12

Deadweight Loss and Collective Redress in Competition Law

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> It may not be necessary for us all to become comparative lawyers and to research unfamiliar disciplines, but some humility may help in recognising that answers can lie outside's one's experience, and that what is needed here is opportunities for free exchange of ideas, as long as someone is going to try to fit all the pieces together.
>
> (C Hodges, 'Collective Redress in Europe: The New Model' (2000))

I. Introduction

This chapter combines two topics that lie at the heart of Chris's research topics: consumer compensation and collective redress. It furthermore ties into his time as a solicitor specialising in, amongst other things, competition law. In the light of Chris's continuously expressed dislike of the deterrence theory, this contribution argues from the compensation perspective, and remarks on deterrence are withheld until the conclusion. Competition law serves to prohibit and/or, if too late, compensate for harm resulting from behaviour that can be linked back to the availability of undesirable market power by a cartel or monopoly (for the remainder, this contribution will focus on the case example of a cartel). Market power leads to two effects: one distributional and the other allocative, if you wish a price and a quantity effect.[1] In other words, a cartel sells fewer units at higher prices than would be available in a competitive market. Consumers therefore first of all pay too much for the units they (still) purchase. Furthermore, a certain number of consumers who would have bought the product at the price but for the cartel no longer acquire the product. A so-called 'deadweight loss' (DWL) emerges. Traditionally, legal scholars are more concerned about redistribution than about the DWL, and many contributions focus on how consumers can obtain compensation for the cartel overcharge that they immediately suffered or that previous buyer levels suffered and passed on to them (for the remainder of the contribution, let us assume that the supply chain is

[1] M Motta, *Competition Policy – Theory and Practice* (Cambridge University Press, 2004) 40.

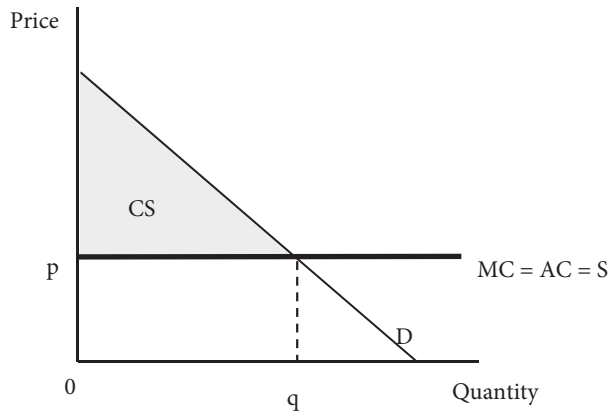
short and that the cartel sells directly to the final consumers).[2] Such compensation claims do not work perfectly yet. However, from a dogmatic legal point of view, approaching a quantification exercise for harm suffered due to a cartel overcharge is quite straightforward. This is very different when it comes to the second damage component that lies in the focus of this contribution: the DWL. For economists the major concern is the DWL, that is, the units that were not purchased due to the competition law infringement. Grasping this concept from a dogmatic legal point of view is far more challenging than ensuring compensation for payment of a price mark-up resulting from cartel activity. Competition law enforcement, if considerate of economic insights, needs to ensure that the tortfeasors also face liability for causing the DWL. Otherwise, full compensation as the overarching goal of European competition law enforcement is not achieved. This contribution will delve into the potential that collective redress has for this matter.

II. Claiming the Deadweight Loss by Way of Collective Redress

A. The Economic Importance of the Deadweight Loss

To explain the DWL, let us start by looking at the welfare situation of competitive markets. The simplified graph in Figure 12.1 displays the static outcome in a situation of perfect competition.

Figure 12.1 A market with perfect competition

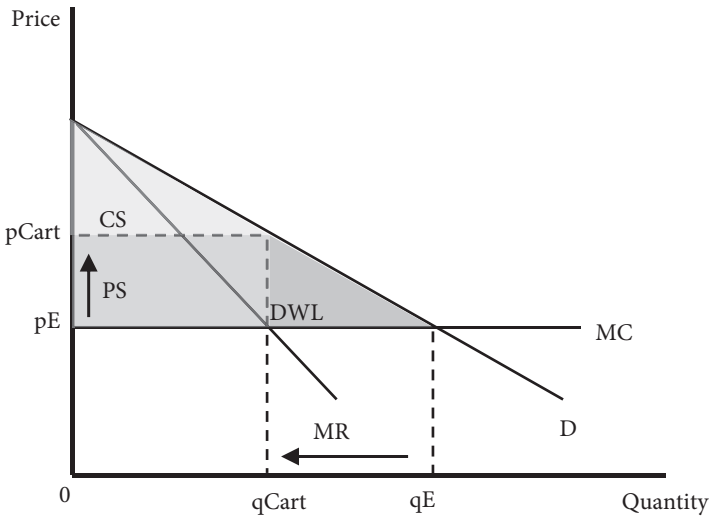


[2] R Van den Bergh, 'Private Enforcement of European Competition Law and the Persisting Collective Action Problem' (2013) 20(1) *Municipal Journal* 12; F Weber, 'A chain reaction – or the necessity of collective redress mechanisms for consumers in competition cases' (2018) 25(2) *Municipal Journal* 208; see, for an estimation, U Laitenberger and F Smuda, 'Estimating consumer damages in cartel cases' (2015) 11(4) *Journal of Competition Law & Economics* 955; G Gaudin and F Weber, 'Antitrust Damages, Consumer Harm, and Consumer Collective Redress' (2021) 12(5) *Journal of European Competition Law & Practice* 370. The latter article already touches upon the matter of the DWL as an additional argument to ensure compensation for the price effect. This contribution goes into more depth on the potential of collective redress to enable a remedy for the DWL as such.

In Figure 12.1,[3] each consumer is modelled as having a fixed reservation price for a certain product, that is, the highest price he or she is willing to pay.[4] This determines the shape of the demand curve (D). Those consumers whose reservation price equals the price at which a product is available in a given market are in principle indifferent as between buying and not buying. All the consumers whose reservation price is below that price do not buy. And, finally, all those consumers whose reservation price is above the price that emerges in a market are gaining in utility. They would have paid even more than the price at hand. Therefore, the so-called consumer surplus (CS) emerges. It is calculated in the following way, namely, by analysing the difference between the consumer's reservation price for a product and the actual price he or she paid. Now, what happens to overall welfare when a cartel is operating in a market?

For the sake of simplicity let us assume a market situation where a cartel sells a cartelised product directly to final consumers.[5] Hence, in this relationship there are only two layers (see Figure 12.2).

Figure 12.2 A cartelised market



In Figure 12.2,[6] the outcome of a cartel's pricing behaviour is contrasted with the result obtained in a perfectly competitive market.[7] When optimising the price – just

[3] Own illustration of the static result of perfect competition, when producers face constant and identical marginal costs and no fixed costs. The supply curve (S) is horizontal and marginal costs (MC) equal average costs (AC).

[4] Obviously, there are a number of challenges regarding the quantification and the comparability of this reservation price but they lie beyond the scope of this contribution.

[5] It could likewise be a monopolist that sells a product directly to final consumers at the monopoly rather than the equilibrium price.

[6] Own illustration is based on M Motta, *Competition Policy – Theory and Practice* (Cambridge University Press, 2004) 40.

[7] In reality, markets in the absence of a cartel do not show all characteristics of perfect competition. However, this figure serves mainly to illustrate the emerging damage components.

as for a monopolist it pays off for the cartel to sell a lower quantity at a higher price – the equilibrium price (pE) does not emerge where demand D and the marginal cost curve MC intersect, but a cartelised price (pCart) emerges where MC and the marginal revenue curve MR intersect. This implies that a reduced quantity qCart is sold. This leads to two effects. A share of what would have been CS at an equilibrium price level is turned into producer surplus (PS). Furthermore, aside from this redistributive effect, the DWL emerges, which is an allocative effect: sales are lost. Buyers, who in this example are immediately the final consumers,[8] are, therefore, harmed in two ways by such an infringement of competition law. First, purchases that they made during the infringement period (eg, while a cartel was ongoing) were made at inflated prices. This shift from CS to PS is typically referred to as the 'cartel overcharge' in legal terminology. Second, the DWL captures the benefits (the utility) that buyers would have derived from all the purchases they did not undertake because of the infringement. This is also called the 'lost consumption effect'.[9] It captures the harm of those buyers who refrained from purchasing (or reduced their purchase volume) during the infringement period precisely due to the inflated prices, but who would have bought (more) without the infringement. Hence, as a group, consumers will typically reduce the quantity they purchase in the light of a price increase.[10] Some consumers would have bought the product or service in question at the non-cartelised price but, however, not at the cartelised price. This also negatively affects the size of the consumer surplus.[11] The cartel is, therefore, not only liable for the harm resulting from having overcharged consumers, that is, the price mark-up that consumers had to pay because of the cartel; it is also liable for the harm emerging from lost purchases. The DWL is not negligible in amount.[12] For consumers as a group it may even be the larger damage component compared to the harm resulting from the cartel overcharge.[13]

B. Quantification Challenges and their Negative Effect on Individual Cartel Damage Claims in the EU

At European level an important legislative initiative in the context of competition law concerned the EU Antitrust Damages Directive (Damages Directive), which was

[8] But a comparable effect emerges for final consumers if they are at the end of a long supply chain too.

[9] RBB Economics/Cuatrecasas Gonçalves Pereira, 'Study on the Passing-on of Overcharges', European Commission Pass-on Study 2016, 13.

[10] This is the classical output effect that comes with a price effect that is only missing if the price elasticity of demand is completely non-elastic (and hence no consumer, in the light of the price increase in question, would switch to a different product and/or stop buying).

[11] Comparing the extreme scenarios of Figure 12.1 and Figure 12.2: what is now CS, PS and DWL would have been all CS under perfect competition.

[12] MA Han, MP Schinkel and J Tuinstra, 'The Overcharge as a Measure for Antitrust Damages' (2008) Amsterdam Center for Law & Economics Working Paper 2008-08; CR Leslie, 'Antitrust Damages and Deadweight Loss' (2006) 51 *Antitrust Bulletin* 521.

[13] See G Gaudin and F Weber, 'Antitrust Damages, Consumer Harm, and Consumer Collective Redress' (2021) 12(5) *Journal of European Competition Law & Practice* 370, 373.

enacted in December 2014 after almost a decade of consultations, with an implementation period running until 27 December 2016.[14] The Damages Directive regulates a number of damage components in considerable detail (in particular the overcharge and pass-on), but makes no reference to the DWL for the (final) buyer level.[15] What about accompanying and preparatory documents? The Pass-on Study of 2016 deals with the 'lost consumption effect' on a very superficial level with reference to its missing importance in litigation.[16] The 2019 Guidelines do not explain it.[17] The explanations in the proposal for a Damages Directive mention the terms 'material' and 'immaterial' damage.[18] The DWL, as in the utility consumers never enjoyed, is typically classified as 'non-material' rather than 'material' damage. This category of harm is in general more challenging to compensate. Also, normative considerations as to whether non-material harm should be compensated at all are voiced more often.[19] The Damages Directive does not seem to preclude claiming compensation for the DWL; however, it also does not facilitate it by way of stipulating any provision that specifically deals with it. After all, it is also a general principle of European law that non-material damage can be claimed.[20] The Damages Directive puts special emphasis on the necessity to fully compensate consumers, to create neither over- nor under-compensation.[21] This can be linked back to question of whether the DWL should, therefore, receive compensation. As we have just seen in the economic explanation, strictly speaking, the attainment of full compensation can only be ensured for the consumer side if the consumers are compensated for the overcharge they paid and if their lost consumption finds some compensation. It is, furthermore, noteworthy that whereas the Damages Directive regulates some aspects of quantification in detail, for others the responsibility is left to the Member States. In general, the topic of 'causation' – and with that on questions of causation in law, like adequacy, etc – is to be handled according to national law.[22] Hence, to what

[14] Directive 2014/104/EU of 5 December 2014 of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national laws for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

[15] However, the Directive does stipulate that anyone can claim compensation: see U Schwalbe, 'Lucrum Cessans und Schäden durch Kartelle bei Zulieferern, Herstellern von Komplementärgütern sowie weiteren Parteien' (2017) 5 *Neue Zeitschrift für Kartellrecht* 157, 163; C Heinze, *Schadensersatz im Unionsprivatrecht* (Mohr Siebeck, 2017) 218.

[16] Pass-on Study (n 9) 13.

[17] Communication from the Commission of 9 August 2019 – Guidelines for national courts on how to estimate the share of over-charge which was passed on to the indirect purchaser C/2019/4899 [2019] OJ C267/07.

[18] 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/2013/0404 final – 2013/0185 (COD) 13.

[19] C Alexander, *Schadensersatz und Abschöpfung im Lauterkeits- und Kartellrecht* (Mohr Siebeck, 2010) 171: 'das deutsche Recht ist "misstrauisch"' ('German law is sceptical').

[20] Heinze (n 15).

[21] Recital 3 et seq and Art 1(1) first sentence and Art 3, Damages 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) *Municipal Journal* 480, 498.

[22] See recital 11, Damages Directive.

extent compensation claims concerning the DWL could ultimately pass the causation standard would, in any event, be for the Member States to determine. Obviously, the power of the Member States is limited by the boundaries set by the Damages Directive. In particular the effectiveness principle should be considered, but also more specifically for this case the full compensation principle. So far, compensating for the DWL is not a priority in the Member States. German law is, for instance, very hesitant to compensate for harm resulting from lost consumption in general.[23] Furthermore, there are specific challenges regarding standing and proof. After all we are discussing a transaction that has never occurred, but that would have occurred if not for the infringement. The challenges concern identifying consumers who would have bought, how much they would have bought and also what they actually did as an alternative. Furthermore, in the light of the principle of full compensation, consumers should only be put in the position they would have been in but for the infringement; they should not be worse off, but neither should they be better off. Hence, if they found a rather good substitute, this would also need to be considered in assessing their actual utility loss. In other words, under certain conditions, compensating consumers for their full utility loss would be over-compensation – for example if they bought the product at a higher price elsewhere, but not at as high a price as the cartelised product price. Did they switch to a product of lower quality? Did they buy a substitute product, and how much less utility did that mean for them? Here, the rules of damages law take effect in full. Indeed, Haucap and Stürmer propose differentiating between three situations when it comes to the allocation effect:

1. Could the consumer buy the goods from the cartel's competitors?
2. Could the consumer substitute the goods with a less preferred alternative?
3. Did the consumer completely forgo the purchases?[24]

Certainly, if there are no good alternatives available, the consumer's loss is likely to be adequately reflected by the full DWL triangle as exemplified in Figure 12.2.[25] The assessment is further complicated by the possible existence of umbrella effects. These are important in markets where the scope of the cartel is not total or over-arching. Competition research, but also litigation,[26] is indeed increasingly aware of the overall

[23] FW Bulst, *Schadensersatzansprüche der Marktgegenseite im Kartellrecht* (Nomos, 2006) 306; G Meessen, *Der Anspruch auf Schadensersatz bei Verstößen gegen EU-Kartellrecht* (Mohr Siebeck. 2011) 403; FW Bulst, 'Zum Problem der Schadensabwälzung und seiner Analyse durch das KG in "Transportbeton"' in W Möschel and F Bien (eds), *Kartellrechtsdurchsetzung durch private Schadensersatzklagen?* (Nomos, 2010) 225, 228: 'Zurückhaltung vieler europäischer Rechtsordnungen' ('hesitation of many European legal orders'); H Schweitzer, 'Kartellschadensersatz – rechtlicher Rahmen' in K Hüschelrath et al (eds), *Schadensermittlung und Schadensersatz bei Hardcore-Kartellen. Ökonomische Methoden und rechtlicher Rahmen* (Nomos, 2012) 39, 67; WH Roth '§ 33a' in W Jaeger et al, *Frankfurter Kommentar zum Kartellrecht* (Dr Otto Schmidt KG, 93 Lieferung 04.2019) para 68.

[24] J Haucap and T Stühmeier, 'Wie hoch sind durch Kartelle verursachte Schäden: Antworten aus Sicht der Wirtschaftstheorie' [2008] *Wirtschaft und Wettbewerb* 413, 421: 'Erstens kann der Konsument das Gut von Kartellaußenseitern beziehen, zweitens kann er das Gut durch eine weniger präferierte Alternative substituieren, und drittens kann er ganz auf den Kauf verzichten.'

[25] See on this Oxera (2009) *Quantifying antitrust damages: Towards non-binding guidance for courts* 100: 'When there are no second-best alternative products, or these products are substantially inferior to the cartelised product, customers bear a loss equal to, or close to, the triangle.' See https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf.

[26] See the exemplary cases of Judgment of the Court (Fifth Chamber), judgment of 5 June 2014; Case C-557/12 *Kone AG and Others v ÖBB-Infrastruktur AG* ECLI:EU:C:2014:1317.

dynamics of cartels in markets.[27] Umbrella effects concern the situation in which a cartel's remaining competitors also do not stick to the prices they were charging in the situation before the cartel was formed, but precisely because of the cartel – under the umbrella of the cartel – they also raise their prices above the previous level. Applying this back to the situation at hand, we can see that for consumers who purchased the goods from a competitor instead of from the cartel, yet again at elevated prices, there is additional harm.[28]

Hence, from a dogmatic legal point of view, the classification of harm resulting from the DWL is a major challenge in European and Member State law. Therefore, the actual quantification challenge has not really been embraced yet. Economics convey a rather optimistic picture when it comes to determining the quantity of the DWL: the mathematical tools, if certain parameters of a market are known, enable economists to determine how large the DWL is for a group of consumers.[29] But note the term 'group'. Whereas quantifying the overall DWL is regarded as feasible (based on a number of defensible assumptions), extrapolating the loss incurred by each individual consumer might be more difficult. This leads us on to exploring the link between compensating the DWL and collective redress enabling compensation for a group, rather than for an individual consumer, in more depth.

C. The Potential of Collective Redress

i. An Inspiring Example: Chile

In 2019, a Chilean court for the first time awarded compensation for the DWL.[30] This competition law case was concerned with collusion among pharmaceutical companies. The pharmacy chains Cruz Verde, Salcobrand and FASA had colluded between December 2007 and March 2008 to artificially increase the prices of at least 206 drugs, most of them requiring prescriptions. Among the motives for this artificial price increase by way of collusion was the desire to compensate the lost margins of a preceding price war. The Tribunal de Defensa de la Libre Competencia (TDLC) found this infringement and imposed the legal maximum in fines.[31] The duration of the cartel came to an end

[27] R Inderst, F Maier-Rigaud and U Schwalbe, 'Umbrella Effects' (2014) 10 *Journal of Competition Law & Economics* 739.

[28] R Inderst and S Thomas, *Schadensersatz bei Kartellverstößen* (Fachmedien Otto Schmidt KG, 2018) 34, 71 f: 'Es ist bedeutsam, inwieweit es Substitute gibt, wie die Wertschätzung der Nachfrager für diese ist und ob es bei Kartellaußenseitern zu Preisschirmeffekten kommt.' Haucap and Stühmeier (n 24) 421: 'Der allokative Effizienzverlust hängt auch hier wieder von der Anzahl der Kartellmitglieder und der Außenseiter ab, da den Nachfragern durch den sog. *Umbrella Effect* auch dadurch ein Schaden entstehen kann, dass die Kartellaußenseiter in Reaktion auf den höheren Kartellpreis auch ihren (nicht kartellierten) Preis erhöhen.'

[29] MW Havens, MF Koehn and MA Williams, 'Consumer Welfare Loss: The Unawarded Damages in Antitrust Suits' (1990) 15 *University of Dayton Law Review* 457, 463; DC Hjelmfelt and CD Strother Jr, 'Antitrust Damages for Consumer Welfare Loss' (1991) 39 *Cleveland State Law Review* 505, 510; see, for a calculation, MP Schinkel, 'Illegale winsten en efficiëntieschade als gevolg van kartelafspraken in de Nederlandse bouw: een toelichting op de Zembla-uitzending "Afrekenen met de bouw"', Amsterdam Center for Law & Economics (ACLE) (2006).

[30] See C-1940-2013, judgment of 17 December 2019, 10º Juzgado Civil de Santiago.

[31] See TDLC, Sentencia No 119/2012 of 31 January 2012.

precisely because of the investigations by the Chilean competition authority. Insights on damage quantification can be drawn from a Supreme Court judgment, which upheld TDLC's decision,[32] and follow-on damages litigation in the civil court.[33] Given that the medication was only available on prescription, substitute products were basically not available. Thinking in terms of the three categories of consumer behaviour identified earlier, this means that rather than buying a substitute or medication of lower quality, some consumers had to abstain from buying altogether. In terms of price elasticity of demand for this particular product we likewise see that there is a low elasticity. We could therefore expect that many consumers would indeed still buy this product at a cartelised price, leading to a high redistributive and a low allocative effect. The Supreme Court judgment indeed asserted the market power of the respective companies at 92 per cent and confirmed the existence of harm as such.[34] It referred to the overcharge.[35] The price increase partly went beyond 50 per cent. The additional gross benefit of the cartelists was calculated to be $27,000,000,000 (€29,074,665[36]).[37] The Court, furthermore, recognised that despite the low price elasticity of demand, an undefined number of consumers had had to withdraw from buying the products due to the price increase. This effect necessarily accompanies every artificial price increase, in the Supreme Court's view. Hence, referring to the Supreme Court judgment of 2012, the claimants saw scope for claiming *damnum emergens*, the overcharge, and to claim compensation for the lost consumption effect.[38] In the judgment of 2019, the 10º Juzgado Civil de Santiago ultimately awarded both damage components.[39] To that end, the court determined two groups of consumers: Group 1 consisted of the consumers who had paid an increased price between 1 January 2007 and 31 March 2008; Group 2 consisted of the consumers who had abstained from buying the medication due to the price increase. The calculation resulted in the compensatory amount of $1,736,961,314 (€1,895,570.87) for Group 1. For Group 2 the lost consumption effect amounted to $284,916,956 (EUR 311,069.03). The court in essence followed an expert report submitted by the claimants' side. That expert report contained two calculations:[40] a conservative calculation, resulting in total damages of roughly 2,021 million pesos, which the court followed in its judgment; and a less conservative calculation, resulting in more extensive total harm of circa 6,945 million pesos. The difference between the two calculation methods boils down to the

[32] Supreme Court, Rol No 2578-2012, approved TDLS's decision on 7 September 2012.

[33] See C-1940-2013 (n 30).

[34] See Supreme Court judgment, septuagésimo sexto. On this TDLC, Sentencia No 119/2012, centésimo nonagésimo octavo: potentially the whole Chilean population is affected by this cartel.

[35] See Supreme Court judgment, considerando nonagésimo, párrafo décimo.

[36] See, for conversion ratio, www.xe.com/currencyconverter/convert/?Amount=27&From=CLP&To=EUR, accessed on 9 November 2021.

[37] Thanks to the low price elasticity of demand, see Supreme Court judgment, decimo octavo.

[38] See Demanda SERNAC (ie the writ of summons by the Servicio Nacional del Consumidor, the Chilean consumer agency acting on behalf of the consumers) as received by the court on 1 February 2013, para 34, paras 41 et seq specifically on the DWL.

[39] See C-1940-2013, judgment of 17 December 2019, 10º Juzgado Civil de Santiago, Cuadragésimo noveno and following.

[40] A Gonzalez, 'Estimación de Daños a Consumidores por Alza Coordinada de Precios de las Farmacias Ahumada, Cruz Verde y Salcobrand' (2015) available at https://centrocompetencia.com/wp-content/uploads/2020/12/InformeDa%C3%B1osFarmacias-SernacAldoGonzalez.pdf.

difference in counter-factuals applied. In the latter case, the counter-factual was situated in the period during which the heavy price war went on, which is why there is a larger difference between the counter-factual price and the cartelised price, and hence a higher damage amount. The more conservative estimation is based upon a counter-factual of average prices calculated over a longer period.

Now, what led to this remarkable judgment in the light of the quantification challenges, questions of causation and standing discussed earlier? To begin with, Chile has rather advanced legislation concerning consumer collective redress.[41] This consumer collective redress procedure can apply here despite the applicability of special legislation like competition law. Ley 19.496 sets out in general that consumers can claim compensation.[42] Importantly, there is a special procedure by way of a representative action available when the collective and/or diffuse consumer interests are hurt (see Article 51 of Ley 19.496). Article 50 of Ley 19.496 defines 'collective interests' and 'diffuse interests':

> interés colectivo se refiere a acciones que se promueven en defensa de derechos comunes a un conjunto determinado o determinable de consumidores, ligados con un proveedor por un vínculo contractual, en tanto el interés difuso se refiere a las acciones que se promueven en defensa de un conjunto indeterminado de consumidores afectados en sus derechos. [English translation: collective interest refers to actions that are promoted in defence of rights common to a determined or determinable group of consumers, linked to a supplier by a contractual bond, while diffuse interest refers to the actions that are promoted in defence of an indeterminate group of consumers affected in their rights.]

Chilean law thus does not insist on the requirement to link the harm very specifically to one consumer, by also allowing compensation in cases where 'diffuse consumer interests' are hurt and the group of consumers is 'indeterminate'. This gives considerable procedural flexibility to award damages for a non-material damage component such as the DWL that cannot easily be tied to the actual consumers. It should be further noted that in the case at hand, the allocative effect was rather low due to the high price inelasticity of demand. This may be different in other scenarios where the price elasticity of demand is greater.

ii. Developments at European Level

To foster compensation claims, from a scientific point of view collective redress is a powerful tool.[43] This is particularly the case if damage may be trifling but widespread –

[41] This is contained in Ley de Protección de los Derechos de los Consumidores (Consumer Rights Protection Law) (Ley 19.496).

[42] See in its Art 3e): 'El derecho a la reparación e indemnización adecuada y oportuna de todos los daños materiales y morales en caso de incumplimiento de cualquiera de las obligaciones contraídas por el proveedor, y el deber de accionar de acuerdo a los medios que la ley le franquea …' [English translation: 'The right to adequate and timely compensation and compensation for all material and moral damages in the event of non-compliance with any of the obligations contracted by the supplier, and the duty to act according to the means that the law allows …']

[43] C Hodges, *Multi-Party Actions* (Oxford University Press 2001); C Hodges (2008) *The Reform of Class and Representative Actions in European Legal Systems: A new framework for collective redress in Europe* (Hart Publishing, 2008); SE Keske, *Group Litigation in European Competition Law* (Intersentia, 2010)

a classical scenario regularly faced by the final consumers in competition law.[44] As elaborated upon before, if a feasible way to compensate the DWL is to be found, collective rather than individual redress seems to be a necessity in the light of the challenges in quantification. Despite these insights, the final text of the Damages Directive does not mention collective redress. In the discussions preceding the Damages Directive, collective redress was the first item of discussion in the Green Paper,[45] and it also figured in the White Paper.[46] The drafters explicitly refer to the possibility of ensuring that the goals of the Damages Directive are reached with either individual or collective litigation.[47] After all, for many years the most far-reaching EU policy document was a non-binding recommendation,[48] but finally a Collective Redress Directive to institutionalise EU-wide collective redress mechanisms was enacted in 2020.[49] Both national and cross-border infringements fall within the scope of the Collective Redress Directive (Article 2(1)). The European compromise puts special emphasis on a qualified entity, representing the collective interests of consumers, that may bring representative actions for the purpose of both injunction and redress measures against traders infringing certain provisions of EU law. This entity can be any organisation or a public body (Articles 3(4), 4). Design-wise, both opt-in or opt-out mechanisms are possible. The number of remedies is wide: the qualified entity may request the stopping or prohibition of an infringement, and seek redress, such as compensation, repair or price reduction.[50] Article 7(4) sets the minimum standard in terms of remedies for providing for injunctive measures and measures of redress. Given that it is a minimum standard, Member States could go further.[51] Importantly, the Directive does currently not apply to competition law.[52] However, Member States are free to extend the scope of application to competition law.[53] They may, furthermore, when keeping, designing or reforming their national systems of collective redress, find inspiration in the provisions of the Collective Redress Directive. For the European level it is also noteworthy that the fields of application are collected in Annex I – and to update an Annex does not require going through the whole legislative procedure at EU level.

To assess the power of these provisions with a view to enabling compensation for the DWL, the key is to look in more depth at the formulations as regards redress. Article 9

[44] Weber (n 2).

[45] See table of contents as an annex to the Green Paper, 'Damages Actions for breach of the EC Antitrust Rules' COM (2005) 672 final

[46] White Paper, 'Damages Actions for Breach of the EC anti-trust rules' COM (2008) 165 of 2 April 2008, 4.

[47] See recital 13, Damages Directive.

[48] Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law [2013] OJ L201/60.

[49] Directive of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC [2020] OJ L409/1 (Collective Redress Directive).

[50] For a definition of 'redress measure', see Art 3(10), Collective Redress Directive.

[51] Art 9(9), Collective Redress Directive fits into this.

[52] It is beyond the scope of this contribution to carefully analyse Member State law. Art 1(2), Collective Redress Directive furthermore makes it explicit that aside from the regime prescribed by European law, other national mechanisms may remain in place as well.

[53] To the best of my knowledge no Member State has explicitly done this.

concerns the redress measures, and Article 9(1) gives the options 'compensation, repair, replacement, price reduction, contract termination or reimbursement of the price paid'. Member States are free as regards the design choice when it comes to the question of when the individual consumers concerned explicitly or tacitly express their wish to be represented (Article 9(2)).[54] Importantly, Article 9(5) grants a certain flexibility regarding the degree to which the consumers have to be identified: 'Where a redress measure does not specify individual consumers entitled to benefit from remedies provided by the redress measure, it shall at least describe the group of consumers entitled to benefit from those remedies.'[55] Hence, describing a group of consumers suffices even in the context of a redress measure. Redress can then be claimed within a specified time; if, however, redress funds remain, Member States ex ante have to lay down the destination of such (Article 9(7)). For the purpose of claiming compensation for the DWL, Article 9(5) seems to be particularly interesting. Again, to a certain extent, as in Chilean law Ley 19.496, there is no necessity for there to be a concrete link to a specific consumer. Reading this in combination with the requirement that consumers do not need to explicitly express their wish to participate in the collective action in question but that a tacit expression suffices, it seems to give certain leeway to experiment. The Collective Redress Directive omits a definition of the 'tacit expression to be represented', which leads to some procedural uncertainty. In the competition law context, the Directive is currently only an inspiration, and European Member States are free to develop their own mechanisms by which compensation for the DWL can be facilitated. Also, for all fields of application that the Annex I does list, it is true that European Member States can continue to experiment with effective collective redress mechanisms within the scope of the Collective Redress Directive.

III. Conclusion

From an economic point of view, the allocative effect resulting from infringements of competition law is a major concern. It is a parameter that is, aside from the cartel overcharge, crucial when discussing whether the full compensation principle is adhered to. To be very clear: consumer harm consists of both the (passed on)[56] overcharge amount and the DWL. In the light of the legal and economic quantification challenges, the feasibility of also compensating consumers for the DWL depends on the existence of

[54] Different rules apply to consumers residing outside the Member State in question, see Art 9(3).

[55] The Directive has undergone quite a number of changes during the legislative procedure. This element, however, was already present in the Proposal for a Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers, and repealing Directive 2009/22/EC, COM/2018/0184 final – 2018/089 (COD) (Proposal). This is in line with Art 5b(4) of the Proposal, which 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.'

[56] For the sake of this contribution, a direct cartelist-consumer relation was described. However, in reality the supply chains may be longer, and the final consumers would, hence, not be confronted with the overcharge directly but with that percentage of the overcharge that previous levels in the supply chain decided to pass on to them.

smart collective redress mechanisms. The Chilean example is proof that considering the DWL as a damage component in civil litigation is possible in principle. The European Collective Redress Directive seem to provide for a certain flexibility as well: Member States are free to experiment. A limitation of this contribution is a pure look at achieving full compensation for the final consumers by way of private (collective) enforcement. The real picture is more complex, and we need to fine-tune the compensation goal with the function of the fine in public enforcement, as cartel damages claims are typically follow-on litigation. Thinking the compensation perspective through in its entirety, we have not yet said anything about who actually obtains the damages paid for the emergence of the DWL. Aside from compensation, EU competition law considers deterrence a complementary goal.[57] The deterrence perspective is interesting, in that it places less emphasis on neatly compensating every consumer but looks at the overall deterrent value of the amount that can be claimed and the likelihood with which such a claim can be successful.

[57] Recital 5, Collective Redress Directive refers to the need to improve deterrence.