

# Injured parties, indirect purchasers and causation in compensatory damages for infringements of competition law

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*Both the passing-on presumption and the standing of indirect purchasers to bring an action for damages against cartels, for the passing-on of overcharges, routinely crop up when addressing Directive 2014/104/EU on Antitrust Damages Actions. But, are there no other causal limitations? The recent transposition into Spanish law of the aforementioned directive also seems to posit immediacy between the infringement and the compensable harm.*

1. **EU and Spanish legislation.** Directive 2014/104/EU (“**the Directive**”) and the Spanish Competition Act<sup>1</sup> (“**the Act**”), as amended by the transposition of Royal Decree-Act 9/2017, partially govern actions for damages for infringements of arts. 101 and 102 of the Treaty on the Functioning of the European Union (“**the TFEU**”) and arts. 1 and 2 of the Act. Among other varied matters pertaining to the law of damages that are not dealt with by the Directive and the Act, our main concern is the topic concerning the causal relationship between behaviour and harm, causation. Essentially, we address here the harm caused to third parties by the existence of cartel prices.
2. **Causal limitations.** When we refer to a causation requirement, we use this locution in a broad sense, expressive of all limitations (except for the requirement of fault, also absent of the Act) that serve to narrowly delimit the circle of persons having standing to claim and the nature

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<sup>1</sup> Ley 15/2007, de 3 de julio, de Defensa de la Competencia.

and quantum of damages. Strictly speaking, the restrictive delimitation mechanisms can be condensed as follows:

- (i) Firstly, not all persons who “suffer” harm caused by a competition law infringement have had a ‘subjective right’ violated (in terms of the practice of the Court of Justice of the European Union [**the CJEU**] and Recital 2 of the Directive). Therefore, we should introduce a limitation to the apparent unconditionality of the expressions used by arts. 71(1) and 72(1) of the Act. An example: purchaser A passes on to purchaser B the cartel’s overcharge and purchaser B integrates the purchase into a business process consisting in the performance of work and services for third parties where the invoice has the overcharge passed on. Another example: is the subjective right under competition law violated by a (simple) “loss of opportunity” to earn profit<sup>2</sup> or a loss of an opportunity to purchase (because of the cartel’s overcharge) or because a non-contracting third party otherwise “suffers” the consequences of the cartel (such as a reduction of available supply or a loss of job)? “Harmed” persons must be in the circle of persons and interests that the substantive rule (Act, Directive) tries to protect. Following on with the examples, it does not seem that the non-cartel competitor that suffered negative financial repercussions belongs to this “circle of protection”, precisely because it is neither inside the cartel nor the cartel’s overcharge has been passed on to it (note the wording of art. 78(1) III: “the right to full compensation shall also entail the right of the injured party to claim and obtain compensation for loss of earnings *as a result of a full or partial pass-on of the overcharge*”).
- (ii) Secondly, “materially caused” harm must be included in any of the possible topics of what is considered, as an additional requirement beyond causality, the “imputation of harm (caused)” or, if you will, causation in law: the theory of adequate cause, the test of foreseeability, the but-for test, the test of direct consequence, the remoteness rule<sup>3</sup>, the duty to mitigate<sup>4</sup>, the *in pari delicto* rule<sup>5</sup>, the requirement of a sufficiently serious breach<sup>6</sup>, etc. Without going any further, despite all the legal blessings to the standing (*legitimitas ad processum* and *ad causam*) of the “indirect purchaser” in the Directive and the Act, properly speaking it is not possible to strictly impute to the infringer the harm

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<sup>2</sup> Interestingly, Recital 13 of the Directive mentions, out of context, loss of opportunity.

<sup>3</sup> Take as example the Judgment of the ECJ of 4 October 1979 in Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79, P. Dumortier frères SA and others v Council of the European Communities, on non-liability for insolvency resulting from the non-payment of refunds due.

<sup>4</sup> For instance the Judgment of the ECJ of 6 July 1995 in Case T-572/93, Odigitria AAE v Council of the European Union and Commission of the European Communities, on the possibility of having mitigated, passing on the overcharge without such pass-on entailing a loss of turnover given the market structure.

<sup>5</sup> Judgment of the ECJ of 20 September 2001 in Case C-453/99, *Courage*.

<sup>6</sup> Judgment of the ECJ of 5 March 1996 in Joined Cases C-46/93 and C-48/93, *Brasserie*.

suffered by reason of the passing-on of the overcharge at this second level of the chain, because this passing-on derives from a free business decision of the first level buyer. And if this is so with regard to the overcharge (in spite of art. 78(1) of the Act), it is more so with respect to a loss of earnings (art. 78(1) III) suffered as a result of the passing-on (or for some other reason), such as a reduction in the turnover of the indirect purchaser.

3. **Legal immediacy between the infringement and the compensable harm.** *The Act contains no restriction or any additional requirement relating to the rule of causation between the infringing behaviour and the harm.* Compared with the problem of proof required for the “quantification of harm”, which is pre-eminent in the Act (art. 76), as well as the “passing-on of the overcharge” (art. 79), proof of the causal relationship, to the extent that it is not subsumed into the former, is not even mentioned in the Act. Because according to the same “any person who has suffered harm occasioned by an infringement” of competition law (art. 72(1), beginning) has the “right to claim and to obtain from the infringer full compensation”. Art. 71(1) (“infringers [...] shall be liable for the harm caused”) does not contain a ‘causal’ delimitation of the compensable harm, because “caused” is here merely a description of the consequence of the infringement (as “occasioned” in art. 72(1)). When the standing of purchasers is enunciated in the different sections of the Act (arts. 73(2), 73(4)(a), 73(5), 78, 79, 80), such is always without reference to having to additionally prove that there is a sufficient causal relationship between the infringement and the harm. The Act does not contain any presumption of a causal relationship, because art. 79(2) only provides a presumption that the overcharge has been passed on to the next level of the chain, but not that the infringer is causally imputable for such passing-on. For this reason, although an administrative finding of infringement is considered “irrefutable” as to the existence of an infringement, nothing else is irrefutable (art. 75(1)). Art. 76(3) contains a presumption that infringements of competition law “cause” harm, but it does not delimit what harm is caused or what persons who suffer the harm can impute it to the infringer.

It could be argued that this legal vacuum is not such, but that EU competition law has waived the additional requirement of a causal relationship between the infringement and the harm. And in fact, previous experience of the CJEU in *Danfoss*<sup>7</sup>, *Courage*<sup>8</sup>, *Manfredi*<sup>9</sup> and *Kone*<sup>10</sup>, among other cases, illustrates a method of constructing the compensation argument as if it suffices (1) to recall that arts. 101 and 102 of the Treaty have a direct effect and create inter-private subjective rights<sup>11</sup>, (2) insist that the principle of effectiveness of EU law is contrary

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<sup>7</sup> C-94/10, 2011.

<sup>8</sup> C-453/99, 2001.

<sup>9</sup> C-295/04 to 298/04, 2006.

<sup>10</sup> C-557/12, 2014.

<sup>11</sup> Recital 3 of the Directive: “Articles 101 and 102 TFEU produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. National

to any national barrier or prohibition that renders practically impossible the exercise of the attributed right (art. 4 of the Directive). It is true that the legal drafting is not polished - or ambiguity is deliberately employed - and sometimes it seems that the barrier to overcome would be a potential national provision denying *standing to sue* to some kind of “injured party” (e.g., *indirect purchasers cannot claim damages*) while other times it seems to suggest that the very same requirement of causation means an unacceptable barrier (e.g., *the harm to indirect purchasers cannot be causally imputed to the anticompetitive behaviour in origin*)<sup>12</sup>. In the former case, and within the terms of art. 47(1) of the Charter of Fundamental Rights of the EU, absence of an “effective remedy” would occur *in limine litis*, while in the latter case such would be caused by the judgment on the merits, as if one could speak of a violation of the right to an “effective remedy” by a judgment on the merits that is marred by procedural defects.

4. **Causation is constitutive of damages.** But Recital 11 of the Directive is eloquent in that the causal relationship is a constituent element of compensation for harm resulting from infringements of competition law, and that its construction and scope are reserved to the laws of the Member States. Of course, with the inevitable tag line that such (causation or other) doctrines “should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the TFEU”. And the ambiguity returns: denying that there is a causal relationship, for example, with the harm of indirect purchasers, simply means *denying that there is a causal relationship* or does it involve a “restriction” that makes it impossible to exercise the right? The logical answer would be the former, because the lack of a causal relationship implies that “there is no right” that can be exercised and, eventually, hampered or hindered.

The resulting situation generates a considerable constructive dilemma. The incorporation of the Directive into the Act has not been intended, at least expressly, to be construed as an exceptional remedy within the ambit of the Spanish law of tort. And yet, the compensatory consequences are formulated in such an abstract fashion that it seems that there are no restrictions on the possibility of claiming and obtaining compensation.

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courts thus have an equally essential part to play in applying the competition rules (private enforcement). When ruling on disputes between private individuals, they protect subjective rights under Union law, for example by awarding damages to the victims of infringements. The full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions”.

<sup>12</sup> Recital 4 of the Directive: “The right in Union law to compensation for harm resulting from infringements of Union and national competition law requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in the second subparagraph of Article 19(1) of the Treaty on European Union (TEU) and in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union. Member States should ensure effective legal protection in the fields covered by Union law”.

5. **The singularity of the indirect purchaser to whom the overcharge is passed on.** In my opinion, the only singularity of the new rules refers to the “indirect purchaser” (or “indirect provider”)<sup>13</sup> of the direct purchaser of a cartel member<sup>14</sup>, clearly singled out in the Act in respect of “any [other] person who has suffered harm”<sup>15</sup> (art. 72(1)). And, moreover, it is a singularity limited to the passing-on of the overcharge; even more, contrary to what certain EU case law might have suggested in cases concerning the passing-on of charges or costs improperly levied by the State to a private individual (*Danfoss* case), the action of the indirect purchaser does not depend on the impossibility or difficulty for this purchaser to recover from his own seller the overcharge passed on, as neither by way of damages nor by way of restitution could such recovery be obtained. That is, the action lies if there is passing-on, and that is enough. An alternative interpretation could not explain the restriction contained in paras. I and II of art. 78(1) of the Act. In fact, it would not make sense if “any person” has the right to obtain “full compensation” for actual loss (apart from loss of earnings) (art. 72(2) of the Act) and that, however, the right to compensation “enunciated in this title will only refer to an overcharge” and “will not be able to exceed the overcharge harm suffered at that level” (article 78(1)). Therefore, the singularity or causal exception only affects the passing-on of the actual loss in the form of an overcharge.

The explanation can only be found in the existence of an implicit assumption in the Act and Directive, namely: *there are no causal limitations regarding the first or second level purchaser to whom the overcharge has been passed on and only to the extent of this overcharge*<sup>16</sup>. Otherwise and for the other individuals concerned, civil law governs, even for specific loss of earnings due to the passing-on of an overcharge (in spite of art. 78(1) III), which is still subject to ordinary causal limitations.

6. **Passing on as a defence and as standing to sue.** It is noteworthy that there is no necessary connection between the admission of the passing-on defence raised by the infringer and the automatic standing of the second level purchaser to whom the overcharge is passed on. The passing-on defence in its defensive aspect (raised by the offender: purchaser A has not suffered harm because it was passed on to B, art. 78(3)) could have been accepted in the Directive and in

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<sup>13</sup> Even of another infringer, given the joint and several rule of art. 73, but for exceptions (“their own direct and indirect purchasers”, articles 73(2) and 73(5)).

<sup>14</sup> In *Kone* the CJEU held that art. 101 TFEU precluded legislation that “categorically excludes” the indirect purchaser of a provider who is not a member of the cartel but who took advantage of the increased prices created by the cartel. But that does not mean that such cannot be excluded on the merits of the case because of a lack of causal relationship, as I believe is the case.

<sup>15</sup> For example, whosoever did not purchase, precisely because of the overcharge. Or whosoever did not sell (more) to the purchaser whose demand from third parties was reduced due the overcharge of the cartel.

<sup>16</sup> Recital 41 of the Directive: “Consumers or undertakings to whom actual loss has thus been passed on have suffered harm caused by an infringement of Union or national competition law”.

the Act, without extending it to the standing to sue aspect, due to a lack of conditions of causal sufficiency in the indirect purchaser to whom the overcharge was passed on. The consequence would be, it is said then, that the infringer would not be liable for the harm passed on, thus eliminating the exemplary role of the law of damages for competition law infringements (art. 80(1) of the Act). However, this reproach would presuppose the issue, since in a hypothetical horizon such as that described, the infringer would not be liable *as legally such harm could not be imputed to the same*. Note that under a strictly causal view, art. 78(3) does not hold either: it is true, the first purchaser would say, that I passed on all the overcharge at level B, but it is an independent action that is not “caused” by the cartel but by a business decision of mine.

7. Finally, note that, on the basis of sound logic, the overcharge, which fair and square could never be a “contractual” harm (contractual harm is only that which derives from a breach of contract), even if the Directive and the Act may wish otherwise, could only be recovered by the direct purchaser, or by the person affected by the behaviour of art. 2(2)(a) or (d) of the Act, as *recovery of consideration given without cause*<sup>17</sup>, while the indirect purchaser or supplier could never recover from the (non-participant in the cartel) counterparty through an action for recovery (the passing-on of the overcharge has a cause) nor from the infringer through an action in restitution (the infringer has not been enriched in any way at the expense of the indirect purchaser). In creating, the Directive and the Act, a non-technical but legislative concept of ‘harm to a subjective right to competition’ (which in my opinion only exists as a reflection of competition law itself), they have avoided the problems and vacuums that might have been encountered if they had had resorted to the law of restitution or the law of contracts, rather than to the law of damages.

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<sup>17</sup> Neither the Act nor the Directive state, however, that, besides the cartel agreement, the cartel member’s sales contract at the first link in the distribution chain is void.