Comparative analysis between the English, Dutch and French approaches to passing-on in competition cases

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Abstract: Several legal topics regarding cartel damages litigation have drawn special attention over the last few years, including the passing-on defence. 'Passing-on' in competition cases is where overcharges caused by a cartel, which affect the customers of the cartelists (direct purchasers), are passed-on by these purchasers to buyers further down the supply chain (indirect purchasers). Cartel members regularly invoke this defence as a (partial) shield against a claim for damages. The EU Damages Directive contains two important presumptions in connection to passed-on damages. This article undertakes a comparative analysis of how the courts in the Netherlands, France and England and Wales apply these presumptions in practice in their case law.

Keywords: cartel, cartel damages, passing-on defence, overcharges, burden of proof, comparative law, direct purchasers, indirect purchasers

1. Introduction

Cartel damages litigation is an increasingly hot topic in Europe. Under normal market conditions, enterprises set their own market prices for their products. Under cartelized conditions, however, there is some form of concerted practice (either explicit or tacit) which could lead to an agreement to fix prices. If competitors agree to fix their prices, this will normally lead to higher prices than under normal circumstances. Competition law prohibits competitors from engaging in this kind of behaviour, setting high penalties (potentially in the billions of Euros for world-wide players) when infringements of EU competition law are identified and punished. However, these penalties, severe as they might appear, nevertheless pale into insignificance compared to civil damages claims. The difference between the normal market price and the artificial, cartelized price is the so-called cartel damage. For example, in the Trucks case, six truck manufacturers were caught red handed by the European Commission in a cartel that lasted (at least) from 1997 to 2011.1 They were fined €3.8 billion. However, estimates are that the total of cartel damages amount to a staggering figure of €200 billion. These stakes are high enough to ensure massive court battles. The defendants have no other option than to put forward any possible or impossible argument to prevent the court from making a decision that might cause their bankruptcy. For the claimants, on the other side, going to court is inevitable, since their losses were so high.

Therefore, when stakes are as high as they are, there is no other option than to be very thorough in all the arguments and defences that are brought to the court, let alone to be meticulous in the first place as to where to litigate.

In this article, we discuss the passing-on defence and provide a comparative analysis between the Netherlands, France and England and Wales. The Netherlands and England and Wales (along with Germany) are considered mature jurisdictions in cartel damages litigation, while France, along with, for instance, Spain and Portugal, are becoming more popular jurisdictions in which to bring damages claims.

2. The passing-on defence

In competition cases, ‘passing-on’ occurs when overcharges caused by a cartel, which affect the customers of the cartelists (direct purchasers), are passed-on by

these purchasers to buyers further down the supply chain (indirect purchasers). The pass-on argument may be invoked as a defence by a cartel member as a (partial) shield against a claim for damages and as a sword by an indirect purchaser to support the argument that it has suffered damage and/or to evidence cartel collusion.

The passing-on defence is valid under both EU and national laws.

The EU Damages Directive\(^2\) (and laws implementing it in the Member States) has set two important presumptions reversing the burden of proof.

First, as far as direct purchasers are concerned, it is presumed that they have not passed the overcharge on to their own customers. Thus, it is up to the defendant in the antitrust action for damages to prove that the overcharge has indeed been passed-on and that its direct purchasers have not suffered any (or less) damage.\(^3\) Secondly, concerning indirect purchasers, it is presumed that their supplier has passed-on the overcharge. Therefore, the burden of proof is again placed on the defendant in the action for antitrust damages.\(^4\)

These contradictory presumptions could potentially apply to all claims. The presumptions are designed to help the (potential) claimants in a case. Everyone familiar with civil litigation knows that a sentiment of wrongdoing is not the same as proving you were wronged. Therefore, it is extremely important to have the burden of proof shifted to the wrongdoers. In that regard, national courts have established a common understanding for the enforcement of the passing-on defence: it is for the defendant to prove passing-on and the extent thereof as well as the absence of volume effects. This outcome is consistent with the *acquis communautaire* on the burden of proving pass-on (i.e. in line with the EU principle of effectiveness) that has been codified in Article 13 of the Damages Directive. So how do courts apply these presumptions in practice in their case law? We believe that this would lead to the conclusion that the odds should favour the claimants. However, do courts indeed apply this presumption? This article considers these questions in England and Wales, the Netherlands and France.

3. The approach in England and Wales

In two recent landmark cases the United Kingdom Supreme Court and the English High Court rendered decisions on the evidential standard that is to be applied in connection to the passing-on defence. The courts emphasized that claimants should be neither under-compensated nor over-compensated and therefore the evidential burden in relation to mitigation of loss on the defendants (i.e. the parties found to have infringed competition law) should not be ‘unreasonably high’. This is an approach in which no apparent choice seems to have been made in favour of either the claimants or the defendants.

In June 2020, the Supreme Court overturned a decision of the Court of Appeal in which it had decided that it required defendants to prove the (virtually) exact amount of loss mitigated by the claimants (through passing-on some or all of the overcharge) in order to reduce the claimed damages.\(^5\) The Supreme Court decided that the law does not require such a high evidential standard and that the Court of Appeal had erred insofar that it required ‘unreasonable precision’ from the defendants in the proof of the amount of loss that the claimants had passed-on to end customers. This decision was rendered in the context of damages lawsuits brought by several supermarkets against Mastercard and Visa for the use of certain payment card schemes, in particular the multilateral interchange fees (MIFs)\(^6\) applicable in the EEA, which the European Commission had found to be anti-competitive in 2007.\(^7\)

The Supreme Court identified the following key considerations regarding the evidential burden to be met by defendants:

- Claimants should not be under-compensated but nor should they be over-compensated for losses suffered from a breach of competition law.
- In the UK, pass-on is an element in the quantification of damages that is required by the compensatory principle and required to prevent double recovery through claims in respect of the same overcharge by a direct purchaser and by subsequent purchasers.

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5. Sainsbury’s Supermarkets Ltd v Visa Europe Services LLC and others, Sainsbury’s Supermarkets Ltd v Mastercard Incorporated and others [2020] UKSC 24. In August 2021 parties announced that they have settled their dispute.

6. MIFs are charged by a cardholder’s bank (the ‘issuer’) to a merchant’s bank (the ‘acquirer’) for each transaction made to the merchant with a payment card. In practice, the acquiring banks passed these fees on to merchants by charging a merchant services charge (MSC), for which they were seeking damages. The defendants, however, argued that the claimant retailers had passed-on the overcharges by the MIFs/MSCs to their end consumers by raising retail prices.

in a chain. Against this background, the Supreme Court considered that ‘justice is not achieved if a claimant receives less or more than its actual loss’. 8

- A balance is required between the compensatory principle and the principle that disputes should be dealt with ‘at a proportionate cost’. In that light ‘the court and the parties may have to forego precision, even where it is possible, if the cost of achieving that precision is disproportionate, and rely on estimates’. 9
- The Supreme Court considered that it saw no reason why, in assessing compensatory damages, there should be a requirement of greater precision in the quantification of the amount of an overcharge which has been passed-on to end consumers because there is a legal burden on defendants in relation to mitigation of loss. 10

According to the Supreme Court, this approach does not offend against the principle of effectiveness of EU law:

As we have said, the relevant requirement of EU law is the principle of effectiveness. The assessment of damages based on the compensatory principle does not offend the principle of effectiveness provided that the court does not require unreasonable precision from the claimant. On the contrary, the Damages Directive is based on the compensatory principle. 11

As the regime is based in the compensatory principle and envisages claims by direct and indirect purchasers in a chain of supply it is logical that the power to estimate the effects of passing-on applies equally when pass-on is used as a sword by a claimant or as a shield by a defendant. 12

On 25 February 2021, the English High Court handed down a decision in which it followed the approach to pass-on taken by the Supreme Court in Sainsbury’s. 13

The High Court referred to several key considerations laid down by the Supreme Court in its decision, including the compensatory principle and the fact that claimants should not be over-compensated for their losses as much as they should not be under-compensated. In addition, the judgment implies that the pass-on approach can be applied in complex and atypical cases of passing on of overcharges, as the underlying case, which would pose a difficult and costly evidential burden on both parties.

This case arose from the ‘Essex Express’ and ‘Three Way Banana Split’ foreign exchange cartels 14 and concerned a damages claim filed by Allianz Global Investors and other claimants against several banking groups for their participation in these cartels. The case involves investment funds who seek to generate a return for their investors and in so doing make use of the foreign exchange services provided by banks. Pass-on in this case is said to have occurred when an investor redeemed or withdrew its investment from the fund. The High Court made clear that even though this is not a typical pass-on case involving the sale and purchase of goods in a supply chain, the compensatory principle equally applies and that the defendants should not be subject to double recovery. 15

The claimants argued that the defendants’ pleaded pass-on defences should have been struck out because they had no real prospect of success, mainly because the investors would have no cause of action against the banks. They also argued that it would have a great impact on the future scope of claims, in terms of disclosure of documents and provision of evidence. The High Court did not agree that the passing-on defences had no real prospect of success. The High Court held that the defences were appropriate and that it therefore considered it necessary to ‘investigate precisely how the alleged wrongdoing of the Defendants impacted upon the investment fund (...) and how that affected the sum payable to the investor’, by disclosure and by factual and perhaps expert evidence at trial. 16

The passing-on defences could therefore be advanced to trial.

In Royal Mail Group v DAF Trucks, the Competition Appeal Tribunal (in refusing the defendant permission to amend its defence to add a new passing-on defence) held that a defendant cannot to make generalized assertions of pass-on that are based in economic or business theory: it must plead a plausible (and at trial show) a direct causative link between the overcharge and the asserted passing-on of the overcharge or the cost mitigation action undertaken by the claimant (such as reducing other input costs). 17 The Tribunal also doubted whether, when an overcharge is covert (as will be the case in a cartel) and represents a ‘tiny’ proportion of the customer’s total input costs, the customer would make a distinct, specific decision on how to address that overcharge (e.g. by negotiating cost reductions from other suppliers), as opposed to taking business decisions based on the totality of its costs. 18

Our preliminary conclusion is that the English courts do not favour one party over the other. It appears that

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8 Sainsbury’s v Visa and Mastercard (fn 5), para 217.
9 Sainsbury’s v Visa and Mastercard (fn 5), para 217.
10 Sainsbury’s v Visa and Mastercard (fn 5), para 219.
11 Sainsbury’s v Visa and Mastercard (fn 5), para 220.
12 Sainsbury’s v Visa and Mastercard (fn 5), para 224.
14 Case AT.40135 FOREX (16 May 2019).
15 Allianz Global Investors v Barclays Bank (fn 13), para 12.
16 Allianz Global Investors v Barclays Bank (fn 13), para 46.
17 [2021] CAT 10, paras 35–43.
18 Royal Mail Group v DAF Trucks (fn 17), paras 44–47.
the courts consider that over-compensation is just as bad as under-compensation. In addition, in this argument there seems to be a deviation from the choice for the principle of effectiveness. Even though the defendant bears the burden of proving a passing-on defence, where a passing-on defence is properly made by a defendant, the claimant will bear a heavy obligation to disclose all relevant information in its possession relating to how it addressed the cartel overcharge.19

4. The approach in the Netherlands

In Dutch case law, the threshold for an effective passing-on defence has been set relatively high, contrary to the standard that has been set in the UK. The principle of effectiveness and the scope of the Antitrust Damages Directive have served as normative and guiding principles for the Dutch courts in this regard. The landmark judgment stems from a follow-on damages claim by the electricity transmission operator TenneT against the electrical equipment manufacturer ABB.

On 8 July 2016, the Supreme Court20 ruled that ABB was liable for the losses suffered by TenneT as a result of the cartel on the market for gas-insulated switchgear.21

Amongst other matters, the Dutch Supreme Court considered in this case that even without retroactive effect for material law, the Antitrust Damages Directive nevertheless had to be taken into account in order to ensure both the effect utile of EU law and the principle of equality.22 In other words, it was clear that although the Antitrust Damages Directive was not applicable in this case, the Supreme Court did consider it. With reference to Article 12(3) of the Damages Directive, the Supreme Court decided that the evidential burden in connection to passing-on is, in principle, on the defendant cartel member. Furthermore, the Supreme Court confirmed that the court is authorized to estimate damages if it is not possible to determine the amount of damages precisely. So with reference to the Antitrust Damages Directive the Supreme Court clearly decided in favour of the claimants.

The District Court of Gelderland delivered judgment on 29 March 2017 and ABB was ordered to pay €23 million in compensation to TenneT for the losses caused to it by the cartel.23 ABB argued against the extent of TenneT’s losses by invoking the passing-on defence. The District Court did not agree with this and found that in considering the question of whether this defence is reasonable, the principle of equality, the principle of effectiveness and the scope of the Antitrust Damages Directive serve as normative and guiding principles.24 The Court considered that ‘the object of the Damages Directive is not that the infringer should be given a hook to get out his liability of damages. The intention is that the compensation to be paid by the infringer should accrue to the direct and indirect customers in the chain to whom the additional costs were charged’.25 The Court also ruled that the chance of end consumers bringing their own damages actions (and thus the risk of double compensation) was negligible. Once again and even more clearly than in the judgment of the Supreme Court the District Court found in favour of the claimants, especially because they took into account the possibility of actual passing-on, but that it was unlikely that further down the line any consumer would collect these scattered damages.

The so-called ‘efficiency defence’ was given particular attention to in this context. Nowadays, almost every claimant advances this ‘defence’. Parties claim the harm suffered and alternatively claim compensation by invoking the efficiency defence. Briefly stated, the efficiency defence results in the court nevertheless awarding compensation to the claimant even if, strictly speaking, the claimant is unable to prove the harm suffered by it. This is of course a slippery slope from the point of view of legal certainty. However, it does seem to follow the European starting position, which is that the process should not be made too difficult for claimants and which forms the basis for the Antitrust Damages Directive. It is a means of ensuring that private litigation is not made impossible from the very start.

5. The approach in France

In France, in cases in which pre-Damages Directive rules apply, the question of the burden of proof regarding the passing-on defence has not yet been entirely settled.

According to the Circular of 23 March 2017, the new Article L481-4 of the French Commercial Code (including the burden of proving passing-on) does not apply to damages claims resulting from an infringement which took place before its entry into force on 11 March 2017.

Prior to the adoption on 9 March 2017 of the rules implementing the Antitrust Damages Directive in

19 Sainsbury’s v Mastercard (fn 5), para 216; Royal Mail v DAF Trucks (fn 18), para 3. This reflects the information asymmetry between the claimant and the defendant about the claimant’s business operations: Royal Mail v DAF Trucks, paras 3 and 37.
21 Case AT.38899 Gas Insulated Switchgear (24 January 2007).
22 TenneT v ABB (fn 20), paras 4.3.1 and 4.3.4.
24 TenneT v ABB (fn 23), para 4.17.
25 TenneT v ABB (fn 23), para 4.18.
France, there was no specific legal provision on the issue of pass-on of overcharge in cartel damages cases. The general civil law provisions governed the issue, namely Article 1315 of Old French Civil Code (now Article 1353 of the New French Civil Code, with the exact same wording).

In accordance with a ruling of the Cour de Cassation, several French civil and commercial courts of first instance have handed down judgments putting the burden on the claimant to prove the absence of pass-on. While in two cases the Paris Court of Appeal considered that it was for the defendant to prove the pass-on after the claimant had shown some indicia that there was no pass-on, it recently quashed a ruling of the first instance court where it found that the claimant, which had been granted damages, had not provided any evidence that there had not been any pass-on. Most recently, however, the Paris Administrative Court of Appeal and the Cour de Cassation have held that, in accordance with EU law and principles, the burden of proof regarding the pass-on of the illegal overcharge lies with the defendant. Besides the economic aspects (additional damages in form of loss of profit and the difficult proof of causality), there are therefore strong legal arguments to counter any potential pass-on defence. As the case law stands, it therefore seems that claimants should be recommended to bring as much evidence as possible about the absence of pass-on, allowing the French courts to then shift the burden of proof on the defendant to establish pass-on. Therefore, overall it appears that the French courts are slowly marching away from Albion to get closer to the Dutch approach regarding cases in which the pre-Antitrust Damages Directive rules apply.

On the other hand, with regard to cases in which the Antitrust Damages Directive rules apply, there is no doubt that claimants will fully benefit from the presumptions set by the Antitrust Damages Directive.

6. Conclusion

Claimants who are facing a pass-on defence are currently best placed in a Dutch court, compared to the French and English courts. In the Dutch approach, the principle of the effet utile of EU law is prominent, and can lead to the award of compensation for claimants, even when they are unable to prove the harm suffered by them. Although the French courts are slowly following this approach, they are not quite there yet. The English courts, on the other hand, may be more favourable for defendants, because they will find the closest to a level playing field here when it comes to pass-on: whilst, as in France and the Netherlands, the defendant bears the burden of proving the existence of pass-on (or other cost savings made by the claimant to counteract an overcharge) and must properly plead its defence, the English courts have not (yet) shown a clear preference to favour one party over the other, for example by permitting the claimant to use presumptions of loss and not to have to quantify its loss.

27 Paris Commercial Court, Provera (26 March 2018); Paris Commercial Court, Cora (20 February 2020); and Rennes High First Instance Court, FRSEA (7 October 2019).
28 Paris Court of Appeal, JCB (20 September 2017); Paris Court of Appeal, Doux (6 February 2019).
29 Paris Court of Appeal, Johnson & Johnson (14 April 2021).
30 Paris Administrative Court of Appeal, SNCF Mobilités (13 June 2019).
31 Cour de Cassation, Collectes valorisation énergie déchets (12 February 2020). This case does not relate to antitrust damages and may only be referred to by analogy.