Antitrust Damages, Consumer Harm, and Consumer Collective Redress

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I. Introduction

The European Union (EU) Antitrust Damages Directive (Directive) was enacted in December 2014 after nearly a decade of consultations—its implementation was due by 27 December 2016. The Directive entails a number of requirements reforming the Member States’ substantive and procedural law, thereby specifying the European damages regime. It seeks to boost private enforcement and, in particular, to enable each purchaser that suffers damage due to infringements of competition law to claim compensation.

The main objective of the Directive is the attainment of ‘full compensation,’ with ‘deterrence’ being stipulated as an important secondary goal.

This paper brings into focus the harm borne by final consumers. Any infringement which raises prices to final consumers, either directly or indirectly through the supply chain, may harm such consumers in two different ways. First, final consumers who made some purchases during the infringement period (e.g. at the time a cartel was in place) may have done so at inflated prices. We refer to this as the ‘overcharge effect’. Second, final consumers who refrained from purchasing (or reduced their purchase volume) during the infringement period only because of the inflated prices, but who would have purchased (more) absent the infringement, suffered from a so-called ‘lost consumption effect’. This damage component, equivalent, in economic terms, to the deadweight loss generated by the infringement, captures the benefits (the utility) that consumers would have derived from all purchases which did not effectively take place because of the infringement. No matter how straightforward the existence of the ‘lost consumption effect’ may be from an economic point of view, it is very difficult, from a legal perspective, for individual consumers to prove that they would have made a purchase if the prices were lower but refrained from doing so due to the infringement. Hence, we argue that all necessary actions—in particular enabling consumer collective redress mechanisms—should be taken to facilitate compensation for the harm resulting from the ‘overcharge effect’ in order to guarantee that the final consumers benefit, at least, from viable enforcement mechanisms related to that share of their overall harm. In this paper, we present the economic and legal arguments supporting our views.

Key Points

- Following (price-increasing) competition law infringements, consumer harm is two-fold.
- Consumers are negatively impacted by (i) the overcharge (they pay more for the goods actually purchased during the infringement period) and (ii) a ‘lost consumption effect’ (they buy less because of the infringement).
- From an economic point of view, the latter damage component can be sizeable, both in absolute and relative terms. From a legal point of view, the harm resulting from this ‘lost consumption effect’ is particularly hard to compensate.
- Collective redress mechanisms are necessary to ensure that at least compensation of (passed-on) overcharges can be successfully claimed by consumers.

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2 Recital 3 and following and Art. 1 (1) 1st sentence and Art. 3 Directive; the antitrust damages regimes in the European Member States were already geared towards this goal before the implementation of the Directive, see BJ Rodger, M Sousa Ferro and F Marcos, ‘A panacea for Competition Law damages actions in the EU? A comparative view of the implementation of the EU Antitrust Damages Directive in sixteen Member States’ (2019) 26:4 Maastricht Journal of European and Comparative Law 480–504, 498.
To the best of our knowledge, our paper is the first to compare, from an economic perspective, consumers’ loss components to one another, as well as to direct purchasers’ loss components, in a setting where the infringement results in a discrete price overcharge. The paper closest to ours is that by Christopher Leslie, where the author argues that antitrust laws (and related damages) should take into consideration the creation of deadweight loss as a relevant harm to society. Indeed, our ‘lost consumption effect’ resulting from an infringement is nothing more than an increase in deadweight loss. Leslie explains that (US) antitrust laws fail to consider deadweight loss in the calculations of damages, and that, as a result, final consumers as a group are not correctly compensated for their losses. Building on Leslie’s work, our contribution focuses more on the EU perspective, within the scope of the Directive, and we provide a clear economic analysis of the various effects at play. We also leverage the recent discussions related to the passing-on of overcharges in the supply chain to provide an analogy between harm to firms, in their role as direct or indirect purchasers, and harm to final consumers. We also intertwine both the economic and the legal perspectives.

From the Union legislator’s point of view, ‘full compensation’ of consumer damage can be achieved by either individual or collective consumer claims, or a combination of both, as the Directive is silent regarding the necessity of collective redress. However, workable collective redress mechanisms are not yet fully established in every Member State. In some, only individual redress options are currently available. Of course, separate damage actions by individual, final consumers claiming compensation both for the ‘overcharge effect’ and the ‘lost consumption effect’ would require, in practice, an important investment that virtually no single consumer could incur. As it is widely acknowledged, consumer collective redress mechanisms constitute a highly relevant tool for enabling claims where individual lawsuits are, in expectation, not profitable. However, the Directive omits any reference to it, and the European proposal for a Directive on Collective Redress that was recently agreed upon does not apply to the competition law context.

The remainder of the paper is as follows. In Section II, we present an economic take on the two types of loss that consumers may face, and how they compare to one another, following a price-increasing infringement of competition law. We also discuss how consumer losses compare to profit losses for purchasing firms (which then sell their own products or services to final consumers) in a supply chain, whose damage can be separated into an overcharge, a passing-on effect, and a volume effect. In Section III, we propose a legal perspective on the strengths and limits of law enforcement by individual consumers to obtain full compensation from infringers. In Section IV, we provide several recommendations regarding the dimension of collective redress. Finally, Section V concludes.

II. Harm to final consumers disentangled: an economic perspective

This section introduces, discusses, and compares the two components of harm to final consumers resulting from a price-increasing infringement of competition law.

A. The ‘overcharge effect’ and the ‘lost consumption effect’

The Directive stipulates an entitlement to full compensation to anyone—i.e. direct and indirect purchasers,
including final consumers—who has suffered harm due to an infringement of competition law.

Let us consider infringements such as cartels or abuses of a dominant position which result in price increases. When an infringer sells directly to final consumers, they directly bear the overcharge which results from the infringement. Alternatively, when an infringer sells to intermediaries in the value chain, such intermediaries may elect to pass-on (a share of) the overcharge they face, and, ultimately, raise prices to final consumers. All in all, an infringement may raise prices for final consumers regardless of the level of the value chain at which it occurred.

When final consumers face an overcharge, be it direct or passed-on to them, they will typically reduce the quantity they purchase as a group. Doing so, the harm they face may be divided into two different effects: Let us first consider all the purchases made by final consumers during the infringement period. In this case, the utility derived by a final consumer from purchasing the product or service in question was high enough for this consumer to complete her purchase at the inflated price; the final consumer would thus have also purchased the product or service at a lower, non-inflated price, absent the infringement. We refer to this effect as the ‘overcharge effect’, when faced directly by final consumers. When it is passed-on to them, it is more accurate to speak of a ‘downstream overcharge effect’.

Let us now consider all the purchases which would have been made at the lower, non-inflated price absent the infringement but which did not realise at the higher, inflated price. In this case, the utility derived by a final consumer from purchasing the product or service in question would have been high enough for this consumer to complete her purchase at the non-inflated price; the final consumer would thus have also purchased the product or service at a lower, non-inflated price, absent the infringement. We refer to this effect as the ‘overcharge effect’, when faced directly by final consumers. When it is passed-on to them, it is more accurate to speak of a ‘downstream overcharge effect’.

As Figure 1 illustrates, the absolute and relative size of areas B and C will depend on the specific demand and market features of each and every case. It appears clearly, however, that damages related to the ‘lost consumption effect’ (area C) cannot be dismissed at the outset, from an economic perspective. In fact, in some instances, final consumers may lose more because of the ‘lost consumption effect’ than because of the ‘overcharge effect’, as shown in the right panel of Figure 1.

A short numerical example, where prices are determined strategically, in equilibrium, may help to illustrate our claim. Consider a market is served by several symmetric producers selling directly to individual consumers. Absent any collusive behaviour, producers compete and set their price at the level of their marginal costs, which are equal to 1€. Market demand takes the form \( (500/p)^\varepsilon \), where \( p \) represents the price faced by consumers, and \( \varepsilon \) corresponds to the elasticity of demand. This elasticity is set to 1.5. First, absent any collusive behaviour, competition implies that \( p = 1€ \) in equilibrium. Second, if producers collude together by way of a price-fixing cartel, set the monopoly price—equal to 3€ in this example—and share the corresponding monopoly profits, consumers suffer two different types of harm. Indeed, any consumer who purchases the good when the price equals 3€ is losing 2€ due to the cartel. Aggregated over all consumers served at the monopoly price, this represents a consumer loss of circa 4303€. This corresponds to the ‘overcharge effect’, represented by the area A only. Area B represents the reduction in final consumer surplus due to the ‘overcharge effect’. Area C, instead, illustrates the loss to final consumers due to the ‘lost consumption effect’.

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In Figure 1, we illustrate both of these effects in three different settings. We consider three different demand forms (linear, concave, and convex, respectively). For each of these, we represent, graphically, the impact of a price increase due to an infringement, from price \( p_1 \) to price \( p_2 \). We only consider prices to final consumers in this illustration. Because of the price increase, the quantity sold in the market decreases, from quantity \( q_1 \) to quantity \( q_2 \).

For any of the three illustrations, the surplus enjoyed by final consumers at the price level \( p_1 \) (i.e. absent the infringement) is represented by the sum of the areas A, B, and C. However, at price \( p_2 \), that is, at the inflated price due to the infringement, such consumer surplus shrinks to the area A only. Area B represents the reduction in final consumer surplus due to the ‘overcharge effect’. Area C, instead, illustrates the loss to final consumers due to the ‘lost consumption effect’.

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B. Building on the passing-on of overcharges: similarities between the ‘volume effect’ for purchasing firms and the ‘lost consumption effect’ for final consumers

We now show that the separation of consumer harm into the ‘overcharge effect’ and the ‘lost consumption effect’ is also robust to value chains with intermediaries. More importantly, considering value chains with intermediaries allows us to make a clear parallel between the ‘lost consumption effect’ at the consumer level and the so-called ‘volume effect’ which is now a well-understood damage component to direct and indirect purchasing undertakings.

In accordance with the Directive, the European Commission recently published guidelines for national courts on how to estimate the share of the overcharge which is passed-on to indirect purchases.\(^9\) In the light of ensuring full compensation, the damage components that receive most attention within the provisions of the Directive are the overcharge and how such overcharge is passed-on down the supply chain—the ‘passing-on effect’. Furthermore, the so-called ‘volume effect’ relates to damages that direct and indirect purchasers can suffer from in the form of lost profits as a consequence of passing-on the overcharge and of a reduction of their sale volume.\(^{10}\) The following graph illustrates the composition of the total antitrust damage from direct and indirect purchasers’ standpoints.

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\(^9\) Communication from the Commission—Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, C/2019/4899, OJ C 267, 9.8.2019 (Guidelines 2019), p. 4–43.

The recent policy discussion and Court decisions about the ‘volume effect’ (area V in Figure 2) can help us to understand our focus on the ‘lost consumption effect’. When some firms behave anti-competitively, leading to a price increase at the wholesale level, their direct purchasers may see their input become more expensive. Then, direct purchasers may decide to pass-on some of the overcharge they face to their own customers (final consumers, in the example illustrated in Figure 2). One type of damage which affects direct purchasers stems from the fact that their sales volume typically shrinks when they pass-on (some of) the overcharge down the value chain; therefore, they incur a loss of profit attributable to those missed sales. This corresponds to the ‘volume effect’. The economic approach to this is that the infringement, which raises wholesale prices, will create some (extra) deadweight loss, captured by the areas V and C in Figure 2. The areas V and C would be gains (in the form of profit and surplus, respectively) attributed to direct purchasers and final consumers, respectively, absent the infringement. In short, the ‘lost consumption effect’ for final consumers is somewhat conceptually identical to the ‘volume effect’ for direct purchasers.

We now show that the consumer harm related to output reduction due to an infringement can be quite substantial. Consider, for instance, the following, stylized example. The industry is represented by three levels: competing producers transform raw material and sell it to an intermediary holding a monopoly position, which then sells it on to final consumers. Assume that demand is linear and of the form $100 - p$, where $p$ represents the price faced by consumers. Each consumer demands at most one unit of the product. Producers acquire the raw material at a market price of $4\€$ per unit and face no additional cost. The intermediary purchases from the producers at a wholesale price $w$ and faces no other cost. The intermediary demands one unit of input in order to sell one unit of output. The timing of this model is such that first the wholesale price $w$ is determined, given whether producers compete against one another or create a cartel. Then, the monopolist intermediary takes this wholesale price as given and sets the final price faced by consumers.

When producers compete against each other, the wholesale price equals the marginal cost of production: $w_1 = 4\€$. (In this stylized model, we assume perfect competition between producers.) The intermediary then sets a monopoly price of $52\€$ in equilibrium, given the demand and its marginal cost. The quantity sold in the market equals 48 units. Instead, if producers decide to collude, the wholesale price would change. Producers, colluding and acting as a single firm, would sell at a price of $w_2 = 52\€$ in equilibrium. The intermediary would then add its own mark-up, passing-on a percentage of the cartel overcharge, and sell to final consumers at an equilibrium price of $76\€$. The quantity sold in the market would thus be 24 units.

Comparing these two scenarios allows us to draw a couple of important observations. First, collusion would severely affect industry output, cutting it by half. Second, the intermediary’s profit falls from 2304\€ (area $R + V$ on Figure 2) to 576\€ (area B) when producers collude. This represents a drop of 75 per cent. Computing the extent of the various effects at play, we find that the ‘volume effect’ (area V) would be responsible for two-thirds of this decrease in profits, whereas the overcharge (area R–B, taking into account the passing-on effect) would account for the remaining third. This clearly shows the relevance of ‘volume effects’ for undertakings active in the supply chain.

Turning now to consumers, we can make a third observation: consumer surplus—that is, the sum of the residual consumer utility enjoyed by consumers who purchased the product—drops from 1152\€ (area $A + B + C$) to 288\€ (area A only) when producers collude. This represents a drop of 75 per cent, meaning that consumers and the intermediary are affected by the cartel behaviour in the same proportion overall. In the case of consumers, two-thirds of the negative impact of producer collusion comes through the downstream overcharge (area B). Moreover, the remaining third of the reduction in consumer surplus due to producer collusion only affects consumers who would purchase the product but for collusion, through the ‘lost consumption effect’ (area C).

In the example above, an outcome of the model used is that the pass-on rate at the intermediary level is 50 per cent. One could also use different demand forms.

11 See the German ORWI case BGH judgment of 28.6.2011—KZR 75/10, BGHZ 190, 145, the Spanish sugar cartel case Tribunal supremo, judgment of 7.11.2013, ECLI:ES:TS:2013:5819, a Danish judgment of 15.1.2015, Chemínova A/S v Akzo Nobel Functional Chemicals BV and others, SH2015.U-0004-07, the UK Supreme Court judgment of 17.6.2020 Sainsbury’s Supermarkets Ltd (Respondent) v Visa Europe Services LLC and others (Appellants) and Sainsbury’s Supermarkets Ltd and others (Respondents) v Mastercard Incorporated and others (Appellants), Trinity Term [2020] UKSC 24, para. 205.

12 The pass-on rate would be of 50% in this model with a single intermediary firm, constant marginal costs, and linear demand.

13 Alternative modelling assumptions may strongly affect these conclusions. For instance, if demand is log-convex, leading to a passing-on rate above 100%, the intermediary would actually benefit from the cartel overcharge through the passing-on effect while being harmed by it through the volume effect. On balance, the monopolist intermediary would be harmed by the cartel.

14 See Boone and Müller (2012) (n4 above), for an analysis of how the harm to final consumers and to intermediaries compare. Boone and Müller do not, however, compare the relative weights of the two sub-categories of harm to final consumers as we do.
which could lead to different pass-on rates. For instance, reproducing the exercise above with a demand of the form $E^{\text{p}}(5 - p/100)$, which leads to a pass-on rate of 100 per cent at the intermediary level, and considering that upstream producers acquire the raw material at a market price of $1\text{e}$ per unit, an upstream cartel would reduce the intermediary’s profits and the surplus enjoyed by consumers in equal proportions, by 63 per cent, approximately. The intermediary losses all come from the ‘volume effect’, as the overcharge is entirely passed-on (as the rate is 100 per cent in equilibrium). The losses for consumers, however, originate in balanced proportions from the overcharge being passed-on to them (37 per cent reduction of consumer surplus) and from the reduction of consumption (26 per cent reduction of consumer surplus). Importantly, the damages created by the existence of the upstream cartel are large and are equally split between the intermediary and consumers in this example: both the intermediary and consumers lose 3417€ in value, because of the upstream cartel. Therefore, (i) the total losses faced by consumers are comparable to those faced by the intermediary and (ii) a non-negligible share of these is due to the loss in consumption effect, which could hardly ever be compensated for.

III. Legal challenges faced by final consumers acting alone

This section serves to outline the legal challenges an individual final consumer faces with a view to enforcing the two damage components discussed above. It prepares a discussion on the added value of collective redress.

A. The fate of the ‘overcharge effect’

The overcharge typically spreads out along the supply chain due to pass-on activity. Passing-on, in the case at hand, because of a cartel-induced price increase but likewise due to any other price increase, is the typical reaction of a purchaser. Regularly, a large share of the initial overcharge is passed-on to the final consumers. In this exercise, the harm becomes typically more widespread, thus reducing the incentives to sue unless mechanisms are in place that significantly reduce the individuals’ burden in litigation. Rational apathy is at play. This effect will be most extreme at the level of the final consumers.17 Hence, passing-on damage to the final consumers is not least done in the awareness that consumers are unlikely to bring claims. In litigation, the final consumer to start with bears the burden of proof to show the harm he or she suffered due to the fraction of the original cartel overcharge that was passed-on all the way. The standard of proof in competition cases is oriented at the standard civil procedural rules for tort law cases. However, the classical rules for alleviating such proof (e.g., reducing the burden of proof in the light of the judges’ powers to estimate) could also come into play. Showing which part of the damage ended up with the final consumer can, depending on the length of the supply chain, involve a large exercise for showing how much each of the previous levels in the supply chain did effectively pass-on.18 Disentangling and extracting which element of the product price increase constitutes the passed-on amount—an exercise for which economic experts are needed—is a challenging one. An individual consumer is not only deterred by the own lack of economic knowledge or that of their lawyer, but also by the costs for economic experts, and the often rather minor amounts that might be at play. Also, it can take time until a cartel is actually detected, thus reducing the likelihood that consumers kept the receipts necessary to prove their contract. A competition law infringement at the final consumer stage is a typical example of small but widespread damage which, when summed up, constitutes large societal damage.

In awareness of the difficulties that are being faced by many of the purchasers, the Directive introduced a new system which became applicable in all the Member States in 2016. The following procedure was developed by the Union legislature specifically to claim any overcharge paid: the Directive stipulates two presumptions. On the one hand, it sets out the rebuttable presumption that cartels cause harm in order to help any victim along the supply chain.19 This presumption is only applicable in the case of cartels and not for cases of abuse of dominance.20 Also, it is not final but ‘rebuttable’. On the other hand, it sets out a presumption for indirect purchasers regarding the fact that the overcharge may

16 See for further elaboration regarding the incentive problems in the enforcement dimension regarding the ‘overcharge effect’; F Weber ‘A Chain Reaction or the Necessity of Collective Actions for Consumers in

18 See on this the challenges faced by the claimants in CAT judgment of 21.7.2017 /CAT 16 [2017], Case No. 1266/7/7/16, para. 28 (ongoing procedure).
19 Art. 17 (1) Directive.
20 See Recital 47 of Directive 2014/104 EU.
be passed-on down the supply chain.\textsuperscript{21} In principle, all indirect purchasers, including final consumers, have to demonstrate the extent of damage created by the infringement. However, if the following three requirements are fulfilled, the second presumption—that of pass-on—kicks in:

(i) the defendant has committed an infringement of competition law;

(ii) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and

(iii) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them.

Again, the presumption is rebuttable as specified by the last sentence of Art. 14 Directive. Whereas condition (i) is regularly proven by an infringement decision, for condition (ii), the first of the presumptions is helpful.\textsuperscript{22} Final consumers might, however, have a particularly hard time to prove condition (iii).\textsuperscript{23} It was already mentioned that they might not have kept the receipts for their purchase, given that it often concerns just a minor financial amount. More importantly, the presumption only relates to the fact that pass-on as such happened. It is silent regarding the extent of pass-on. The actual amount of damage suffered needs to be proved by the claimants. Regularly, courts will estimate this damage for which they, however, need to be provided with sufficient leads by the claimants. Even if this presumption is of some help, the Directive takes overall too little account of the fact that the damage for each individual consumer will often be minor and the individual costs of a lawsuit would have to be reduced substantially more to ensure that individual consumers obtain a net benefit.

B. Tackling the ‘lost consumption effect’

The situation of the final consumers is worsened by the fact that this overcharge is by far not the only damage they suffer. As the examples elaborated upon above show, a substantial ‘lost consumption effect’ can emerge. From a legal point of view, such damage would rather be termed ‘non-material’ as opposed to ‘material’. The provisions in the Directive are rather ambiguous as to whether compensation for this damage component should be enabled by the Member States’ legal systems. The explanations in the proposal for a Directive explicitly speak of material and immaterial damage.\textsuperscript{24} As a general principle of European law, non-material damage can be claimed.\textsuperscript{25} However, the Directive as such makes no explicit reference to the ‘lost consumption effect’.\textsuperscript{26} It is noteworthy that the pass-on study of 2016 deals with this damage component on a very superficial level only because it is argued that it typically remains unconsidered in litigation.\textsuperscript{27} The 2019 Guidelines do not elaborate upon it either.\textsuperscript{28} Hence, there are some doubts as to whether the ‘lost consumption effect’ can count as a legal category of damage worthy of any compensation at all.

There are, clearly, major problems of proof. How could a consumer prove that he or she would have bought a product but for the price increase? Whereas there might be creative legal solutions imaginable for a company’s regular customers, new or occasional customers would face quite a number of challenges to prove and argue their utility loss. Also, their actual harm would depend on whether or not they could find a good substitute product from sellers not involved in the competition law infringement. Although an overall quantification of the ‘lost consumption effect’ could be feasible, extrapolating the loss incurred by each individual consumer might be more of a challenge. Moreover, the victims as such are typically very difficult to identify.

The hesitation to legally engage with the ‘lost consumption effect’ can be endorsed with a short look into some legal literature in the European Member States. The ‘lost consumption effect’ in German law is typically counted as a form of non-material damage not worthy of compensation.\textsuperscript{29} Compensation for lost consumption is

\textsuperscript{21} Art. 14 (2) Directive.


\textsuperscript{23} Wijckmans et al. (2016) (n22 above), 66.


\textsuperscript{25} C Heinze, Schadensersatz im Unionsprivatrecht (2017) 601: Mohr Siebeck, Tübingen.

\textsuperscript{26} However, the Directive does stipulate that anyone can claim compensation, see Schwabe (2017) (n15 above), 163; Heinze (2017) (n 25 above), 218.

\textsuperscript{27} Pass-on Study 2016, p. 13.

\textsuperscript{28} Commission, Guidelines 2019.

restricted to goods that are central to the own conduct of life.30 Whereas it is regarded as necessary to reform the current German Act on competition law in this regard, such a reform has not yet happened.31 One of the major reasons why legal systems are cautious with a view to non-material damage is to prevent the overflow of compensation payments. To date, there are, to the best of our knowledge, no cases in which consumers successfully claimed the ‘lost consumption effect’ as a competition damage component.

IV. Recommendation regarding consumer collective redress

Individual consumer claims regarding both of the damage components that were illustrated are bound to fail in the light of the lack of incentives to sue with the ‘lost consumption effect’ having the lower success probability of the two. In full awareness that this suggestion does not entirely comply with the goal of full compensation, the central claim of this paper is that the current impossibility of obtaining damages due to the ‘lost consumption effect’ reinforces the need to ensure that, at least, the more easily identifiable part of the overall consumer harm—the ‘(downstream) overcharge effect’—is effectively compensated. To do so, collective redress is undoubtedly of the essence.

The overall consensus on a way forward for collective redress at European level seemed to be particularly difficult to achieve. Whereas, in the discussions preceding the Directive, collective redress was the first item of discussion in the Green paper32 and also figured in the White paper,33 the final text of the Directive does not mention it. Negotiations on a separate, overarching legal instrument regarding collective redress were initiated more than a decade ago.34 For many years, the most far-reaching, related document was a non-binding Commission Recommendation regarding collective redress.35 This Recommendation summarised common European principles regarding collective redress and applies to the field of competition law, consumer law and more broadly.36 Only rather recently, a proposal for a Directive to institutionalise EU-wide collective redress mechanisms has been agreed upon.37

What does the collective mechanism envisaged in this proposal look like? At the centre of the collective mechanism design, a qualified entity, representing the collective interests of consumers, may bring representative actions for the purpose of both injunction and redress measures against traders infringing provisions of EU law. In terms of remedies, the qualified entity may ask to stop or prohibit an infringement and to seek redress, such as compensation, repair, or price reduction. The scope covers both national and cross-border infringements. However, for instance, the requirements for the designated authority vary depending on the type of infringement. In Art. 5 (2), providing for injunction measures and redress measures is mentioned as the minimum standard; Member States could thus go beyond these remedies. Hence, the proposal leaves some discretion as regards the remedy. The same is true in terms of the design: interestingly, both opt-in and opt-out designs are equally permissible.

Furthermore, Art. 5b (4) of the proposal is interesting when it comes to not knowing each affected individual in advance. It reads ‘If the redress measure does not specify individual consumers entitled to benefit from remedies provided by the measure, it shall at least describe the group of consumers entitled to benefit from those remedies. There is thus potential within the European piece of legislation to capture case scenarios in which each consumer’s active participation is unlikely. This is regularly the case when it comes to the ‘overcharge effect’ but even more so with the ‘lost consumption effect’. Be that as it may, the proposal’s scope does not extend to competition law. The responsibility to enable collective redress in competition law cases continues to lie with the Member States. Of course, Member States are also free to extend the scope of application to competition law.38

The current state of collective redress mechanisms in the EU is rather mixed and varies per Member State. Some
of the collective redress mechanisms applicable in the competition law context are the following:

In Germany, in December 2016, a legislative proposal for a collective redress instrument was put on the table, thus ending decades of a particularly hostile stance taken vis-a-vis such matter. To the surprise of many, the instrument actually entered into force and, since 1 November 2018, German consumers can jointly bring model claims (Musterfeststellungsklagen). 39 Such a proceeding can resolve some general matters relevant to a group of cases (§ 660 [1] ZPO). An important element of the procedure is the claims register, where individual claims can be registered (§ 609 ZPO). It is not a collective redress mechanism as such. In order to claim damages, each claimant still needs to act individually, however, while at the same time being able to profit from the findings of the model case. Individual law enforcement is in a way simplified but not really carried out jointly.

In the Netherlands, a new Act regarding collective redress entered into force on 1 January 2020. 40 In short, it empowers a representative to claim damages for a group of victims in court. The requirements to become such a representative are rather strict. The mechanism operates on the basis of an opt-out regime giving the members of the ‘class’ opt-out possibilities at various moments of the procedure (for foreign claimants, a different regime applies). This new tool enhances the previously existing collective settlement procedure according to its Wet Collectieve Afwikkeling Massaschade (WCAM). 42 This procedure envisages an out-of-court collective settlement that is a result of negotiations between the infringer and a representative to be declared binding in court. Such settlements do determine the amount of damages that the infringer has to pay. 43 The procedure has been used in various occasions but, however, not yet for cases of small and widespread harm. 44 One major criticism to the procedure is that it depends a lot on the voluntary participation of the infringer. In this sense, the new law is beneficial even if it is not a perfect piece of legislation. 45

Belgium introduced a possibility for a collective action for business-to-consumer cases in 2014. 46 The courts in Brussels have exclusive jurisdiction to decide class actions. These actions can have both—an opt-in or an opt-out nature (for non-Belgian residents, however, it can only be opt-in). They require a representative. According to Art. XVII. 39 in the Code of Economic Law, such a representative can exclusively be a consumer association with legal personality or a non-profit organisation with legal personality if its objectives are related to the collective damage suffered by the group. 47 Effectively, since the representatives have to be authorised by the Minister, there is a strong governmental involvement. 48 The Belgian procedure involves in total four phases: the certification phase, the mandatory negotiation phase, a phase on the merits of the case (optional), and an enforcement phase under the supervision of a collective claims settler.

The case so far most explicitly dealing with a consumer collective claim is the ongoing collective action Merricks v Mastercard in the UK. 49 It is, however, restricted to the ‘(downstream) overcharge effect’ and does not cover the ‘lost consumption effect’. This case is a follow-on litigation to the European Commission decision that Mastercard imposed unlawful fees on transactions processed through its network. The scope of claim concerns purchases of goods or services between 22 May 1992 and 21 June 2008.

40 Zivilprozessordnung—German Civil Procedural Law.
41 Wijziging van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering teneinde de afwikkeling van massaschade in een collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie), Staatsblad 2019, 130.
42 Art. 7:907—910 Dutch Civil Code—Burgerlijk Wetboek et Wetboek van Burgerlijke Rechtsvordering teleinf de afwikkeling van massaschade in even collectieve actie mogelijk te maken (Wet afwikkeling massaschade in collectieve actie), Staatsbld 2019, 130.
43 Art. 7:907 (2e) and (3b&c) BW.
44 For details, see X Kramer (2013) (n42 above).
46 Wet tot invoeging van titel 2 ‘Rechtsvordering tot collectief herstel’ in boek XVII ‘Bijzondere rechts procedures’ van het Wetboek van economisch recht en houdende invoeging van de definities eigen aen boek XVII in boek I van het Wetboek van economisch recht.
47 The Consumer Ombudsman office can, furthermore, be involved in the negotiation stage. If the procedure has to continue after that, a new representative would need to come into the negotiation stage. Class actions can, by the way, also be brought by the representative entities designated for this purpose by the Member States of the EU and EEA as declared by the Belgian Constitutional Court in its decision of 17 March 2016.
49 Most explicit read on damages in CAT 16 [2017], Case No. 1266/7/7/16, para. 28. Another UK follow-on damage case that was settled in 2008 concerned cartel price-fixing in the context of ‘replica football T-shirts’, see OTF, 1.8.2003, No. CA98/06/2003. Besides the Spanish consumer association AUSBANC initiated a collective proceeding against Telefónica on the basis of Telefónica’s margin squeeze in the Spanish broadband market causing Spanish consumers allegedly damages of EUR 458 million. The case was dismissed though because the court denied AUSBANC the fact that it fulfilled the formal requirements to submit a claim on the behalf of an unascertainable group of consumers, see Audiencia Provincial Cáceres, judgment of 4.12.2012, ECLI: ES:APCC:2012:967. Also, in the ongoing UK case, many complications concern its construction as an opt-out mechanism.
from business selling in the UK that accepted Mastercard cards. Needless to say, this is a large group of individuals and a large amount of an alleged total 'passed-on overcharge', namely, billions of pounds. The size of the claim can also be explained by design: the group action is pursued as an opt-out action. As a matter of fact, one important element in the design of a collective action is the opt-in or opt-out nature of the regime. This concerns in essence the question of whether all victims need to be individually identified and step up in advance. For Germany, an opt-out regime is completely out of the question, whereas Belgium and the Netherlands, for example, now do experiment with it.\footnote{Also the UK has an opt-out regime for competition cases before the CAT.} There is a lot of potential in opt-out designs to ensure that the infringer is facing the compensation payment for the full amount of the 'overcharge effect'. It, furthermore, stands out that an opt-out design even shows some potential for a successful enforcement of compensation claims for the 'lost consumption effect'. We would argue that it is desirable for the collective redress design to encompass the potential to expand its scope vis-à-vis the 'lost consumption effect'. Where there is a lack of clarity about the exact composition of the group members, i.e. who are those final consumers that refrained from buying, a design that does not require the active participation of each consumer concerned in litigation would be of the essence. Obviously, there are major challenges with this type of mass litigation design. A crucial question is who the proceeds of such an action should go to if individual consumers cannot be identified. Second-best options could include, for instance, a general consumer issues fund or consumer associations. Such problems pose themselves mostly from the compensation perspective, which is the primary perspective in European competition law enforcement. However, from a deterrence point of view, the question of where the money that the infringers need to pay actually goes is a rather secondary consideration.\footnote{Recital 2 of the proposal actually refers to the need to improve deterrence.}

V. Conclusion

This paper elaborates an economic and a legal vision on the consumer side's 'lost consumption effect' in competition cases. Obtaining compensation for this damage component seems as it stands even more hopeless than for the overcharge that was passed-on to final consumers. Therefore, we argue that in the light of two damage components that exist for final consumers, at least one, 'the overcharge effect', should be compensated with certainty. To this end, collective redress is needed. Whereas the new European Proposal does not extend to competition law, developments towards enabling collective redress for competition cases in the Member States are ongoing. We are aware that by ensuring compensation for the 'overcharge effect', the goal of full compensation is not completely achieved. Potentially, with the help of innovative remedies available in collective redress mechanisms, even compensation for the 'lost consumption effect' might ultimately become feasible. Flexibility is needed, for instance, with regard to the question of whether every (unknown) consumer has to give a mandate, or if compensation payments need to be distributed to the individual consumers. Rather than pure compensation concerns, some deterrence reasoning might be more appropriate. As an alternative to enhancing collective redress, one could also work on the interplay between public and private enforcements and fine-tune what antitrust damage the public fine actually 'represents'.

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