press, 2008), 129 ff.

[119] For a more recent and clear jurisprudential definition see Case C-205/03 P - FENIN v Commission, [2006] I–06295.

match the single economic entity theory. While at the beginning the term undertaking was meant to draw attention to the different activities operated by the same legal entity,[120] rather than on a compound of different entities, it became lately an instrument for joining several companies as if they deliver a single economic activity. This approach is summarised by the Court of Justice which states that "*the definition of an 'undertaking' covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed*"[121]. The interpretation of undertaking shifted therefore from a more restrictive view, in its inception, to a much broader definition which is comprehensive of corporate conglomerates. In Akzo, the CJEU pointed out that when a parent company owns, directly or indirectly, all the shares of the subsidiary there is a rebuttable presumption of liability of the parent company for the anticompetitive behaviours of the subsidiary[122]. The CJEU formed, in other words, a form of vicarious liability for competition law infringements. By consequence, the assessment of causation has to be likewise adapted[123].

The consequence of the application of such rule is that when one of the legal entities forming the group causes a damage for infringement of competition law, the responsibility spreads all over the group, with no need to substantiate a causal contribution. A company part might indeed give evidence of the absence of any control and, therefore, that it is not part of a single economic entity, but it cannot find exemption from liability substantiating lack of causation.

In these cases the causal proportional liability might help to restore a balance, dividing the liability among the different legal entities on the basis of their causal contribution to the harm.

[120] See Case C-22/71 Béguelin Import v G.L. Import Export [1971] ECR 00949, para 8..

[121] Ibid.

[122] Case C-97/08 P Akzo Nobel and Others v Commission [2009] ECR I-08237.

[123] Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002), 131; Michael S. Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford University Press, 2010), 282.

V. Proof of causation and standards of proof in competition damages actions

Causation, as any other element of the claim, has to be proven in the proceeding. The standard of persuasion adopted by the court is the level of proof demanded in a certain type of cases and it varies across European countries. In this chapter I will firstly analyse comparatively the different approaches adopted by the four countries under scrutiny and, secondly, I will deep into the rules developed by European courts.

Issues of evidence are generally regarded as rules of procedure that benefit of the principle of procedural autonomy of Member States. Therefore, in competition law cases, national courts are left free to apply the standards of proof provided by their domestic laws of procedure.

The Treaty contains no rules on standards or evidences and Regulation 1/2003 clearly states, at the Recital (5), that "*This Regulation affects neither national rules on the standard of proof nor obligations of competition authorities and courts of the Member States to ascertain the relevant facts of a case, provided that such rules and obligations are compatible with general principles of Community law*"[1].

The Directive n. 2014/104 considers that the effectiveness and consistency of the application of Articles 101 and 102 TFEU requires a convergence of the approaches across the Union on the disclosure of evidences in order to ease homogeneously the burden of proof across the EU. Moreover, the Directive notes that "*Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis*" and, since "*The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties (..) strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU*"[2].

[1] *Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty OJ L 001 , 04/01/2003*, 2003, Recital (5).

[2] *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 Law for Infringements of the Competition Law*

In the pursuit of this aim the Directive states that "*Member States shall ensure that national courts are able, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence*"[3]. Although the definition of the term 'standard of proof' remains rather vague and non-defined by EU law, it appeared in many of the Court's competition law judgements[4].

In competition law, the European Courts do not provide any detailed specification of the degree required for the standard of proof[5], limiting often the requirement to the "*requisite legal standard*" ("*à suffisance de droit*")[6]. In some cases, the Courts additionally defined the standard of proof as "*sufficiently proved in law*"[7], "*sufficiently precise and coherent proof*"[8] and finally applied the method of "*a firm, precise and consistent body of evidence*" where there is no documentary evidence of concertation between producers[9].

With regard to the distinction to be maintained between burden of proof and standard of proof, Advocate General Kokott, in her Opinion to Case C-97/08 P *Akzo Nobel and Others v Commission*, pointed out that "*The standard of proof determines the requirements which must be satisfied for facts to be regarded as proven. It must be*

Provisions of the Member States and of the European Union Text with EEA Relevance, OJ L 349, Recital (14).

[3] Directive 2014/104, Art. 5.

[4] Joined cases C-12/03 P-DEP and C-13/03 P-DEP Tetra Laval [2010] ECR I-00067; Joined Cases C-403/04 P and C-405/04 P Sumitomo Metal Industries and Nippon Steel v Commission [2007] ECR I-729; C-413/06P Bertelsmann and Sony Corporation of America v Impala [2008] ECR I-4951 and C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services and Others v Commission and Others, [2009] ECR I-9291, paragraphs 87.

[5] For a general overview, see Anne-Lise Sibony and Eric Barbier de La Serre, "Charge de La Preuve et Théorie Du Contrôle En Droit Communautaire de La Concurrence: Pour Un Changement de Perspective," *Revue Trimestrielle de Droit Européen*, no. 2 (2007), p. 205 and the Opinion of Mr Advocate General Jääskinen delivered on 21 November 2013 (1). Case C-559/12 P. French Republic. v Commission.

[6] Case T-303/02 Westfalen Gassen Nederland BV v Commission of the European Communities [2006] ECR II-4567; Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-8417, paragraph 58; Schneider Electric SA v. Commission, Case T-310/01, [2002] E.C.R. 11-4071, 4182, 402, [2003] 4 C.M.L.R. 17, 832.

[7] Case 107/82 AEG-Telefunken v Commission [1983] ECR 3151, paragraph 136.

[8] Case 29/83 and 30/83 Compagnie royale asturienne des mines and Rheinzink v Commission [1984] ECR 1679, paragraph 20.

[9] Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 Ahlström Osakeyhtiö and Others v Commission [1993] ECR I-1307, paragraphs 70 and 127.

distinguished from the burden of proof. The burden of proof determines, first, which party must put forward the facts and, where necessary, adduce the related evidence (subjektive or formelle Beweislast, also known as the evidential burden); second, the allocation of that burden determines which party bears the risk of facts remaining unresolved or allegations unproven (objektive or materielle Beweislast)"[10].

In the same vein, Advocate General Jääskinen, considered, in the case *French Republic v Commission* that "*in the case of an implied guarantee inferred from a body of evidence, the standard of proof must be based on serious probability and sufficiency of evidence. The requisite standard is thus more than mere probability, whilst falling short of a requirement of being beyond all reasonable doubt.*"[11].

However, this case law regards the burden of proof required for demonstrating the antitrust infringement in administrative proceedings. Differently, proof of causation in a competition law damages action mixes the requirements of national tort law with the limits established by EU rules and the typical causal uncertainty surrounding antitrust damages. Moreover, it has to be noted that competition law remedies have a mixed public and private nature[12] that has the effect of heightening the standard of proof required.

5.1. Proving causation in national courts

The analysis of the law of evidences and their assessment by the judge is, from a scholarly point of view, a subject that received more attention in common law jurisdictions rather than in civil law countries.

Judges exercise a certain degree of discretion in 'weighting' and evaluating the proof. This is true in both civil law and common law jurisdictions, although with some differences. The standards of persuasion of the judge can be lax or more constrained by formal limits but they are generally funded on the principle of 'free evaluation' of the

[10] Opinion of Advocate General Kokott Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG (2014) footnote 64.

[11] Opinion of Advocate General Jääskinen in Case C-559/12 P, French Republic v Commission, 21 November 2013, paragraph 35.

[12] Ioannis Lianos, "Competition Law Remedies in Europe: Which Limits for Remedial Discretion?," *CLES Research Paper No. 2/2013*, January 1, 2013, available at http://papers.ssrn.com/abstract=2235817.

proof in order to reach conviction. In a paper published in 2002 Clermont and Sherwin maintained that the common-law preponderance standard is able to produce more accurate results than what they defined an "obscure" civil law standard[13]. Although harshly criticised by the following literature[14], that paper had the merit to cast a light on a rather obfuscated part of the comparative research.

In civil litigation, European national courts apply standards that are diversely formulated but that generally converge toward the *intime conviction* of the judge in civil law countries and to the balance of probabilities in common law countries. In competition law cases the free appreciation of the proof by the judge is even more poignant if we think that rarely national courts possess documentary evidence of both damage and infringement[15]. It is therefore a useful exercise - but not a resolving one - to observe the different standards adopted in civil and common law countries, to understand how the degree of the proof of causation in competition law varies depending on the court where the case is heard.

a. Civil law jurisdictions

In civil law countries, the degree of proof varies but it is generally acknowledged that the proof submitted has to be at least 'sufficient' in order to convince the judge about the claim or defence. The diffuse standard in civil law countries, is the 'intime conviction' of the judge[16]. This definition clearly differs from the standard

[13] Kevin M. Clermont and Emily Sherwin, "A Comparative View of Standards of Proof," *The American Journal of Comparative Law*, 2002, 243–75.

[14] See, among the others, Michele Taruffo, "Rethinking the Standards of Proof," *The American Journal of Comparative Law*, 2003, 659–77; Christoph Engel, "Preponderance of the Evidence versus Intime Conviction: A Behavior Perspective on a Conflict between American and Continental European Law," *Vt. L. Rev.* 33 (2008): 435; Richard W. Wright, "Proving Causation: Probability versus Belief," in *Perspectives on Causation*, ed. Richard Goldberg (Hart Publishing, 2011), available at SSRN: http://ssrn.com/abstract=1918474. In particular Taruffo asserted that Clermont and Sherwin have fallen prey to a "reductivist fallacy", due to a shallow comparative overview (at 659).

[15] Lianos, Ioannis, "'Judging' Economists: Economic Expertise in Competition Law Litigation - A European View," in *The Reform of EC Competition Law: New Challenges*, ed. Ioannis, Lianos and Ioannis Kokkoris (Kluwer, 2009), Available at SSRN: http://ssrn.com/abstract=1468502 or http://dx.doi.org/10.2139/ssrn.1468502, 90-91.

[16] See French Code de Procédure Pénale, Art. 3531; German Zivilprozessordnung, § 286 I 1; German Strafprozessordnung, § 261, Art. 116 Italian Codice di procedura civile.

'beyond reasonable doubts' that should characterise the criminal procedure, although in some civil law systems such requirements are not differentiated by law[17].

In France, for instance, the law does not require the trier of facts to adopt any different standard of proof between criminal and civil law procedure[18]. The Article 353 of the French Code de Procédure Pénale, talks indeed of 'intime conviction' of the judge. This means that the judge need to reach a personal, subjective, belief in the truth of the facts of the proceeding[19]. However, this should not bring to the conclusion that judges adopt the same standard in criminal and civil procedures[20].

On the other hand, while Continental civil law traditions similarly apply a standard recalling the subjective conviction of the judge on the specific case at hand, some of them have also sided this analysis with the probabilistic approach.

For instance, in Germany, Section 261 of the German Code of Criminal Procedure states: "*The court shall decide on the result of the evidence taken according to its free conviction gained from the hearing as a whole*". Thus, in Germany again it is required a minimum standard of persuasion of the judge based on her free conviction[21], but courts, in the evaluation of the proof, generally apply the 'preponderance of the evidence' rule[22]. However, the leading German Courts decisions on the interpretation of the standard of proof has clarified that even a very high probability would not suffice a judge who did not reach a personal conviction about the case at hand[23]. More than a

[17] Taruffo, "Rethinking the Standards of Proof."

[18] Ibid.

[19] Wright, "Proving Causation," 23.

[20] Taruffo, "Rethinking the Standards of Proof," 665.

[21] Subsection 1 of section 286 of the Code of Civil Procedure states: "*The court shall decide at its free discretion, by taking into account the whole substance of the proceedings and the results of any evidence taking, whether a factual allegation should be regarded as true or untrue. The grounds which prompted the court's conviction shall be stated in the judgment*".

[22] Peter L. Murray and Rolf Stürner, *German Civil Justice* (Carolina Academic Press, 2004); Peter Gottwald, "Civil Procedure Reform in Germany," *The American Journal of Comparative Law*, 1997, 753–66.

[23] BGH, 17 February 1970 ('Anastasia Decision'), 53 BGHZ 245, 256 (German Federal Court of Justice) (interpreting s 286 of the German Code of Civil Procedure as requiring 'full judicial conviction in the form of a degree of certainty that silences doubt for practical purposes, even if it does not eliminate them entirely').

discretionary decision, some authors explain, the judge is asked to adopt an empirical standard[24] resting on "*ethos, experience and intuition*"[25].

In Italy, the Court of Cassation expressly stated that it pursues the application of the standard of 'more probable than not' in civil cases and 'beyond reasonable doubt' in criminal proceeding: "*As this Court has previously stated, the main difference [between the penal and civil processes] is in the standards of proof that each system requires (Cass. Pen., S.U., 11.09.2002, n. 30328). The Penal Code requires proof 'beyond a reasonable doubt' while the Civil Code merely requires 'more probable than not.' The different standards correspond to the different values at stake in each system (Cass. 16.10.2007, n. 21619; Cass. 18.04.2007, n. 9238; Cass. 05.09.2006, n. 19047; Cass. 04.03.2004, n. 4400; Cass. 21.01.2000, n. 632)"*[26].

However, the civil standard of proof has always to be completed by the judge's conviction that the general statistical probability finds application in the case at hand[27]. This approach is indicated by the law; while Article 116 of the Italian Code of Civil Procedure predicates the principle of "cautious evaluation" of the proof, an attenuated version of the standard of intime conviction, Article 115, states that the judge has to base her decision on the evidences submitted by the parties. Hence, the decision, that is always motivated, hinges on the proof lodged by the parties during the proceeding, but the evaluation of this proof remains discretionary to a large extent, as the judge can decide the standard to adopt.

For instance, the Italian Court of Cassation in the case *Fondiaria SAI*[28] stated that in competition damages action the judge can proceed to the assessment of causation

[24] Engel, "Preponderance of the Evidence versus Intime Conviction.", p. 440.

[25] Joachim Schulz, *Sachverhaltsfeststellung und Beweistheorie: Elemente einer Theorie strafprozessualer Sachverhaltsfeststellung* (Heymann, 1992)., p. 168. (SL Goren, The Code of Civil Procedure Rules of the Federal Republic of Germany of January 30, 1877 and the Introductory Act for the Code of Civil Procedure Rules of January 30, 1877 (Littleton, Fred B Rothman & Co, 1990) 73; see Wright, Proving Facts (n 1) 82–83, 94).

[26] Corte di Cassazione S.U., 11 January 2008, no 581, in Danno e resp., 2009, 667 (2008). s 3.9. The translation is taken from Wright, "Proving Causation.", p. 198.

[27] Luigi P. Comoglio, *Le prove civili* (Wolters Kluwer Italia, 2010).

[28] Corte di Cassazione, Fonsai v Nigriello, 2 February 2007, n. 2305, In «Foro it.», vol. I, 2007, 1097, commented by A. Palmieri, Cartello fra compagnie assicuratrici, aumento dei premi e prova del pregiudizio: il disagevole cammino dell'azione risarcitoria per danno da illecito antitrust, and R. Pardolesi, Il danno antitrust in cerca di disciplina (e di identità?); S. Bastianon, Tutela risarcitoria

using probability, but also logic, presumptions and the yardstick of 'more probable than not'. This last method, is quite diffuse in antitrust, above all when the claim is based on lost chances and passing-on of overcharges.

b. Common law jurisdictions

Common law jurisdictions distinguish notably the criminal standard of 'beyond reasonable doubt' to the civil procedural standards of preponderance of the evidence (chiefly American definition) and balance of probabilities (generally preferred in English evidence law)[29]. These two definitions traditionally attest that the subject burdened has to prove that the event was 'more probable than not', that is to say that the event had more than the 50% chances to happen[30].

In the case of *Miller v Minister of Pensions*, Lord Denning pointed out in this regard that "*The…[standard of proof]…is well settled. It must carry a reasonable degree of probability...if the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not"*[31].

The objectivistic approach that characterise the preponderance of the evidence standard is therefore based on the use of probability which should suffice for the

antitrust, nesso causale e danni «lungolatenti», in Danno e resp., 2007, p. 764. In this decision the Court of Cassation deployed a flexible approach to causation in antitrust. However, in the final decision the Court rejected the approach of the appellate judge for which the assessment of causation was 'in re ipsa' and demonstrated by the verification of the antitrust infringement already purported by the National Authority.

[29] Rarely, it is required in civil law cases the standard of a "clear and convincing evidence", see Engel, "Preponderance of the Evidence versus Intime Conviction," 3.

[30] Richard Glover, *Murphy on Evidence* (Oxford University Press, 2013)., p. 104.Clermont and Sherwin, "A Comparative View of Standards of Proof"; Dominique Demougin and Claude Fluet, "Preponderance of Evidence," *European Economic Review* 50, no. 4 (2006): 963–76; Juliane Kokott, *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches With Special Reference to the American and German Legal Systems* (Martinus Nijhoff Publishers, 1998).

[31] Miller v. Minister of Pensions [1947] 2 ALL ER, 372. See also Mallett v. McMonagle, AC 166 (1970), where the English court notoriously stated that "*Anything that is more probable than not is treated as certainty*".

decision of the judge[32]. However, some other authors believe that also in the US, judges do not solely rely on class-based statistical probability of an event to happen to deliver the judgment, but rather they require "*the formation of a minimal belief regarding the truth of the fact(s) at issue*"[33].

5.2. Proving causation in the antitrust case law

Class-based statistical probability form full proof of causation in common law countries[34] and an evidence in civil law jurisdictions[35]. Competition law damages actions have followed generally in the wake of these domestic traditions.

The European Court of Justice seems to have espoused a civil law standard for proving causation when stated that there is an infringement of competition law if "*it is possible to foresee with a sufficient degree of probability*" the damage to competition[36]. Similarly, the CJEU noted, in the case Tetra Laval, that it is "*necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely*"[37]. This approach which leaves ample room to the discretionary power of the judge, is indeed more similar to the civil law standard of intime conviction and, at the same time, enable the full application of national legal standards.

---

[32] Clermont and Sherwin, "A Comparative View of Standards of Proof"; Demougin and Fluet, "Preponderance of Evidence"; Kokott, *The Burden of Proof in Comparative and International Human Rights Law*.

[33] Wright, "Proving Causation.", 199-200.

[34] Robert Cooter, "Torts as the Union of Liberty and Efficiency: An Essay on Causation," *Chi.-Kent L. Rev.* 63 (1987): 523; Guido Calabresi, "Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.," *The University of Chicago Law Review*, 1975, 69–108; William M. Landes and Richard A. Posner, "Causation in Tort Law: An Economic Approach," *The Journal of Legal Studies*, 1983, 109–34; Alan Schwartz, "Causation in Private Tory Law: A Comment on Kelman," *Chi.-Kent L. Rev.* 63 (1987): 639; Mario J. Rizzo, "Imputation Theory of Proximate Cause: An Economic Framework, The," *Ga. L. Rev.* 15 (1980): 1007.

[35] Comoglio, *Le prove civili*; Kokott, *The Burden of Proof in Comparative and International Human Rights Law*; Schulz, *Sachverhaltsfeststellung und Beweistheorie*.

[36] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA [2006] ECR I-06619.

[37] Case C-12/03 P Commission of the European Communities v Tetra Laval BV ECR [2005] ECR I-00987.

In the United Kingdom, the antitrust courts have clarified that also in competition law litigation parties have to substantiate their claim under the standard of the balance of probabilities (ie, more likely than not)[38].

In this vein, the CAT observes that regarding the standard of evidence in competition law proceedings "*There is no requirement, under the ECHR, of proof beyond reasonable doubt*"[39] and that "*The balance of probabilities is a sufficiently flexible standard to require that the Tribunal (or Director) should be more sure before finding serious allegations proved than when deciding less serious matters": per Lord Nicholls in In re H [1996] AC 563 at 586-587. The criminal standard of proof beyond reasonable doubt would not be appropriate in relation to the kind and range of issues this Tribunal has to determine under the Act.*"[40].

The British courts believe therefore that the standard of balance of probabilities perfectly suits the type of proceeding involved in competition law damages actions and that, moreover, it is in line with the European courts' jurisprudence[41]. As an exceptional measure, the seriousness of an infringement of the competition rules justifies, in the opinion of the *High Court in Attheraces v British Horseracing Board*[42], the adoption of a standard where the proof has to be 'commensurately cogent and convincing'[43]. This is usually addressed as a 'heightened civil standard'[44].

German antitrust courts have to abide to the same standards of proof designed for tort cases. Therefore the judge has to reach a personal conviction that has to reach a 'high level of plausibility'[45]. Similar standards are adopted by other Continental jurisdictions, with scant further specifications by courts. For instance, the Italian Court of Cassation conceded that, while applying the usual standard of intime conviction, the

[38] CAT JJB Sports Plc v Office of Fair Trading [2004] 17, [2005] Comp. A.R. 29 at [195] (2005), p. 195; Bookmakers Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd [2008] EWHC 1978 (Ch) at [392] (2008), 392.

[39] Making reference here to Richard Buxton, "The Human Rights Act and the Substantive Criminal Law," *Criminal Law Review*, 2000, 331–40.

[40] Napp Pharmaceuticals Holdings Ltd v Director General of Fair Trading [2002] CAT 1 (2002), 96.

[41] Ibid., p. 112.

[42] [2005] EWHC 3015.

[43] Ibid., para 126.

[44] See Glover, *Murphy on Evidence*, 114.

[45] Barry E. Hawk, *International Antitrust Law & Policy: Fordham Corporate Law 2005* (Juris Publishing, Inc., 2006), 224.

judge can infer the existence of a causal link between the agreement and the alleged damage also "*through criteria of high logic probability or through presumptions*"[46]. In other words, the standard of "probabilistic certainty" in civil law jurisdictions should not be exclusively based on the quantitative determination of statistical frequency of classes of events, which could also be missing or ineffective, but should be verified by the judge who has to determine whether the elements of the case at hand confirm the assumption based general probabilities and - at the same time – has to exclude other possible alternative causes[47].

5.3. Standards of proof, judges persuasion and causal uncertainty in competition law

Civil law countries showed to be more prone to accept false acquittals rather than false condemnations adopting a higher standard of proof. On the other side, common law jurisdictions profess a cost-based approach for which the claimant should not be overtly burdened with a proof that goes beyond the mere 'preponderance'[48], otherwise any claim would be too difficult and expensive to prove[49].

These different approaches can explain, for a certain extent, also the hard time for competition law litigation in Europe, where indeed the main hurdle is detected in the difficult burden of proof for the claimant. On the other hand, the European legislator and national courts are trying to ease this burden building 'bespoke presumptions' that reverse the burden of proof on to the subject that has, assumingly, more information to provide the counter-proof.

---

[46] Corte di Cassazione, Fonsai v Nigriello, 2 February 2007, n. 2305, In «Foro it.», vol. I, 2007, 1097, commented by A. Palmieri, Cartello fra compagnie assicuratrici, aumento dei premi e prova del pregiudizio: il disagevole cammino dell'azione risarcitoria per danno da illecito antitrust, and R. Pardolesi, Il danno antitrust in cerca di disciplina (e di identità?); S. Bastianon, Tutela risarcitoria antitrust, nesso causale e danni «lungolatenti», in Danno e resp., 2007, 764.

[47] Ibid.

[48] Clermont and Sherwin, "A Comparative View of Standards of Proof"; Kevin M. Clermont, "Standards of Proof Revisited," *Vt. L. Rev.* 33 (2008): 469.

[49] Richard A. Posner, "An Economic Approach to the Law of Evidence," *University of Chicago Law School, John M. Olin Law & Economics Working Paper No. 66*, February 1, 1999, Available at SSRN: http://papers.ssrn.com/abstract=165176.

The proof of causal connection, even if facilitated, is highly influenced by the standard adopted. The higher the standard the less will be the room for managing causal uncertainty, even in systems where the judge has wide discretionary powers. Knowledge of causal laws is limited, hence nothing is certain. For this reason, proponents of probability approach maintain that the only way to objectivise and render a predictable judgment is to rely on laws of probability rather than on obscure subjective conviction[50]. Differently some other authors object that mere class-based aggregate probability, cannot say what happened in the specific case[51].

However, in this dispute, two remarks are central in the analysis of the standard of proof in competition law damages actions. As already pointed out, the majority of the European legal traditions are not accustomed to delve into the 'meanderings' of the different standards of persuasions[52]. But the private enforcement of European competition law before national courts is posing the problem, calling for a major confrontation.

Secondly, all these differences between civil law and common law traditions tend to fade away when factual issues become particularly complicated. As an example, after a thorough probabilistic-based approach, the English judge in *Arkin v Borchard Lines Limited* considered that the assessment of causation between damages and the antitrust infringement was a matter of 'common sense'[53], that is a way to solve with the use of a 'broad axe'[54] and ample discretionary power a complex situation that class-based probabilities and economic reasoning have brought to a dead end.

---

[50] Clermont and Sherwin, "A Comparative View of Standards of Proof," 271.

[51] Wright, "Proving Causation.". On the issue of the formation of the conviction of the judge about the issue at stake, the author translate the dispute in other terms, saying that "*the holding of a belief regarding what actually happened in a particular situation is very different from being willing to place a bet on what happened, and that while class-based statistics are very useful for the placing of the bet, they are insufficient and generally unhelpful for the formation of the belief, for which instead particularistic evidence is essential because only it is capable of converting possibly applicable causal generalisations (with their associated statistical frequencies) into actually instantiated causal laws*".

[52] Eric Gippini-Fournier, "The Elusive Standard of Proof in EU Competition Cases," *World Competition*, June 1, 2009, available at http://papers.ssrn.com/abstract=1433744.

[53] Arkin v Borchard Lines Ltd. & Ors [2003] EWHC 687 (Comm).

[54] Concept effectively explained by Lord Shaw in Watson Laidlaw & Co Ltd v Pott, Cassells and Williamson (1914) 31 RPC 104 at 117-118: *"[t]he restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe*".

The analysis of case law shoes indeed an aspect of the assessment of the standard of persuasion of the judge with relation to causation partly different from the theoretical background of the different systems. Judges, of both civil law and common law jurisdictions, tend to assess the causal link relying on the persuasiveness of the evidence rather than on the general probability of the outcome. In other words, the claims quashed for lack of proof of causation, such as in the English Enron and Italian Brennercom, demonstrate that the attention of the judge is focussed on the value of the proof submitted as able, in the specific case, to yield the supposed effect. This evaluation is certainly influenced by the judge's perception of 'normality'[55] and by her intuition of standard patterns drawn by experience and common sense. In this context, causal generalisation, such as that in the x% of cases a cartel causes a damage via price effect to customers, certainly play a fundamental role in the judge's persuasion[56].

For this reason, using class-based probabilities in order to build presumptions that revert the burden of proof can be a useful solution to offset a possible imbalance in the competition between the opposite explanations of the facts and issues at stake. Differently, intending class-based probabilities as proof of a causal link would be not only a logic mistake but also an empirical one.

Finally, the analysis of case law shows that in all jurisdictions the judges' persuasion is shaped by two competing narratives, the ones brought by the parties into the proceeding, more than by any other concurring factor. Claimant, defendant and eventually other intervening subjects, such as expert witnesses, present a narrative construction of reality on which the decision of the judge is based[57]. The level of persuasion of the judge is indeed determined by the evidences submitted and by the interpretation of their value. That applies in particular to the proof of causation which,

---

[55] Anne-Lise Sibony, *Le juge et le raisonnement économique en droit de la concurrence* (L.G.D.J., 2008), http://orbi.ulg.ac.be/handle/2268/410.

[56] To this regard Gippini-Fournier recalls the well know example used by Lord Hoffmann's: "*Some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness than to be satisfied to the same standard of probability that it was an Alsatian*" ("lion or Alsatian" illustration appears in paragraph 55 of Secretary of State for the Home Department v Rehman [2001] UKHL 47, [2003] 1 AC 153) Gippini-Fournier, "The Elusive Standard of Proof in EU Competition Cases.", p. 19, note 59.

[57] Jerome Bruner, "The Narrative Construction of Reality" *Critical Inquiry*, 1991, 1–21; Joshua A. Newberg, "The Narrative Construction of Antitrust," *S. Cal. Interdisc. LJ* 12 (2002): 181.

as already noted, is not a fact and therefore cannot be simply submitted as, for instance, a documentary evidence, but needs to be 'explained'. This approach to the evaluation of the proof recalls the application of those theories[58] that oppose to the probability theories an approach based on the "*comparative plausibility of the parties' explanations offered at trial*"[59]. Allen and Leiter believe that the fact finder, in civil cases, identifies the most plausible of the competing explanations rather than merely applying pre-confectioned probabilities[60]. The relative plausibility theory was firstly formulated by Allen and then refined through a number of contributions of Allen and Leiter, where the authors firmly opposed mathematical probability theories of the burden of proof[61].

In the end, what indeed is asked to the decision maker is not to sentence the truth, but rather the 'truth of the decision'.

5.4. Proving the uncertain causation

As pointed out, the causal link is not a fact, it is indeed a connections between two known facts[62], also defined as "*an empirical relation between concrete conditions*"[63]. It follows that it is not subject to the same burden of proof as any other evidence of events submitted to the court. The causal link needs a demonstration through logic, statistic and common sense, that is supported by general scientific theories and, simultaneously, by specific justification of the singular causation. Proof of singular causation needs therefore, 1. scientific validity of causal generalisations that control the condition; 2. complete instantiation of the empirical relation.

---

[58] H. L. Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford University Press, 2008), 154.

[59] Ronald J. Allen and Brian Leiter, "Naturalized Epistemology and the Law of Evidence" *Virginia Law Review*, 2001, 1527.

[60] Ibid., 1528.

[61] Louis Kaplow, "Burden of Proof," *Yale LJ* 121 (2011): 738; Edward K. Cheng, "Reconceptualizing the Burden of Proof" *Yale LJ* 122 (2012): 1254.

[62] See Patti, Salvatore, "La Responsabilità Degli Amministratori: Il Nesso Causale" *Responsabilità Civile E Previdenziale*, no. 3 (2002).

[63] Wright, "Proving Causation.", 12. This means that, from this point of view, causation does not correspond to the probability of an event to happen, but rather to a law of nature that describes the relation between a set of conditions (NESS set of conditions) and a consequence.

Often, proof of causation hinges upon inferences and legal presumptions. These logic tools are used, in competition law, to draw conclusions about statistical and econometric evidences, which have an important role in the array of means of proofs available, and other means of proof. Generally, the plaintiff can prove its claim submitting documentary evidences, or gathering them through inspections, through proof by witnesses or by interrogations and, finally, thanks to expert reports that form evidences of the existence of a causal link between the event and the damage. When an expert evidence hinging on a well acclaimed theory (such as passing-on or umbrella effect) is laid out, this evidence constitutes a presumption of damages, whose rebuttable proof can often become particularly difficult task.

In some cases, therefore, causal generalisations can form presumptions that revert the burden of proof on to the claimant[64].

5.5. Inferences and legal presumptions

Legal scholars generally acknowledge the existence of two main types of presumptions, rebuttable and conclusive[65]. Some studies, also regarding competition law enforcement, classified presumptions in a more detailed manner, focusing on effects

[64] Patti observes that the causal link, being it a connection between two facts, may not be presumed, as it is applicable only to facts and events: "*There is therefore no presumption, which can only be used for the demonstration of a fact. The existence of a causal link can not be so "presumed" but it has to be proven as any other element required by law to set up the responsibility*". Patti, Salvatore, "La Responsabilità Degli Amministratori: Il Nesso Causale.", 601. The presumption of an etiologic relationship between damage and action can be drawn instead from the regular outcome of the typical set of events repeating in the specific case. Hence, the proof of damage through presumption does not imply causation that, differently, corresponds to a 'regular' set (or chain) of condition that repeat in those cases. In other cases, while the presumption would rebut the burden of proving the infringement, the causation would be assessed only by scientific laws. Moreover, the judge faces the choice of balancing different, overlapping, and sometimes opposing assumptions, on the basis of policy reasons.

[65] Stone, Julius, "Burden of Proof and the Judicial Process" *Law Quarterly Review*, no. 60 (1944): 262; Sir Richard Eggleston, *Evidence, Proof, and Probability* (Weidenfeld and Nicolson, 1983), 92; John Henry Wigmore, *A Students' Textbook of the Law of Evidence* (Foundation Press, 1935), 454; Simon Deakin, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law* (Oxford University Press, 2012), 234; Terence Anderson, David Schum, and William Twining, *Analysis of Evidence* (Cambridge University Press, 2005); James Franklin, *The Science of Conjecture: Evidence and Probability Before Pascal* (Taylor & Francis, 2002), 6.

of the use of the same on evidential burdens[66]. Hence, they have been divided into provisional presumptions, evidential presumptions, persuasive presumptions and conclusive presumptions[67].

The provisional presumptions, also called *praesumptiones hominis*, does simply state a matter of fact but does not need to be rebutted, since they are left to the free evaluation of the judge. Differently, rebuttable presumptions (also known as *praesumptiones iuris tantum*) are divided in common law countries into evidential presumptions and persuasive presumptions[68] while generally left as a unitary class in .

A conclusive presumption (*presumptio iuris et de jure*), instead, is a presumption of law that cannot be rebutted by evidence and must be taken to be the case whatever the evidence to the contrary[69]. In competition law, neither national domestic legislation nor European law have placed any such presumption with regard to the causation of damages to private subjects.

In competition law damages actions we often have also substantive presumptions which "*are invariably an expression of mainstream economic theory*"[70]. For instance the "per se" rule applied in the Unites States, is a substantive non-rebuttable presumption. In competition law litigation, one can also find several procedural presumptions that can be divided in rebuttable and conclusive as well[71].

EU Courts tend to discern the probative value of a proof judging on the body of evidence gathered for the case[72]. The logical inferences used by the decision maker in competition law are used in order to reconstitute the relevant circumstances[73] from the scratches of evidences gleaned.

---

[66] Bailey, David, "Presumptions in EU Competition Law" *European Competition Law Review*, no. 31 (2010): 20; Cristina Volpin, "The Ball Is in Your Court: Evidential Burden of Proof and the Proof-Proximity Principle in EU Competition Law" *Common Market Law Review* 51, no. 4 (2014): 1159–85.

[67] Bailey, David, "Presumptions in EU Competition Law" 20 ff.

[68] I. H. Dennis, *The Law of Evidence* (Sweet & Maxwell, 2007)., p. 525.

[69] Ibid.

[70] Bailey, David, "Presumptions in EU Competition Law.", p. 22.

[71] Ibid., 24 ff.

[72] Case T-44/02 Dresdner Bank AG and Others v Commission of the European Communities [2006] ECR II-3567, para 60-61.

[73] T-112/07 Hitachi Ltd, Hitachi Europe Ltd and Japan AE Power Systems Corp. v European Commission [2011] ECR II-03871.

In the T-Mobile case the CJEU responded to the question regarding the application of presumption in order to determine the causal link between the concerted practice and the market conduct of the operators. The question regarded in particular the relevance of the presumption established in the case Commission v Anic Partecipazioni[74] and the case Hüls v Commission[75], "*according to which, subject to proof to the contrary, which it is for the economic operators concerned to produce, undertakings participating in concerting arrangements and remaining active on the market are presumed to take account of the information exchanged with their competitors when determining their conduct on that market, particularly when they concert together on a regular basis over a long period.*"[76]. The CJEU observed that the presumptions instituted by the Court in the mentioned decisions stem from the interpretation of article 101 and therefore form integral part of community law[77]. Consequently, the presumption has to be applied as it is and there is no room for the national procedural laws to overcome its application. The principle of procedural autonomy of national judges has therefore been cracked also in the realm of competition law.

While the Courts have dealt, even if for a limited extent, with the use logical inferences in order to form an evidence out of a set of "coincidences" and "indicia" for finding an infringement of competition law[78], no such guidance is provided in order to infer damages to private subjects. For a larger extent the legislator is making important use of them in order to remedy to the informational asymmetry of parties[79].

---

[74] C-49/92 P Commission v Anic Partecipazioni [1999] ECR I-4125.

[75] C-199/92 P Hüls v Commission [1999] ECR I-4287.

[76] C-8/08 T-Mobile v Raad van bestuur van de Nederlandse Mededingingsautoriteit [2009] ECR I-04529, para 21.

[77] Ibid. para 52: "*In those circumstances, it must be held that the presumption of a causal connection stems from Article 81(1) EC, as interpreted by the Court, and it consequently forms an integral part of applicable Community law*".

[78] Case T-112/07 Hitachi Ltd, Hitachi Europe Ltd and Japan AE Power Systems Corp. v European Commission [2011] ECR II-03871.

[79] Article 17(2) *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance, OJ L 349.*

Lianos observes that while permitting the Commission to operate inferences the Courts eased the burden on the Commission, on the other hand, legal presumptions limit that discretion within the boundaries of a "*ready-made causal inference*"[80] .

5.6. Econometrics and the 'calculation' of causation in EU competition law

The two stage process for assessing causation advanced in this thesis serves as a guidance also in this chapter. The economic theories and econometric techniques have a central role in the assessment of both material and legal causal links in competition damages actions. The advancement of science and the tangling nature of business activities made for the judge particularly cumbersome the application of deterministic approaches in causation[81] also recurring to discretionary powers in the assessment of the proof. In some cases it becomes even impossible to determine the causal link, given the nature of the infringement. Judges firstly started to depart from a deterministic approach when endorsed in the area of medical responsibility[82] and asbestos related illnesses[83] the theory of stochastic causality[84]. The same probabilistic approach found fortune also for the assessment of the loss of chance in tort liability[85]. Similarly, competition law shows

[80] Ioannis Lianos and Christos Genakos, "Econometric Evidence in EU Competition Law: An Empirical and Theoretical Analysis," *CLES Research Paper Series 06/12*, October 1, 2012, 76, available at http://papers.ssrn.com/abstract=2184563.

[81] Hanns A. Abele, Georg E. Kodek, and Guido K. Schaefer, "Proving Causation in Private Antitrust Cases," *Journal of Competition Law and Economics* 7, no. 4 (2011): 847–69., 852.

[82] Sienkiewicz v Greif (UK) Ltd [2009] EWCA Civ 1159 (EWCA (Civ) 2009); AB & Ors v British Coal Corporation & Anor [2004] EWHC 1372 (QB) (EWHC (QB) 2004); Richard Goldberg, "The Role of Scientific Evidence in the Assessment of Causation in Medicinal Product Liability Litigation: A Probabilistic and Economic Analysis," *Current Legal Issues* 1 (1998): 55–80.

[83] See Rothwell v Chemical and Insulating Co Ltd and another, Topping v Benchtown Ltd (formerly Jones Bros Preston Ltd), Johnston v NEI International Combustion Ltd, Grieves v F T Everard & sons Ltd and another [2007] UKHL 39, [2008] 1 AC 281; Cartledge v E Jopling & Sons Ltd [1963] AC 758 (HL); Cassazione penale , sez. IV, sentenza 12.03.2012 n° 9479; Cass. pen. Sez. IV, 10-06-2010, n. 38991 (rv. 248851), CED Cassazione, 2010.

[84] See, for an introductory description, James Robins and Sander Greenland, "The Probability of Causation under a Stochastic Model for Individual Risk" *Biometrics*, 1989, 1125–38.

[85] Wesley C. Salmon University Professor of Philosophy University of Pittsburgh, *Causality and Explanation* (Oxford University Press, 1997); Wesley C. Salmon, *Scientific Explanation and the Causal Structure of the World* (Princeton University Press, 1984); D. H. Mellor, *The Facts of Causation* (Routledge, 2002); Robert Young, Michael Faure, and Paul Fenn, "Causality and Causation in Tort Law" *International Review of Law and Economics* 24, no. 4 (2004): 507–23.

frequent cases where it is impossible to state with certainty that the direct cause of the damage lies in a specific infringement[86]. In these cases courts are able to depart from the analysis of the single transaction to take into account statistical data from which they can obtain average patterns to establish a stochastic causation[87].

Scholars refer that the wide use of counterfactuals in competition law proceedings witnesses the importance of the economic "effect based" approach and, by consequence, the fact that legal causation borrows widely from (or even coincides with) causality[88]. Lianos divides the relevant factors for determining if and how legal causation borrows from causality dividing the causative links into two main categories. In the first box are falling all the causation links that work by mere reference to the general concept of causality[89]. In this case, causation is assessed embedding the result of the verification of causality outside law[90] (as in the case of economic counterfactual explanation of the causes of damages). A second option regards instead the relevant legal category examined. The judge can analyse the causal link relying on the special conditions that characterise it by law (necessary or sufficient condition) or to focus on a specific future of the link itself. In the latter case the examination can hinge on the "cause in fact", using a 'but-for', NESS, INUS test or on the evaluation of legal policies of risk distribution[91], as economic analysis of law puts forward[92].

---

[86] Abele, Kodek, and Schaefer, "Proving Causation in Private Antitrust Cases" 468.

[87] Ibid., 470.

[88] Lianos and Genakos, "Econometric Evidence in EU Competition Law" 85; Cento Veljanovski, "Counterfactual Tests in Competition Law" *Competition Law Journal*, no. 4 (2010); Damien Geradin and Ianis Girgenson, "The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach" *(December 11, 2011)* a*vailable at SSRN:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1970917.

[89] Lianos and Genakos, "Econometric Evidence in EU Competition Law", 85.

[90] As argued by H. L. A. Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 1985).

[91] Lianos and Genakos, "Econometric Evidence in EU Competition Law", 87.

[92] Richard A. Posner, "The Law and Economics of the Economic Expert Witness," *The Journal of Economic Perspectives*, 1999, 91–99; Landes and Posner, "Causation in Tort Law"; Calabresi, "Concerning Cause and the Law of Torts"; Steven Shavell, "An Analysis of Causation and the Scope of Liability in the Law of Torts" *The Journal of Legal Studies*, 1980, 463–516; Steven Shavell, "Uncertainty over Causation and the Determination of Civil Liability" *Journal of Law and Economics* 28, no. 3, 1985, 587–609; Richard W. Wright, "Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis," *The Journal of Legal Studies*, 1985, 435–56.

The objective of this reconstruction is to understand if the different concepts of causation in law might correspond to the one of causality in econometrics.

Econometrics is defined as "*statistics that is centrally conditioned by economic theory*"[93]. In economic terms, the objective of econometrics is "*the quantitative analysis of actual economic phenomena based on the concurrent development of theory and observation, related by appropriate methods of inference*"[94]. Hence, this method consists in the interpretation of data through economic theories, in order to infer effects from selected causes. Econometrics, indeed, contrary to law, is mainly forward looking, since it aims at foreseeing future events[95]. In order to do this, econometrics uses economics, mathematics and statistics. The result is a probability addressing average quantitative data gathered in order to confirm or disprove the underlying economic theory.

A first philosophical approach to the interrelation drawn in this 'triangle' (formed by statistics, economics and mathematics) wants economics to provide the blueprint to the underling theory that makes statistics economically interpretable[96]. This view is openly criticised by Hoover who remarks that "*if the inferential direction runs only from theory to data, how could we ever use empirical evidence to determine which theory is right?*"[97].

A second and contrasting position explains that econometrics differs from statistics because while the former seeks causality, the latter simply finds correlations[98]. As clarified by Stigum, indeed, the aim of econometrics nothing but "*to obtain knowledge concerning relations that exist in the social reality*" through a theory-data

[93] Kevin D. Hoover, "The Methodology of Econometrics," *New Palgrave Handbook of Econometrics* 1 (2006): 61–87.

[94] Paul A. Samuelson, Tjalling C. Koopmans, and J. Richard Stone, "Report of the Evaluative Committee for Econometrica" *Econometrica* 22, no. 2 (1954): 141.

[95] Lianos and Genakos, "Econometric Evidence in EU Competition Law", 84.

[96] Nancy Cartwright, "Causal Structures in Econometrics" in *On the Reliability of Economic Models* (Springer, 1995), 63–89; Nancy Cartwright, "Counterfactuals in Economics: A Commentary" *Causation and Explanation* 4 (2007): 191.

[97] Hoover, "The Methodology of Econometrics", 5.

[98] James J. Heckman, "Causal Parameters and Policy Analysis in Economics: A Twentieth Century Retrospective" *The Quarterly Journal of Economics* 115, no. 1 (2000): 85.

confrontation[99]. In law, however, any assumption that is not imposed by law itself is part of a procedural debate that can disprove the truthfulness of its underlying theory. Therefore, both the theoretical basis for material and legal causation are questioned before the judge by parties, to the extent that their reliability lies mostly on the method of assessment rather than the 'direction' of it, marking a first difference with causality.

Econometrics has been approached by economist in three different ways. The first (also chronologically) is a structural approach[100] deployed by Haavelmo[101] and the Cowles Commission[102] in the 1940s', where the effects are inferred by theories that are stated as underlying assumptions. Here the aim of Haavelmo was to bridge theory and empirical research in a logically rigorous manner[103]. This type of *a priori* approach has been opposed in the following years by different types of inferential approaches[104] such as the VAR method[105] and the LSE approach[106].

Finally, a third model of econometric evaluation of causal inference found place with the name of 'counterfactual (test)'[107]. Only this last approach found application in competition law enforcement, hence we will focus exclusively on that.

---

[99] Bernt P. Stigum, *Econometrics and the Philosophy of Economics: Theory-Data Confrontations in Economics* (Princeton University Press, 2003), 3.

[100] See Ragnar Frisch, "Autonomy of Economic Relations: Statistical versus Theoretical Relations in Economic Macrodynamics" (Reproduced by University of Oslo in 1948 with Tinbergen's Comments), Memorandum, Oslo; Published in Hendry and Morgan (eds.) 1995, *The Foundations of Econometric Analysis*, 1938.

[101] Trygve Haavelmo, "The Probability Approach in Econometrics" *Econometrica: Journal of the Econometric Society*, 1944, iii – 115.

[102] T. C. Koopmans and W. C. Hood, *The Estimation of Simultaneous Linear Economic Relationships, in W. C. Hood and T. Koopmans (eds), Studies In Econometric Method, Cowles Commission Monograph 14.*, vol. pp. 112–99 (New Haven, CT: Yale University Press, 1953).

[103] Duo Qin, *A History of Econometrics: The Reformation from the 1970s* (Oxford University Press, 2013).

[104] Hoover, "The Methodology of Econometrics"

[105] The VAR method focuses on the detection of appropriate theoretical models for specific set of data; see Qin, *A History of Econometrics*; Badi Baltagi, *Econometrics* (Springer Science & Business Media, 2011).

[106] Christopher L. Gilbert, "LSE and the British Approach to Time Series Econometrics" *Oxford Economic Papers*, 1989, 108–28.

[107] James J. Heckman, "Econometric Causality" *International Statistical Review* 76, no. 1 (2008): 1–27; Heckman, "Causal Parameters and Policy Analysis in Economics".

Moreover, it is worth to hasten that a second and major difference between the causality and causation in law consists in the fact that econometric does not select causes on their legal significance. Indeed the aim of economic theories is not to spot responsibility of agents in the market but rather to establish connections between causes and effects.

5.6.1. When 'but-for' becomes 'if then': the counterfactuals

Courts are therefore trying to drag from the general principles of causality the tools for determining the causal link in antitrust damages actions. Competition law phenomena exists indeed firstly in a world of economic theories. The causation-in-fact is generally proven through the use of logic inferences or, in most cases, through counterfactuals. In other words, the but-for scenario is reconstructed thanks to economic models capable of designing a hypothetical situation with which the real world can be compared. But, as already explained, in econometrics we are in the realm of probabilities spawning from theories and generating other probabilities. It comes as a consequence that this process is error-prone, although this is not always acknowledged. In this vein the European Commission in its Guidance Paper to Quantification of Harm specifies that *"(t)he quantification of such harm requires comparing the actual position of the injured party with the position this party would have been in without the infringement" but that "(t)his is something that cannot be observed in reality; it is impossible to know with certainty how market conditions and the interactions between market participants would have evolved in the absence of the infringement. All that is possible is an estimate of the scenario likely to have existed without the infringement*"[108].

The last decades have seen arising academic and judicial interest around the problem of the assessment of counterfactuals[109]. Counterfactuals scenarios are generally

[108] Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union 2013/C 167/07.

[109] Although the first analysis of counterfactuals is attributable to John Stuart Mill, *A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation* (John W. Parker, 1843), it is only from the 1960s' that the theory had been thoroughly developed mainly thanks to Ardon Lyon, "Causality" *British Journal for the Philosophy of*

used to prove causation when is not possible to infer a sufficient (or necessary) connection between agency and effects, based on the mere reasonableness of the assumptions[110]. In this vein, for counterfactuals here we refer to a but-for test applied in antitrust through economic theories. Therefore these counterfactuals aim at describing an hypothetical situation through econometric explanations. In other words the decision maker compares the actual situation with a counterfactual (or theoretical) one created through economic theories and aggregate data.

In public competition law enforcement the causal link between the infringement and the damage to the market is often presumed or even embedded in the same behaviour. For this reason, the research of a causal connection generally shifts to the link between the behaviour and the infringement[111]. The Court of Justice opened at the use of counterfactuals with the *Société Technique Minière v Maschinenbau Ulm GmbH* decision[112] where analysed a case of infringement by effect. In the recent cases Visa and MasterCard the European courts have adopted a counterfactual approach rather broad stating that "*irrespective of the context or aim in relation to which a counterfactual hypothesis is used, it is important that that hypothesis is appropriate to the issue it is supposed to clarify and that the assumption on which it is based is not unrealistic*"[113]. Public enforcement of competition law generally applies a wide number of different counterfactuals, based on the antitrust rule infringed or on their being purported ex ante (for the assessment of future conditions) or ex post (to find out a breach of competition law)[114]. Based on this division of the different alternatives it is possible to make

---

Science 18, no. 1 (1967): 1–20; J. L. Mackie and John Leslie Mackie, *The Cement of the Universe: A Study of Causation* (Clarendon Press, 1980); David Lewis, "Causation" *The Journal of Philosophy*, 1973, 556–67.

[110] Hart and Honoré, *Causation in the Law*, 495.

[111] See, for instance, Commission decision of 14 December 1993, Case IV/M.308, Kali and Salz/MdK/Treuhand, 1994 OJ L 316/1.

[112] Case C-56/65 [1966] ECR 235 where the Court stated that "'*The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute. In particular it may be doubted whether there is an interference with competition if the said agreement seems really necessary for the penetration of a new area by an undertaking*."; see also Deere (John) Ltd v Commission (Case C-7/95 P) [1998] ECR I-3111, at para 76.

[113] T-461/07 - Visa Europe and Visa International Service v Commission, ECR II-01729 (2013) paragraph 108.

[114] Geradin and Girgenson, "The Counterfactual Method in EU Competition Law"; Veljanovski, "Counterfactual Tests in Competition Law".

reference to the sole legal category and quality of the causal link is possible only when the infringement is "by object" and the damage can be inferred relying on the "*id quod plerumque accidit*" and therefore skipping the assessment of the effects of the infringement[115]. In restrictions by object the Commission favours the sole legal interpretation of the agreement to evaluate its lawfulness[116]. The use of restrictions by object has being far extended by the Commission that is aiming at dramatically reduce the use of counterfactual methodology[117]. Differently, when causation cannot be so inferred, it is necessary to rely on the use of counterfactuals in order to confront the present scenario with an hypothetical one where no antitrust infringement is committed. In the words of the CJEU, this approach consists in "*taking into account of the competition situation that would exist in the absence of the agreement*"[118].

In competition law damages actions, the assessment is done ex post and the counterfactual scenario aims at presenting an alternative situation where there are no market distortions due to the antitrust infringement. This method mainly consists in the assessment of stochastic causation that implies the analysis of the probability of effects across a set of data corresponding to a group of transactions. In other terms the method generate a probability that the damage would not have occurred in absence of the infringement. In this case the probability is used as a tool to substantiate an event. Differently, in the case of loss of chance the probability is the object of compensation (and injury), making therefore the claim utterly different. The but-for (or in counterfactual terms, the if then) test for causation is particularly cumbersome to prove on a case-by-case basis[119].

[115] Case T-286/09 Intel v Commission [2014] not yet published (Court Reports - general) - publication in extract form, para 141 ff.

[116] See Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 2011 OJ C 11/1 ("Guidelines on Horizontal Agreements").

[117] Case T-286/09 Intel v Commission [2014] not yet published (Court Reports - general) - publication in extract form.

[118] Case T-328/03, O2 (Germany) GbmH & Co. OHG v. Commission [2006] ECR II-1231, paras 69, 71.

[119] Arkin v Borchard Lines Ltd (No 4) [2003] EWHC 687 (Comm), [2003] 2 Lloyd's Rep 225, Crehan v Inntrepreneur Pub Co (CPC) (Office of Fair Trade Intervening) [2003] EWHC 1510 (Ch), [2003] LLR 573, and Enron v EWS [2009] CAT 36 are all unsuccessful damages actions which failed to establish 'but-for' causation.

The use of probability is creating classes of infringement based on the fact that the scant chances that a negligible risk would take place becomes element of proof, in substitution of the 'objective substantiation'[120]. For instance, the recent Kone[121] case introduced a new class of causative events where the damage is inferred from the main stochastic evaluation that markets are generally behaving in a way that prices tend to follow the 'umbrella-price'. Here the peril consists in the fact that a blind equalisation of probabilities in similar categories of events might displace the objective or even stochastic analysis of the specific causative event.

The detection of a causal connection implies a qualification and not a mere description of the event[122]. Causation in law does not totally depend indeed on factual determinants. Legal causation is indeed product of a judgment over the type of consequences that are connected by law to the unlawful behaviour. In this legal reasoning also scientific and economic concepts have to be turned in juridical truth[123].

5.6.2. The two different uses of economic tools for causation

As seen there are cases in antitrust where it is not possible to determine with certainty which transactions were affected by the antitrust violation. For this reason, Courts and Authorities endorsed quantitative approaches that provide only an estimation of the probable damages over a set of transactions. This application of stochastic causality certainly echoes the risk-liability theory developed in tort law. Here indeed is the fact of ex ante analysis of a risk to happen, that legitimize a Court to award damages for antitrust infringement. In the Microsoft case, the CJEU stated that in order to give application to art. 102 TFEU it suffices for the decision maker to assess that the agency

[120] Roberto Pucella, *La causalità "incerta"* (Giappichelli, 2007); Richard W. Wright, "Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts" *Iowa L. Rev.* 73 (1987): 1001; Calabresi, "Concerning Cause and the Law of Torts".

[121] Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG [2014] not yet published.

[122] Roberto Pucella, *La causalità "incerta"* (Giappichelli, 2007), 68.

[123] Vaughn C. Ball, "The Moment of Truth: Probability Theory and Standards of Proof," *Vanderbilt Law Review* 14 (1961 1960): 905.

has a "*high probability of eliminating effective competition*"[124]. This approach, if reproduced in private enforcement, tends to reverse the risk of substantiating the tort on the defendant that is assumed as the party that can, in a most efficient cost-effect way, bear this burden, in order to reduce negative externalities due to informational asymmetries[125]. However, when an ex post examination of the activity is required, judges normally resort to two different techniques for reconstructing an hypothetical situation as if the infringement was not committed.

On the one hand, it is possible to use a comparator-based model[126] where the anticompetitive prices are compared with a non-infringement scenario. This empirical study can be operated on the same market before or after the infringement, on a similar geographic market or on similar product markets[127].

On the other hand, when such comparator model is impossible to display for evident differences between geographical or product markets, it is possible to recur to a simulation model. This second technique consists in the simulation of market outcomes on the basis of economic models[128]. Here econometrics finds wide application since the proof of causation consists in finding average patterns through the analysis of set of data interpreted on the basis of the economic theories.

Other approaches can also be distinguished on the basis of the benchmark of evaluation adopted. It is possible to analyse the differences in prices on a case by case

[124] Case T-201/04, Microsoft Corp. v Commission, ECR [2007] II-3601, para 439. In the US parallel case the FTC requested the assessment of causation in order to infer a reasonable connection between the conduct and the injury suffered, United States v. Microsoft 253 F.3d 34 (D.C. Cir. 2001).

[125] Landes and Posner, "Causation in Tort Law.".

[126] Commission's Practical guide quantifying harm in actions for damages based on breaches of article 101 or 102 of the treaty on the functioning of the European Union, SWD(2013) 205, available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_en.html. The Commission explains the usage of this methods in order to quantify damages. However, they are based on the counterfactual method that, in the same words of the Commission it "is based on comparing the actual position of claimants with the position they would find themselves in had the infringement not occurred. In any hypothetical assessment of how market conditions and the interactions of market participants would have evolved without the infringement, complex and specific economic and competition law issues often arise. Courts and parties are increasingly confronted with these matters and with considering the methods and techniques available to address them".

[127] Ibid. par. 33.

[128] Commission's Practical Guide, para. 96.

basis or through average patterns gained from statistical data[129]. The case-by-case analysis is often made non feasible by the vast number of transactions comprised in a claim for antitrust damages. Therefore, often a statistical study is needed in order to infer effects from the market dynamics[130]. Through these techniques, substantiating causation implies to prove that, for instance, the price overcharge was due to the antitrust infringement and not to other price determinants.

As maintained before, the use of case-by-case method (that is to analyse each transaction comparing all the price determinants with and without the antitrust violation) is often made impossible by the condition of the market and by the number of transactions operated on it. Claimants and judges therefore delve into the 'universe of data' in order to create a 'world of theory' that can explain a social reality where a damage has been caused. This demonstration implies a confrontation between different versions of reality in order to ascertain which of them is the most likely[131]. While the assessment of causation is generally left to the free evaluation of the judge in civil law countries, the witness of economic experts has naturally gained a fundamental importance in gauging economic data submitted to the court[132]. Through econometrics economists infer causal links between causes and effects, using average quantitative data. However, these results should not be confused with causation in law which stands outside the realm of economic theory[133]. In competition law is very easy to mix these

[129] Abele, Kodek, and Schaefer, "Proving Causation in Private Antitrust Cases" 857.

[130] Abele, Kodek, and Schaefer, "Proving Causation in Private Antitrust Cases"

[131] Case C-12/03 P, Commission v. Tetra Laval [2005] ECR I-987, para 42.

[132] Lianos, Ioannis, "'Judging' Economists: Economic Expertise in Competition Law Litigation - A European View".

[133] The Italian Supreme Court has noted in two recent cases that the insured party has the right to presume that the premium paid to the insurance company was higher than the market price due to the effect of the collusive behaviour of the defendant, in an amount corresponding to the increase in premiums as compared to the European average. The defendant may provide contrary evidence concerning both the existence of the causal link between the anticompetitive behaviour and the damage, and the amount of such damages. However, the Court further stated that if that company has participated in the proceedings before the Authority, the burden of proof cannot be limited to general considerations relating to the interpretation of economic data on the formation of premiums in the market of insurance policies, as already taken into account by the Authority, but must provide precise indications of situations and behaviours specifically attaining the undertaking concerned and the insured subject, capable of demonstrating that the level of the premium has not been determined by participation in an the illegal conduct, but by other factors. Corte di Cassazione, Allianz v Tagliaferro, 26 May 2011, n 11610, in Giust.

two notions reducing causation to a quantitative substantiation of causality. The point of separation between causality and causation lies firstly in the nature of the causation in the law, practically expounded by the function of the violated norm.

5.6.3. The use of counterfactuals and the presumption of damage in the case law

The presumption of damage enshrined in the damages Directive does not change the use of counterfactuals in a dramatic way. Indeed it is in any case fundamental to substantiate firstly the existence of an infringement that, in case of Articles 101 and 102 TFEU, consists indeed in the causation of a damage to competition. Hence, the claimant need to prove through counterfactuals or logical inferences, that the behaviour caused a damage to the market[134]. In case of cartels, this proof allows the plaintiff to presume the damage to single market actors. However, before national courts while the claimant can presume the damage in some specific circumstances, she still has to substantiate the causal link between the type of damage that is not immediate in its connection to the anticompetitive behaviour and the infringement (legal causation). Moreover, the defendant will most probably recur massively to the use of counterfactuals in order to disprove the claim and will additionally have to counter-argue upon the reasons deducted for the legal causation. The Commission enjoys a broad discretion in the assessment of "complex economic and technical assessment" which can be overturned only on the base of a manifest error[135].

---

civ. Mass. 2011, 5, 808 (2011); Corte di Cassazione Sara Assicurazioni v. G.V., 30 May 2013, n. 13667, not yet published.

[134] See Case 56/65, Société Technique Minière v. Mascinenbau Ulm [1966] ECR 235, at 249-250 "*the consequences of the agreement should then be considered and for it to be caught by the prohibition it is then necessary to find that those factors are present which show that competition has in fact been prevented or restricted or distorted to an appreciable extent. The competition in question must be understood within the actual context in which it would occur in the absence of the agreement in dispute*".

[135] Case 42/84, Remia [1985] ECR 2545, para 34; Joined Cases 142/84 & 156/84, BAT and Reynolds v. Commission [1987] ECR 4487, para. 62; Case C-7/95, John Deere v. Commission [1998] ECR I-3111, para. 41, noting that "*(d)etermination of the effects of an agreement on competition constitutes a complex economic appraisal*".

Finally, the use of counterfactuals also shifts to the phase of quantification of damages[136]. However, while proving causation is a fundamental step for the recognition of damages, the quantification of the same damages can be avoided by the judge who can estimate uncertain damages.

In Healthcare at Home, the CAT adopted a counterfactual test in order to assess causation in a margin squeeze case[137]. Genzyme Limited is a drug producer that manufactures and sells Cerezyme, used in the treatment of Gaucher disease. Between 1999 and 2001, Healthcare at Home Limited provided the drug to patients thanks to an exclusive contract with Genzyme. At termination of the contract, Genzyme started an independent home care service in order to administer autonomously the drug to patients. From this moment on, other companies, such as Healthcare, had to purchase the Cerezyme at the 'NHS list price' which included also the home service costs. In 2003 the OFT noted that Genzyme had abused its dominant position, imposing a margin squeeze on the upstream market for home care delivery.

In the follow-on action initiated by Healthcare, the CAT awarded damages, with an interim decision, based on the percentage discount that should have been applied in order to avoid margin squeeze[138]. In other words, the CAT's experts reckoned the pricing that would have ensured a reasonable profit margin to the defendant and, from that amount, obtained the percentage discount. The damages therefore were awarded to the claimant in form of loss of revenues[139].

The use of counterfactuals in order to prove lost profits is also well described by the recent case 2 Travel Group PLC v Cardiff City Transport[140] where the Tribunal adopted a "but-for" approach in order to establish the cause in fact connecting the loss

[136] Cento Veljanovski, "Market Power and Counterfactuals in New Zealand Competition Law" *Journal of Competition Law and Economics*, 2013, available at SSRN: http://ssrn.com/abstract=1908088 or http://dx.doi.org/10.2139/ssrn.1908088; Geradin and Girgenson, "The Counterfactual Method in EU Competition Law".

[137] Healthcare at Home v Genzyme Ltd, CAT 29 (2006).

[138] Ibid., CAT 29:110 ff.

[139] Ibid., CAT 29:148.

[140] 2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Ltd, CAT (2012).

to the infringement[141]. Here the CAT compared the market condition with the situation of an hypothetical market in absence of the infringement. Through this counterfactual the CAT observed that without the infringement the claimant would have made further profits.

Similarly, the Commercial Court of Milan in the case Brennercom[142] assessed the legal causation relying on the economic experts' report which construed the counterfactual world. The counterfactual reasoning proceeded through a three steps assessment. Firstly the experts studied the difference between the prices charge by the antitrust infringer, Telecom Italia (TI) to its internal divisions and the ones fixed for the same services (LLs) to competitors. Hence, secondly, they assessed the raise in price of TI's services. Finally, determined the price effect on Brennercom.

The experts deployed different theories and standard economic models for the creation of different counterfactual scenarios. There were indeed no evidences of LLs prices and, therefore, of real differences of LLs prices over time and between the competitors. However, the experts, relying on the gathered data, created different counterfactual worlds to calculate the market price in situation of oligopoly[143]. From the experts counterfactual report, the judge gained the information for assessing the margin squeeze and reckoning the amount of damages. The judge observed indeed that in absence of TI's infringement, B would have been to get more clients (calculated in percentage)[144].

[141] Explicitly recalling also Enron Coal Services Limited v English Welsh & Scottish Railway Limited [2009] CAT 36 (at paragraph 85(a)) and the assessment reported by Colman J in Arkin v Borchard Lines Ltd [2003] EWHC 687 (Comm), [2004] 2 CLC 242.

[142] Court of Milan, Brennercom Spa v. Telecom Italia Spa decision n. 14802/2011 (2014).

[143] Based on the two theories of Martin Shubik and Richard Levitan, *Market Structure and Behavior* (Harvard University Press, 1980) and Nirvikar Singh and Xavier Vives, "Price and Quantity Competition in a Differentiated Duopoly" *The RAND Journal of Economics*, 1984, 546–54.

[144] Tribunale di Milano, Brennercom Spa v. Telecom Italia Spa, no. 14802/2011, 3 March 2014.

VI. Indirect claimants and causal uncertainty in damages actions for competition law infringements

A competition law infringement is capable of damaging different subjects at the same time, virtually all the market players that are directly or even indirectly connected to the business of the competition law infringer[1]. Exclusionary conducts, exploitative abuses and cartels bring about different types of damages to a potentially vast array of subjects. In particular, exploitative abuses and cartels can cause damages to: *i)* direct purchasers of the goods or services; *ii)* indirect purchasers to whom the overcharge was passed on; *iii)* costumers of goods affected by umbrella prices; *iv)* potential customers who renounced to the purchase due to the rise in prices (counterfactual customers); *v)* producers of complementary goods.

On the other hand, exclusionary abuses tend to damage: *i)* undertaking excluded from the relevant market; *ii)* suppliers of undertaking excluded from the market; *iii)* future customers of excluded undertakings; *iv)* employees dismissed because of market foreclosure. One can formulate additional hypothesis with regard to subjects that might be damaged by a breach of competition law, since, as already noted, it potentially reaches all market players. Moreover, all these subjects are able to claim damages as the CJEU[2] and the Directive 104/2014[3] have granted the right to stand to any person damaged by an anticompetitive behaviour. But the empirical analysis of competition law litigation says[4] that indirect purchasers, counterfactual buyers and other classes of non-direct purchasers are discouraged from bringing an action for damages. In the four

[1] *Green Paper - Damages Actions for Breach of the EC Antitrust Rules SEC (2005) 1732 COM/2005, 672*, 678; Castelli, "La causalità giuridica nel campo degli illeciti anticoncorrenziali," 1050.

[2] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA ECR [2006] I-06619, para 60 (2006), para 60; Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others ECR I-06297, para 26 (2001), para 26; Case C-199/11 Otis and Others ECLI:EU:C:2012:684, para 41 (2012), para 41; Case C-536/11, Donau Chemie and Others (not yet published) ECLI:EU:C:2013:366, para 21 (2013), para 21.

[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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance* Article 1 and Recital (13).

[4] I have developed this analysis starting from other researches covering the period 1999-2013. I added the most recent developments and delved into aspects that were not taken into consideration by such studies as, for instance, the number of actions brought by indirect purchasers.

jurisdictions selected for the comparative analysis in this thesis, which are also the most important in terms of size of the economy in Europe, I could not find any claim from counterfactual customers, neither from other classes of indirect purchasers or suppliers, if we except passing on claimants[5].

Competition law litigation is mainly centred on claims brought by direct purchasers of goods or services[6]. These cases are characterised by a marked causal uncertainty due to the nature of the harm[7]. This causal uncertainty is generated by an additional action that adds up in the causal line. For instance, in the case of umbrella pricing, this action consists in the adaption of prices by the umbrella customer, while for counterfactual buyers it consists in the renounce to the purchase by the potential buyer. Establishing a causal link in all these situations can be a particularly difficult task as the claimant needs to fulfil the requirements of causation in national tort laws and substantiate a loss protected by the EU competition law.

In this chapter I delve into the two main cases of causal uncertainty created by indirect customer. I firstly analyse the damages to indirect purchasers and the passing-on defence (7.1) which moved into focus of courts and European legislator, especially in the last decade. The second part (7.2) of this chapter regards instead the umbrella customers, recently subject of an important decision of the CJEU. Finally (7.3) I conclude with considerations about non-direct claimants.

6.1. Indirect purchasers and the passing-on of an overcharge

[5] Only in Germany and United Kingdom I was able to find a few actions for damages brought by indirect purchasers. Paradoxically, English courts have been the most sceptical, among the four jurisdictions selected, with regard to pass on claims, mainly for reasons related to remoteness of the damage claimed.

[6] See the results of the empirical research conducted by Rodger, *Competition Law, Comparative Private Enforcement and Collective Redress Across the EU*.

[7] Some authors even excluded that the overcharge passed on can give rise to compensation, since this damage would be indirect; Mario Barcellona, *Trattato della responsabilità civile* (UTET Giuridica 2011); M. Barcellona, *Funzione compensativa della responsabilità*, 2009, p. 62.

An antitrust infringement very often results in harm via price effect[8]. This means that the cartel or the dominant undertaking fixes a supra-competitive price that charges to its customers. However, these buyers might not be the end consumers of those goods or services but only a first juncture of a supply chain that can be more or less complex[9]. The direct purchaser has therefore a threefold choice. Firstly, she can internalise the overcharge and impose to her clients the same prices as before the infringement. Alternatively, she might pass-on the whole overcharge, raising at her turn the prices to the same amount as the overcharge, and burden the indirect purchaser with the correspondent cost. Finally, the direct purchaser can pass on a part of this overcharge, internalising the rest of it. The passing-on is due to trade relations that bind the production to the distribution process, so that what happens in a certain level of the supply chain tends to be passed on to the next level[10].

To put it with an example, take a vitamin producer 'β' which cartelises with other competitors in order to fix higher prices for bulk vitamins. β sells the vitamins at a supra-competitive price to the cosmetic producer 'Ω'. This latter firm has a distributor, 'α', to whom sells the cosmetic products. Although the price of vitamins increased, due to the cartel, Ω might decide, for instance because worried about losing an important client, to sell the cosmetics at the same price as before.

[8] Einer Elhauge, *Research Handbook on the Economics of Antitrust Law* (Edward Elgar Publishing, 2012).

[9] Hence, for price overcharge we mean the difference between the supra-competitive price fixed by the antitrust infringer and the market price of the same goods or services.

[10] For an introduction to the problem of passing-on of price overcharges in competition law see, Damien Geradin, Anne Layne-Farrar, and Nicolas Petit, *EU Competition Law and Economics* (Oxford University Press, 2012); Ashton and Henry, *Competition Damages Actions in the EU*; Ivo Van Bael, *Due Process in EU Competition Proceedings* (Kluwer Law International, 2011); Richard Craswell, "Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships," *Stanford Law Review*, 1991, 361–98; Frank Verboven and Theon Van Dijk, "Cartel Damages Claims and the Passing-on Defense*," *The Journal of Industrial Economics* 57, no. 3 (September 1, 2009): 457–91; Robert G. Harris and Lawrence A. Sullivan, "Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis," *University of Pennsylvania Law Review*, 1979, 269–360; Earl E. Pollock, "Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine," *Antitrust Law Journal*, 1966, 5–40.

Differently, and as it is more likely to be for the economic scholars[11], Ω might decide to pass-on the whole or part of the price increase it had to pay on vitamins to the next level of the supply chain, that is the cosmetics' distributor α. The question posed in this regard in both EU and US systems is, therefore, if α is entitled to claim damages against the cartelist β and if the latter can oppose the passing-on defence to a claim raised by the direct purchaser Ω. It is questioned, indeed, whether the overcharge paid by the indirect purchaser is the result of a free choice of the direct purchaser to raise the prices that, for some critics, would alone suffice the lack of causation, or a natural and foreseeable dynamic.

The scenario is even more complicated if we think that in the downstream market, after the distributor, there might be a long list of subjects buying, implementing or re-selling the vitamins under cartel and the other derived products. The longer and more complex the supply chain, the more the final purchaser will be 'far' from the initial infringement. This distance raises questions of proximity of the causal connection between the damage and the infringement, not exactly for matters of geographical distances but rather because at each step of the supply chain a new action will be implemented, resulting in an additional possibility to introduce an independent and sufficient cause of the damage ('break the causal chain'). In other words, it is not always clear when the overcharge passing through the supply chain dissipates and stops being a cause of damages and when instead remains an adequate causal link of the damage.

In this chapter, I analyse the passing-on in the light of causation laws. Once described the general problem around the proof of causation in passing-on actions, I present the choices made by national judges in the four countries selected for the comparative study. Therefore, the third part describes the approach adopted by the

[11] Assimakis P. Komninos and Oxera, "Quantifying Antitrust Damages: Towards Non-Binding Guidance for Courts," *Oxera*, X, accessed March 20, 2014, http://www.oxera.com/Latest-Thinking/Publications/Reports/2010/Quantifying-antitrust-damages-Towards-non-binding.aspx; *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance* Recital (41). For a different view, see Frank P. Maier-Rigaud, "Toward a European Directive on Damages Actions," *Journal of Competition Law and Economics* 10, no. 2 (January 23, 2014): 346.

recently released Directive on competition law damages actions[12]. With regard to the Directive, this chapter argues that the legislator has been sufficiently precise in identifying the problems and fixing the aims, but has not been as efficient in proposing solutions. Part IV analyses the solutions laid down by the Directive in the light of the aims posed by the same European legislator. Finally I suggest interpretative solutions in order to bring consistency both into the interpretation of the causation link in passing-on cases and the policy issues that the same arises.

6.1.2 Passing- on as a matter of causation

The private enforcement of European competition law is centred on the aim of compensating the victim of the antitrust infringement[13]. This is one of the main differences with the US system relying on the deterrence effect of private antitrust provisions[14]. The compensatory principle dispenses a general rule for which the damaged party should be able to recover damages in order to restore the same situation she was, at least from an economic point of view, before the breach occurred[15]. For obtaining compensation of the damage, the claimant has to substantiate the infringement, the prejudice suffered and the causal connection between the two. Antitrust infringements usually affect several subjects at the same time, because they impact horizontally on the direct buyers of those goods and vertically on the

[12] *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance*.

[13] The principle was stated in Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA ECR [2006] I-06619 (2006); Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others ECR I-06297 (2001)., and subsequently adopted by the *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance*. For an historical reconstruction of the right to damages in competition law see Veljko Milutinović, *The "Right to Damages" Under EU Competition Law: From Courage V. Crehan to the White Paper and Beyond* (Kluwer Law International, 2010).

[14] Wouter P. J. Wils, *The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics* (Kluwer Law International, 2002).

[15] Deakin, Johnston, and Markesinis, *Markesinis and Deakin's Tort Law*; Prosser, *Prosser and Keeton on the Law of Torts*.

downstream markets connected to them. These commercial chains of distributions can be simple or complex and are composed by different links which correspond to an equal number of steps before the final consumer. The complexity of these chains depends, therefore, also on how many levels the product undergoes before reaching the final consumer.

A supply chain is defined as "*a network of autonomous or semi-autonomous business entities collectively responsible for procurement, manufacturing, and distribution activities associated with one or more families of related products*"[16]. Market chains (sometimes alternatively called value chains) comprise a broader spectrum of subjects than supply chains, that is all the economic actors who produce and transact a particular product as it moves from primary producer to final consumer.

In simple chains there is an immediate connection between undertaking and distributor and between undertaking and consumer, through one or more exchange of goods, services, money and information. Differently, complex chains include all firms spanning from the first supplier to the last customer involved in the exchange of goods, services, money and information.

An antitrust infringement is normally capable of affecting multiple subjects, since its impact on the market is not limited to the direct purchaser of the good or service directly interested by the infringement[17]. Economists explain that one of the main reasons for the propagation of the damage along the market chain, rests on the passing-on phenomenon since market players react to cost changes contributing to the distribution of the damage passing it through the chain[18]. For instance, when a

[16] Jayashankar M. Swaminathan, Stephen F. Smith, and Norman M. Sadeh, "Modeling Supply Chain Dynamics: A Multiagent Approach*," *Decision Sciences* 29, no. 3 (1998): 607–32.

[17] William M. Landes and Richard A. Posner, "Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick," *The University of Chicago Law Review*, 1979, 602–35; Firat Cengiz, "Passing-On Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: What Can the EC Learn from the US?," *University of East Anglia Centre for Competition Policy, Working Paper*, 2007, 39; Ashton and Henry, *Competition Damages Actions in the EU*, 42.

[18] The Oxera and a multi-jurisdictional team of lawyers led by Dr Assimakis Komninos have developed a study for the European Commission where they cautiously state that "*Economic theory has identified certain relationships between cost changes (such as changes in input prices) and price changes. In essence, these relationships follow from the standard models of competition, oligopoly and monopoly in*

downstream cartel sets higher prices for the goods sold, it is thought by economic literature that it is often the case that the direct purchaser of those goods passes at least part of the overcharge on to the following link of the chain[19]. This passage might repeat till the final purchaser who is not able to unload the overcharge. While these passages are seen by economists as almost unavoidable in some cases because of cost-price embedded in the pricing dynamics (to a higher input cost corresponds a higher output price), it is also true that the damage propagates at each step thanks to the actions of market actors which are damaged parties and not the antitrust infringers.

a. Cause-in-fact and the passing-on

It is intuitive to understand that the causation link between the breach of law and the damage of an indirect purchaser along such complex chains might be not as immediate as in direct purchases. However, this convincing evidence has to be converted into a more dogmatic truth and correspondent solutions has to be drawn. The position of the indirect purchaser in passing-on actions is generally analysed as a matter of standing rather than of causation[20]. As related to pass on damages in EU competition damages actions, however, the CJEU and the directive 104/2014 clearly stated that any natural or legal person who has suffered harm caused by an infringement of competition

---

which there is a certain relationship between price and (marginal) cost. On this basis, the report describes several insights from economic theory regarding the likely pass-on rate in various market situations. A distinction must be made between firm-specific and industry-wide cost increases" Komninos and Oxera, "Quantifying Antitrust Damages," X.

[19] Maier-Rigaud labels this view as simplistic, as he argues that "*By changing relative prices, competition law infringements trigger responses throughout the economy and neither all competition law infringements nor all repercussions of competition law infringements occur within a vertical chain*" and that the overcharge should not be classified as damage; Maier-Rigaud, "Toward a European Directive on Damages Actions," 346.

[20] Süleyman Parlak, "Passing-on Defence and Indirect Purchaser Standing: Should the Passing-on Defence Be Rejected Now the Indirect Purchaser Has Standing after Manfredi and the White Paper of the European Commission?," *World Competition* 33, no. 1 (2010): 31–53; Ashton and Henry, *Competition Damages Actions in the EU*, 36; Cengiz, "Passing-On Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law"; Assimakis P. Komninos, *Ec Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing Limited, 2008).

law is able to claim full compensation for that harm[21] irrespective of whether they are direct or indirect purchasers[22]. Therefore, no room remained on speculations about the possibility for these subjects to claim for damages as a matter of standing[23].

The general question for causation, instead, is whether steps after the first purchase reduced the damage to the purchaser, or caused other types of damages such as lost profits. However, the specific questions related to causation are different and specifically related to the factual situation[24]. The causal link is indeed a structural element of the infringement, which generally responds to an objective reconstruction of a syllogistic type, between an action (author of the act) abstractly considered (not yet classified as *damnum injuria datum*) and the harmful event. In order to identify the primary relationship between conduct and event, the judge in the first instance excludes any assessment of foreseeability, both subjective as an objective, that is an analytic element placed at a later stage of the reconstruction of the causal nexus. Here again, therefore, the double-test on causation applies. The problem is to understand and substantiate, firstly that the overcharge inflicted a damage to the claimant and not to another subject along the supply chain, who internalised the negative externality (compensatory principle). Secondly, it is fundamental to assess the proximity, or however the legal causation, of the specific type of damage claimed to the antitrust infringement.

On this basis, a general subdivision of causal questions can be framed as follows. The material causation demands the claimant (indirect purchaser) to give sufficient proof that the cartel overcharge has passed on to her. So the question would be whether the damage would have happened but-for the antitrust infringement[25]. On

[21] Article 2 *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance*.

[22] Article 12, ibid.

[23] It remains certainly still vivid the policy-based discussion about the opposite choice made by the US Supreme Court and the most efficient system as confronted to the aim it pursues.

[24] Although causation is a matter of fact that, therefore, regards the specific characteristics of the singular situation, it is important to make clear the general structure of the rules on causation in order to avoid inconsistencies or (as demonstrated) failures in its substantiation.

[25] Differently and, in a more sophisticated way, the judge can ask whether the overcharge passed-on was a necessary element of a set of conditions jointly sufficient for causing the damage claimed. For an analysis

the other hand, the defendant (the antitrust infringer) has to prove that the steps taken after the first purchase reduced or eliminated the damage.

When instead is the direct purchaser to claim for damages, the evidential burden related to causation varies according to the specific characteristics of the domestic system. Generally, it is required to the claimant to substantiate the damage, the negligent violation of law and the causal link connecting them. However, in case of passing-on some courts have also required the claimant to provide sufficient proof that the overcharge was not passed on to the next buyer. The motivation of this approach is mainly about proximity to the relevant information for proving passing-on. However, this requirement reverts the burden of proof onto the claimant. This presumption does not technically affect causation since the claimant has in any case to prove that the overcharge is directly connected to the damage claimed. However, the presumption revert the burden of proving a further element, the passing-on, which is strictly related to causation. Therefore, as for the factual causation, it is crucial to assess if the damage to the indirect purchaser would have occurred but-for the antitrust infringement via price effect. The claimant has to prove that the antitrust infringement, and not the following actions enacted by direct and indirect buyers, has caused a damage.

When the overcharge is the result of an antitrust infringement that inflates prices of goods or services, the legislator has to decide whether to allow indirect purchasers to claim compensation for the relative damages or not. At this point, the material causal link between the conduct and the event finds correspondents in each antecedent (near, intermediate and remote) that has generated, or even contributed to this objective relation to the fact, and therefore should be considered a cause of the event. The second stage requires instead the analysis of legal causation in order to ascertain that the damage claimed falls foul of competition regulation and within is attributable to the antitrust infringer.

---

of the NESS theory and its application in tort law see supra, para 2.6; Wright, "Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof"; Hart and Honoré, *Causation in the Law*; Richard W. Wright, "Causation in Tort Law," *California Law Review*, 1985, 1735–1828; Wright, "The NESS Account of Natural Causation."

b. *Legal causation in passing-on damages actions*

The illegal overcharge passed through the market chain may cause different types of damages to both direct and indirect purchasers. Firstly, there is the actual loss of the consumer (or anyway of the purchaser who did not pass on the overcharge) that amounts to the level of the overcharge multiplied the number of items purchased[26]. As for intermediate buyers of the good or services under infringement, when they succeed to pass on the overcharge paid, they can claim for lost profits caused by the decline in demand due to higher prices[27].

The evaluation of legal causation - both in terms of the dependence of the event from its factual antecedents and belonging to the scope of the rule infringed - is done according to criteria of scientific probability or relying on logic inferences[28]. Legal causation delimits the compensation, identifying which damages are ruled out from the compensation to the indirect purchaser materially injured by the infringement.

Hence, through the tests of remoteness, directness, scope of the rule, 'causal regularity', probability[29], or any other, the claimant has to substantiate that the supra-competitive price of her purchase, albeit indirectly charged, caused damages that are causally linked to the antitrust infringement.

Hence, on the basis of these theories, are damages caused by pass-on such as umbrella effects, renounce to the purchase, decrease in demand, *lucrum cessans*, and the like, recoverable?

The time is not ripe enough to base a response on national case law that –so far- has mainly dealt with claims that are more straightforward[30], however, some responses (and some new doubts) can be gleaned from the Directive and from the CJEU case law. The following paragraph displays indeed an analysis of the case law of the European

[26] This actually happens only in perfectly competitive markets where the pass-on rate is 100%, see *Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union SWD(2013) 205*, 2013 para 170.

[27] Ibid. para 175 ff.

[28] Hart and Honoré, *Causation in the Law*, 85 ff.

[29] For an analysis of some national European approaches to the legal causation, see here chapter III.

[30] See here para 2.1.

Courts about passing-on which focused on different areas of law but holds applicable, to some extent, to competition law.

6.1.3. Passing-on in non-competition law cases and the CJEU

a. *Passing-on on tax levies*

A consistent CJEU case law admits the passing-on defence in claims for restitution of taxes and burdens illicitly charged in conflict with EU regulation[31]. The national tax Authority can oppose the passing-on to the claimant which is asking for the restitution of the burden paid. However, this case law burdens the defendant (the tax Authority) to give evidence that the tax was passed on[32]. In the *San Giorgio* case the Court points out that "*in a market economy based on freedom of competition, the question whether, and if so to what extent, a fiscal charge imposed on an importer has factually been passed on in subsequent transactions involves a degree of uncertainty for which the person obliged to pay a charge contrary to Community law cannot be systematically held responsible"*[33]. In other words burdening the possible injured subject to substantiate that the overcharge was not passed on the downstream market, would make the exercise of its right to compensation almost impossible.

Moreover, the CJEU has more recently required the national tax Authority to prove also the unjust enrichment of the claimant in case of compensation[34]. The CJEU deems it necessary because, even in case of passing-on of the charge levied, the claimant might suffer a reduction in its sales due to the price increase, resulting in a loss of profits[35]

[31] See, among the many others, Case C-398/09 Lady & Kid A/S and Others v Skatteministeriet ECR I-07375 (2011); Case C-94/10 Danfoss A/S and Sauer-Danfoss ApS v Skatteministeriet ECR I-09963 (2011); Case C-440/12 Metropol Spielstätten Unternehmergesellschaft (haftungsbeschränkt) v Finanzamt Hamburg-Bergedorf not yet published (2013).

[32] Case 199/82 Amministrazione delle Finanze dello Stato v SpA San Giorgio ECR 1983 03595 (1983).

[33] Ibid. para 15.

[34] C-192/95 - Comateb and Others v Directeur général des douanes and droits indirects ECR I-00165 (1997) para 27.

[35] Ibid. para 29.

b. *Passing on in non-contractual liability*

In *Ireks-Arkady*[36] a *quellmehl* producer claimed for compensation of the damages caused by the European Community that rejected his application to receive the subsidies. The quellmehl is used in bread production and is derived from maize or wheat. The point made by the claimant was that the quellmehl is used in alternative to starch, therefore the European institutions were supposed to recognise the subsidy under the parity of treatment clause. At the moment of the claim the European Commission already stated that quellmehl producers had to be levelled with the starch producers. Ireks decided to claim for the prior damages felt. The Commission opposed that the claimant had passed the damage through the supply chain. In response, the claimant objected that he could not raise prices, given the competition of starch producers who were benefitting of subsidies in the same relevant period.

The CJEU admitted in general terms the possibility to invoke the passing-on defence. However, in the specific case, rejected the objection of the defendant because there was no sufficient proof of the passing-on.

In the following Wührer case[37], the Court faces a double defence by the Commission and the Council based on passing-on exceptions. This case regards the same line of refunds to maze producers as in the Ireks-Arkady. Differently from Ireks, the Italian brewery Wührer was not a maze producer. However, it purchased the maze directly from the producers and used it for the production of beer. The same producers assigned to Wührer their right to the production refund. On this point, the Commission and the Council raised two objections. With the first objection, they maintained that Wührer had passed on the damage through price overcharges on the final products sold. Here the Court rejected the objection, because the defendants failed to substantiate their counter-claim, which was mainly speculative[38].

[36] C-238/78 - Ireks-Arkady v Council and Commission ECR 01719 (1981).
[37] C-256/80 - Birra Wührer v Council and Commission ECR 00789 (1987).
[38] Ibid. paragraph 85.

Secondly, the Commission and the Council objected that Wührer was an 'indirect assignee' of the right to production refund. Hence, the claimant had to substantiate the consideration paid for having that right. On this ground, the Court stated that the Commission erred to qualify the relationship between Wührer and the right to compensation. The claimant was indeed assignee of those rights, which were legally transferred to him by the owner. By consequence, Wührer was not claiming for a refund passed on by the producers. The claimant was, indeed, the direct owner of the right to refund[39].

6.1.4. Passing-on in national courts: a comparative overview

National courts have since long been dealing with passing-on of price overcharges in competition damages actions, preceding in time the choices made with the Directive. Generally, national courts have accepted the passing-on, granting indirect purchasers the right to claim damages and ensuring, at the same time, the right to exercise the passing-on defence. However, the degree and extent of these rights are slightly different in modulation.

A. Germany

The German Act against Restrictions of Competition (ARC) provides at Section 33, subsection 3, that "*whoever intentionally or negligently commits an infringement of competition law shall be liable for the damages arising therefrom*". According to the wording of this paragraph, the antitrust infringer is liable indifferently for damages to direct purchasers and to indirect purchasers. However, it is not clear if the passing-on defence is admitted. In 2005 the German legislator amended the law and specified that "*if a product or a service has been purchased at an excessive price, the damage is not excluded because the good or service has been resold*"[40]. The fact that the direct

[39] Ibid. para 95.

[40] Section 33, subsection 3, sentence 2 ARC. This provision is applicable only to cartels taking place from 2005 on. However, the Supreme Court interpreted also the amended text in order to provide guidance for future cases.

purchaser passed on the price overcharge does not exclude his right to claim compensation of damages. But the provision fail to indicate what these damages are. Some authors observed that the provision had to be referred to the direct cartel damages caused by the price overcharge, and that by consequence it prevented the antitrust infringer to raise the passing-on defence. However, the German Supreme Court interpreted this sentence differently.

The ORWI case[41] solved indeed a longstanding issue in German case law about the admissibility of passing-on actions and defences. Before this decision, the Court of Appeals of Berlin opened a fracture in the judicial approach to passing-on. In an early case, the Court of Dortmund held that the defendant could not raise the passing-on defence[42]. In the following *Readymix* case the Higher Regional Court of Berlin[43] disallowed the cartelist to object the passing-on of the overcharge. The Court observed that the payment, either to direct or indirect purchaser, relieves the infringer from any other action pertaining to the same cartel damage[44]. The Appellate judge of Berlin, by contrary, held that both the direct and indirect purchasers could claim the entire amount of damages.

In a later case, related to the carbonless paper cartel, the Federal Court of Justice finally granted right to stand to the indirect purchaser and allowed the passing-on defence[45]. The proceeding involved three parties, a savings Bank (claimant), a printing firm (injured party) and the cartelist (defendant), a carbonless paper producer.

The damaged party, an insolvent printing firm, transferred its own right to compensation to the savings bank through an assignment of claims. The defendant, on

[41] Bundesgerichtshof [BGH] [Federal Court of Justice] KZR 75/10 (F.R.G.) (2011).

[42] Regional Court of Dortmund WuW/E DE-R 1352 (2004).

[43] Higher Regional Court Berlin, judgment of 1 October 2009, 2 U 17/03 – Readymix concrete. The proceeding is a follow-on action of the cement cartel. The claim was first rejected by the Regional Court of Berlin in 2003, because the claimant was not a specific target of the cartel. The Appellate Court of Berlin reversed this decision and established that the claimant not necessarily has to be targeted by the cartel. The Court also states that the existence of a cartel constitutes a rebuttable presumption of a cartel overcharge.

[44] Higher Regional Court Berlin 2 U 17/03 (2009).

[45] Bundesgerichtshof [BGH] [Federal Court of Justice] KZR 75/10 (F.R.G.) (2011).

the other side, was part of a cartel fined by the European Commission[46]. The claimant purchased carbonless paper from a wholesaler of the defendant at inflated prices. By consequence, when it learned about the existence of the cartel claimed for compensation of the damages due to the price overcharge.

The Court of first instance (District Court of Mannheim) dismissed the claim, stating that only direct purchasers of cartel members had the right to claim compensation[47]. Moreover, the judge of the merit clung to the motivation observing that the claimant, by its turn, might have passed on the overcharge on to its clients. The claimant appealed the judgment to the Court of Appeal of Karlsrusche, which, however, endorsed the position of the first grade judge with regard to the passing-on issue[48]. The Appellate Court, however, found out that in the specific case the claimant was entitled to claim for damages. The claimant purchased the paper from a wholesaler which was fully owned by the cartelist. On this basis the judge reasoned that, since the direct purchaser, being it a subsidiary, would have never recovered the damage against the parent company, the judge had to grant the indirect purchaser with the right to claim compensation, in order to avoid unjust enrichment of the cartelist. The reasoning appear to be lagging, since it recognise the right to compensation only as a counterbalance to avoid unjust enrichment of the cartelist.

On the other hand, both courts agreed that the passing on defence should not be likewise allowed. For, in that case, the cartel member would be exempted by any sort of compensatory liability. By consequence, the Appellate Court granted the defendant with the damages, calculating only the sales from the wholly owned subsidiary of the cartel member and excluded the passing-on exception, by denying any possible reduction of damages based on eventual pass-on of the overcharge.

By contrast, and finally, the Supreme Court held that also indirect purchasers should be able to bring damages claims against the members of a cartel[49]. In addition, the Court sided for the admissibility of the passing-on defence, so dismissing the

[46] Commission decision Carbonless paper cartel, OJ L 115, 21.04.2004 (2001).

[47] Landgericht Mannheim (District Court of Mannheim), 22 O 74/04 Kart EWiR 659 (2005).

[48] Oberlandesgericht Karlsruhe (Higher Regional Court of Karlsruhe), June 11, 2010, 6-U 118/05 (Kart) (F.R.G) (2010).

[49] Bundesgerichtshof [BGH] [Federal Court of Justice] KZR 75/10 (F.R.G.) (2011).

argument of the Court of Appeal[50]. As a result, the Supreme Court stated that every damaged party is entitled to claim compensatory damages from any of the antitrust infringers[51]. By consequence, each cartelist is jointly and severally liable for the whole damage caused to a purchaser, being it direct or indirect. On the other hand, the defendant has the right to object the fact that the direct purchaser had passed the damage through the market chain. The Court moreover reasserts the power of the trial judge to estimate damages caused by a cartel[52]. The Court bases its interpretation also on Section 33(3), sentence 2 ARC (even though was not applicable in the case at hand) making more difficult the possibility to object the passing-on defence. The defendant can invoke the passing-on defence pleading an adjustment of profits. For doing this the defendant has to substantiate the simultaneous fulfilment of three conditions. Firstly the defendant has to support with plausible proof or evidence that the passing on was economically possible. Secondly, he has to show that there was a causal link between the infringement and the damage passed on. Finally, the defendant's burden of proof compels also that he has to give evidence of the fact that no other economic disadvantages injured the direct purchaser. In particular, the Court refers to the loss of profit descending from the decrease in demand, that is a normal market response to the increase in prices.

The BGH made clear that the burden of proof of the passing-on of the overcharge lies on the defendant. Therefore, when the direct purchaser claims compensation from the antitrust infringer, it is up to the cartelist to show evidence of the passing-on. On this point, commentators already noticed that the proof can in many cases become a '*probatio diabolica*' given that it can be particularly thorny the access to information needed to substantiate the passing-on[53]. Some pointed out that the obstacle could be overcome by courts giving acceptance to the so called 'secondary burden of

[50] Ibid.

[51] Ibid.

[52] Ibid. The estimation has to be conducted within a specific framework that the Supreme Court draws. Firstly, the judge has to base the estimation on the prices of goods actually paid by the claimant. Secondly, the prices can be adjusted by de- or increasing factors. Finally, there are lingering effects that the judge can use in taking the decision for adapting the rule to the specific case.

[53] Johannes Zöttl, "Die Private Durchsetzung von Kartellrechtlichen Schadensersatzansprüchen — Status Quo in Deutschland," 2012.

allegation'[54]. This is a special procedural instrument used in some jurisdictions to oblige claimants to disclose the relevant.

However, in fact it will prove to be rather difficult for an indirect purchaser to claim damages successfully due to the evidential burden, e.g., having to prove that the intermediary has passed on the excessive prices. The damage suffered by an indirect purchaser is relatively minor compared to the cost risk and, by consequence, the practical relevance of such cases is reduced. In this respect, it is also important to note that the possibility of class actions does not exist in Germany[55]. German civil procedure law is based on the individual filing of an action. Thus, apart from the contractual possibility of agreeing on a model suit clause, German procedural law does not provide for a representative action by one member of a group of potential claimants with a binding effect of res judicata towards and against all the other members of the group.

The claimant then has to demonstrate and to prove that his damage is based on the prohibited cartel. If the victim did not purchase directly from the cartel members, he must also prove that the overcharge was passed on to him as indirect purchaser. Given the complexity of pricing, the BGH held that there is no presumption that an increase in prices during the period of cartelization results from such cartel. In contrast to the EU Commission, the BGH demands evidence in every individual case.

B. France

There is no specific statutory basis for actions proposed by indirect purchasers. Hence, all claims are based on art. 1382 FCC. Given the broadness of the rule, French judges facing for the first time indirect purchasers actions had enough room to interpret the law as they deemed more reasonable. This discretion created conflicting judgments that ended in the Court of Cassation decision of 2010[56].

[54] Hüschelrath and Schweitzer, *Public and Private Enforcement of Competition Law in Europe*, 274.

[55] Simon Vande Walle, *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective* (Maklu, 2013), 200.

[56] Cour de Cassation, Doux Aliments v Ajinomoto Eurolyne 09-15816 (2010).

This notable case takes place as a follow on action of the lysine cartel decision of the European Commission of 2004[57]. The claimant, *Doux aliments Bretagne* (Doux), a poultry farmer group, purchased lysine from *Ceva santé animale* (Ceva) which did not take part to the cartel. However, Ceva purchased lysine from cartel members, in particular *Ajinomoto Eurolyne* (Ajinomoto), at inflated price and supplied Doux. Doux decided to bring an action for damages directly against Ajinomoto before the French courts, arguing that the overcharge of the cartel had been passed on to it.

The Court of first instance, the Commercial Court of Paris[58], rejected the claim of Doux because the claimant failed to prove that it was unable to pass the overcharge through the market chain. In other words, Doux failed to prove the causal link between the cartel and the damage claimed. Moreover, the judge observed that the claimant failed to calculate the amount of damages. But Doux did not lose heart and appealed the decision before the Court of Appeals of Paris that reversed the judgement on both points[59]. The appellate judge commented that Doux was entitled to damages since it suffered a loss of profits due to a diminution of competitiveness of its products for which it should be compensated up to 30 per cent of its claims and, by consequence, awarded damages amounting to € 380,000[60].

Finally, the Court of Cassation defined the dispute and stated that the Court of Appeal failed to motivate the underlying reasons for accepting Doux's claim. The judge, indeed, erred when considered the passing-on as non-influent in order to assess the damage and its quantification[61]. Although the Cassation concluded that indirect

[57] Commission Decision (Case COMP / E-2 / 37.533 - Choline Chloride (2004).

[58] Commercial Court of Paris, Laboratoires JUVA c/ Hoffmann La Roche (2007).

[59] Paris Court of Appeal, SNC Doux Aliments Bretagne etc v. SAS Ajinamoto Eurolysine, No 07/10478 (2009).

[60] This ruling clearly admits that indirect purchasers have standing under French law to bring a damages action against a competition law infringer. Not only is this ruling in line with the recommendations of the Commission in the White Paper, but it also complies with the ruling rendered on July 13, 2006 by the EUCJ in Manfredi,14 in which the Court stated that "[A]ny individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC."

[61] Cour de cassation, civile, Chambre commerciale, 15 juin 2010, 09-15.816, Inédit, Inédit (Cour de cassation 2010). "*[A]warding damages without assessing whether Doux aliments had fully or partly passed on to its clients the overcharge resulting from AE's infringement could have resulted in an unjust enrichment*."

purchasers are allowed to bring claims directly against cartelists, the decision has being criticised for taking a rather defensive approach with regard to pass on[62].

In a following case[63] the French Supreme Court also specified that, as a matter of usual market dynamics, there is a presumption that purchasers tend to pass on the price overcharge paid for the good or service. Hence, the claimant has the burden to prove that she internalized the damage and avoided to pass the overcharge on the next level of the market chain.

In both cases, the Court ruled that the claimant has the burden to substantiate the claim and also to prove that she internalised the overcharge avoiding to pass it on.

The Commercial Court of Nanterre, in 2006, adopted a similar approach[64] that, however, has brought the judge to draw different conclusions. In this case, the judge burdened the plaintiff to prove why he could not have passed on the price increase onto consumers. The court based its decision on the Commission's decision on the vitamins' cartel, presuming that price increases were likely to be passed on to consumers[65]. Ultimately, the court held that the cartel was implemented worldwide and, consequently, every competitor of the plaintiff was subject to the same conditions. Therefore, the plaintiff had the possibility of passing on the increase and the choice not to do so was part of the plaintiff's pricing policy. In view of this, the court concluded that the plaintiff had not established the causal link between the fault and the damage.

However, by recognising the standing to indirect purchasers, the Court of Cassation's decision should bring a new wave of antitrust damages actions and could have a deterrent effect on potential infringers. It must be however underlined that, under French tort law, only damages amounting to the actual loss are awarded to claimant, since no punitive damages are admitted. Therefore, given the costs of proceedings, only indirect purchasers left with a significant damage should, in practice, seek compensation before courts.

---

[62] Parmentier, Hugues and Descôte, Mathilde, "The French Commercial Supreme Court Validates the Passing-on Defence in a Follow-on Action Based on the Lysine Cartel (Doux Aliments/Ajinomoto Eurolyne)," *E-Competitions*, no. n° 32066 (June 15, 2010).

[63] Cour de Cassation, Gouessant, arrêt no. 540, pourvoi no. 11-18.495 (2012).

[64] Commercial Court of Nanterre (Arkopharma) (2006).

[65] Commission Decision (Case COMP / E-2 / 37.533 - Choline Chloride (2004).

C. Italy

Some of the earliest cases regarding the passing-on in antitrust damages actions have taken place in Italy with the proceedings *Indaba v. Juventus*[66] and *Unimare v. Geasar*[67].

In the former case, Indaba, a travel agency, agreed with Juventus Football Club to sell tickets for the 1997 Champions League final match in Munich, offering them along with extra services such as transportation, excursions and the like. The 'travel package' had no success among supporters and Indaba sued Juventus claiming that the football club abused its dominant position infringing Article 102 TFEU and imposing an unreasonable surcharge on the ticket prices. The Court of Appeal noted that, indeed, the parties entered an agreement that restricted competition and that Juventus imposed excessive prices. Moreover, the practice of tying the sales of the tickets to the sale of travel packages amounted to a second infringement of competition law as it illegally restricted the relevant market, ultimately damaging consumers.

However, the Court observed that Indaba entered into the agreement with the intention to pass on the overcharge to its customers. The Turin Court reasoned about the effects of the passing-on in the specific case applying the Article 1227 of the Italian Civil Code, for which the causal contribution of the damaged party to the event reduces or even exclude the compensation. For this reason the Court awarded no damages, noting that Indaba passed on the full amount of the costs with which was illegally burdened. In this vein, the Court stated that only the indirect customers "*would be the ones entitled to claim damages for the overcharges they did not want*"[68].

D. England

[66] Court of Appeal of Turin, judgment of 6 July 2000, Indaba Incentive co. v. società Juventus F.C. S.p.A. (2000).

[67] Court of Appeal of Cagliari, judgment of 23 January 1999, Unimare S.r.l. v. Geasar S.p.a. (1999).

[68] Siragusa, Mario, "Private Damages Claims: Questions Relating to the Passing-on Defence," *Oxera*, no. April 2011 (2011), http://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/Private-damages-claims-%28Mario-Siragusa%29_1.pdf?ext=.pdf.

English courts have for long being reluctant to deal with the problem of passing-on in competition damages actions. The admissibility of passing-on has been accepted with a few *obiter dicta*[69] but never became object of judicial interpretation. In *Devenish Nutrition Ltd v Sanofi-Aventis SA*, for instance, Tuckey LJ considered that *"…Devenish is claiming the overcharge as if it were the defendants' net profit so as to avoid having to take into account the fact (if true) that it passed on the whole of the overcharge to its customers. I can see no way in which it could avoid taking this "pass on" into account in any compensatory claim for damages*"[70].

Moreover, in Emerald Supplies v British Airways Mummery LJ stated at this regard that "*The potential conflicts arising from the defences that could be raised by [British Airways] to different claimants, such as direct purchasers who have "passed on" the inflated price and would not want BA to run that passing on defence to their claims and those indirect purchasers to whom the inflated price has been passed on and who would want BA to raise the pass on defence to claims by direct purchasers, reinforce the fact that they do not have the same interest and that the proceedings are not equally beneficial to all those to be represented*"[71].

Following, in *Cooper Tire*, the parties settled the case and agreed that the availability of the passing-on defence should depend on normal English principles of causation and mitigation[72].

The ostensible reluctance to treat the problem of passing-on in-depth might be explained by the factual approach that English judges have with regard to the pass-on issue. As explained by Mr Justice Popplewell in *Fulton Shipping Inc v Globalia Business Travel SAU*: "*In order for a benefit to be taken into account in reducing the loss recoverable by the innocent party for a breach of contract, it is generally speaking a necessary condition that the benefit is caused by the breach […] The test is whether*

[69] Emerald Supplies Ltd & Anor v British Airways Plc [2010] EWCA Civ 1284 (EWCA (Civ) 2010); WH Newson Holding Ltd & Ors v IMI Plc & Ors [2013] EWCA Civ 1377 (EWCA (Civ) 2013); Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors (Rev 1) (EWCA Civ 1086 2008).

[70] Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors (Rev 1) (EWCA Civ 1086 2008).

[71] Emerald Supplies Ltd & Anor v British Airways Plc [2010] EWCA Civ 1284 (EWCA (Civ) 2010).

[72] Court of Appeal (Civil Division) Cooper Tire & Rubber Co Europe Ltd v Shell Chemicals UK Ltd 23 July 2010 [2010] EWCA Civ 864; [2010] Bus. L.R. 1697; [2011] C.P. Rep. 1; [2010] 2 C.L.C. 104; [2010] U.K.C.L.R. 1277; (2010) 160 N.L.J. 1116; Official Transcript (2010).

the breach has caused the benefit; it is not sufficient if the breach has merely provided the occasion or context for the innocent party to obtain the benefit, or merely triggered his doing so […] Nor is it sufficient merely that the benefit would not have been obtained but for the breach."[73]. Hence, the court should adopt a case-by-case approach, verifying whether the cartel "*has caused the benefit*" or "*provided the occasion or context for the innocent party to obtain the benefit",* and it is be part of the claimant's burden of proof to demonstrate how the cartel influenced prices.

However, as a matter of principle, the English system is in line with the other European jurisdiction that accept both claims from indirect purchasers and the defence of passing-on.

Meanwhile in the United States the Supreme Court, with the *Hanover Shoe*[74] and *Illinois Brick*[75] cases, rejected the defence of passing on and barred indirect purchaser claims under federal antitrust law[76]. Defendants are not allowed to invoke the defence of passing on against the claims of direct purchasers, and indirect purchasers cannot claim damages on the basis that an overcharge has been passed on to them[77].

These two opposite views show dogmatic, legal and economical differences that it is worth to analyse but their enforcement is mostly leaded by considerations connected to the specific legal, economic and geographical drawbacks. The US approach is however deeply complicated by the fact that State courts have generally disregarded this case law. In many states it is indeed recognised to the indirect purchaser the right to claim for antitrust damages and the antitrust infringer can use the passing-on argument as a defence. It is reported indeed that "*thirty-six states and the District of Columbia, representing over 70 percent of the nation's population, now*

[73] Fulton Shipping Inc of Panama v Globalia Business Travel S.A.U. (formerly Travelplan S.A.U) of Spain, EWHC 1547 (Comm) (2014).

[74] Hanover Shoe, Inc. v. United Shoe Machinery Corp. 392 U.S. 481 (1968) (1968).

[75] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[76] Phillip Areeda, Herbert Hovenkamp, and John L. Solow, *Antitrust Law* (Aspen Publishers, 2001); Areeda and Hovenkamp, *Fundamentals of Antitrust Law*.

[77]See Timothy F. Bresnahan, "Antitrust Modernization Commission" (New York University, 2006), available at http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Roundtable_Participant_List.pdf..

provide for some sort of right of action on behalf of some or all indirect purchasers"[78]. This situation has generated paradoxical litigation where indirect purchasers are claiming for damages before state courts and direct purchasers sue the infringers before the federal courts.

6.1.5. The regulatory framework for passing-on in Europe

The choice of the EU Commission, expounded in the White Paper 2008 and clinched with the Directive 104/2014, has been to grant indirect purchasers with the right to claim for damages due to the passing-on of the overcharge and, simultaneously, to allow cartelists to oppose the passing-on defence. This choice is justified by the aim of ensuring the effective exercise of the victims' right to full compensation. However, the actual formulation of the Directive is the result of a process that counts at least ten years of different drafts. During the same period of time, the priorities of the European legislator changed and with them also the formulation of the relative rules on the passing-on, some of whose were hardly uncomplicated by a cryptic formulation[79]. In the following two paragraphs a critical description of such evolution is laid down.

a. The Green Paper and the White Paper

In the Green Paper[80], the Commission left open the question whether or not a defendant should be able to invoke the passing-on defence. The Green Paper proposed four different alternatives to the passing-on of to the passing-on defence issue and indirect purchaser standing[81]. The Ashurst study laid down, instead, a highly sceptic position in this regard, noting that "*The existence of the passing on defence itself is an obstacle to the extent it complicates claims. Moreover, to the extent it reduces the money paid to the plaintiff it clearly also reduces the latter's incentive to bring a claim.*

[78] Kevin J. O'Connor, "Is the Illinois Brick Wall Crumbling," *Antitrust* 15 (2000): 34. See also*Antitrust Modernization Commission Report and Recommendations VI*, 2007, available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

[79] See, for instance, art. 12.3 of the Directive Proposal.

[80] *Green Paper - Damages Actions for Breach of the EC Antitrust Rules SEC (2005) 1732 COM/2005, 672* at 2.4.

[81] Ibid. para 2.4.

Lack of clarity as concerns the possibility for the indirect purchaser to claim and the difficulties of proof (in particular as regards causation and damages) both constitute obstacles to the indirect purchaser's claim. The combination of the passing on defence (in particular where this is readily accepted) and the difficulties faced by indirect purchasers will seriously restrict private claims"[82].

This advice remained however largely unheard[83]. Basing their assumption on the evolution of the CJEU case law, the Commission argued in the White Paper[84] that it was time to introduce a common European rule about passing-on in private antitrust enforcement. With the *Courage* and *Manfredi* cases, the CJEU stated that anyone should be able to claim for damages caused by an illegal conduct, agreement or practice, where there is a causal link between the infringement and the harm, and that the compensation is limited to the *damnum emergens* and *lucrum cessans*, plus interests.

The aim of the White Paper was to ensure a consistent application of this principle, through a twofold action. Firstly it intended to deny that the application of the right to compensation could lead to multiple compensation and artificial multiplication of lawsuits[85]. Secondly, the White Paper sought to avoid unjust enrichment of the claimant who actually passed-on the overcharge[86].

Therefore, the Commission proposed to make available both a passing–on defence for the defendant and the right for the indirect purchaser to claim for damages connected to the cartel. Regarding the standard of proof, the White Paper also pointed out that for the defendant it should not be lower than the burden imposed on the claimant to prove the damage. For indirect purchasers, instead, the Commission

---

[82] *Ashurst Study*, 6.

[83] Part of the US scholars share a similar view commenting on the point that "*We, however, address a more fundamental question: assuming the procedural details could be worked out, would the objectives of the antitrust laws be advanced or retarded by allowing indirect purchasers to sue? This question, we believe, can be fruitfully addressed with the assistance of economic analysis. That analysis leads us to conclude that allowing indirect purchasers to sue would probably retard rather than advance antitrust enforcement. The basis for this conclusion lies in the detrimental impact that allowing a passing-on defense would have on enforcement by direct purchasers.*"Landes and Posner, "Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws?," 620.

[84] *White Paper on Damages Actions for Breach of the EC Antitrust Rules*.

[85] Ibid. para 2.6.

[86] Ibid. para 2.6.

suggested the integration of the normative text with a rebuttable presumption that the illegal overcharge was passed on to them[87].

b. The Directive Proposal and its amendments

In the wake of the mentioned CJEU case law and the White Paper, the Draft Directive[88] stated that injured parties are entitled to compensation for actual loss (overcharge harm) and loss of profit. The direct purchaser who passes the overcharge on, is entitled – therefore – to claim for the loss of profit due to the reduction of the volume sold consequent to the increase of price.

The Commission then pointed out the situation - before neglected - that the pass-on can take place also in upwards direction on the supply chain (for instance in cases of buying cartels)[89].

With Article 12 the Commission has then introduced the main innovation to the previous formulations. In particular art. 12.2 states that "*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*".

This article has been totally changed by the General Approach that stated more simply that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement. Moreover, it provided that the burden of proving that the overcharge was passed on rest with the defendant.

The following Article 13 determined that the passing-on of the overcharge is presumed unless the infringement is proven. The defendant is entitled to give proof that the overcharge has not been passed on or has been only partially passed on to the indirect purchaser.

[87] Ibid. para 2.6.

[88] *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*.

[89] Ibid. para 4.4.

6.1.6. Passing-on of the overcharge in the 'Damages Directive'

Finally, on 26 November 2014, the Directive 104/2014[90] on antitrust damages action was signed down and, with it, the load of amendments it brought.

With this Directive, the EU legislator intended to ensure effective application of the compensatory principle enshrined in the *Manfredi*[91] and *Courage*[92] landmark cases. In order to do this the Commission proposes, firstly, to deny that the application of the right to compensation could lead to multiple compensation and artificial multiplication of lawsuits. Secondly, to avoid unjust enrichment of the claimant who actually passed-on the overcharge. The solution to this problem is, for the legislator, to introduce the passing-on both as a 'sword' and as a 'shield' in the EU legislation, in order to make it applicable in the whole EU area.

In this vein, the Directive proposes, in first instance, to ensure effective application of TFEU's rules; in particular granting the right to full compensation[93]. Secondly, the Directive aims at the creation of a level playing field for undertakings and ensure equivalent protection to all the market players over the European economic area[94].

The Article 2 sets out the general rule of the right to full compensation based on which "*any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm*". The damage is composed by (and limited to) the actual loss and the lost profits, plus interests (Article 2.2.). In this way, the European legislator intended to oppose any form of overcompensation, "*whether by means of punitive, multiple or other types of damages*" (Article 2.3.).

[90] *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance*.

[91] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA ECR [2006] I-06619 (2006).

[92] Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others ECR I-06297 (2001).

[93] Article 2.

[94] See Recitals 9 and 10

With regard to passing-on, this compensatory principle has to be linked to Artilce 12.2 for which "*compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level*". Article 12 lays down the general principle supporting both the indirect purchaser claims and the passing-on defence. It firstly makes application of the judgements Manfredi and Courage to state that compensation of harm can be claimed by anyone who suffered a damage, included indirect purchasers[95]. Moreover, it clarifies that, as for all the other claims based on infringement of competition law, the compensation consists of actual loss and loss of profits. If the passing-on defence is successfully

The indirect purchaser has therefore the right to claim for damages directly from the antitrust infringer. As a general rule, the claimant bears the burden of proving the passing-on[96]. This burden of proof for the claimant is, however, simplified (at least at first glance) by a sum of presumptions. Firstly, the Directive instructs the national judge that the passing-on has to be assessed "*taking into account the commercial practice that price increases are passed on down the supply chain*"[97]. This statement is partly disproved by the Commission's Practical Guide on Quantifying Harm which states that "*Where the direct customer of the infringing undertakings uses the cartelised goods to compete in a downstream market, it is likely that the direct customer will normally not be able to pass on this increase in cost (or only to a very limited degree) if his own competitors in that downstream market are not subject to the same or a similar overcharge (for example, where they receive their input from a market that is not subject to the cartel)*"[98].

Despite this apparent inconsistency, that might be justified by the objective of relieving the burden of proof to indirect purchasers, the Directive creates a further incongruence, this time right inside the legislative text. The Article 14.2 lays down indeed a presumption of damage dependent on the realisation of three conditions:

[95] Article 12.1.
[96] Article 14.
[97] Ibid.
[98] *Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union SWD(2013) 205*.

"*The indirect purchaser shall be deemed to have proven that a passing-on to him occurred where he has shown that:*

(a) the defendant has committed an infringement of competition law;

(b) the infringement of competition law resulted in an overcharge for the direct purchaser of the defendant; and

(c) he purchased the goods or services that were the subject of the infringement of competition law , or purchased goods or services derived from or containing the goods or services that were the subject of the infringement.".

In follow-on actions the first condition is automatically fulfilled thanks to the disposal of Article 9 regarding the validity of the national competition authorities' decisions[99]. Moreover, the second requisite is also satisfied in case of cartels. Art. 17.2 states indeed that it shall be presumed that cartel infringements cause harm, in particular via price effect[100], and the infringer shall have the right to rebut that presumption.

Finally, the injured party needs to substantiate the purchase of a good or service that was subject to the infringement, or that derived from it or, finally, that contains the good or services subject to the infringement. The broad formulation of the third condition placed by Article 14.2 simplifies as well the burden of proof of the claimant but creates deep interpretative issues. What the norm means for "*goods or services derived from or containing the goods or services that were the subject of the infringement*"? It is open to question.

Let us make an example. The international law firm 'X' purchases a number of printers from the undertaking 'Y'. After few years it comes out that the seller took part to a printers' cartel. In the meanwhile, the law firm decides to raise its fees. Are the clients of the law firm entitled to claim compensation as indirect purchasers?

Can we say that the service offered by the law firm is derived by the use of the printers and therefore its cost reflects also the cartel overcharge?

[99] The decisions of national and EU Antitrust Authorities have –at least- the rank of prima facie evidence of the infringement.

[100] See Recital (42).

In favour of a positive response stands the consideration that the operating costs of the law firm increased in the relevant period. In this case, relying on the actual formulation of the Directive, the clients of the advising company should be able to claim damages against the cartelist, since they purchased a service from a direct purchaser and they also paid an overcharge due to the price increase. Their advisor, indeed, included - allegedly and presumably – an overcharge caused by the price increase, in which the cartel overcharge is embedded. However, this simple assertion is too feeble to prove causation. Indeed, the legal service is not directly derived from the printing devices. And also from a cost analysis, the price overcharge of the printers weights on the cost of the service for a very limited extent. Therefore, it cannot be assumed that the cost is contained in one of the services[101].

This reasoning can be extended to all cases where the good or service passed through the supply chain is somehow related but not yet part of the good or service subject to the infringement. Otherwise, we should admit damages actions from any indirect purchaser related to any of the good or services of subjects that purchased cartel products. The link of causation would be definitely lost as well as the function of the antitrust compensation would be distorted.

The right to compensation of the indirect purchasers finds a counterbalance in Article 13 which allows the passing-on defence. Thanks to this clause, the defendant can oppose to the claimant that he passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proof of passing-on remains on the defendant, who may reasonably require disclosure from the claimant or from third parties.

The direct purchaser who passed on the whole or part of the overcharge maintains, in any case, the possibility to obtain compensation for lost profits[102].

[101] See at this regard Commercial Court of Paris, Laboratoires JUVA c/ Hoffmann La Roche, 12–13 (2007), 12–13.
[102] Article 12(3).

6.1.7. How the passing-on works in the Directive: a game of opposing presumptions

Article 14 (1) firstly restates the (by now blurry) principle that the burden to substantiate the claim rests on the claimant. A special clause completes Article 14(1) where it is suggested that the judge should take into account the commercial practice of passing on the price increases. This statement, is further explained in Recital (41) which specifies that since *i)* it may be commercial practice to pass on price increases and *ii)* that it may be particularly difficult for indirect purchasers to prove the harm as connected to the infringement, the claimant has to be regarded "*as having proven that an overcharge paid by that direct purchaser has been passed on to its level where it is able to show prima facie that such passing-on has occurred*". The same Recital (41) adds that "*This rebuttable presumption applies unless the infringer can credibly demonstrate to the satisfaction of the court that the actual loss has not or not entirely been passed on to the indirect purchaser".* This clause has been introduced only with the very last Parliamentary amendments[103]. Since it is embedded as acting commercial pattern, the pass on is more likely to happen than not, at least for the law. Hence, the Directive prefers to presume the pass on to be happened with the indirect purchaser being able to show a prima facie clue.

While this clause forms therefore a proper presumption, the second paragraph of the same article 14 arranges another rebuttable presumption that heads in the same direction and works subordinately to three conditions. The first condition requires the proof that the defendant has committed an infringement of competition law. Secondly, the infringement has to result in an overcharge on goods or services. Finally, the indirect purchaser obtained goods or services subject of the infringement or derived or containing them. If all these three conditions are fulfilled, the judge can presume that the overcharge was passed-on to indirect purchaser, reverting the burden of proof on the defendant.

[103] *Committee on Economic and Monetary Affairs, Amendments to the Proposal for a Directive 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)0404 – C7-0170/2013 – 2013/0185(COD)), PE516.968v01-00*, 2014.

The reason for this rules mainly resides in motivations of substantial justice. The legislator indeed followed a long-standing CJEU case law that considered that it would be better to burden the tortfeasor with the risk of having to substantiate the causal link, rather than the (possible) injured party, being it direct or indirect[104]. Moreover, the defendant is also in this occasion closer to the information decisive for proffering the proof. However, the wording of the article raises a number of interpretative problems that national courts will have to deal with relying again on the evaluations of facts and on domestic principle of causation. The case will have to overcome another hurdle as well. This is created by a presumption which goes in the opposite direction.

Art. 17 (2) states that "*Member States shall ensure that it shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut this presumption*". The claimant therefore does not need to demonstrate the existence of a damage originated by the cartel, for the burden of proof is rebutted on the infringer. Also in this case, the reason for such presumption reflects the intention of the Directive to remedy the information asymmetry and other hurdles that the claimant has to face in antitrust litigation[105]. This should work has an incentive to litigation through alleviating the role of the claimant and as a tool to harmonise the different approaches to antitrust liability[106]. However, the presumption is limited to violation of Article 101 TFUE.

In other words, the most common application of such rebuttable presumption is, in the head of the legislator, for cases where claimant purchase a good or service subject to cartel overcharge. The pricing of a good or service depends on a vast number of variables, each capable of influencing the price[107]. The subject who is closer to the information regarding pricing strategies is, beyond doubt, the same cartelist who fixed the price. In this fashion, the EU legislator has operated a redistribution of information

[104] Case 199/82 Amministrazione delle Finanze dello Stato v SpA San Giorgio ECR 1983 03595 (1983) para 14; C-331/85 - Bianco and Girard v Directeur général des douanes and droits indirects, ECR 1988 01099 (1988) para 12.

[105] See Recital (42).

[106] Recitals (9) and (10).

[107] See, in general for the economics theories, Özalp Özer and Robert Phillips, *The Oxford Handbook of Pricing Management* (Oxford University Press 2012); more specifically on antitrust pricing strategies, Einer Elhauge, *Research Handbook on the Economics of Antitrust Law* (Edward Elgar Publishing 2012), p. 30 ff.

costs burdening the defendant to disclose the information regarding the influence of the cartel on the price it charged to the claimant. However, the claimant still needs to substantiate that he suffered the damages consequence of the unlawful behaviour[108].

This presumption clearly conflicts with the Article 17 (2) which presumes that cartels cause harm via price effect[109]. A first conflict would be therefore created between the presumption of damage to the direct purchaser of the cartel and the indirect buyers.

Moreover, it is hard to imagine how can the judge deny the application of the same presumption of passing on embedded in Article 14(1) when it is submitted by the defendant who is using the passing-on defence. Take the case of a direct purchaser who, relying on the general presumption set forth in Article 17(2), claims for the damages incurred as a consequence of the cartel overcharge. If the action is a follow-on type, the infringement and the overcharge are already proven. As a consequence, if the defendant gives evidence that the claimant sold, at her turn, the good or services subject to cartel overcharge, the same presumption of pass-on should apply. The Directive does not give any clear explanation on this point.

On the other side, if the aim of the Directive is to give exclusive prerogative to the two opposite presumptions, this might have deeply inconsistent effects on the market. If direct and indirect purchasers from the same supply chain claim for damages, they will all benefit of presumptions that burden the defendant to substantiate whether the overcharge was passed through or not. On the other hand, a game of contrasting presumptions takes the stage also when the defendant resorts to the argument of the 'commercial practice' in order to object the claim.

The Directive partly solves this problems warding off the danger of multiple liability through overcompensation. The total amount of the actual loss that the infringer

[108] The indirect purchaser has to prove therefore: the purchase; the infringement; the prejudice suffered; the causation.

[109] The decision of the European legislator evidently originates also from considerations of market dynamics that are however highly disputed, see for instance Maier-Rigaud, "Toward a European Directive on Damages Actions," 346.

might be called to compensate equate indeed, and its limited to, the overcharge harm[110]. Moreover, the court seized for each case is supposed to decide the case taking "due account of" related actions for damages[111].

However, unless the claimant is not the final consumer of the good or service, the presumption of passing-on should prevail. By consequence, the damage, which is identified in the overcharge, would be always presumed to be found at the bottom of the supply chain.

In this perspective, it is reasonable to observe that the Directive falls short of the aims that poses as its basis. The first aim of the Directive is indeed to ensure full compensation to anyone who is damaged by a competition law infringement. Secondly, the Directive intends to improve the conditions for consumers to exercise the rights[112] and, thirdly, to create a 'level playing field' for all undertakings operating in the internal market[113]. The rules contained in the Directive tend to push the overcharge to the bottom of the supply chain where consumers are not helped anyhow to bring a claim more easily. The 'big absent' of the Directive on damages actions is indeed a rule on the collective redress system, topic that has been relegated to a Commission recommendation[114].

The further aim of the Directive is the convergence of the different approaches adopted by the Member States' jurisdictions, in order to create a 'level playing field'. On this point, the Directive harmonises the rules on passing-on but fails to do the same with its consequences. Questions such as what damages are recoverable, how the different presumptions work and to what extent the causation test is proven, it remain wrapped in uncertainty. Moreover, the Directive says nothing about the possibility of resorting to actions for restitutions and unjust enrichment instead of claims for

[110] Article 12 (2).
[111] Article 15.
[112] Recital (9).
[113] Ibid.
[114] See IP/13/524 and MEMO/13/530.

compensation of damages, although they have already being excluded in different European jurisdictions were the conflict could arise[115].

In conclusion, the solutions proposed by the Directive are insufficient to cover the present needs of the private antitrust enforcement. The Directive registers - with a lag of almost a decade – what some doctrine suggested after the publication of the Ashurst Report[116]. In the meanwhile, though, many other issues gained importance in antitrust litigation and some other have been naturally digested and harmonised by the member states' systems, through case law and legislative adaptations.

6.1.8. Heads of damages and computation of cartel damages in passing-on

The main practical concern rightly addressed by the Commission relates the position of the indirect purchasers. They are distant from the infringement and have scarce economic power, which makes for them very hard if not impossible to prove the damage. For this reason the Commission introduced a rebuttable presumption of passing-on of the overcharge, reversing the burden of proof in favour of the indirect purchasers. However, the consumer has still to cope with the problem of the computation of cartel damages and of the demonstration of the types of damages he or she is entitled to claim. The commonly accepted basis for calculating cartel damages is the price overcharge[117]. This corresponds to the price actually charged during the infringement minus the price that would be charged in normal market conditions.

Therefore the end-consumers' damages are equal to the pass-on of the overcharge. On the other side, the direct purchaser might not have passed on the whole overcharge, in which case he or she would be entitled to claim for the difference. In addition, the cartel-inflated prices cause a loss of profit to the direct purchaser who will

[115] Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors (Rev 1) (EWCA Civ 1086 2008) paragaph 109.

[116] Jürgen Basedow, *Private Enforcement of EC Competition Law* (Kluwer Law International, 2007), 37.

[117] For a contrary view, arguing that overhcharge does not equal damage, see Maier-Rigaud, "Toward a European Directive on Damages Actions," 347.

typically sell less, because of the decrease in the consumer demand[118]. The full compensation principle compels the award of both the actual loss suffered (*damnum emergens*) and also for the loss of profit (*lucrum cessans*) plus interest. The total harm suffered by the direct purchaser will amount therefore to the price of the overcharge minus the passing-on of the overcharge plus the damage from the lost sales that results from the pass-on.

The computation of lost sales factor is instead particularly thorny. Economist typically apply to the price of the overcharge an adjustment factor which is a number comprised between 0 and 1[119]. In a perfectly competitive downstream market the lost sales adjustment factor is 0. In this case the profit margin of the direct purchasers' lost would be 0. Conversely, in a monopolist or oligopolist industry the adjustment factor equal to 1. In this case, instead, the lost sales from passing-on exactly offset the gains from the pass-on.

In a nutshell, the computing of pass-on damages poses several problems. Firstly it is particularly difficult to determine how much of the cartel price over-charge direct purchasers actually passed on to the next level. Secondly, the calculation of the lost-sales effect, that occurs when direct purchasers are passing on higher input prices, is made difficult by the different clashing approaches of economic theories on the topic and by their practical application.

Some scholars argued that we do not need passing-on because that is not a real "defence" but is merely a way to calculate damages[120]. Domestic private laws already provide all the tools for overcoming any problem of unjust enrichment or lack of compensation of the damaged party. When the volume of sales decreases, generally

---

[118] Herbert Hovenkamp and Mark A. Lemley, *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law* (Aspen Publishers Online, 2009)6-32.1; Lianos and Geradin, *Handbook on European Competition Law*, 251; Hüschelrath and Schweitzer, *Public and Private Enforcement of Competition Law in Europe*, 241; Almunia et al., *Private Enforcement of Competition Law*, 107; Basedow, *Private Enforcement of EC Competition Law*, 41.

[119] *Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union SWD(2013) 205*, 188 ff.

[120] Peter Whelan, "An Argument in Favour of the Passing-On Defence: A Response to Private Actions in Competition Law: A Consultation on Options for Reform," *Competition Law Journal*, 2012, 211.

companies respond by increasing prices. Therefore, if a company internalise the overcharge but, given for instance to a (cartel) margin squeeze, it is forced aside of the market losing clients and sales, it cannot neither invoke the actual loss. Since it increased prices in the relevant period, it is presumed that the cartel overcharge is comprised in that amount. It should rest therefore with the direct purchaser to demonstrate that, instead, the price increase depends on the loss of sales and that the cartel overcharge was internalised.

6.2. Indirect purchasers aggrieved by 'umbrella effects'

After about two years of gestation, the Court of Justice of the European Union has established in the Kone case that antitrust damages caused by umbrella effects are indemnifiable under art. 101 TFEU[121].

The case originates from an action for compensation purported by ÖBB-Infrastruktur AG (ÖBB), a subsidiary of the *Österreichische Bundesbahnen* (Austrian national railway company) against the members of the lifts and escalators cartel which operated in Austria since the '80s.

The operation of a collusive agreement among the major undertakings of the sector[122] was identified and fined by the European Commission[123] for activities in Belgium, Germany, the Netherland and Luxemburg. Following this decision, the Austrian antitrust authority also fined the cartel for its operations within the domestic borders. The decision was ratified by the Austrian Cartel Court[124] and subsequently by the Appellate Court[125].

[121] Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG not yet published (2014).

[122] Namely the groups *Kone, Otis, Schindler Aufzüge und Fahrtreppen, Schindler Liegenschaftsverwaltung* e *ThyssenKrupp Aufzüge* that, thanks to their subsidiaries, partitioned the European market, allocated the sales and fixed prices of goods and services.

[123] European Commission, 21 February 2007, IP/07/209. The decision issued one of the highest sanctions ever for infringement of art. 101 TFEU, for a totalling 992 million Euros.

[124] Oberlandesgericht Wien, 14 December 2007, Az. 25 Kt 12/07.

[125] Oberster Gerichtshof, 8 October 2008, Az. 16 Ok 5/08.

The ÖBB purchased and installed a considerable amount of supplies of escalators and lifts hailing partly from members of the cartel and partly from other distributors which passed-on to ÖBB the cartel overcharge. Finally, a third part of the supplies was purchased by sellers that were not connected at any title to the antitrust infringement. ÖBB claimed reparation of damages felt as a consequence of price overcharges caused by the cartel, for a total amount of 8.134.344,54 Euros. Only a third of it (precisely 1.839.239,74 Euros) has become subject of the plea that induced the Austrian Supreme Court to submit a request for preliminary ruling to the CJEU. The matter of law was posed indeed only on the portion of damage relating to the purchases done by ÖBB from non-cartelists.

ÖBB maintained that those sellers external to the collusion raised their prices as a consequence of the price umbrella created by the cartel. Without that collusion and, hence, in a normal market setting, the distributors not partaking to the cartel would have had no chances to impose such high prices.

The Austrian court of first instance rejected this part of the claim because unfounded as a matter of law. The decision was reversed by the Appellate Court where the claim was wholly accepted. Joined before the Cassation Court, the claim was once more rejected in the part concerned by the umbrella pricing. The preliminary ruling regards exclusively this point.

6.2.1. What is an umbrella price

In the Kone case, the overcharge causing the damage has been imposed by an undertaking that did not take part to the cartel. We might consequently wonder how is possible to ascribe also this damage to the cartelists. Here, particular economic dynamics play a substantial role.

A cartel exerts, by definition, a monopolist-like power on the market[126], even when it does not control the whole relevant market. This situation makes possible for the cartel to impose prices higher than the market value of the goods or services[127]. However, some competitors might remain in the market or the market itself might maintain a certain degree of elasticity as to redirect buyers on substitute goods[128].

In order to determine the price of the good or service, the seller does not consider solely elements internal to the undertaking such as turnover, production costs and the units sold but also examines the price choices of competitors. For doing so, the firm adopts as a benchmark for setting its own prices the market price of the same goods. Hence, if due to an illicit collusion this market price is artificially inflated, the non-cartelist will in any case be bound to follow the market-price and raise at its turn the selling prices.

The Kone case takes into consideration exclusively this possibility. However, also a second scenario can be advanced. The non-cartelist might indeed decide to raise prices consequently to the increase in demand of its substitute goods[129]. Those who can no longer purchase the goods subject to cartel will turn, in fact, to the producers of alternative goods with a consequent increase in demand for them. This second possibility seems more likely, moreover, in markets where information about the prices charged by competitors are difficult to access. From the point of view of the causal relationship it does not matter, though, if the issue at hand falls in one case or the other.

[126] Whish, *Competition Law*; Van Bael & Bellis (Firm), *Competition Law of the European Community* (Kluwer Law International, 2005); Barry Rodger and Angus MacCulloch, *Competition Law* (Cavendish Publishing, 2001).

[127] Jonathan B. Baker and Timothy E. Bresnahan, "Empirical Methods of Identifying and Measuring Market Power," *Journal of Reprints for Antitrust Law and Economics* 27 (1997): 743; *Market Power Handbook: Competition Law and Economic Foundations* (American Bar Association, 2005)., p. 142.

[128] R. Inderst, F. Maier-Rigaud, U. Schwalbe, *Umbrella Effects*, Journal of Competition Law and Economics 2014, in SSRN: *http://ssrn.com/abstract=2297399*. The American doctrine began to include umbrella damages into the '*net harm to others*' long ago, see J. M. Connor, R. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev. 427 (2012-2013), 461; P. E. Areeda, H. Hovenkamp, *Antitrust Law*, Aspen Publishers, 2001, 337.3. However, the U.S. courts reject the idea that the umbrella effects can give right to claim damages, see U.S. District Court of Columbia, *In Re: Vitamins antitrust litigation*, 2001 Lexis 12114; 2001-2 Trade Cas. (CCH) P73, 339 e U.S. District Court, S.D. New York, *Gross c. New Balance Athletic Shoe*, February 11, 1997, Inc. n. 96 CIV. 4921 (RWS), MDL-1154.

[129] R. Inderst, F. Maier-Rigaud, U. Schwalbe, *Umbrella Effects*,p.3, where the Authors comment also on the umbrella effects caused by the overcharge passed through the market chain.

Both dynamics are anti-competitive effects of the offense that has distorted the market, resulting in fixing supra-competitive prices. The problem is to determine whether there is adequate causal link between the first and the second.

6.2.2. The reference for a preliminary ruling of the Austrian Court

According to the Austrian Supreme court the causal link between the anti-competitive conduct and the harm suffered by the plaintiff does not exist. The link was, in fact, interrupted by the act of the seller, who has freely established the selling price of the goods. The Austrian Court applied, in accordance with the Manfredi and Courage judgments[130], its domestic statutory principles to decide above the existence of the causal link in the case at hand. The Supreme Court held that the continuity of the causal chain was interrupted by the sale made by a person operating outside the cartel agreement. In addition, for the Court the collusion would not be illegal with reference to the damage claimed. What is the standard of protection violated by the companies participating in the cartel, the Austrian Court questions? The referring court therefore asked to the Court of Justice whether Article 101 TFEU postulates an autonomous concept of adequate causation and wrongfulness that can overcome the domestic law, in order to recognize the right of the injured party to seek compensation for damages.

6.2.3. Causation and umbrella effects

The existence of a notion of causation of European law and its own legal definition independent of national legal traditions has long been questioned. The Court of Justice does not advance an idea so daring and indeed abstains from formulating a general principle of causation[131]. For the purpose of solving the case, it considers that, in spite of the doubts harboured by the national court, the assessment of causation

[130] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA ECR [2006] I-06619 (2006); Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others ECR I-06297 (2001).

[131] As by contrast states the A.G. Kokott in her conclusions to the case Kone C-557/12, submitted on 30 January 2014, at § 31 e ss.

according to the national substantive law should be barred by the principle of effectiveness of European law[132]. If the national judge denies the right to compensation for lack of adequate legal causation under domestic law, the effectiveness of the prohibition of anticompetitive agreements would inevitably be compromised. A victim of anticompetitive behaviour (in the specific case Article 101 TFEU) would in fact be deprived of its right to claim damages. The Court observes in that regard that art.101 TFEU gives the right to 'anyone' is aggrieved by an illegal agreement to ask for compensation of damages suffered. The wrongfulness of the conduct occurs, therefore, not only, as claimed by the *Oberster Gerichtshof*, with respect to damages caused to the direct buyers of the cartel, but also to other subjects, provided that the damage is causally linked to the behaviour and is foreseeable[133]. The Court also stated that the increase in the prices of alternative goods is a phenomenon that must certainly be foresaw by the cartelists[134].

Similarly, the causal chain is not interrupted by a decision taken '*ad nutum*' by the non-cartelist, for the direct purchaser has determined the selling price based on the market price altered by the cartel[135]. It follows that the buyer of the distributor unrelated to the illegal agreement has the right to seek compensation for the damage caused by the overcharge just as the direct or indirect purchasers of the cartelists.

6.2.4. On the application of national law

The Austrian court had pointed out that the Manfredi judgment has been clear in stating that, in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of the right to compensation. This includes also those rules governing the application of the concept of 'causal relationship', provided that the principles of

[132] For which, the domestic legal system should not render practically impossible or excessively difficult the exercise of rights conferred by Community law, CJEU, C-453/99 *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, 20 September 2001, , in ECR I-06297.

[133] Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG not yet published (2014) paragraph 28.

[134] Ibid. paragraph 29.

[135] Ibid., paragraph 33.

equivalence and effectiveness are observed[136]. With its only (and laconic) response, the Court of Justice asserts the existence of a causal link, in the case of price umbrella, which can be defined independently of the domestic law of obligation, in accordance with the principle of effectiveness. The CJEU does not explain, however, this independent concept. In general, it can be drawn from the judgment the principle that, all the times the analysis of the causal link within the internal ordering principles induces the rejection of the claim for compensation for damage caused by an antitrust offense, the court must ask if the principle of effectiveness of European law has been infringed. From here the need to obtain a notion of causality independent from that deduced by interpretation of the national court, which excludes the application of Article 101 TFEU in case.

6.2.5. Legal causation, consequential damages and the burden of proof

The Court of Justice also requires the application of a principle of direct causality that, in spite of what is said, was never detailed by the Court's case law[137].

The European legislator admits, in the recent Directive on damages claim, the lack of a common concept of legal causation and refers to the judgment Manfredi for a provisional solution[138]. This decision, being it equally vague, delegates to the national law of the Member States the definition of causation, with the sole limitations of the respect of the principles of equivalence[139] and effectiveness[140] of EU law[141].

The Court of Justice in its judgment considers necessary for the award of damages a prior verification that, given the peculiarities of the specific market, the agreement is likely to create a price umbrella in the market. Additionally, the CJEU

[136] Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA ECR [2006] I-06619 (2006) para 64.
[137] See supra paragraph 4.2.
[138] *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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance* Recital (11).
[139] CJEU, C-45/76, Comet v. Produktschap, 16 December 1976, in ECR I-2043.
[140] CJEU, Joined cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic [1991] E.C.R. 5357.
[141] See supra paragraph 4.3.

argues that this effect shall be expected by all cartelists. The Court avoids, however, to detail the burden to prove such circumstances in future similar cases.

The attempt to harmonize the various positions adopted by domestic laws with respect to damages resulting from the umbrella effects, was then arrested on the ground of the burden of proof. It will be, therefore, up to the national courts to identify the rules applicable to it. According to a generally accepted principle amongst European jurisdictions in the field of non-contractual liability, the claimant bears the burden of proving whether the injury has been caused by the defendant's behaviour.

The victim must then prove the existence of a cartel (in the case of stand-alone actions), the suitability of this cartel to create an umbrella effect on the market and the presence of a causal link between the unlawful behaviour and the damage.

It might be objected that it is necessary for the claimant also to substantiate the causative link between the fact of the cartel and the increase in prices by the non-colluding seller. This must be ruled out, first of all, based on what the Court says, since the judgement limits the burden of proof only on the suitability of the collusion to create an umbrella price and not also to its inflating effect on seller's prices. Moreover, a careful examination of the causal link within the principles of national law reveals that the damage (i.e. the overcharge paid by the buyer) must be a probable consequence of the wrongful act, which is the anticompetitive agreement and not the sale made by the independent undertaking. Therefore, the claimant should not be asked to prove the behaviour of the seller in relation to the cartel, or that he had increased prices as a result of the anticompetitive agreement. In this regard, the claimant shall only prove the presence of a (potential) "price umbrella" created by the cartel, together with the circumstance that the prices imposed by the non-colluding seller are higher than the market standard price. However, this might form the basis of a further interpretative conundrum, prioritise again the use of econometric analysis before national courts. The decision requires that the umbrella purchaser, in order to claim for damages, has to establish that "*the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently, and that those*

circumstances and specific aspects could not be ignored by the members of that cartel"[142].

In this perspective, it is also useful to refer to the presumption of cartel damage laid down in the Directive[143]. The rule does not define, however, or otherwise delimits such damages. With this presumption, therefore, the buyer of goods or services of colluding undertakings will have to prove only the extent of the injury and not the damage itself. It will be up to the defendants to substantiate the lack of direct causation between the agreement and the injury. In the case of umbrella pricing, however, the damage is induced and not caused directly by the cartel overcharge. Indeed, even the Court of Justice provides that it must first be established that the characteristics of the market concerned has made possible the application of a price umbrella. It must therefore be the claimant to demonstrate these market conditions. He will benefit from the presumption established in his favour when it is given sufficient justification of the adequacy of the cartel to influence market prices. At this point, based on an interpretation of the directive in conformity with the law in question, the presumption will play its role.

A further aspect of the test, not clarified by the Court, is the quantification of the damage caused by umbrella pricing. The independent undertaking, in fact, does not necessarily apply an overcharge equal to the one imposed by the cartel. The proof of the quantum of damages appears therefore entrusted, in such cases, to complex economic arguments which will have to determine to what extent the non-colluding firm increased prices with reference to the market price.

6.2.6. Umbrella actions following the Kone case

The echo of the decision in Kone will certainly be heard in the years to come. The most important interpretative problems, however, have to be expected from possible attempts to apply by analogy a judgment that is written to be confined to the specific nature of the issue submitted to the Court.

[142] Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG not yet published (2014) at 34.
[143] Art. 17 (2).

The decision also brings to light a particularly thorny aspect of the application of national rights in private antitrust litigation. The European legal traditions provide statutory definitions of the different legal principles and institutions that are often very different from each other[144]. The approach followed so far, in order to pursue the convergence of these different standards, has been to deal with specific aspects of civil law separately. So did this time the Court in addressing the issue of causation in umbrella claims. The lack of an overall design, however, raises doubts about the effectiveness of an harmonization which bundles rules and decisions changing the systematic order of domestic civil laws, rather than promoting their comprehensive development.

[144] See supra, chapter III.

Conclusion

Causation in competition law damages actions shows peculiarities that distinguish it from any other tort in civil law and common law countries. Antitrust damages claims are based on pure economic losses made compensable by the violation of statutorily protected interests (Articles 101 and 102 TFEU). The claims are therefore based on losses caused by distorted market dynamics which negatively affect the assets of undertakings or consumers operating in the same market. The wide range of subjects and heads of damages involved in this process makes the identification of the causal link a particularly difficult task for parties and judges. In confirmation of this, the empirical analysis of national case law suggests that claimants are often discouraged from bringing damages claims characterised by high causal uncertainty.

The European Union courts have dealt with the issue of the causal link in numerous cases. Notwithstanding this, it is not possible to find in this case law the formulation of an independent principle of causation. By consequence, it is necessary to resort to the domestic antitrust laws and laws of obligations. At a theoretical level, the solutions laid down by national courts differ in many aspects. From a practical viewpoint, these differences are more important for parties that need to know how to substantiate and pose a question of fact or a question of law, rather than for the results they bring with the judicial decisions. In all countries analysed, the econometric analysis has abruptly 'stolen the spotlight' in the assessment of the causal nexus. However, while parties often erroneously confuse the proof of economic causality with the one of legal causation, judges rarely have fallen into the same mistake. The analysis of national case law shows that final judgements, albeit often heavily relying on the expert witnesses, generally establish the causative link between the infringement of competition law and the harm through logic inferences and functional interpretation of the rule infringed.

In this regard, it is suggested that the counterfactual test, especially in its NESS formulation, shows optimal outcomes when the statement over the general causation does not automatically become an assumption and is always followed by the substantiation of the singular causal claim. Generalisations through probabilities may, in

some circumstances, justify the creation of 'bespoke presumptions', as in the case of the passing-on of price overcharges[1]. However, the adoption of an all-or-nothing approach shows its limits when the likeliness of a damage is close to a 'turning point'. In other words, when the probability of a damage is close to 50% the judge has to decide whether to award damages or leave the possible harm without compensation. In these cases, the application of a causal proportional liability approach may be introduced, although none of the analysed jurisdictions adopts a similar approach for the time being. Similarly, the causal proportional approach may find application for the apportionment of liability among multiple tortfeasors and in conglomerates of companies deemed responsible altogether as a single economic entity, when the circumstances would bring to a rejection of the claim.

The case law on the passing-on of the overcharge has shown that the diversity of approaches to the causal link does not impede to reach common aims established by EU law and the uniform interpretation of the function of competition law damages actions. The CJEU appear to be still reluctant to deep into such aspects of the private antitrust enforcement and the recent legislative interventions have put forward the same cautious approach. On the other hand, the European Commission seems more distracted by the ambitious objective of suggesting the convergence of domestic laws of obligations, at least to the extent it serves for the creation of a harmonised discipline for competition law damages actions. The actual situation, by contrast, creates incentives to regulatory competition among domestic laws of obligation and procedure that not necessarily deserves to be combated. The assessment of the causal nexus depends, especially in its second stage, on the clarification of the function and aims of the right to compensation for infringement of competition law rules. This theoretical underpinning, if duly elaborated, would benefit any regime.

[1] Although their functioning has to be carefully clarified in order to avoid confusion between contrasting presumptions.

Bibliography

Books

Almunia, Joaquín, Alberto Arribas Hernández, Rosa Bayo Álvarez, Luis Berenguer Fuster, Cristina Cano Ortega, Marta Cantero Gamito, Michele Carpagnano, et al. *Private Enforcement of Competition Law*. Lex Nova, 2011.

Alpa, Guido. *Diritto privato comparato: istituti e problemi*. Laterza, 2012.

———. *La responsabilità civile. Parte generale*. Wolters Kluwer Italia, 2010.

Anderson, Terence, David Schum, and William Twining. *Analysis of Evidence*. Cambridge University Press, 2005.

Andersson, Håkan, and Bénédict Winiger. *Digest of European Tort Law. 1, 1,*. Wien: Springer, 2007.

Areeda, Phillip, and Herbert Hovenkamp. *Fundamentals of Antitrust Law*. Aspen Publishers, 2011.

Areeda, Phillip, Herbert Hovenkamp, and John L. Solow. *Antitrust Law*. Aspen Publishers, 2001.

Ashton, David, and David Henry. *Competition Damages Actions in the EU: Law and Practice*. Edward Elgar Publishing, 2013.

Bael, Ivo Van. *Due Process in EU Competition Proceedings*. Kluwer Law International, 2011.

Baltagi, Badi. *Econometrics*. Springer Science & Business Media, 2011.

Barcellona, Mario. *Inattuazione dello scambio e sviluppo capitalistico: formazione storica e funzione della disciplina del danno contrattuale*. A. Giuffrè, 1980.

———. *Trattato della responsabilità civile*. UTET Giuridica, 2011.

———. *Trattato della responsabilità civile*. UTET Giuridica, 2011.

Barnard, Catherine, and Okeoghene Odudu. *The Outer Limits of European Union Law*. Bloomsbury Publishing, 2009.

Bar, Christian von. *The Common European Law of Torts: Damage and Damages, Liability for and without Personal Misconduct, Causality, and Defences*. Clarendon Press, 1998.

Bar, Christian von, Study Group on a European Civil Code, and Research Group on the Existing EC Private Law. *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR)*. sellier. european law publ., 2009.

Basedow, Jürgen. *Private Enforcement of EC Competition Law*. Kluwer Law International, 2007.

Basedow, Jürgen, and Wolfgang Wurmnest. *Structure and Effects in EU Competition Law: Studies on Exclusionary Conduct and State Aid*. Kluwer Law International, 2011.

Bastianon, Stefano. *Diritto antitrust dell'Unione europea*. Giuffrè Editore, 2011.

Beebee, Helen, Christopher Hitchcock, and Peter Menzies. *The Oxford Handbook of Causation*. Oxford University Press, 2009.

Benacchio, G. A., and M. Carpagnano. *I rimedi civilistici agli illeciti anticoncorrenziali. Private enforcement of competition law*. Padova: CEDAM, 2012.

Benacchio, Gian Antonio, and Michele Carpagnano. *Il private enforcement del diritto comunitario della concorrenza: ruolo e competenze dei giudici nazionali : atti del II Convegno di studio tenuto presso la Facoltà di giurisprudenza di Trento, 8-9 maggio 2009*. Wolters Kluwer Italia, 2009.

Bonvicini, Eugenio. *La responsabilità civile: Responsabilità da accadimento tipico. Parte speciale: Il danno a persona*. A. Giuffrè, 1971.

Breccia, Umberto. *Le obbligazioni*. Giuffrè, 1991.

Busnelli, Francesco Donato. *La Lesione Del Credito Da Parte Di Terzi*. Milano, 1963.

Busnelli, Francesco Donato, and Salvatore Patti. *Danno e responsabilità civile*. G Giappichelli Editore, 2013.

Bussani, Mauro, and Vernon Valentine Palmer. *Pure Economic Loss in Europe*. Cambridge University Press, 2003.

Buttigieg, Eugène. *Competition Law: Safeguarding the Consumer Interest : A Comparative Analysis of US Antitrust Law and EC Competition Law*. Kluwer Law International, 2009.

Cafaggi, Fabrizio. *Contractual Networks, Inter-Firm Cooperation and Economic Growth*. Edward Elgar Publishing, 2011.

Cafaggi, Fabrizio, and Paola Iamiceli. *Reti di imprese tra crescita e innovazione organizzativa. Riflessioni da una ricerca sul campo*. Il Mulino, 2007.

Campbell, David, Hugh Collins, and John Wightman. *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts*. Hart Publishing, 2003.

Campbell, Joseph Keim, Michael O'Rourke, and Harry Silverstein. *Causation and Explanation*. MIT Press, 2007.

Cane, Peter. *Responsibility in Law and Morality*. Hart Publishing, 2002.

———. *Tort Law and Economic Interests*. Clarendon Press, 1996.

Cane, Peter, Tony Honoré, and John Gardner. *Relating to Responsibility: Essays for Tony Honoré on His Eightieth Birthday*. Hart Publishing, 2001.

Capecchi, Marco. *Il Nesso Di Causalità: Dalla Condicio Sine qua Non Alla Responsabilità Proporzionale*. III. Cedam, 2012.

Carbone, Vincenzo. *Il fatto dannoso nella responsabilità civile*. Jovene, 1969.

Cartwright, Nancy. *Hunting Causes and Using Them*. Cambridge University Press Cambridge, 2007. http://www.langtoninfo.com/web_content/9780521860819_frontmatter.pdf.

———. *Hunting Causes and Using Them*. Cambridge University Press Cambridge, 2007. http://www.langtoninfo.com/web_content/9780521860819_frontmatter.pdf.

Castelli, Laura. *Disciplina antitrust e illecito civile*. Giuffrè, 2012.

Catricalà, Antonio. *I contratti nella concorrenza*. UTET Giuridica, 2011.

Chalmers, Damian, Gareth Davies, and Giorgio Monti. *European Union Law: Cases and Materials*. Cambridge University Press, 2010.

Collins, John David, Edward Jonathan Hall, and Laurie Ann Paul. *Causation and Counterfactuals*. MIT Press, 2004.

———. *Causation and Counterfactuals*. MIT Press, 2004.

Comoglio, Luigi P. *Le prove civili*. Wolters Kluwer Italia, 2010.

Cooter, Robert, Ugo Mattei, Roberto Pardolesi, Thomas Ulen, and Pier Giuseppe Monateri. *Il mercato delle regole: analisi economica del diritto civile*. Il Mulino, 2006.

Cooter, Robert, and Thomas Ulen. *Law and Economics*. Pearson Education, Limited, 2013.

Craig, Paul, and Gráinne de Búrca. *EU Law: Text, Cases, and Materials*. Oxford University Press, 2011.

Craig, Paul P., and Gráinne De Búrca. *The Evolution of EU Law*. Oxford University Press, 2011.

Cseres, Katalin Judit. *Competition Law and Consumer Protection*. Kluwer Law International, 2005.

Daintith, Terence, and Gunther Teubner. *Contract and Organisation: Legal Analysis in the Light of Economic and Social Theory*. Walter de Gruyter, 1986.

———. *Contract and Organisation: Legal Analysis in the Light of Economic and Social Theory*. Walter de Gruyter, 1986.

David, René. *International Encyclopedia of Comparative Law*. Brill Archive, 1986.

Davidson, Donald. *Essays on Actions and Events*. Oxford; New York: Clarendon Press ; Oxford University Press, 1980.

Deakin, Simon, Angus Johnston, and Basil Markesinis. *Markesinis and Deakin's Tort Law*. Oxford University Press, 2012.

De Cupis, Adriano. *Il danno: teoria generale della responsabilità civile*. A. Giuffrè, 1979.

Dennis, I. H. *The Law of Evidence*. Sweet & Maxwell, 2007.

Denozza, Francesco. *Norme efficienti: l'analisi economica delle regole giuridiche*. Giuffrè, 2002.

Deringer, Arved, and André Armengaud. *The Competition Law of the European Economic Community: A Commentary on the EEC Rules of Competition (articles 85 to 90) Including the Implementing Regulations and Directives*. Commerce Clearing House, 1968.

Dine, Janet, and Marios Koutsias. *Company Law*. Palgrave Macmillan, 2014.

Dougan, Michael. *National Remedies Before the Court of Justice: Issues of Harmonisation and Differentiation*. Hart Publishing, 2004.

Drahos, Michaela. *Convergence of Competition Laws and Policies in the European Community: Germany, Austria, and the Netherlands*. Kluwer Law International, 2001.

Eggleston, Sir Richard. *Evidence, Proof, and Probability*. Weidenfeld and Nicolson, 1983.

Elhauge, Einer. *Research Handbook on the Economics of Antitrust Law*. Edward Elgar Publishing, 2012.

Epstein, Roy J. *A History of Econometrics*. North-Holland Amsterdam, 1987. http://tocs.ulb.tu-darmstadt.de/13632132.pdf.

———. *A history of econometrics*. North-Holland, 1987.

Ezrachi, Ariel. *Research Handbook on International Competition Law*. Edward Elgar Publishing, 2012.

Fagnart, Jean-Luc. *La responsabilité civile: Chronique de jurisprudence 1985-1995*. Larcier, 1997.

Faure, Michael. *Tort Law and Economics*. Edward Elgar Publishing, 2009.

Feldstein, Martin, and A. J. Auerbach. *Handbook of Public Economics*. Elsevier, 2002.

(Firm), Van Bael & Bellis. *Competition Law of the European Community*. Kluwer Law International, 2005.

———. *Competition Law of the European Community*. Kluwer Law International, 2005.

Foer, Albert A., and Jonathan W. Cuneo. *The International Handbook on Private Enforcement of Competition Law*. Edward Elgar Publishing, 2010.

———. *The International Handbook on Private Enforcement of Competition Law*. Edward Elgar Publishing, 2010.

Forchielli, Paolo. *Il rapporto di causalità nell'illecito civile*. CEDAM, 1960.

———. *Responsabilità civile*. CEDAM, 1983.

Franklin, James. *The Science of Conjecture: Evidence and Probability Before Pascal*. Taylor & Francis, 2002.

Frisch, Ragnar, Trygve Haavelmo, T. C. Koopmans, and Jan Tinbergen. *Autonomy of Economic Relations*, 1948. http://scholar.google.com/scholar?cluster=11157934385269407642&hl=en&oi=scholar.

Gärdenfors, Peter. *The Dynamics of Thought*. Springer Science & Business Media, 2006.

Gärdenförs, Peter, Bengt Hansson, Nils-Eric Sahlin, and Sören Halldén. *Evidentiary Value: Philosophical, Judicial, and Psychological Aspects of a Theory: Essays Dedicated to Sören Halldén on His Sixtieth Birthday*. C.W.K. Gleerups, 1983.

Genovese, Anna. *Il risarcimento del danno da illecito concorrenziale*. Edizioni scientifiche italiane, 2005.

Georg Henrik von Wright. *A Treatise on Induction and Probability*. London, 1951.

Geradin, Damien, Anne Layne-Farrar, and Nicolas Petit. *EU Competition Law and Economics*. Oxford University Press, 2012.

Gerber, David. *Global Competition: Law, Markets, and Globalization*. Oxford University Press, 2010.

Gerven, Walter, Jeremy Lever, and Pierre Larouche. *Tort Law*. Hart, 2000.

Ghestin, Jacques, Geneviève Viney, Patrice Jourdain, and Librairie générale de droit et de jurisprudence. *Traité de droit civil: Les conditions de la responsabilité*. L.G.D.J., 1998.

Ghezzi, Federico, Michele Polo, and Disiano Preite. *L'attuazione delle politiche di tutela della concorrenza e l'esperienza italiana di attività antitrust*. Università Bocconi, 1994.

Gilead, Israel, Michael D. Green, Bernhard A. Koch, and Bjarte Askeland. *Proportional Liability: Analytical and Comparative Perspectives*. De Gruyter, 2013.

Glover, Richard. *Murphy on Evidence*. Oxford University Press, 2013.

Goldberg, John C. P., and Benjamin Charles Zipursky. *The Oxford Introductions to U.S. Law: Torts*. Oxford University Press, 2010.

Goldberg, Richard. *Perspectives on Causation*. Hart Publishing, 2011.

Goldstein, William M., and Robin M. Hogarth. *Research on Judgment and Decision Making: Currents, Connections, and Controversies*. Cambridge University Press, 1997.

Green, Leon. *Judge and Jury*. Vernon law book Company, 1930.

———. *Rationale of Proximate Cause*. Rothman Reprints, 1927.

———. *Rationale of Proximate Cause*. Rothman Reprints, 1927.

———. *Rationale of Proximate Cause*. Rothman Reprints, 1927.

Green, Sarah. *Causation in Negligence,*. Bloomsbury Publishing, 2015.

Harper, Fowler Vincent, Fleming James, and Oscar S. Gray. *The Law of Torts*. Little, Brown, 1986.

Hart, H. L. A., and Tony Honoré. *Causation in the Law*. Oxford University Press, 1985.

Hawk, Barry E. *International Antitrust Law & Policy: Fordham Corporate Law 2005*. Juris Publishing, Inc., 2006.

Heckman, James Joseph, and James L. Heckman. *Causal Parameters and Policy Analysis in Economics: A Twentieth Century Retrospective*. National bureau of economic research, 1999.

Hodgson, Douglas. *The Law of Intervening Causation*. Ashgate Publishing, Ltd., 2008.

Ho, H. L. *A Philosophy of Evidence Law: Justice in the Search for Truth*. Oxford University Press, 2008.

Holmes, Oliver Wendell. *The Common Law*. Barnes & Noble Publishing, 2004.

Hovenkamp, Herbert. *Federal Antitrust Policy: The Law of Competition and Its Practice*. Thomson/West, 2005.

Hovenkamp, Herbert, and Mark A. Lemley. *IP and Antitrust: An Analysis of Antitrust Principles Applied to Intellectual Property Law*. Aspen Publishers Online, 2009.

Hume, David. *An Inquiry Concerning Human Understanding. A Dissertation on the Passions. An. Inquiry Concerning the Principles of Morals. The Natural History of Religion*. T. Cadell, 1772.

———. *A Treatise of Human Nature*, 1817.

Hüschelrath, Kai, and Heike Schweitzer. *Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives*. Springer, 2014.

———. *Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives*. Springer, 2014.

Indirect Purchaser Litigation Handbook. American Bar Association, 2007.

Jones, Alison, and B. E. Sufrin. *EC Competition Law: Text, Cases, and Materials*. Oxford University Press, 2008.

Keeton, Robert E. *Legal Cause in the Law of Torts*. University Microfilms, 1986.

Kneale, William. *Probability and Induction*. Clarendon Press, 1966.

Kokott, Juliane. *The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches With Special Reference to the American and German Legal Systems*. Martinus Nijhoff Publishers, 1998.

Komninos, Assimakis P. *Ec Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts*. Hart Publishing Limited, 2008.

Koopmans, Tjalling C., and Jacob Marschak. *Statistical Inference in Dynamic Economic Models*. Vol. 10. Wiley New York, 1950. http://cowles.econ.yale.edu/P/cm/m10/.

Koziol, Helmut, and Francesco Donato Busnelli. *Unification of Tort Law: Wrongfulness*. Kluwer Law International, 1998.

Koziol, Helmut, Jaap Spier, Bernhard A. Koch, and Olivier Moréteau. *Principles of European Tort Law (PETL): Text and Commentary*. Springer, 2005.

Koziol, Helmut, and Barbara C. Steininger. *European Tort Law 2009*. Walter de Gruyter, 2010.

Landes, William M., and Richard A. Posner. *The Economic Structure of Tort Law*. Harvard University Press, 1987.

Larouche, Pierre. *Competition Law and Regulation in European Telecommunications*. Hart Publishing, 2000.

Law, ASCOLA Workshop on Comparative Competition. *The Goals of Competition Law*. Edward Elgar Publishing, 2012.

Lewis, David. *Philosophical Papers, Volume II*. Oxford: Oxford University Press, 1986.

Lianos, Ioannis, Peter Davis, and Paolisa Nebbia. *Damages Claims for the Infringement of Competition Law*. Also available as: eBook, 2015.

Lianos, Ioannis, and Damien Geradin. *Handbook on European Competition Law: Enforcement and Procedure*. Edward Elgar Publishing, 2013.

———. *Handbook on European Competition Law: Substantive Aspects*. Edward Elgar Publishing, 2013.

Lipari, Nicolò, Pietro Rescigno, Andrea Zoppini, Fausto Caggia, Giovanni Bonilini, Giuseppe Amadio, Giorgio Baralis, et al. *Diritto civile*. Giuffrè Editore, 2009.

———. *Diritto civile*. Giuffrè Editore, 2009.

Losee, John. *Theories of Causality: From Antiquity to the Present*. Transaction Publishers, 2012.

Lucy, William. *Philosophy of Private Law*. Oxford University Press, 2007.

Lunney, Mark, and Ken Oliphant. *Tort Law: Text and Materials*. Fifth Edition. Oxford University Press, 2013.

Mackie, J. L., and John Leslie Mackie. *The Cement of the Universe: A Study of Causation*. Clarendon Press, 1980.

Mackie, John Leslie. *Truth, Probability and Paradox: Studies in Philosophical Logic*. Oxford University Press, 1973.

Macneil, Ian R. *The Relational Theory of Contract: Selected Works of Ian MacNeil*. Sweet & Maxwell, 2001.

Macneil, Ian R., and Paul J. Gudel. *Contracts: Exchange Transactions and Relations : Cases and Materials*. Foundation Press, 2001.

Marchetti, Gustavo Ghidini, Marcello Clarich, Fabiana Di Porto e Piergaetano. *Concorrenza e mercato. Rassegna degli orientamenti dell'autorità garante (2009)*. Giuffrè Editore, 2010.

Markesinis, B. S., and Hannes Unberath. *The German Law of Torts: A Comparative Treatise*. Hart Publishing, 2002.

Market Power Handbook: Competition Law and Economic Foundations. American Bar Association, 2005.

Marshall, Kevin Scott. *The Economics of Antitrust Injury and Firm-Specific Damages*. Lawyers & Judges Publishing Company, 2008.

Mellor, D. H. *The Facts of Causation*. Routledge, 2002.

Mill, John Stuart. *A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation*. John W. Parker, 1843.

———. *A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation*. Harper & Brothers, 1858.

Milutinović, Veljko. *The "Right to Damages" Under EU Competition Law: From Courage V. Crehan to the White Paper and Beyond*. Kluwer Law International, 2010.

Monateri, Pier Giuseppe, Davide Gianti, and Luca Siliquini Cinelli. *DANNO E RISARCIMENTO*. G Giappichelli Editore, 2013.

Monti, Giorgio. *EC Competition Law*. Cambridge University Press, 2007.

Moore, Michael S. *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics*. Oxford University Press, 2010.

Murray, Peter L., and Rolf Stürner. *German Civil Justice*. Carolina Academic Press, 2004.

Navarretta, Emanuela. *Diritti inviolabili e risarcimento del danno*. Giappichelli, 1996.

Neyers, Jason W., Erika Chamberlain, and Stephen G. A. Pitel. *Emerging Issues in Tort Law*. Bloomsbury Publishing, 2007.

Odudu, Okeoghene. *The Boundaries of EC Competition Law: The Scope of Article 81*. Oxford University Press, 2006.

Owen, David G. *Philosophical Foundations of Tort Law*. Oxford University Press, 1995.

Özer, Özalp, and Robert Phillips. *The Oxford Handbook of Pricing Management*. Oxford University Press, 2012.

Page, William Hepburn. *Proving Antitrust Damages*. American Bar Association, n.d.

Palmer, Vernon V., and Mauro Bussani. *Pure Economic Loss: New Horizons in Comparative Law*. Taylor & Francis, 2009.

Patti, Salvatore. *Le prove. Parte generale*. Giuffrè Editore, 2010.

Peczenik, Aleksander. *Causes and Damages*. Juridiska fören., 1979.

Pitofsky, Robert. *How the Chicago School Overshot the Mark: The Efect of Conservative Economic Analysis on U.S. Antitrust: The Efect of Conservative Economic Analysis on U.S. Antitrust*. Oxford University Press, 2008.

Pittsburgh, Wesley C. Salmon University Professor of Philosophy University of. *Causality and Explanation*. Oxford University Press, 1997.

Posner, Richard A. *Economic Analysis of Law*. Wolters Kluwer Law and Business, 2014.

Pothier, Robert Joseph. *Traité des obligations, selon les règles, tant du for de la conscience que du for extérieur*. Letellier, 1805.

Prosperetti, Luigi, Eleonora Pani, and Ines Tomasi. *Il danno antitrust: una prospettiva economica*. Il Mulino, 2009.

Prosser, William Lloyd. *Handbook of the Law of Torts*. West Pub. Co., 1971.

———. *Prosser and Keeton on the Law of Torts*. West Pub. Co., 1984.

Pucella, Roberto. *La causalità "incerta."* Giappichelli, 2007.

Pucella, Roberto, and Giovanni De Santis. *Il nesso di causalità: profili giuridici e scientifici*. Wolters Kluwer Italia, 2007.

Qin, Duo. *A History of Econometrics: The Reformation from the 1970s*. Oxford University Press, 2013.

Realmonte, Francesco. *Il problema del rapporto di causalità nel risarcimento del danno*. A. Giuffrè, 1967.

Review, University of Chicago Law. *University of Chicago Law Review: Volume 81, Number 3 - Summer 2014*. Quid Pro Books, 2014.

Rodger, Barry. *Competition Law, Comparative Private Enforcement and Collective Redress Across the EU*. Kluwer Law International, 2014.

Rodger, Barry, and Angus MacCulloch. *Competition Law*. Cavendish Publishing, 2001.

Salmon, Wesley C. *Scientific Explanation and the Causal Structure of the World*. Princeton University Press, 1984.

Schulz, Joachim. *Sachverhaltsfeststellung und Beweistheorie: Elemente einer Theorie strafprozessualer Sachverhaltsfeststellung*. Heymann, 1992.

Seuring, Stefan, and Maria Goldbach. *Cost Management in Supply Chains*. Springer Science & Business Media, 2002.

Shavell, Steven. *Foundations of Economic Analysis of Law*. Harvard University Press, 2009.

———. *Uncertainty over Causation and the Determination of Civil Liability*. National Bureau of Economic Research Cambridge, Mass., USA, 1983. http://www.nber.org/papers/w1219.

Shubik, Martin, and Richard Levitan. *Market Structure and Behavior*. Harvard University Press, 1980.

Sibony, Anne-Lise. *Le juge et le raisonnement économique en droit de la concurrence*. L.G.D.J., 2008.

Simon, Hermann, Simon, Zatta Fassnacht, Danilo Zatta, and Martin Fassnacht. *Price management. I: Strategia, analisi e determinazione del prezzo*. FrancoAngeli, 2013.

Skyrms, Brian. *Causal Necessity: A Pragmatic Investigation of the Necessity of Laws*. Yale University Press, 1980.

Spier, Jaap, Francesco Donato Busnelli, and European Centre of Tort and Insurance Law. *Unification of Tort Law: Causation*. The Hague; London; Boston: Kluwer Law International, 2000.

Stauch, Marc. *The Law of Medical Negligence in England and Germany: A Comparative Analysis*. Bloomsbury Publishing, 2008.

Stigum, Bernt P. *Econometrics and the Philosophy of Economics: Theory-Data Confrontations in Economics*. Princeton University Press, 2003.

Storskrubb, Eva. *Civil Procedure and EU Law: A Policy Area Uncovered*. Oxford University Press, 2008.

Suppes, Patrick. *A Probabilistic Theory of Causality*. North-Holland Pub. Co., 1970.

T. C. Koopmans, and W. C. Hood. *The Estimation of Simultaneous Linear Economic Relationships, in W. C. Hood and T. Koopmans (eds), Studies In Econometric Method, Cowles Commission Monograph 14.* Vol. pp. 112–99. New Haven, CT: Yale University Press, 1953.

Terré, François, ed. *Pour une réforme du droit de la responsabilité civile*. Dalloz, 2011.

Terré, François, Philippe Simler, and Yves Lequette. *Droit civil: Les obligations*. Dalloz, 1999.

Teubner, Gunther. *Networks as Connected Contracts: Edited with an Introduction by Hugh Collins*. Bloomsbury Publishing, 2011.

Toulmin, Stephen E. *The Uses of Argument*. Cambridge University Press, 2003.

Townley, Christopher. *Article 81 EC and Public Policy*. Bloomsbury Publishing, 2009.

Träger, Ludwig. *Der Kausalbegriff Im Straf- Und Zivilrecht*. Marburg - Elwert, 1904.

Tridimas, Takis. *The General Principles of EU Law*. OUP Oxford, 2013.

Trimarchi, Pietro. *Causalità e danno*. Giuffrè, 1967.

———. *Il contratto: inadempimento e rimedi*. Giuffrè Editore, 2010.

Van Dam, Cees. *European Tort Law*. Oxford University Press, 2013.

Vande Walle, Simon. *Private Antitrust Litigation in the European Union and Japan: A Comparative Perspective*. Maklu, 2013.

Van Gerven, Walter, Jeremy Lever, and Pierre Larouche. *Cases, Materials and Text on National, Supranational and International Tort Law*. Hart, 2000.

Vineis, Paolo. *Modelli di rischio: epidemiologia e causalità*. Torino: Einaudi, 1990.

Viney, Geneviève, and Patrice Jourdain. *Les conditions de la responsabilité*. L.G.D.J., 2006.

Vogel, Louis. *Les Actions Civiles de Concurrence. Union Européenne, France, Allemagne, Royaume-Uni, Italie, Suisse, États-Unis*. Paris: EPA, 2013.

Von Bar, Carl Ludwig. *Zur Lehre von Versuch und Theilnahme am Verbrechen*. Hahn, 1859.

Von Bar, Christian. *Non-Contractual Liability Arising Out of Damage Caused to Another: (PEL Liab. Dam.)*. Sellier, 2009.

Von Kries, Johannes. *Die Principien Der Wahrscheinlichkeitsrechnung*, 1886.

Whish, Richard. *Competition Law*. Oxford University Press, 2012.

Wien, Forschungsstelle für Europäisches Schadenersatzrecht, and Österreichische Akademie der Wissenschaften Forschungsstelle für Europäisches Schadenersatzrecht. *Digest of European Tort Law*. Springer., 2007.

Wigmore, John Henry. *A Students' Textbook of the Law of Evidence*. Foundation Press, 1935.

Williamson, Oliver E. *Markets and Hierarchies, Analysis and Antitrust Implications: A Study in the Economics of Internal Organization*. Free Press, 1975.

———. *The Mechanisms of Governance*. Oxford University Press, 1996.

Wils, Wouter P. J. *The Optimal Enforcement of EC Antitrust Law: Essays in Law & Economics*. Kluwer Law International, 2002.

Winiger, Bénédict, Helmut Koziol, Bernhard A. Koch, and Reinhard Zimmermann. *Essential Cases on Natural Causation*. Springer, 2010.

Wittman, Donald A. *Economic Analysis of the Law: Selected Readings*. London: Blackwell, 2003.

Wolf, Joseph Georg. *Der Normzweck im Deliktsrecht: ein Diskussionsbeitrag*. Göttingen: Schwartz, 1962.

Wright, Georg Henrik. *Explanation and Understanding*. Cornell University Press, 2004.

Wurmnest, Wolfgang. *Grundzüge eines europäischen Haftungsrecht: eine vergleichende Untersuchung des Gemeinschaftsrechts*. Mohr Siebeck, 2003.

Articles

Abele, Hanns A., Georg E. Kodek, and Guido K. Schaefer. "Proving Causation in Private Antitrust Cases." *Journal of Competition Law and Economics* 7, no. 4 (2011): 847–69.

Allen, Ronald J. "The Nature of Juridicial Proof." *Cardozo L. Rev.* 13 (1991): 373.

Allen, Ronald J., and Brian Leiter. "Naturalized Epistemology and the Law of Evidence." *Virginia Law Review*, 2001, 1491–1550.

Allen, Ronald J., and Alex Stein. "Evidence, Probability, and the Burden of Proof." *Arizona Law Review* 55 (2013): 557–602.

Bailey, David. "Presumptions in EU Competition Law." *European Competition Law Review*, no. 31 (2010): 20.

Baker, Jonathan B., and Timothy E. Bresnahan. "Empirical Methods of Identifying and Measuring Market Power." *Journal of Reprints for Antitrust Law and Economics* 27 (1997): 743.

Ball, Vaughn C. "The Moment of Truth: Probability Theory and Standards of Proof." *Vanderbilt Law Review* 14 (1961 1960): 807.

Bastianon, Stefano. "Tutela risarcitoria antitrust, nesso causale e danni 'lungolatenti.'" *Il Corriere Giuridico*, no. n. 5–2007 (2007).

Bitterich, Klaus. "Elements of an Autonomous Concept of Causation in European Community Law Concerning Liability." *Zeitschrift Für Vergleichende Rechtswissenschaft*, 2007, 12–39.

Brennan, Troyen A. "Causal Chains and Statistical Links: The Role of Scientific Uncertainty in Hazardous-Substance Litigation." *Cornell L. Rev.* 73 (1987): 469.

Broadbent, Alex. "Fact and Law in the Causal Inquiry," 2009.

Bruner, Jerome. "The Narrative Construction of Reality." *Critical Inquiry*, 1991, 1–21.

Buhart, Jacques, and Lionel Lesur. "France: Private Antitrust Litigation." *Global Competition Review*, 2014, 60.

Buxton, Richard. "The Human Rights Act and the Substantive Criminal Law." *Criminal Law Review*, 2000, 331–40.

Calabresi, Guido. “Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.” *The University of Chicago Law Review*, 1975, 69–108.

Carbonelli, Vincenzo. “Private Enforcement of EU Competition Law between Public and Private Issues.” *International Journal of Public Law and Policy* 2, no. 4 (January 1, 2012): 335–51. doi:10.1504/IJPLAP.2012.049335.

Carbone, S. M. “Il Rapporto Di Causalità.” *Alpa-Bessone (a Cura Di), La Responsabilità Civile*, n.d.

Carnelutti, Francesco. “Perseverare Diabolicum (a Proposito Del Limite Della Responsabilità per Danni).” *Il Foro Italiano*, 1952, 97–98.

Carrier, Michael A. “A Tort-Based Causation Framework for Antitrust Analysis.” *Antitrust Law Journal* 77 (2011): 991.

Cartwright, Nancy. “Causation: One Word, Many Things.” *Philosophy of Science* 71, no. 5 (2004): 805–20.

———. “Counterfactuals in Economics: A Commentary.” *Causation and Explanation* 4 (2007): 191.

———. “Nature’s Capacities and Their Measurement.” *OUP Catalogue*, 1994.

Cartwright, Nancy, and Julian Reiss. “Uncertainty in Econometrics: Evaluating Policy Counterfactuals.” *Economic Policy*, 2004.

Castelli, Laura. “La Causalità Giuridica Nel Campo Degli Illeciti Anticoncorrenziali.” *Danno E Responsabilità* 18, no. 11 (2013): 1049–62.

Cengiz, Firat. “Passing-On Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: What Can the EC Learn from the US?” *University of East Anglia Centre for Competition Policy, Working Paper*, 2007, 07–21.

Centre for European Policy Studies (CEPS), Erasmus University Rotterdam (EUR), and Luiss Guido Carli (LUISS). “Making Antitrust Damages Actions More Effective in the EU: Welfare Impact and Potential Scenarios,” December 21, 2007. available at: http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf.

Chabas, François. “La Perte D’une Chance En Droit Français, Colloque Sur Les Développements Récents Du Droit de La Responsabilité Civile.” *Centre D’études Européennes*, 1991, 131 ss.

Cheng, Edward K. “Reconceptualizing the Burden of Proof.” *Yale LJ* 122 (2012): 1254.

Clermont, Kevin M. “Standards of Proof Revisited.” *Vt. L. Rev.* 33 (2008): 469.

Clermont, Kevin M., and Emily Sherwin. “A Comparative View of Standards of Proof.” *The American Journal of Comparative Law*, 2002, 243–75.

Collingwood, R. G. “Causation in Practical Natural Science.” *RG. Collingwood, An Essay on Metaphysics. Revised Edition. R Martin, Ed*, 1940, 286–312.

Connor, John M. “Forensic Economics: An Introduction with Special Emphasis on Price Fixing.” *Journal of Competition Law and Economics* 4, no. 1 (2008): 31–59.

Cooter, Robert. “Torts as the Union of Liberty and Efficiency: An Essay on Causation.” *Chi.-Kent L. Rev.* 63 (1987): 523.

Craswell, Richard. “Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships.” *Stanford Law Review*, 1991, 361–98.

Davidson, Donald. “Causal Relations.” *The Journal of Philosophy* 64, no. 21 (November 9, 1967): 691. doi:10.2307/2023853.

Demougin, Dominique, and Claude Fluet. “Preponderance of Evidence.” *European Economic Review* 50, no. 4 (2006): 963–76.

Denozza, Francesco, and Luca Toffoletti. “Compensation Function and Deterrence Effects of Private Actions for Damages: The Case of Antitrust Damage Suits,” March 1, 2008. available at http://papers.ssrn.com/abstract=1116324.

Dewey, John. “The Historic Background of Corporate Legal Personality.” *Yale Law Journal*, 1926, 655–73.

Edgerton, Henry W. “Legal Cause.” *University of Pennsylvania Law Review and American Law Register*, 1924, 211–44.

Engel, Christoph. “Preponderance of the Evidence versus Intime Conviction: A Behavior Perspective on a Conflict between American and Continental European Law.” *Vt. L. Rev.* 33 (2008): 435.

Fox, Eleanor, and Paul Sirkis. “Antitrust Remedies–Selected Bibliography and Annotations.” *American Antitrust Institute Working Paper No. 06-01*, 2005. available at: http://ssrn.com/abstract=1103601 or http://dx.doi.org/10.2139/ssrn.1103601.

Frignani, Aldo. “La Difesa Disarmata Nelle Cause Follow on per Danno Antitrust. La Cassazione in Guerra Con Se Stessa.” *Mercato Concorrenza Regole*, no. 3 (2013): 429–48.

Gärdenfors, Peter. “Probabilistic Reasoning and Evidentiary Value.” *The Dynamics of Thought*, 2005, 1–10.

Gavil, Andrew I. “The Challenges of Economic Proof in a Decentralized and Privatized European Competition Policy System: Lessons from the American Experience.” *Journal of Competition Law and Economics* 4, no. 1 (2008): 177–206.

Geradin, Damien, and Ianis Girgenson. “The Counterfactual Method in EU Competition Law: The Cornerstone of the Effects-Based Approach.” *(December 11, 2011)*, 2011. availble at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1970917.

Gilbert, Christopher L. “LSE and the British Approach to Time Series Econometrics.” *Oxford Economic Papers*, 1989, 108–28.

Gippini-Fournier, Eric. “The Elusive Standard of Proof in EU Competition Cases.” *World Competition*, June 1, 2009. available at http://papers.ssrn.com/abstract=1433744.

Goldberg, Richard. “The Role of Scientific Evidence in the Assessment of Causation in Medicinal Product Liability Litigation: A Probabilistic and Economic Analysis.” *Current Legal Issues* 1 (1998): 55–80.

Goldberg, Victor P. “Risk Management in Long-Term Contracts.” *Institutions in Perspective: Festschrift in Honor of Rudolf Richter on the Occasion of His 80th Birthday*, 2006, 81.

Gorla, Gino. “Sulla Cosiddetta Causalità Giuridica: Fatto Dannoso E Conseguenze.” *Rivista Di Diritto Commerciale* I (1951): 46.

Gottwald, Peter. “Civil Procedure Reform in Germany.” *The American Journal of Comparative Law*, 1997, 753–66.

Gregory, Charles O. “Proximate Cause in Negligence: A Retreat from‘ Rationalization.’” *The University of Chicago Law Review*, 1938, 36–61.

Haavelmo, Trygve. “The Probability Approach in Econometrics.” *Econometrica: Journal of the Econometric Society*, 1944, iii – 115.

Hansberry, Dorothy, Christina Hummer, Morvan Le Berre, and Mélanie Leclerc. “Umbrella Effect: Damages Claimed by Customers of Non-Cartelist Competitors.” *Journal of European Competition Law & Practice* 5, no. 4 (April 1, 2014): 196–205. doi:10.1093/jeclap/lpu012.

Harris, Robert G., and Lawrence A. Sullivan. “Passing on the Monopoly Overcharge: A Comprehensive Policy Analysis.” *University of Pennsylvania Law Review*, 1979, 269–360.

Heckman, James J. “Causal Parameters and Policy Analysis in Economics: A Twentieth Century Retrospective.” *The Quarterly Journal of Economics* 115, no. 1 (2000): 45–97.

———. “Econometric Causality.” *International Statistical Review* 76, no. 1 (2008): 1–27.

Heckman, James J., Robert J. LaLonde, and Jeffrey A. Smith. “The Economics and Econometrics of Active Labor Market Programs.” *Handbook of Labor Economics* 3 (1999): 1865–2097.

Hellner, Jan. “Causality and Causation in the Law’.” *Scandinavian Studies in Law* 40 (2000): 111.

Hellstrom, Per. “A Uniform Standard of Proof in EU Competition Proceedings.” *European Competition Law Annual*, 2009. available at http://papers.ssrn.com/abstract=2147705.

Hoover, Kevin D. “The Methodology of Econometrics.” *New Palgrave Handbook of Econometrics* 1 (2006): 61–87.

Hovenkamp, Herbert J. “American Needle and the Boundaries of the Firm in Antitrust Law.” *Available at SSRN 1616625*, 2010. available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1616625.

———. “American Needle and the Boundaries of the Firm in Antitrust Law” (August 15, 2010), available at SSRN:http://ssrn.com/abstract=1616625.

Kadner, Thomas G. “Loss of a Chance in European Private Law ‘All or Nothing’or Partial Liability in Cases of Uncertain Causation.” *European Review of Private Law* 16, no. 6 (2008): 1009–42.

Kaplow, Louis. “Burden of Proof.” *Yale LJ* 121 (2011): 738.

K. Bitterich. “Elements of an Autonomous Concept of Causation in European Community Law Concerning Liability.” *ZVglRWiss*, 2007.

Kosicki, George, and Miles B. Cahill. “Economics of Cost Pass through and Damages in Indirect Purchaser Antitrust Cases.” *Antitrust Bull.* 51 (2006): 599.

Landes, William M., and Richard A. Posner. “Causation in Tort Law: An Economic Approach.” *The Journal of Legal Studies*, 1983, 109–34.

———. “Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick.” *The University of Chicago Law Review*, 1979, 602–35.

Lewis, David. “Causation.” *The Journal of Philosophy*, 1973, 556–67.

Lianos, Ioannis. “Commercial Agency Agreements, Vertical Restraints, and the Limits of Article 81 (1) EC: Between Hierarchies and Networks.” *Journal of Competition Law and Economics* 3, no. 4 (2007): 625–72.

———. “Competition Law Remedies in Europe: Which Limits for Remedial Discretion?” *CLES Research Paper No. 2/2013*, January 1, 2013. available at http://papers.ssrn.com/abstract=2235817.

———. “Some Reflections on the Question of the Goals of EU Competition Law.” *CLES Working Paper Series 3/2013*, January 1, 2013. available at http://papers.ssrn.com/abstract=2235875.

Lianos, Ioannis, and Christos Genakos. “Econometric Evidence in EU Competition Law: An Empirical and Theoretical Analysis.” *CLES Research Paper Series 06/12*, October 1, 2012. available at http://papers.ssrn.com/abstract=2184563.

Luminoso, Angelo. “Possibilità O Necessità Della Relazione Causale.” *Rivista Giuridica Sarda*, 1991, 533.

Lyon, Ardon. “Causality.” *British Journal for the Philosophy of Science* 18, no. 1 (1967): 1–20.

Maier-Rigaud, Frank P. “Toward a European Directive on Damages Actions.” *Journal of Competition Law and Economics* 10, no. 2 (January 23, 2014): 341–60.

Malone, Wex S. “Ruminations on Cause-in-Fact.” *Stanford Law Review*, 1956, 60–99.

Ménard, Claude. “The Economics of Hybrid Organizations.” *Journal of Institutional and Theoretical Economics (JITE)/Zeitschrift Für Die Gesamte Staatswissenschaft*, 2004, 345–76.

Moréteau, Olivier. “France: French Tort Law in the Light of European Harmonization.” *Journal of Civil Law Studies* 6, no. 2 (2013): 15.

Morris, Clarence. “On the Teaching of Legal Cause.” *Columbia Law Review*, 1939, 1087–1109.

Newberg, Joshua A. “The Narrative Construction of Antitrust.” *S. Cal. Interdisc. LJ* 12 (2002): 181.

O’Connor, Kevin J. “Is the Illinois Brick Wall Crumbling.” *Antitrust* 15 (2000): 34.

Odudu, Okeoghene. “The Wider Concerns of Competition Law.” *Oxford Journal of Legal Studies*, 2010, 599–613.

Ottolenghi, Smadar. “From Peeping Behind the Corporate Veil, to Ignoring It Completely.” *The Modern Law Review* 53, no. 3 (1990): 338–53.

Page, William H. “Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury.” *The University of Chicago Law Review* 47, no. 3 (April 1, 1980): 467–504.

Papineau, David. “Causal Asymmetry.” *British Journal for the Philosophy of Science*, 1985, 273–89.

Parlak, Süleyman. “Passing-on Defence and Indirect Purchaser Standing: Should the Passing-on Defence Be Rejected Now the Indirect Purchaser Has Standing after Manfredi and the White Paper of the European Commission?” *World Competition* 33, no. 1 (2010): 31–53.

Parmentier, Hugues, and Descôte, Mathilde. “The French Commercial Supreme Court Validates the Passing-on Defence in a Follow-on Action Based on the Lysine Cartel (Doux Aliments/Ajinomoto Eurolyne).” *E-Competitions*, no. n° 32066 (June 15, 2010).

Patti, Salvatore. “La Responsabilità Degli Amministratori: Il Nesso Causale.” *Responsabilità Civile E Previdenziale*, no. 3 (2002).

Pickering, Murray A. “The Company as a Separate Legal Entity.” *The Modern Law Review* 31, no. 5 (1968): 481–511.

Pollock, Earl E. “Injury and Causation Elements of a Treble–Damage Antitrust Action.” *Nw. UL Rev.* 57 (1962): 691.

———. “Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine.” *Antitrust Law Journal*, 1966, 5–40.

———. “The‘ Injury’ and‘ Causation’ Elements of a Private Antitrust Action.” *Section of Antitrust Law*, 1962, 341–55.

Posner, Richard A. “An Economic Approach to the Law of Evidence.” *University of Chicago Law School, John M. Olin Law & Economics Working Paper No. 66*, February 1, 1999. Available at SSRN: http://papers.ssrn.com/abstract=165176.

———. “The Law and Economics of the Economic Expert Witness.” *The Journal of Economic Perspectives*, 1999, 91–99.

Powell, W. “Neither Market nor Hierarchy.” *The Sociology of Organizations: Classic, Contemporary, and Critical Readings* 315 (2003): 104–17.

Rabin, Robert L. “Pervasive Role of Uncertainty in Tort Law: Rights and Remedies, The.” *DePaul L. Rev.* 60 (2010): 431.

Reddick, Ernest N. “Joint Ventures and Other Competitor Collaborations as Single Entity ‘Undertakings’ Under US Law.” *European Competition Journal* 8, no. 2 (2012): 333–63.

———. “Joint Ventures And Other Competitor Collaborations As Single Entity—“Undertakings” Under US Law” [2012] 8(2) European Competition Journal 333.

Reiss, Julian. “Causation in the Social Sciences: Evidence, Inference, and Purpose.” *Philosophy of the Social Sciences* 39, no. 1 (2009): 20–40.

Rizzo, Mario J. “Imputation Theory of Proximate Cause: An Economic Framework, The.” *Ga. L. Rev.* 15 (1980): 1007.

Robins, James, and Sander Greenland. “The Probability of Causation under a Stochastic Model for Individual Risk.” *Biometrics*, 1989, 1125–38.

Rodger, Barry J., and Angus MacCulloch. “Wielding the Blunt Sword: Interim Relief for Breaches of EC Competition Law before the UK Courts.” *European Competition Law Review* 17 (1996): 393–402.

Rubin, Donald B. “Causal Inference Using Potential Outcomes.” *Journal of the American Statistical Association* 100, no. 469 (2005).

Samuelson, Paul A., Tjalling C. Koopmans, and J. Richard Stone. “Report of the Evaluative Committee for Econometrica.” *Econometrica* 22, no. 2 (1954): 141.

Sanders, Joseph, Miachal D. Green, and William C. Powers Jr. “Insubstantiality of the Substantial Factor Test for Causation, The.” *Mo. L. Rev.* 73 (2008): 399.

Schwartz, Alan. “Causation in Private Tory Law: A Comment on Kelman.” *Chi.-Kent L. Rev.* 63 (1987): 639.

Schwartz, Alan, and Robert E. Scott. “Contract Theory and the Limits of Contract Law.” *Yale Law Journal*, 2003, 541–619.

Seavey, Warren A. “Mr. Justice Cardozo and the Law of Torts.” *Yale Law Journal*, 1939, 390–425.

Shavell, Steven. “An Analysis of Causation and the Scope of Liability in the Law of Torts.” *The Journal of Legal Studies*, 1980, 463–516.

———. “Uncertainty over Causation and the Determination of Civil Liability.” *Journal of Law and Economics* 28, no. 3 (1985): 587–609.

Sibony, Anne-Lise, and Eric Barbier de La Serre. “Charge de La Preuve et Théorie Du Contrôle En Droit Communautaire de La Concurrence: Pour Un Changement de Perspective.” *Revue Trimestrielle de Droit Européen*, no. 2 (2007).

Singh, Nirvikar, and Xavier Vives. “Price and Quantity Competition in a Differentiated Duopoly.” *The RAND Journal of Economics*, 1984, 546–54.

Siragusa, Mario. “Private Damages Claims: Questions Relating to the Passing-on Defence.” *Oxera*, no. April 2011 (2011).

Stapleton, Jane. “Law, Causation and Common Sense.” *Oxford Journal of Legal Studies* 8, no. 1 (1988): 111–31.

———. “Two Explosive Proof-of-Causation Doctrines Central to Asbestos Claims, The.” *Brook. L. Rev.* 74 (2008): 1011.

Stone, Julius. “Burden of Proof and the Judicial Process.” *Law Quarterly Review*, no. 60 (1944): 262.

Stucke, Maurice E. “Should Competition Policy Promote Happiness?” *Fordham Law Review* 81 (January 14, 2013): 2575.

Taruffo, Michele. “Rethinking the Standards of Proof.” *The American Journal of Comparative Law*, 2003, 659–77.

Teubner, Gunther. “Coincidentia Oppositorum: Hybrid Networks Beyond Contract and Organization,” 2006. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=876939.

Utzschneider, Yann, and Parmentier, Hugues. “The New Frontier of Antitrust: Damages Actions by Indirect Purchasers and the Passing on Defence in France and California.” *European Competition Law Review* 32, no. 5 (2011): 266–72.

Valcavi, Giovanni. “Sulla causalità giuridica nella responsabilità civile da inadempienza e da illecito.” *Rivista di diritto civile* II (2001): 409.

Valente. “Appunti in Tema Di Fatto, Nesso Causale E Danno.” *Diritto E Giurisprudenza*, 1955, 372.

Van Gerven, Walter. “Harmonization of Private Law: Do We Need It?” *Common Market Law Review* 41, no. 2 (2004): 505–32.

Veljanovski, Cento. “Counterfactual Tests in Competition Law.” *Competition Law Journal*, no. 4 (2010).

———. “Market Power and Counterfactuals in New Zealand Competition Law.” *Journal of Competition Law and Economics*, 2013. available at SSRN: http://ssrn.com/abstract=1908088 or http://dx.doi.org/10.2139/ssrn.1908088.

Verboven, Frank, and Theon Van Dijk. “Cartel Damages Claims and the Passing-on Defense*.” *The Journal of Industrial Economics* 57, no. 3 (September 1, 2009): 457–91.

Volpin, Cristina. “The Ball Is in Your Court: Evidential Burden of Proof and the Proof-Proximity Principle in EU Competition Law.” *Common Market Law Review* 51, no. 4 (2014): 1159–85.

Whelan, Peter. “An Argument in Favour of the Passing-On Defence: A Response to Private Actions in Competition Law: A Consultation on Options for Reform.” *Competition Law Journal*, 2012, 211.

Williams, Glanville. “The Risk Principle.” *LQ Rev.* 77 (1961): 179.

Williamson, Jon. “Causal Pluralism versus Epistemic Causality.” *Philosophica-Gent* 77 (2006): 69.

Williamson, Oliver E. “The Economics of Governance.” *American Economic Review*, 2005, 1–18.

Wils, Wouter P. J. “Ten Years of Regulation 1/2003 - A Retrospective.” *Journal of European Competition Law and Practice*, June 4, 2013. available at http://papers.ssrn.com/abstract=2274013.

———. “The Undertaking as Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal Persons.” *European Law Review*, no. 2 (2000): 99–116.

———. “The Undertaking as Subject of E.C. Competition Law and the Imputation of Infringements to Natural or Legal Persons” (2000) 25 ELRev 99.

Wright, Charles Alan. “Law of Remedies as a Social Institution, The.” *U. Det. LJ* 18 (1954): 376.

Wright, Richard W. “Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis.” *The Journal of Legal Studies*, 1985, 435–56.

———. “Causation in Tort Law.” *California Law Review*, 1985, 1735–1828.

———. “Causation, Responsibility, Risk, Probability, Naked Statistics, and Proof: Pruning the Bramble Bush by Clarifying the Concepts.” *Iowa L. Rev.* 73 (1987): 1001.

Young, Robert, Michael Faure, and Paul Fenn. “Causality and Causation in Tort Law.” *International Review of Law and Economics* 24, no. 4 (2004): 507–23.

Zöttl, Johannes, and Schlepper, Lisa. “Die Private Durchsetzung von Kartellrechtlichen Schadensersatzansprüchen - Status Quo in Deutschland.” *Europäische Zeitschrift Für Wirtschaftsrecht*, 2012, 573.

Zygimantas, Juska. “Obstacles in European Competition Law Enforcement: A Potential Solution from Collective Redress.” *European Journal of Legal Studies*, 2014. available at: http://cadmus.eui.eu/handle/1814/32274.

Book Chapters

Alpa, Guido, Mario Bessone, and Zeno Zencovich. “I Fatti Illeciti.” In *Trattato Di Diritto Privato*, edited by Pietro Rescigno. 14. Torino: Utet, 1995.

Benson, Peter. “The Basis for Excluding Liability for Economic Loss in Tort Law.” In *Philosophical Foundations of Tort Law*, edited by David G. Owen, 427, 1995.

Brown, John P. “Economic Theory of Liability Rules.” In *Economic Analysis of Law: Selected Readings*, edited by Donald A. Wittman. London: Blackwell, 2003.

Cartwright, Nancy. “Causal Structures in Econometrics.” In *On the Reliability of Economic Models*, 63–89. Springer, 1995.

Craufurd Smith, Rachael. “Culture and European Union Law.” In *The Evolution of EU Law*. Oxford University Press, 1999.

De Mot, Jef. “Pure Economic Loss.” In *Tort Law and Economics*, edited by Michael Faure, 201. Edward Elgar Publishing, 2009.

Fairgrieve, Duncan, and Florence G’Sell-Macrez. “Causation in French Law: Pragmatism and Policy.” In *Perspectives on Causation*, edited by Richard Goldberg, 111. Hart Publishing, 2011.

Frisch, Ragnar. “Autonomy of Economic Relations: Statistical versus Theoretical Relations in Economic Macrodynamics,(Reproduced by University of Oslo in 1948 with Tinbergen’s Comments), Memorandum, Oslo; Published in Hendry and Morgan (eds.) 1995.” In *The Foundations of Econometric Analysis*, 1938.

Hitchcock, Christopher. “Probabilistic Causation.” In *The Stanford Encyclopedia of Philosophy (Winter 2012 Edition)*, edited by Edward N. Zalta, 2012. available at http://plato.stanford.edu/archives/win2012/entries/causation-probabilistic/.

Honoré, Anthony M. “Causation and Remoteness of Damage.” In *International Encyclopedia of Comparative Law*, edited by A. Tunc, Vol. 6. XI. Tübingen: Mohr Siebeck, 1983.

Honoré, Antony. “Causation in the Law.” In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Winter 2010., 2010. available at http://plato.stanford.edu/archives/win2010/entries/causation-law/.

Irti, Natalino. “Legge E Caso (diagnosi Giuridica E Diagnosi Medica).” In *Il Salvagente Della Riforma*, edited by Irti, Natalino. Bari: Editori Laterza, 2007.

Jones, Alison “Drawing the boundary between joint and unilateral conduct: Parent-Subsidiary Relationships and Joint Ventures.”, in A Ezrachi (ed.) International Research Handbook of Competition Law (Edward Elgar, 2012).

Koziol, Helmut. “Loss of a Chance: Comparative Report.” In *Digest of European Tort Law. Vol. 1 : Essential Cases on Natural Causation*, edited by Winiger, Bénédict, Koziol, Helmut, Koch, Bernhard A., and Zimmermann, Reinhard. Wien: Springer, 2007.

Lianos, Ioannis. “‘Judging’ Economists: Economic Expertise in Competition Law Litigation - A European View.” In *The Reform of EC Competition Law: New Challenges*, edited by Ioannis, Lianos and Ioannis Kokkoris. Kluwer, 2009. Available at SSRN: http://ssrn.com/abstract=1468502 or http://dx.doi.org/10.2139/ssrn.1468502.

Moréteau, Olivier. “Causal Uncertainty and Proportional Liability in France.” In *Proportional Liability: Analytical and Comparative Perspectives*, edited by Israel Gilead, Michael D. Green, and Bernhard A. Koch, 141. Tort and Insurance Law 33. De Gruyter, 2013.

Nazzini, Renato. “Potency and Act of the Principle of Effectiveness: The Development of Competition Law Remedies and Procedures in Community Law.” In *The Outer Limits of European Union Law*, edited by Catherine Barnard and Okeoghene Odudu, 401–35, 2009.

Pinori, Alessandra. “Il Criterio Legislativo Delle Conseguenze Immediate E Dirette.” In *Il Risarcimento Del Danno Contrattuale Ed Extracontrattuale*, edited by Giovanna Visintini. Milano: Giuffrè, 1984.

"Probabilistic Reasoning and Evidentiary Value." In *The Dynamics of Thought*, 1–10. Synthese Library 300. Springer Netherlands, 2005.

Stapleton, Jane. "Unpacking Causation." In *Relating to Responsibility: Essays for Tony Honoré on His Eightieth Birthday*, edited by Peter Cane, Anthony M. Honoré, and John Gardner, 145. Hart Publishing, 2001.

Townley, Christopher. "The Concept of an'Undertaking': The Boundaries of the Corporation-A Discussion of Agency, Employees and Subsidiaries." In *EC Competition Law: A Critical Assessment, G. Amato & C. Ehlermann, Eds.* Hart Publishing, Oxford, 2007. available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1358649.

Waldron, Jeremy. "Moments of Carelessness and Massive Loss." In *The Philosophical Foundations of Tort Law*, edited by David G. Owen, 387–408. Oxford University Press, 1997.

Wright, Richard W. "Proving Causation: Probability versus Belief." In *Perspectives on Causation*, edited by Richard Goldberg. Hart Publishing, 2011. available at SSRN: http://ssrn.com/abstract=1918474.

Wright Richard W. "The NESS Account of Natural Causation: A Response to Criticisms." In *Perspectives on Causation*, edited by R. Goldberg. Hart Publishing, 2011. available at SSRN: http://ssrn.com/abstract=1918405.

Cases and Decisions

European Union

Case 107/82 AEG-Telefunken v Commission [1983] ECR 3151.

Case 96/82, IAZ International Belgium NV v Commission [1989] ECR 2117.

Case C-12/03 P Commission of the European Communities v Tetra Laval BV [2005] ECR I-00987 (n.d.).

Case C-127/73 BRT and SABAM [1974] ECR 51 ('BRT ľ).

Case C-128/92 H. J. Banks & Co. Ltd v British Coal Corporation [1994] ECR I-01209.

Case C-14/83 Von Colson and Kamann v. Land Nordrhein-Westfalen [1984] ECR 1891.

Case C-147/83 Münchener Import-Weinkellerei Herold Binderer GmbH v Commission of the European Communities [1985] ECR 257.

Case C-185/95 P Baustahlgewebe v Commission [1998] ECR I-8417.

Case C-188/95 Fantask [1997] ECR I-6 783.

Case C-192/95 - Comateb and Others v Directeur général des douanes and droits indirects [1997] ECR I-00165.

Case C-199/11 Europese Gemeenschap v Otis NV and Others [2012] published in the electronic Reports of Cases (Court Reports - general).

Case C-199/82 Amministrazione delle Finanze dello Stato v SpA San Giorgio [1983] ECR 1983 03595.

Case C-199/92 P Hüls v Commission [1999] ECR I-4287.

Case C-205/03 P - FENIN v Commission [2008] I–06295. ?

Case C-208/90 Emmott v. Minister for Social Welfare [1991] ECR I-4269.

Case C-208/90 Theresa Emmott v Minister for Social Welfare and AG [1991] ECR I-4269.

Case C-22/71 Béguelin Import v G.L. Import Export [1971] ECR 00949.

Case C-222/84 Johnston v. the Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651.

Case C-222/86 UNECTEF v Heylens [1987] ECR 4097.

Case C-238/78 - Ireks-Arkady v Council and Commission [1981] ECR 01719.

Case C-250/92 Gøttrup-Klim [1994] ECR I-564.

Case C-256/80 - Birra Wührer v Council and Commission [1987] ECR 00789.

Case C-26/62 Van Gend en Loos [1963] ECR 1.

Case C-271/91 Marshall v. Southampton and South West Area Health Authority II [1993] ECR I-4367.

Case C-281/84 Zuckerfabrik Bedburg AG and others v Council and Commission of the European Communities [1987] ECR 49.

Case C-282/95 P Guérin Automobiles v Commission [1997] ECR 1-1503.

Case C-331/85 - Bianco and Girard v Directeur général des douanes and droits indirects [1988] ECR 1988 01099.

Case C-382/12 P MasterCard Inc. and Others v European Commission [2014] not yet published .

Case C-398/09 Lady & Kid A/S and Others v Skatteministeriet [2011] ECR I-07375.

Case C-413/06P Bertelsmann and Sony Corporation of America v Impala [2008] ECR I-4951.

Case C-44/76 Milch-, Fett- und Eier-Kontor GmbH v Council and Commission of the European Communities [1977] ECR 393.

Case C-440/12 Metropol Spielstätten Unternehmergesellschaft (haftungsbeschränkt) v Finanzamt Hamburg-Bergedorf [2013] not yet published.

Case C-453/00 Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren [2004] I-00837.

Case C-453/99 Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others [2001] ECR I-06297.

Case C-45-76 Comet BV v Produktschap voor Siergewassen [1976] ECR 2043.

Case C-470/03 A.G.M.-COS.MET Srl v Suomen valtio [2007] ECR I-2749.

Case C-472/00 Commission v Fresh Marine Company A/S [2003] ECR 7541.

Case C-49/92 P Commission v Anic Partecipazioni [1999] ECR I-4125.

Case C-536/11, Donau Chemie and Others [2013] not yet published.

Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG [2014] not yet published.

Case C-56/65 Société Technique Minière v Maschinenbau Ulm GmbH [1966] ECR 235.

Case C-6/64 Costa v E.N.E.L. [1964] ECR 585.

Case C-7/95 P Deere (John) Ltd v Commission [1998] ECR I-3111.

Case C-8/08 T-Mobile v Raad van bestuur van de Nederlandse Mededingingsautoriteit [2009] ECR I-04529.

Case C-94/00 Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission of the European Communities [2002] ECR I-09011.

Case C-94/10 Danfoss A/S and Sauer-Danfoss ApS v Skatteministeriet [2011] ECR I-09963.

Case C-97/08 P Akzo Nobel and Others v Commission [2009] ECR I-08237.

Case T-11/89 Shell International Chemical Company v Commission [1992] ECR II-757.

Case T-112/07 Hitachi Ltd, Hitachi Europe Ltd and Japan AE Power Systems Corp. v European Commission [2011] ECR II-03871.

Case T-193/02, Piau v Commission [2005] ECR II-209.

Case T-286/09 Intel v Commission [2014] not yet published (Court Reports - general) - publication in extract form.

Case T-303/02 Westfalen Gassen Nederland BV v Commission of the European Communities [2006] ECR II-4567.

Case T-310/01 Schneider Electric SA v. Commission [2002] E.C.R. 11-4071, 4182, 402, [2003] 4 C.M.L.R. 17, 832.

Case T-328/03, O2 (Germany) GbmH & Co. OHG v. Commission [2006] ECR II-1231.

Case T-44/02 Dresdner Bank AG and Others v Commission of the European Communities [2006] ECR II-3567.

Case T-461/07 - Visa Europe and Visa International Service v Commission [2013] ECR II-01729.

Case T-478/93 Wafer Zoo v Commission [1995] ECR II-1479.

Commission decision Carbonless paper cartel [2001] OJ L 115, 21.04.2004.

Commission decision Case COMP / E-2 / 37.533 [2004] Choline Chloride.

Commission decision Case COMP/36.545/F3 — Amino Acids OJ L 152, 7.6.2001, p. 24–72, (2000).

Commission decision Kali and Salz, MdK, Treuhand 14 December 1993, Case IV/M.308, OJ L 316/1 (1994).

Joined Cases 5/66, 7/66 and 13/66 to 24/66 Kampffmeyer v Commission [1967] ECR 245.

Joined Cases 56/74 to 66/74 Kampffmeyer [1976] ECR 711.

Joined Cases 64 and 113/76, 167, and 239/78, 27–28 and 45/79 Dumortier Frères v Commission [1979] ECR 3091.

Joined Cases C-104/89 and C-37/90 Mulder v Council and Commission[1992] ECR I-3061.

Joined Cases C-29/83 and C-30/83 Compagnie royale asturienne des mines and Rheinzink v Commission [1984] ECR 1679.

Joined cases C-295/04 to C-298/04 Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA [2006] ECR I-0661.

Joined Cases C-397/01 to C-403/01 Pfeiffer and Others [2004] ECR I-8835.

Joined Cases C-403/04 P and C-405/04 P Sumitomo Metal Industries and Nippon Steel v Commission [2007] ECR I-729.

Joined cases C-46/93 and C-48/93 Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others [1996] ECR I-01029.

Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, GlaxoSmithKline Services and Others v Commission and Others, [2009] ECR I-9291.

Joined cases C-6/90 and C-9/90, Andrea Francovich and Danila Bonifaci and others v Italian Republic [1991] ECR 5357.

Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 Ahlström Osakeyhtiö and Others v Commission [1993] ECR I-1307.

Opinion of Advocate General Jääskinen in Case C-559/12 P, French Republic v Commission, 21 November 2013, (2013).

Opinion of Advocate General Kokott Case C-557/12 Kone AG and Others v ÖBB-Infrastruktur AG ECLI:EU:C:2014:45, (2014).

Opinion of Advocate General Van Gerven, Case C-128/92, ECR I-01209, (1994).

England and Wales

2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Ltd [2011] CAT 30.

AB & Ors v British Coal Corporation & Anor [2004] EWHC 1372 (QB).

Allied Maples Group Ltd v Simmons & Simmons [1995] EWCA Civ 17.

Alphacell Ltd v Woodward [1972] UKHL 4.

Arkin v Borchard Lines Ltd & Ors [2005] EWCA Civ 655.

Arkin v Borchard Lines Ltd. & Ors [2003] EWHC 687 (Comm).

Attheraces Ltd & Anor v British Horse Racing Board & Anor [2005] EWHC 3015 (Ch).

Baker v Willoughby [1969] UKHL 8 [1969] 3 All ER 1528.

Barker v. Corus (UK) Plc [2006] UKHL 20.

Barnett v Chelsea & Kensington Hospital Management Committee [1968] 1 All ER 1068.

BCL Old Co Ltd & Ors v BASF SE & Ors, 24 [2008] CAT.

Bookmakers Afternoon Greyhound Services Ltd v Amalgamated Racing Ltd [2008] EWHC 1978 (Ch).

Bradford v Robinson Rentals Ltd [1967] 1 All ER 267.

Caswell v. Powell Duffryn Associated Collieries [1940] AC 152, 165.

JJB Sports Plc v Office of Fair Trading [2005] CAT 17 Comp. A.R. 29.

Chaplin v Hicks CA [1911] 2 KB 786.

Cooper Tire & Rubber Company Europe Ltd & Ors v Dow Deutschland Inc & Ors [2010] EWCA Civ 864.

Corr v IBC Vehicles Ltd [2008] UKHL 13.

Crehan v Inntrepreneur Pub Co (CPC) (Office of Fair Trade Intervening) [2003] EWHC 1510 (Ch), [2003] LLR 573.

Crehan v Inntrepreneur Pub Company CPC [2004] EWCA Civ 637.

Deere (John) Ltd v Commission (Case C-7/95 P) [1998] ECR I-3111.

Devenish Nutrition Ltd v Sanofi-Aventis SA (France) & Ors (Rev 1) [2008] EWCA Civ 1086.

DHN Food Distributors v London Borough of Tower Hamlets [1976] 3 All ER 852.

Doughty v Turner Manufacturing Company [1964] 1 QB 518.

Emerald Supplies Ltd & Anor v British Airways Plc [2010] EWCA Civ 1284.

English Welsh & Scottish Railway Ltd v Enron Coal Services Ltd [2009] EWCA Civ 647.

Enron Coal Services Ltd (In Liquidation) v English Welsh & Scottish Railway Ltd [2011] EWCA Civ 2.

Enron Coal Services v English Welsh and Scottish Railways [2003] EWHC 687.

Fairchild v Glenhaven Funeral Services Ltd, House of Lords [2002] UKHL 22.

Fulton Shipping Inc of Panama v Globalia Business Travel S.A.U. (formerly Travelplan S.A.U) of Spain [2014] EWHC 1547 (Comm).

Gabriel v Kirklees Metropolitan Council [2004] EWCA Civ 345.

Gregg v. Scott [2005] UKHL 2.

H & Ors (minors), Re [1995] UKHL 16, (UKHL (1995) 2000).

Healthcare at Home v Genzyme Ltd [2006] CAT 29.

Hotson v East Berkshire Area Health Authority [1988] UKHL 1.

Hughes v Lord Advocate [1963] AC 837.

Jobling v Associated Dairies Ltd [1981] UKHL 3.

Mallett v. McMonagle [1970] AC 166.

McGhee v National Coal Board [1972] 3 All E.R. 1008, 1 W.L.R. 1.

Miller v. Minister of Pensions [1947]2 ALL ER 372.

Napp Pharmaceuticals Holdings Ltd v Director General of Fair Trading [2002] CAT 1.

Overseas Tankship (U.K.) Ltd v Morts Dock & Engineering Company Ltd [1961] UKPC 1.

Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty (The Wagon Mound No.2) [1966] UKPC 1.

Re Polemis and Furness, Withy & Co. [1921] 3 KB 560.

Sienkiewicz v Greif (UK) Ltd [2009] EWCA Civ 1159.

Smith v Leech Brain & Co [1962] 2 QB 405.

Watson Laidlaw & Co Ltd v Pott, Cassells and Williamson [1914] 31 RPC 104.

WH Newson Holding Ltd & Ors v IMI Plc & Ors [2013] EWCA Civ 1377.

France

Cour d'Appel de Versailles, SA Concurrence v. SA Aiwa France, No 01/08413, 9 December 2003.

Cour de Cassation, Gouessant, arrêt no. 540, pourvoi no. 11-18.495, 15 May 2012.

Tribunal de Commerce de Nanterre, Arkopharma v. Hoffmann La Roche, 11 May 2006.

Tribunal de Commerce de Paris, Laboratoires JUVA v. Hoffmann La Roche, 26 January 2007.
Cour d'Appel de Paris, SNC Doux Aliments Bretagne etc v. SAS Ajinamoto Eurolysine, no. 07/10478, 10 June 2009.
Cour de Cassation, Doux Aliments v Ajinomoto Eurolyne, no. 09-15816, 15 June 2010.
Cour d'Appel de Paris, M. Merhi Bassam v. SNC Société Presse Paris Services – SPPS, no. 08/21750, 27 April 2011.
Cour de Cassation req., 17 July 1889, S. 1891. I. 399.
Cour de Cassation civ. 1re 14 December 1965, JCP 1966. II. 14753.
Cour de Cassation civ. 1re 17 November 1982, JCP 1983. II. 20056, D. 1984.
Cour de Cassation civile, 1re, 3 November 1983, Bull. civ. I, no. 253.
Cour de Cassation civ. 1re, 8 January 1985, D. 1986. 390, comm. Penneau.
Cour de Cassation civile, 1re, 12 November 1985, Bull. civ I, no. 298.
Cour de Cassation civ., 10 June 1986, Bull. civ. 1986. I. 163.
Cour de Cassation civile, 1re, 7 February 1990, Bull. civ I, no. 39.
Cour de Cassation crim., 6 June 1990, Bull. crim. 1990. 224.
Cour de Cassation, Chambre commerciale, 18 April 2000, 97-22.604.
Cour de Cassation civ. 1re, JCP 2007. I. 185, no. 2, 4 June 2007, ETL 2007, 276.
Cour de cassation, civile, Chambre commerciale, 15 Septembre 2009, 08-14.398.
Cour de cassation, civile, Chambre commerciale, 15 June 2010, 09-15.816.
Cour de cassation, civile, Chambre commerciale, 15 February 2011, 09-16.779.

Germany

OLG Frankfurt, 6 U (Kart), 176/88, WuW/E OLG 4475, 26 January 1989.
BGH, KZR 12/81, BGHZ 86, 324, 25 January 1983.
OLG Bremen, U (Kart) 1/88, WuW/E OLG 4478, 22 April 1989.
OLG Düsseldorf, U (Kart) 13/88, WuW/E OLG 4454, 23 May 1989.
BGH, KZR 23/96, 12 May 1998, NJW-RR 1999, 190.
LG Berlin, 102 O 129/02 Kart, WuW/E DE-R 1325, 23 May 2003.
LG Mannheim, 7 O 326/02, GRUR 2004, 182, 11 July 2003.
LG Mainz, 12 HK O 56/02 Kart, WuW/E DE-R 1349, 15 January 2004.
LG Dortmund WuW/E DE-R 1352, 1 April 2004.
Landgericht Mannheim, 22 O 74/04 Kart EWiR 659, 29 April 2005.
BGH, KRB 12/07, WuW/E DE-R, 19 June 2007, 2225.
LG Berlin 2 U 17/03, 1 October 2009.
Oberlandesgericht Karlsruhe, 11 June 2010, 6-U 118/05 (Kart) (F.R.G).
Kammergericht Berlin, 1 October 2010, 2 U 17/03 Kart, BeckRS 2009, 88509.
Bundesgerichtshof [BGH] ORWI, KZR 75/10 (F.R.G.), 28 June 2011, BGHZ 190, 145.
BGH Kartellsenat, 28 June 2011, KZR 75/10 (ORWI), BGHZ 190, 145-172.
OLG München, U 3283/11 Kart, 09 February 2012,.

Oberlandesgericht Karlsruhe), 31 July 2013, 6 U51/12 (Kart), BWGZ 2013, 1011.

Italy

Corte di Cassazione, Blasi v. Az. cons. trasp. pubbl. Napoli, 22 April 1993, no. 4725, in Giust. civ. Mass. 1993, 720.

Corte di Cassazione Montani et al v. Lloyd Adriatico, 25 September 1998, no 9598, in Studium Juris 1999, 81 Danno e resp. 1999, 534.

Tribunale di Milano, Brennercom Spa v. Telecom Italia Spa, no. 14802/2011, 3 March 2014.

Tribunale di Milano, Brennercom Spa v. Telecom Italia Spa, no. 22423/2010 27 December 2013.

Tribunale di Milano, OkCom Spa v. Telecom Italia Spa, no. 76568/2008, 13 February 2013.

Tribunale di Milano, Teleunit Spa v. Vodafone Omnitel Spa, no. 75623/2008, 1 October 2013.

Tribunale civile di Milano, OK Com Spa c. Telecom Italia SpA, 13 February 2013, R.G. 76568/2008.

Corte di Cassazione, 9 April 1963, n 910, in Giuriprudenza italiana, 1964, I, 490.

Corte di Cassazione Sez. Un., 26 January 1971, n. 174, in G.I. 1971, I, 1, c. 680.

Corte di Cassazione, 3 June 1980, n 3622, in Massiamario Giustizia civile, 1980, 6.

Corte di Cassazione civ., 18 July 1987, n. 6325, in Massimario Giuridico italiano, 1987.

Corte d'Appello di Cagliari, 23 January 1999, Unimare S.r.l. v. Geasar S.p.a.

Corte di Cassazione Cass. civ., 4 March 1999, n. 1811, in Riv. dir. ind., 2000, II, 421.

Corte d'Appello, Torino, 6 July 2000, in Danno e resp., 2001, 46.

Corte d'Appello di Torino, 6 July 2000, Indaba Incentive co. v. società Juventus F.C. S.p.A.

Corte di Cassazione Cass. civ., 9 December 2002, n. 17475, in Foro it., 2003, I, 1121.

Corte di Cassazione civ., 21 July 2003, n. 11322, in Danno e resp., 2004, 567.

Corte di Cassazione civ. Sez. Un., 4 February 2005, n. 2207, in Riv. dir. proc., 2006, I, 375, comm. Barletta.

Corte di Cassazione civ., 30 March 2005, n. 6735 in Giust. civ. Mass., 2005, 4.

Corte di Cassazione civ., 17 May 2006, n. 11498 in Giust. civ. Mass., 2006, 5.

Corte di Cassazione civ., 4 July 2006, n. 15274, in Giust. civ. Mass., 2006, 7-8

Corte di Cassazione, Fonsai v Nigriello, 2 February 2007, n. 2305, In «Foro it.», vol. I, 2007, 1097, commented by A. Palmieri, and R. Pardolesi; S. Bastianon, in Danno e resp., 2007, p. 764, .

Corte di Cassazione civ., Telecom v. Sign and others, 16 May 2007, n. 11312.

Corte di Cassazione civ., 25 May 2007, n. 12243, in Giust. civ. Mass., 2007, 5;

Corte di Cassazione civ., 5 July 2007, n. 15231 in Giust. civ. Mass., 2007, 7-8.

Corte di Cassazione civ., 16 October 2007, n. 21619, in Danno e Responsabilità, 2008, 1, 43 commented by R. Pucella.

Corte di Cassazione S.U., 11 January 2008, no 581, in Danno e resp., 2009, 667.

Corte di Cassazione civ., 10 June 2009, n. 13369, in Giust. civ. Mass., 2009, 6, 896.

Corte di Cassazione civ., 5 May 2010, n. 10895, in Dir. & Giust., 2010.

Corte di Cassazione civ., 23 December 2010, n. 26042 (rv. 615614), in CED Cassazione.

Corte di Cassazione, Allianz v Tagliaferro, 26 May 2011, n 11610, in Giust. civ. Mass. 2011, 5, 808.

Corte di Cassazione Sara Assicurazioni v. G.V., 30 May 2013, n. 13667, not yet published.

Autorità Garante della Concorrenza e del Mercato, decision 28 July 2000, n. 8546, I377.

United States

City of Long Beach v. Standard Oil Co. of California no. 872 F.2d 1401 (9th Cir. 1989), 1408.

Continental Ore Co. v. Union Carbide & Carbon Corp. 370 U.S. 690, 702 (1962).

Conwood Co. v. U.S. Tobacco Co., 290 F.3d 768, 791 (6th Cir. 2002).

Costner v. Blount National Bank no. 52 578 F.2d 1192 (6th Cir. 1978).

Ferebee v. Chevron Chemical Company 21 ERC 1688, 237 U.S.App.D.C. 164, 14, F2d 1529 (C.A. and D.C. 1983).

Hanover Shoe, Inc. v. United Shoe Machinery Corp. 392 U.S. 481 (1968), (1968).

Hayes v. Solomon 597 F.2d 958, 978 (5th Cir. 1979).

Illinois Brick Co. v. Illinois, 431 U.S. 720, (1977).

In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, 739 F. Supp. 2d 576 (S.D.N.Y. 2010).

Lohrmann v. Pittsburgh Corning Corp Gaf Ac S & Hk782 F. 2d 1156, (1986).

McClure v. Undersea In dus., Inc., 671 F.2d 1287, 1289 (11th Cir. 1982).

Nat'l Indep. Theatre Exhibitors, Inc. v. Buena Vista Distrib. Co., 748 F.2d 602, 607 (11th Cir. 1984).

Rambus Inc. v. FTC. 522 F.3d 456 (D.C. Cir. 2008).

Tele Atlas N.V. v. NAVTEQ Corp., No. C-05-01673, 2008 WL 4809441 (N.D. Cal. 2008)

United States v. Microsoft 253 F.3d 34 (D.C. Cir. 2001).

Zenith Radio Corp. v. Hazeltine Research, Inc. 395 U.S. 100 (1969).

Others

Oberlandesgericht Wien, 14 December 2007, Az. 25 Kt 12/07 (2007).

Oberster Gerichtshof, 8 October 2008, Az. 16 Ok 5/08 (2008).

Legislation

Antitrust Modernization Commission Report and Recommendations VI, 2007. available at http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

Commission Staff Working Document Accompanying Document to the White Paper on Damages Actions for Breach of the EC Antitrust Rules - Impact Assessment, 2008.

Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union SWD(2013) 205, 2013.

Commission Staff Working Paper Accompanying the White Paper on Damages Actions for Breach of the EC Antitrust Rules, 2008.

Committee on Economic and Monetary Affairs, Amendments to the Proposal for a Directive 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)0404 – C7-0170/2013 – 2013/0185(COD)), PE516.968v01-00, 2014.

Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty OJ L 001 , 04/01/2003, 2003.

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 Law for Infringements of the Competition Law Provisions of the Member States and of the European Union Text with EEA Relevance, OJ L 349, 2014.

European Group on Tort Law, Principles of European Tort Law, 2005. available at http://www.egtl.org/.

Green Paper - Damages Actions for Breach of the EC Antitrust Rules SEC (2005) 1732 COM/2005, 672, 2005.

Impact Assessment Report Accompanying the Proposal for a Directive COM(2013) 404, SWD(2013) 203 Final, 2013.

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, 2013.

Siebtes Gesetz Zur Änderung Des Gesetzes Gegen Wettbewerbsbeschränkungen, Bundesgesetzblatt (BGBl.) 2005, Part I, 1954-1969, 2005.

Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules, 2004. available at http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf.

White Paper on Damages Actions for Breach of the EC Antitrust Rules, SEC(2008) 404-406.