



# EU Damages Directive - the passing on defence

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Where a defendant can show that a direct purchaser passed on any price increase it experienced then, under the Directive, the damages that the direct purchaser receives should be adjusted to take this into account.

### Practical problems

On one level this makes perfect sense. However, there is the question of whether the main parties to the proceedings, the ones with the best knowledge of the facts - the defendant and the direct purchaser - have any incentive to do this. If the defendant establishes 'passing on' by the direct purchaser, it is simply establishing loss at the level of the indirect purchasers of the same amount (and opening

itself up to additional claims for loss of profits). Similarly, the direct purchaser's claim will be reduced by any 'passing on' argument. Therefore, the interests of the defendant and the direct purchasers may be aligned on this to the detriment of any indirect purchasers.

The Directive goes some way to getting round this issue by putting in place an assumption that an indirect purchaser has experienced a 'passing on' where the direct purchaser has experienced an overcharge. However, this is rebuttable by the defendant where it can demonstrate that the overcharge was not, or was not entirely, passed on to the indirect purchaser. Experience suggests that it will be a rare case where an overcharge is entirely passed on.

### Conclusion

Therefore, far from these provisions opening up damages claims for indirect purchasers there is a risk that the interests of defendants and direct purchasers will align to keep them out of the picture, thereby undermining one of the policy aims of the Directive. Indirect purchasers will have to ensure that they take a robust approach to ensure that this does not happen and hope that the courts are sympathetic to their position.

### Background

On 27 December 2014 the EU's competition law Damages Directive (Directive 2014/104/EU) entered into force. The Directive attempts to resolve a number of long-running debates that have been going on in this area with the aim of making actions for damages in competition law cases more effective. One of these involves the so-called '**passing on defence**'.

A number of cases (Emerald, Newson and Devenish) have indicated that a 'passing on' defence is available in England and Wales - if for no other reason than basic damages principles of causation and mitigation. In simple terms, defendants can use the passing-on defence where they can show that the party claiming damages passed on the overcharge resulting from the infringement.

### Directive protections

The Directive is clear that those harmed by anti-competitive behaviour (including direct and indirect purchasers) should have a right to full compensation for any losses, including any loss of profits. It also, helpfully, makes clear that this is a matter of estimation for national courts and can never be a precise science.

## Contact

Burges Salmon's Competition team is extremely highly regarded. For example, we successfully represented Cardiff Bus in one of the few competition damages actions to go to trial to date and the first to really consider issues of causation and loss.

For more information on competition damages matters please contact:



**Laura Claydon**

Partner

+44 (0) 117 939 2273

[laura.claydon@burges-salmon.com](mailto:laura.claydon@burges-salmon.com)



**Ruth Jefferson**

Associate

+44 (0) 117 307 6053

[ruth.jefferson@burges-salmon.com](mailto:ruth.jefferson@burges-salmon.com)



**Noel Beale**

Director, Competition – Regulation

+44 (0) 117 307 6056

[noel.beale@burges-salmon.com](mailto:noel.beale@burges-salmon.com)



**Brian Wong**

Senior Associate

+44 (0) 117 902 7759

[brian.wong@burges-salmon.com](mailto:brian.wong@burges-salmon.com)

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Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400  
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

[www.burges-salmon.com](http://www.burges-salmon.com)

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