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SUPPLIERS AS FORGOTTEN CARTEL VICTIMS

JENS-UWE FRANCK AND MARTIN PEITZ*

Antitrust law has always allowed buyers of the products of a price-fixing cartel to obtain compensation even when the buyers are not consumers, but rather downstream firms in the supply chain, and even when these firms are able to pass the increase in price brought about by the cartel on to the ultimate consumer of the finished good. Antitrust has so far failed to appreciate, however, that suppliers to a cartel or to the cartel's customers are in the same economic position as buyers from a cartel insofar as they suffer the harm of reduced output, because those higher cartel prices reduce demand, and that in turn reduces the amount of inputs the cartel demands from suppliers. Moreover, component suppliers will have to lower their prices in reaction to the reduced demand and so will sustain damage due to a cartel-induced underpayment that is economically related to the overcharge that harms the cartel's customers. It is argued that the courts should reverse the current doctrine, which essentially limits antitrust standing to direct purchasers. While this would constitute a major change under federal law, it would be consistent with current law in those states that grant antitrust standing to indirect purchasers.

Keywords: antitrust damages, antitrust standing, antitrust injury, pass-on, suppliers, complementary goods

* Jens-Uwe Franck is Professor of Law in the Department of Law and MaCCI at University of Mannheim. Martin Peitz is Professor of Economics in the Department of Economics and MaCCI at University of Mannheim. For the insightful comments and suggestions, advise and encouragement, the authors are grateful to Andreas Engert, Louis Kaplow, Maarten Pieter Schinkel, Norbert Schulz, Heike Schweitzer, Giancarlo Spagnolo and participants at the 2016 MaCCI Law and Economics Conference in Mannheim and at the CRESSE 2017 in Heraklion. They owe particular thanks to Ramsi Woodcock for his encouragement and support of this project. Finally, the authors gratefully acknowledge support from the Deutsche Forschungsgemeinschaft (PE 813/2-2 and CRC TR 224).

INTRODUCTION

How does a component become part of a manufactured good? One obvious way is for the manufacturer of the good to buy the component from a supplier and build the component into the product. But there are two others. Sometimes the order is reversed and the component maker purchases the otherwise complete product from the manufacturer, adds the component, and resells the finished product to consumers. And sometimes the component maker supplies the component directly to the consumer, who buys the otherwise complete product separately and combines it with the component at home.[1] Indeed, erasers make it on to pencils in all three ways. Pencil makers buy erasers and attach them to the pencils they sell; eraser makers buy pencils and attach the pencils to the erasers they sell; and consumers also sometimes buy eraserless pencils,

1. In the following, we will refer to these scenarios as the "supplier case," the "purchaser case," and the "separate seller case," respectively; see for more detail *infra* Part II.

along with separate eraser tops, and put the two together at home.[2]

Given that all three approaches—supply, purchase, and separate sale—achieve the same end of providing a complete product to the consumer, one might expect all three approaches to be economically equivalent; and indeed they are. When product manufacturers form a cartel and raise prices, all component makers are harmed regardless of whether they contribute their components to the end product as suppliers, purchasers, or separate sellers, because the higher price charged by the product manufacturer reduces consumer demand in all three cases.[3] That reduction in demand for the product translates into a reduction in demand for the component and a corresponding reduction in sales, and therefore results in a loss of profits for the maker of the component.

Given this equivalence of harm to the component makers in all three roles, one might expect antitrust law to allow component makers to sue for damages in all three cases. In fact, as antitrust law stands,[4] a remedy is provided only when the component maker pursues a purchase strategy, buying the good from the manufacturer, adding the component, and then reselling the finished good to consumers, because in this case the component maker pays the higher cartel price directly. Antitrust law has long recognized the right of component makers to sue for compensation in this scenario.

Enforcers and courts have failed, however, to recognize that component makers are equally harmed by manufacturer cartels when component makers act as suppliers or when they sell components separately to consumers. Even though in these cases component makers do not pay the higher prices charged by the cartel, they suffer because such higher prices reduce consumer demand for the combined product and, therefore, the sales of the component. For example, if pencil makers collude to raise pencil prices, consumers will buy fewer pencils. That means that pencil makers will buy fewer erasers for attachment to pencils, and consumers will buy fewer eras-

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2. For further illustration based on the facts of *International Raw Material v. Stauffer Chem. Co.*, 978 F.2d 1318 (3d Cir. 1992), see *infra* text accompanying note 50.

3. For the economic analysis, see *infra* Part II.

4. *See infra* Part I.

ers to use alongside their pencils, harming eraser makers acting as suppliers or as separate sellers. Lost sales mean lost profits, and component makers are harmed just as surely as if they had been forced to pay higher prices for the pencils themselves. As a response, component makers will find it a profit-maximizing strategy to lower their prices to mitigate the decline in demand. Thus, while in the purchaser case component makers suffer primarily from a cartel-induced overcharge, as suppliers and separate sellers they suffer a loss due to cartel-induced underpayment.

Antitrust law today permits component makers to sue for damages only if they happen to have embraced the purchaser model, buying directly from the manufacturer and then adding the component themselves. The culprit is the current standing doctrine,[5] which holds that only "direct purchasers" of cartel products—understood to mean those who have actually paid the prices fixed by the cartel—have a right to sue for damages.[6] It follows directly from the existence of harm in the supplier and separate seller cases that the absence of standing today allows cartels to escape financial responsibility for some of the harm that they cause. And it follows just as directly that, as a matter of deterrence and corrective justice, the law should provide all component makers with the same means of redress, because they all suffer exactly the same harm.

A change in the law would not necessarily make the calculation of damages any more difficult than it is today. Courts today award direct purchasers "overcharge damages" equal to the increase in price imposed by the cartel, multiplied by the volume of sales.[7] Awarding damages to suppliers and separate sellers would require only that courts or enforcers substitute

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5. "Antitrust standing" is used here in a broad sense, embracing a plurality of rules such as, for instance, "antitrust injury" or "causation in law," which may effectively delimit the class of potential plaintiffs in cartel damages actions; for more detail, see *infra* Section I.A.

6. Notable exceptions are purchasers injured by "umbrella pricing," for whose benefit at least two circuit courts have affirmed standing and proximate causation. *See In re* Beef Indus. Antitrust Litig., 600 F.2d 1148, 1166 n.24 (5th Cir. 1979); U.S. Gypsum Co. v. Indiana Gas Co., Inc., 350 F.3d 623, 627–28 (7th Cir. 2003). In contrast, a claim for damages due to umbrella pricing was dismissed in *Mid-West Paper Products Co. v. Continental Group Inc.*, 596 F.2d 573 (3d Cir. 1979).

7. The use of this classical approach to measuring cartel-induced damages dates back to *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390,

the decline in price caused by the resulting decrease in component demand for the increase in price currently used in the overcharge measure of damages.

Broadening the concept of antitrust standing would also eliminate the conflict of interest in enforcement that is inherent in the "direct purchaser rule."[8] On the one hand, because direct purchasers may not be able to obtain the cartel's products elsewhere, they may have an incentive not to bring suit against the cartel, even if forced to accept higher prices as a result. On the other hand, a cartel may simply bribe its direct purchasers by forwarding a share of the cartel profits on to them. Conferring standing rights to a broader class of aggrieved parties reduces such risks of intimidation or corruption. In contrast, separate component sellers have no direct business relationships to preserve, and would therefore be more likely to act as private attorneys general, suing to enforce anti-cartel rules or revealing private information about cartelization to government enforcers.

Giving suppliers and separate sellers standing is consistent with both of the two main competing views of the mission of antitrust policy. The dominant view is that the goal is to protect consumers from harm.[9] Against this "consumer welfare standard," some argue instead for a "total welfare standard" that would require antitrust to protect both consumers and

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396 ("The verdict was for the difference between the price paid and the market or fair price . . . ."). *See infra* notes 22–25 and accompanying text.

8. *See infra* note 20 and accompanying text.

9. In particular, the *Merger Guidelines* indicate support for a consumer welfare standard:

> The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market. To make the requisite determination, the Agencies consider whether cognizable efficiencies likely would be sufficient to reverse the merger's potential to harm customers in the relevant market.

See U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 30 (2010). *See also* Steven C. Salop, *What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 338–48 (2010) (providing evidence that "the standard legislated by Congress in adopting the Sherman Act—the standard currently used by antitrust agencies and our judicial system—is the true consumer welfare standard"). Note that "consumer," in this sense, encompasses not only those who acquire a product for private purposes (final consumers) but also intermediate buyers.

producers as a group.[10] Giving suppliers and separate sellers standing would obviously protect the interests of producers, in accordance with the total welfare standard. But this approach would also protect consumers. Consumers benefit from the lower prices charged by component makers in response to creation of the cartel, offsetting the harm that consumers suffer from the higher prices charged by the cartel itself. By compensating component makers, antitrust would therefore reward their response to cartelization, which effectively benefits consumers.

Providing standing rights to suppliers and separate sellers would require a fundamental change in the focus of the courts in antitrust damages cases. It would presuppose overturning a line of cases, arising mostly under federal antitrust law, that confirm the "direct purchaser rule."[11] However, notably, in those states that have enacted so-called "*Illinois Brick* repealer" statutes, and consequently grant antitrust standing rights to indirect purchasers and allow for a passing-on defense, such a step would not demand more than a coherent amendment of the existing state law framework.[12]

Such a reorientation is, however, worth the trouble, because the importance of component production in the economy is great. Virtually everything sold in a modern economy, from computers to weapons systems, incorporates essential components either purchased by the manufacturer from independent suppliers or purchased separately by end users.[13] Jet manufacturers such as Boeing and Airbus source components for their airplanes from thousands of independent suppliers,

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10. The pursuit of a *social* (or *total*) welfare standard, according to which antitrust law should focus solely on the prevention of losses of (net) social welfare but should not be concerned with mere transfers of consumer surplus to producers, has been proposed particularly by authors associated with the so-called Chicago School. *See* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 90–91, 426–29 (photo. reprint 1993). Confusion may arise as *Bork* uses the term "consumer welfare" as a synonym for "wealth of the nation" and, therefore, for what is otherwise called "social welfare." *Id.* at 90. *See* KATALIN CSERES, COMPETITION LAW AND CONSUMER PROTECTION 331–32 (2005).

11. *See infra* note 20.

12. *See infra* Section I.D.

13. Production functions exhibiting this property are sometimes called "O-ring production functions." *See* Michael Kremer, *The O-Ring Theory of Economic Development*, 108 Q.J. ECON. 553 (1993).

but airlines buy jet engines for the planes separately, from engine manufacturers such as Rolls-Royce and General Electric.[14] Builders buy their elevators from one company, and repair services—another kind of component essential to use of the product—from independent service providers. Even Apple, which is famously possessive of its supply chain, sources iPhone components from thousands of independent suppliers, while users buy apps and their phone cases, which many would consider essential to use of the product, from independent suppliers. Losses to component suppliers are therefore guaranteed in virtually every cartel case.

The remainder of this article is structured as follows: Part I outlines the current law and policy of antitrust standing; Part II considers the economic effects of cartelization on the market for components; Part III discusses antitrust policy implications; and Part IV sets forth legal implications for standing doctrine. In Part V, we cast a sideways glance at how the issue is being dealt with in Europe. The final part concludes the article.

I.
Current Law and Policy

A. *The Doctrine of Antitrust Standing*

Although Section 4 of the Clayton Act authorizes "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to sue for damages, the courts, which have long exercised a kind of common law authority to develop antitrust doctrine,[15] impose a five-factor test for antitrust standing.[16] In *Associated General Contractors*,[17] the U.S. Supreme Court ordered courts to consider: (1) the causal connection between the antitrust violation and the harm to the plaintiff, and whether the harm was intended; (2) the nature of the injury, in particular whether the plaintiff is a

14. For instance, in its *2017 Commercial Engines Report*, FlightGlobal provides jet engine options and market shares for the Boeing 787. Flightglobal, Commercial Engines 2017, at 8, https://www.flightglobal.com/asset/17069 (last visited Oct. 26, 2018).

15. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 110 n.5 (1986).

16. 15 U.S.C. § 15 (2012). *See, e.g.*, Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519 (1983).

17. *Id.* at 540–45.

consumer or a competitor in the relevant market ("antitrust injury"); (3) the directness of the injury, including whether determining damages would be too speculative; (4) the danger of duplicative recovery and whether it would be too complex to apportion the damages; and (5) the existence of a class of better-situated plaintiffs or more direct victims.[18]

Probably the best-known limit on antitrust standing to arise from application of these factors is the direct purchaser rule established by *Illinois Brick*, which prohibits buyers downstream of a price-fixing cartel to claim damages on the ground that direct purchasers passed on the higher prices charged by the cartel to the downstream buyers by reselling the goods to those downstream buyers at higher prices.[19] Only direct purchasers may sue for cartel damages.[20] The courts have been willing to interpret this limit narrowly, however, to include plaintiffs who pay higher prices in the same market as direct purchasers but who do not actually buy from the cartel. These so-called "umbrella plaintiffs" buy from competitors of the cartel who have taken advantage of the higher prices charged by the cartel to charge higher prices themselves to their own buyers.[21]

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18. Summary taken from ABA SECTION OF ANTITRUST LAW, PROVING ANTITRUST DAMAGES: LEGAL AND ECONOMIC ISSUES 18 (2d ed. 2010).

19. Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

20. The rise of platform markets calls into question the limits of the *Illinois Brick* doctrine. Ultimately, it may even result in the demise of the direct purchaser standing rule. In *Apple,* the Ninth Circuit held that consumers have direct purchaser standing to challenge Apple's 30% mandatory commission on all iPhone apps. The action is based on the theory that Apple abuses its monopoly control over the iPhone app distribution market by hindering developers from selling their apps directly to consumers at a lower price or via other distribution channels at a smaller fee. Yet Apple charges commission based on its distribution agreements with the app developers and, therefore, appears to act as a supplier of distribution services to the developers. However, the Ninth Circuit argued that Apple functions as a distributor rather than as a manufacturer or producer, according to the distinction established in *Hanover Shoe*, *Illinois Brick,* and subsequent case law. Consequently, consumers must be regarded as direct purchasers. *In re* Apple Iphone Antitrust Litig., 846 F.3d 313, 322–24 (9th Cir. 2017). On June 18, 2018, the U.S. Supreme Court accepted Apple's petition for certiorari. Apple Inc. v. Pepper, 138 S. Ct. 2647 (2018). The case presents the Supreme Court with the opportunity to clarify the application of the *Illinois Brick* doctrine to platform markets, or even to reconsider the reasonableness of the doctrine altogether.

21. *See supra* note 6 and accompanying text.

The direct purchaser rule would seem to support recognition of standing for suppliers to a cartel because the harm suffered by a direct purchaser arises not so much from the higher prices that the firm pays to the cartel, as these higher prices often may be passed on to indirect purchasers, but from the lost sales volume of the direct purchaser arising from the reduced demand of the ultimate consumers who pay the higher prices. The harm of the cartel to suppliers is also in the nature of reduced demand. But, interestingly, courts award direct purchasers damages calculated based on the higher prices paid by direct purchasers, rather than the purchaser's lost volume due to decreased demand, even when it is clear that the direct purchasers have recouped losses from the higher prices by turning around and charging higher prices themselves to their own buyers.[22] Thus, while as a matter of principle, plaintiffs are entitled to an award of damages that will restore them to the position in which they would have been but for the infringement of the law, and consequently, the direct purchasers' damages should be computed as the sum of (1) the overcharge (which is otherwise referred to as the "direct cost effect"), (2) the pass-on effect, and (3) the output effect, i.e., the lost profits associated with any lost sales,[23] this is not current practice. Rather, it is consistent with the direct purchaser rule as adopted in *Illinois Brick* and with the denial of the passing-on defense in *Hanover Shoe*[24] that direct purchasers compute their damages based solely on overcharges—which serve as a rough proxy for the damages sustained but for the antitrust violation—and not based on lost profits that would generate a more accurate measure of the actual damages.[25]

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22. *See* Chattanooga Foundry & Pipe Works v. Atlanta, 203 U.S. 390 (1906); 2A PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 395, at 426–27 (2014).

23. *See, e.g.*, Theon van Dijk & Frank Verboven, *Quantification of Damages*, *in* 3 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW & POLICY 2331, 2333–34 (2008).

24. Cartelists cannot assert against their direct purchasers' actions for damages that the latter passed the overcharge on to their customers. *See* Hanover Shoe & Co. v. United Shoe Mach. Corp., 392 U.S. 481 (1968).

25. On the "lost-profits-versus-overcharges" debate, see, on the one hand, Jeffrey L. Harrison, *The Lost Profits Measure of Damages in Price Enhancement Cases*, 64 MINN. L. REV. 751 (1980), and, on the other hand, Frank H. Easterbrook, *Treble What?*, 55 ANTITRUST L.J. 95 (1986). In contrast, in a legal system that provides both for the availability of a passing-on defense and for

B. *Suppliers to the Cartel*

This insensitivity to demand-based harm has carried over to the courts' treatment of claims for damages by suppliers to a cartel. Although there is no case rejecting standing for a supplier alleging the harm of reduced demand, four U.S. Courts of Appeals[26] have denied standing to suppliers alleging other harms.[27] In *Comet*, the Tenth Circuit denied standing to a supplier who allegedly lost a contract in retaliation for refusing to pay a bribe to which his general contractor had agreed with other construction contractors and a Governor in the course of a bid-rigging conspiracy.[28] In *Exhibitors' Service*, the Ninth Circuit denied standing to a supplier whose services had become superfluous due to a market share conspiracy unrelated to any cartel-induced output restriction.[29] In *SAS of Puerto Rico*, the First Circuit denied standing to a supplier who had supplied a market-dominant firm that was alleged to have foreclosed a downstream market in breach of the essential facilities doctrine.[30] And, in *International Raw Material*, the Third Circuit, perhaps the country's leading antitrust jurisdiction, de-

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antitrust standing by indirect purchasers, it is consistent that direct purchasers may claim lost profits in addition to their overcharge. *See, e.g.*, Article 12(3) of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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, 2014 O.J. (L349) 1 [hereinafter E.U. Directive on Actions for Competition Damages or the Directive] ("This Chapter shall be without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.").

26. Not included are cases that involve suits that target downstream mergers, and in which suppliers' standing is also generally denied. *See* AREEDA ET AL., *supra* note 22, ¶ 350c, at 269–74.

27. There are, however, occasional earlier judgments by lower courts that have argued for a wider concept of standing. *See, e.g.*, Wilson v. Ringsby Truck Lines, Inc., 320 F. Supp. 699, 701–03 (D. Colo. 1970) (granting antitrust standing to truck drivers and warehousemen who brought suit against their employer, claiming to have suffered reductions in wages and other compensation because the defendant discontinued some of its business as a result of a market-sharing agreement with its competitors).

28. Comet Mech. Contractors, Inc., v. E.A. Cowen Constr., Inc., 609 F.2d 404 (10th Cir.1980).

29. Exhibitors' Service, Inc. v. American Multi-Cinema, Inc., 788 F.2d 574 (9th Cir. 1986).

30. SAS of Puerto Rico, Inc., v. Puerto Rico Tel. Co., 48 F.3d 39, 44 (1st Cir. 1995).

nied standing to a terminal operator that alleged unspecified harm to the market for terminalling services from an international soda ash cartel that buys such services.[31]

Despite the absence of a case explicitly predicated on lost demand, all the reasons that these courts gave for denying standing could plausibly be applied to lost-demand suppliers, suggesting that courts today are unlikely to recognize standing for that class of plaintiff. The courts in these cases rejected standing for suppliers on the policy ground that suppliers were not needed as plaintiffs to ensure enforcement of the antitrust laws because both direct purchasers and injured competitors of the cartels were available to sue and would have standing. The courts assumed that competitors, in particular, were in a superior position to notice antitrust violations and would have sufficient self-interest to bring an antitrust suit.[32] The courts further worried that authorizing supplier suits would lead to duplicative recovery,[33] or that damages would be difficult to calculate.[34]

The only standing that the courts have been willing to recognize for suppliers to a cartel arises when the cartel participants agree to reduce the prices that they pay to the supplier: an activity that might be called "cartel monopsony."[35] The conduct at issue in this article, however, involves agreements to raise prices charged to *buyers*, not agreements to insist on lower prices from sellers. Thus, standing for suppliers victimized by cartel monopsony is not discussed here.

C. *Suppliers to the Cartel's Customers ("Separate Sellers")*

The question whether separate sellers of components, rather than suppliers, can sue a cartel for fixing the price of the product with which the component belongs seems never to have been considered by the courts, regardless of whether the harm alleged was lost demand or something else. But the

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31. Int'l Raw Material v. Stauffer Chem. Co., 978 F.2d 1318, 1327–29 (3d Cir. 1992).

32. *Exhibitors' Serv., Inc.,* 788 F.2d at 578–79; *Int'l Raw Material*, 978 F.2d at 1329; *SAS of Puerto Rico, Inc.*, 48 F.3d at 44.

33. *Int'l Raw Material*, 978 F.2d at 1329.

34. *SAS of Puerto Rico, Inc.*, 48 F.3d at 45.

35. Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219 (1948); *In re* Beef Indus. Antitrust Litig., 600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); *SAS of Puerto Rico, Inc.*, 48 F.3d at 44.

courts' insistence, in a related case, that standing is limited to purchasers or competitors suggests that they would not recognize standing for separate sellers either. In that case, the court denied standing to a supplier to an airline that had been run out of business by predatory pricing conducted by competing airlines.[36] The case is not a true separate seller case, not only because the underlying antitrust violation was predatory pricing, and not cartelization, but also because the supplier did not sell components directly to consumers, but instead operated as a supplier to a firm operating in the market in which the anticompetitive conduct occurred. But the case is relevant because it shows how courts read the *Associated General Contractors* test,[37] with its reference to standing for "a consumer or a competitor" to exclude standing for firms occupying other roles.

Applying *Associated General Contractors*, the court explicitly based its denial of standing, *inter alia*, on the already familiar consideration that the plaintiff "was neither a consumer nor competitor" in the airline market.[38] Moreover, the court emphasized the existence of classes of potential plaintiffs that were in a better position to assert antitrust claims—namely, the airline that was the target of the alleged predatory pricing and whose suit against the defendant airlines had been settled, as well as the customers of the airline whose class actions were on track to be settled.[39] Finally, the court emphasized that the plaintiff "stands in the same position of numerous other prospective plaintiffs whose alleged losses are indirect and derivative," including "other supplies of goods and services, food vendors, waste disposal, services and custodians."[40]

These reasons given by the court indicate that the court would have equally denied standing if the plaintiff had alleged

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36. Brian Clewer, Inc. v. Pan Am. World Airways, Inc., 674 F. Supp. 782 (C.D. Cal. 1986), *aff'd*, 811 F.2d 1507 (9th Cir.), *cert. denied*, 484 U.S. 925 (1987). In fact, the plaintiff was not a typical supplier but a travel agency that characterized itself as a "marketer of air transportation and related services" whose profits depended largely on the commission obtained from the sale of tickets for the airline that had been the alleged victim of predatory practices. *Brian Clewer, Inc.*, 674 F. Supp. at 784, 788.

37. *See supra* note 17 and accompanying text.

38. *Brian Clewer, Inc.*, 674 F. Supp. at 784, 788.

39. *Id.* at 787.

40. *Id.*

a conspiracy to fix prices charged to the plaintiff's own customers, as occurs in the separate seller case. In light of the established doctrine of antitrust standing and the existing body of case law, there can be hardly any doubt that courts would not confer antitrust standing on firms that separately sell complementary goods to cartels' purchasers and that claim to have suffered a loss due to reduced demand.[41]

D. *State Antitrust Law*

Firms or persons that suffer harm caused by an infringement of the state antitrust laws can sue for damages under state law.[42] Most states have enacted statutes that resemble Section 4 of the Clayton Act.[43] Standing rules, including the doctrine of antitrust injury, typically track federal law.[44] However, about 30 states have enacted so-called "*Illinois Brick* repealer" legislation, under which indirect purchasers may sue for cartel damages under the states' antitrust laws.[45] Remarkably, courts allow for simultaneous actions by direct and indirect purchasers even though this combination of actions based on federal and state law can result in duplicative recovery.[46] This is ac-

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41. *See, e.g.*, John E. Lopatka, *Antitrust Injury and Causation, in* 3 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 2299, 2312–13 (2008); AREEDA ET AL., *supra* note 22, ¶ 350a, at 267 ("An immediate victim of illegal conduct by the defendant(s) is the plaintiff's customer, who then buys fewer inputs from the plaintiff. The plaintiff generally lacks standing unless the plaintiff competes with the defendant.").

42. 14 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2412, at 367 (2012).

43. *Id.* at 367–68.

44. *See, e.g.*, Lorenzo v. Qualcomm, Inc., 2009 WL 2448375, 2009-2 Trade Cas. ¶76,709 (S.D. Cal. Aug. 10, 2009) (indirect purchaser of cell phone lacked standing to challenge allegedly anticompetitive licensing practice between patentee and phone manufacturer under state provision); Flores v. Rawlings Co., 177 P.3d 341 (Haw. 2008), *cert. denied*, 180 P.3d 1047 (Haw. 2008) (members of medical benefit plans were considered "consumers," and thus lacked standing).

45. Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and* Illinois Brick, 100 IOWA L. REV. 2115, 2119 (2015). *See also* ABA SECTION OF ANTITRUST LAW, *supra* note 18, at 30 (2d ed. 2010); AREEDA & HOVENKAMP, *supra* note 42, ¶ 2412d1, at 372–75. For an analysis of *Illinois Brick* repealer legislation, see Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violation*, 61 ALA. L. REV. 447, 451–60 (2010).

46. *In re* Flash Memory Antitrust Litig., 643 F. Supp. 2d 1143, 1156 (N.D. Cal 2009) ("Duplicative recovery is, in many if not all cases alleging a nation-

cepted even if the two actions are joined under the federal court's pendent or diversity jurisdiction.[47] Yet, arguably, the expansion of standing rights under state law and practice hitherto concerns only indirect purchasers but not suppliers of a cartel or of separate sellers of complementary products. Hence, it appears at first glance that the legal framework is not more favorable to suppliers and separate sellers under state laws than under federal law. However, taking a closer look, it becomes apparent that recognizing standing to indirect purchasers breaks with fundamental restrictions under federal law and prepares the ground for a generally broader concept of antitrust standing.[48]

II.
The Economics of Cartel Effects on Component Makers

The law may not, at present, provide standing to firms that supply the cartel or the cartel's customers, but there is in fact injury to them. Products and their components are what economists call "complementary goods," meaning that consumers prefer to consume both goods, rather than either separately. Pencils and pencil erasers are an illustrative example: as erasers are not much use to the consumer who has no pencil and, at least for those who wish to correct mistakes, pencils are not much use without erasers either.[49]

The principal economic insight upon which standing for separate sellers and suppliers rests is that an increase in the price of one complement, whether brought about by a cartel or indeed for any other reason, causes consumers of other complements to reduce their demand for those complements, because consumers demand complementary products only if they can buy all the complements together. If the price for one

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wide conspiracy with both direct and indirect purchaser classes, a necessary consequence that flows from indirect purchaser recovery."); *In re* TFT-LCD (Flat Panel) Antitrust Litig., 2013 WL 257148 (N.D. Cal. Jan. 23,2013) (duplicative recovery between federal and state plaintiffs is not a basis for dismissal).

47. Areeda & Hovenkamp, *supra* note 42, ¶ 2412d1, at 375.

48. See for more detail *infra* Section IV.B.

49. The insight that firms have incentives to raise price in component markets with market power goes back to Antoine-Agustin Cournot, Recherches sur les Principes Mathématiques de la Théorie de la Richesse (Paris, Calmann-Lévy 1838).

of the complements goes up, forcing consumers to buy fewer units of that product, then consumers will reduce the number of units of all the complements that they buy, because they derive value from the complements only together as a group. If the price of pencils goes up, then consumers will buy fewer erasers, because they will now be able to afford fewer pencils with which to use those erasers.

The second key insight is that this loss in demand for components of a cartelized product is identical regardless of how consumers obtain those components:

> **Supplier Case.** If the component is bundled into the product by the cartel, and then sold as a bundle to the consumer, putting the component maker in the role of supplier, then, when a cartel-induced increase in the price of the final product reduces demand for the product, the cartel will make fewer units of the product and therefore buy fewer units of the component from the supplier.
>
> **Separate Seller Case.** If the component is sold separately from the product, directly to the consumer, then a cartel-induced increase in the price of the product will cause consumers to buy less of the component, because the component is complementary to the cartelized product.
>
> **Purchaser Case.** Finally, if the component maker buys the product, incorporates the component into the product, and then resells the bundle to consumers, the effect on demand is the same, because a cartel-driven increase in the price of the product will force the maker of the component to increase the price of the bundle that the component maker resells to consumers, causing consumers to buy less of the bundle and therefore effectively forcing the component maker to sell fewer units of the component that goes into the bundle.

Using the facts of *International Raw Material*[50] as an example, one can see how this might look in a real-world business scenario. Assume that a producer of soda ash sells his products overseas via maritime cargo to industrial consumers. This

50. Int'l Raw Material v. Stauffer Chem. Co., 978 F.2d 1318 (3d Cir. 1992).

mode of transport necessarily involves the service of a terminal operator at the harbor that specializes in loading vessels with this kind of substance. Starting from this base case, different market organizations are conceivable:

> **Supplier Case.** The producer sells soda ash overseas at an agreed-upon port of destination. The terminal operator loads the soda ash on behalf of the seller.
>
> **Separate Seller Case.** The producer sells soda ash overseas and commits to placing the goods alongside the buyer's vessel at a specified port of shipment. The terminal operator loads the soda ash on behalf of the buyer.
>
> **Purchaser Case.** The producer sells soda ash to a dealer that operates a harbor terminal and that resells the soda ash overseas at an agreed port of destination.

The odd thing about antitrust law is that, today, only the component maker in the last case would be able to sue the cartel for damages, because only in this last case does the component maker buy directly from the cartel. But so long as the character of consumer demand is the same in all three cases, the cartel's price increase will cause consumers to react in the same way, and so consumers will reduce demand for the overall components-included product by the same amount in each case, resulting in the same amount of harm to the component maker in each case. This is clear in the case of the supplier and the direct purchaser, because in both cases consumers pay a single price for the finished components-included product, either to the maker of the product or to the direct purchaser. But it is also true in the separate seller case, because consumers know that they want to assemble the finished product themselves, and so when they consider buying any component they take into account whether they can afford the product that goes along with it, and will respond to an increase in the price of any component as though the price of the bundle had gone up, because, in fact, the price of the bundle has risen.

The misfortune of the current law is that not only is standing restricted to direct purchasers, despite the identity of the harm inflicted on suppliers and separate sellers of complements, but the amount of damages awarded to those direct purchasers under current law depends on the market organization and appears to be incoherent. In addition, damages do

not account for the lost-demand harm.[51] Direct purchasers receive the cartel overcharge under current law, which is calculated as the increase in price brought about by the cartel, multiplied by the volume of sales after cartelization. But the magnitude of the lost-demand harm suffered by direct purchasers, as well as suppliers and separate sellers, is entirely different.

The magnitude of lost-demand harm depends instead on a decline in the price of the component that may be triggered by the drop in demand. Assuming that the component maker is operating in a competitive market for the component,[52] meaning that there are numerous other sellers of the same component all competing either to supply the complement to the cartel, or to sell it to consumers either as a bundle with the cartelized product or separately, the component maker will charge a price equal to the marginal cost of producing the last unit of the component demanded—a price just high enough to ensure that no unit is produced at a loss, but no higher, given the competitive pressure from other sellers. The reduction in demand for the component caused by the cartel's price increase will then drive down the price charged by the component maker for the component and drive out some of the component makers, because the marginal cost of the last unit will fall as sales volume falls—the first units are cheaper to make than the last.

This price reduction is most obvious in the separate seller case, because the component is sold separately, and the reduc-

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51. The economics literature has pointed out that there is no clear relationship between damages awarded on the basis of overcharge and the true harm. *See, e.g.*, Frank Verboven & Theon van Dijk, *Cartel Damages Claims and the Passing-On Defense*, 57 J. INDUS. ECON. 457 (2009); Martijn A. Han, Maarten Pieter Schinkel & Jan Tuinstra, *The Overcharge as a Measure of Antitrust* (Amsterdam Center for Law & Economics Working Paper No. 2008-08, 2009). As the former emphasize, the output effect of a cartel is usually not accounted for.

52. The assumption in this article is that all markets are perfectly competitive. Under imperfect competition, the analysis would need to be modified, and the behavior of imperfectly competitive firms would need to be specified. For a particular specification, see Eckart Bueren & Florian Smuda, *Suppliers to a Sellers' Cartel and the Boundaries of the Right to Damages in U.S. Versus EU Competition Law*, 45 EUR. J.L. & ECON. 397 (2018) (considering the purchaser and supplier case and postulating symmetric Cournot competition among component makers). Depending on the postulated behavior, the way in which the selling of complements is organized may affect the market outcome.

tion in demand must then drive the price down in that separate, competitive market. But the effect is the same in the case of the supplier or the direct purchaser, both of which involve sale of the cartelized product and the component together as a bundle. The supplier competes with other suppliers, so, as purchases of the component by the cartel fall due to the cartel's raising of the price charged to consumers for the bundle, the supplier's price is driven down in the supply market. Similarly, the direct purchaser competes with other direct purchasers in reselling to consumers, so the direct purchaser cannot resist reducing the margin that the purchaser takes as compensation for the contribution of its own component to the bundle out of the overall price that the purchaser charges to consumers. Were the direct purchaser to do otherwise, competitors in the component market could buy from the cartel and sell the bundle for a lower price, inclusive of the component, depriving the component maker of sales. Consequently, the direct purchaser's margin, which is the price that the purchaser in effect charges for the component, must fall in response to the cartel's price increase.

The consequence of the decline in prices associated with cartel-induced reductions in demand is that component makers suffer two kinds of harm: Harm associated with the price reduction, which can be calculated as the decline in price times the number of units sold after the decline in demand, plus the lost profits, at the original higher price, associated with the units that are not sold at all due to the reduction in sales volume.

The measure of harm for direct purchasers under current antitrust practice takes neither kinds of harm into account.[53] Instead, today, the harm to direct purchasers is calculated as the increase in price paid by the direct purchasers to the cartel.[54] If the direct purchaser just passed the price increase on to the end consumer and enjoyed a zero margin, it would not

53. It could be argued that Section 4 of the Clayton Act provides for treble damages and, thus, offsets that shortcoming. However, the trouble is that the relationship between the overcharge and the loss suffered due to a cartel-induced price increase is arbitrary. Moreover, treble damages are meant to close other shortcomings in the system of cartel damages law. *See infra* notes 94–96 and accompanying text.

54. *See supra* note 7 and accompanying text.

experience this increase as a loss.[55] The loss to the direct purchaser comes from the reduction in the margin between what the direct purchaser pays to the cartel and what it can charge to the consumer.[56] That margin is the price that the direct purchaser receives for its component less the cost that it incurs and, as discussed above, that margin falls as the cartel increases its price, and consumers reduce their purchases. An antitrust practice that focuses solely on the cartel overcharge neglects a price decrease on the part of direct purchasers, which is also suffered by separate sellers and suppliers.

Indeed, the arbitrary relationship between the overcharge and the actual harm to component makers becomes clear when it is understood that the overcharge awarded by courts itself varies arbitrarily, depending on how the component is supplied. When the cartel buys the component from a supplier the overcharge is the difference between the price of the bundle before and after cartelization, because the cartel raises the price of the bundle. In the separate seller and direct purchaser cases, however, the overcharge is the increase in the price of the cartelized product, before inclusion of the component, because that is the product for which the cartel fixes the price. These two measures of overcharge differ by the amount of the decrease in the price of the component, because the overall price of the bundle consists only of the price of the cartelized product plus the price of the component.

All this is illustrated in Figure 1, which depicts the market for the bundled product.[57] In the absence of cartelization, the price paid by the consumer for the bundled product, either all at once in the supplier and direct purchaser cases, or separately to the supplier for the component and to the cartel for the cartelized product in the separate seller case, is $P_A^X + P_B^X$: the sum of the prices of the cartelized product and the component. When the cartel raises the price of the cartelized prod-

55. A complete passing-on of the cartel-induced overcharge will occur only in perfectly competitive markets with constant marginal costs, but not when marginal costs increase in the volume of sales. We do not consider here the additional effect that firms buying from the cartel will pass on to their customers only a certain part of the overcharge if they enjoy market power on the downstream market.

56. *See* Jens-Uwe Franck & Martin Peitz, *Toward a Coherent Policy on Cartel Damages* 21–23 (ZEW Discussion Paper No. 17-009, 2017).

57. For a detailed analysis, see *id.* at 17–33.

uct—labeled product in Figure 1—from P_A^X to P_A^C, the price of the component—labeled B in Figure 1—falls from P_B^X to P_B^C. The price for the bundle then is $P_A^C + P_B^C$ under cartelization. The total overcharge listed in Figure 1 is the overcharge in the supplier case that is borne by consumers for the bundle. If only the direct purchaser can sue for damages based on the overcharge, consumers will be awarded this total overcharge, but the damage in the form of the underpayment will not be accounted for.

The (total) overcharge in the separate seller and direct purchaser cases is the change in the price of A (times the volume of trade under cartelization). The price for product A under competition is the difference between $P_A^X + P_B^X$ and P_B^X in Figure 1, while the price for product A under cartelization is the difference between $P_A^C + P_B^C$ and P_B^C. The total overcharge is then equal to the total overcharge in the supplier case plus the underpayment listed in Figure 1. According to antitrust law, only direct purchasers may sue for damages.[58] Thus, in the direct purchaser case, damages are awarded to the component makers, whereas, in the separate seller case, they are awarded to consumers.

The demand reduction loss to the consumers is the upper of the two shaded triangles. The demand reduction loss to the component maker is the lower of the two shaded triangles. Antitrust law today accounts for the overcharge, but not the harm created by the reduction in consumer demand caused by that overcharge.

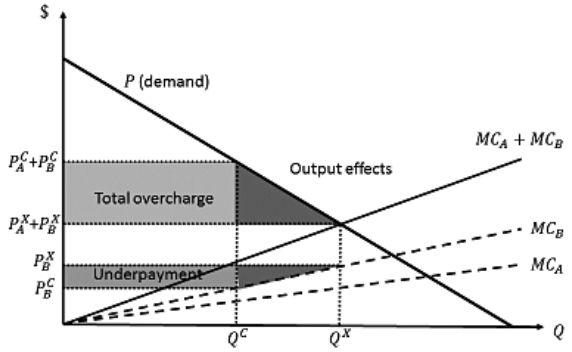

Figure 1: Losses to consumers (top shaded areas) and the makers of a component (bottom shaded areas) from cartelization of the market for a product (A) that consumers purchase in conjunction with a component (B).

58. *See supra* Part I.

III.
Policy Considerations

The economics of complements shows that there can be no question whether harm to component makers exists. Arguments against recognizing standing for component suppliers and separate sellers center instead on three issues. First, there is the question whether the costs, in terms of judicial resources of permitting additional classes of plaintiff to sue, are worth the benefit of increased enforcement of antitrust laws when persons who are apparently more directly injured, such as buyers from cartels, already seem to be in a good position to identify cartels and bring suit against cartelists (suppliers as "inferior plaintiffs" or "immediate victims" as preferred plaintiffs, respectively).[59] Second, there is the question whether demonstrating the existence of lost-demand harm and its measurement is more complex than demonstrating and measuring a cartel-induced overcharge, and therefore more costly in terms of both judicial resources and the costs of error when the amount is calculated incorrectly, further tipping the balance of cost and benefit against recognition of standing.[60] Third, there is the question whether antitrust should seek to

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59. *See* Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 542–43 (1983) ("The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party . . . to perform the office of a private attorney general."); Exhibitors' Serv., Inc. v. Am. Multi-Cinema, Inc., 788 F.2d 574, 578 (9th Cir. 1986) ("[T]he existence of more direct victims of the alleged violation [is a factor] a court must consider when making the 'proper party' determination."); Int'l Raw Material v. Stauffer Chem. Co., 978 F.2d 1318, 1329 (3d Cir. 1992) ("Because IRM is neither a producer nor a consumer of soda ash, it is not the plaintiff best situated to challenge ANSAC's allegedly unlawful conduct in the soda ash market. That is, IRM cannot be depended upon to advance the strongest arguments identifying the anticompetitive effects in the soda ash market, in which it does not participate."); SAS of Puerto Rico, Inc., v. Puerto Rico Tel. Co., 48 F.3d 39, 44 (1st Cir. 1995) ("It is not surprising that no simple rules has emerged for choosing the best antitrust plaintiff and deciding when second-best plaintiffs should be barred.").

60. *See Associated Gen. Contractors*, 459 U.S. at ("The indirectness of the alleged injury also implicates the strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits."); *SAS of Puerto Rico, Inc.*, 48 F.3d at 45("[O]ne of the reasons for limiting standing concerns the speculative character of either the injury or the relationship between the violation and the injury.").

provide full compensation for injury to anyone at all, when what matters for deterrence of anticompetitive conduct is that the *defendants* are forced to pay damages that equal the amount of the profits they generate from the wrongdoing at the expense of other players in the market plus the harm they inflict on social welfare,[61] and not that those injured necessarily receive any compensation for injury. Deterrence requires that the wrongdoer suffer, not that the victim be made whole. To the extent that overcharge damages claimed by consumers already approximate the total harm caused by cartels, deterrence does not seem to require that suppliers or separate sellers receive a share of those damages as compensation for their injuries (avoiding "duplicative recovery" and "complex apportionment of damages").[62]

A. *Efficiency Concerns*

1. *Detection of Cartel Infringements*

Standing encourages firms to act upon their private information about violations of the law[63] either by directly filing a suit for damages,[64] or by informing government enforcers,

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61. *See infra* Section III.A.4.

62. *See Associated Gen. Contractors*, 459 U.S. at 543–44 ("These cases have stressed the importance of avoiding either the risk of duplicative recoveries on the one hand, or the danger of complex apportionment of damages on the other."); Int'l Raw Material v. Stauffer Chem. Co., 978 F.2d 1318, 1329 (3d Cir. 1992) ("[P]ermitting IRM to go forward with this claim creates the risk of duplicative recovery."); *Exhibitors' Serv., Inc.*, 788 F.2d at 578.

63. This assumption is shared by many authors in the "private versus public enforcement" debate. *See, e.g.*, Kent Roach & Michael J. Trebilcock, *Private Enforcement of Competition Laws,* 34 OSGOODE HALL L. J. 461, 472, 480 (1996); Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement,* U. ILL. L. REV. 185, 191–92 (2000); STEVEN SHAVELL, Foundations of Economic Analysis of Law 578–79 (2004); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies,* 91 VA. L. REV. 93, 108–09 (2005); Ilya Segal & Michael Whinston, *Public vs. Private Enforcement of Antitrust Law: A Survey,* EUR. COMPETITION L. REV. 306, 308–09 (2007). *See also* R. Preston McAfee, Hugo M. Mialon, & Sue H. Mialon, *Private v. Public Antitrust Enforcement: A Strategic Analysis*, 92 J. PUB. ECON. 1863 (2008), who base their model of antitrust enforcement on the assumption that a private party has a better signal of infringements than a public authority.

64. In the United States, stand-alone cases play a significant role. In an analysis of forty cases before courts, Lande and Davis found fifteen that did not follow federal, state, or E.U. enforcement actions. The authors empha-

waiting for the government to prosecute the cartel, and then using the government's victory as the basis for bringing a damages suit. It is from this perspective that standing rights to sue for antitrust damages should be given to those who have the highest likelihood of being informed about infringements of the antitrust rules.

While direct purchasers may be in a relatively good position to identify cartels, because direct purchasers pay the higher prices charged by them, suppliers of components may be in at least as good a position, due to their intimate knowledge of an industry and their person-to-person contacts with the cartel's staff. Indeed, direct purchasers cannot necessarily distinguish between a price increase caused by cartelization and one caused by rising input costs, but suppliers certainly can if they are the sole external input providers.[65]

A similar argument can be made in the case of separate sellers, as they may have intimate knowledge of the market for complementary products and, thus, a good understanding of business practices in this market. Indeed, in *International Raw Materials*, the U.S. Court of Appeals for the Third Circuit implicitly suggested that all participants in a market—not just

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sized that, for each of those cases, it was the private plaintiffs "that completely uncovered the violations, and initiated and pursued the litigation." *See* Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases,* 42 U.S.F. L. REV. 879, 897–99 (2008). In a subsequent article, referring to the same study, the authors concluded "that sixteen of these forty cases originally had been discovered by private parties and their counsel, ten were follow-ons to government enforcement actions, and the others had mixed or uncertain origins." Moreover, they ascertained that "at least nine of the private follow-on cases . . . were significantly broader than the DOJ case: they involved more defendants than the DOJ case, more causes of action, greater relief (in some instances the only relief), or longer periods of illegality." Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. REV. 315, 346 (2011). In a second study, the authors analyzed twenty cases, ten of which they identified as not having been preceded by government action. *See* Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement,* 36 SEATTLE U. L. REV. 1269, 1292 (2013).

65. For the supplier, the problem is determining whether a reduction in purchases of the supplier's product is due to cartelization or independent changes in downstream consumer demand. Both suppliers and direct purchasers face information problems; it is not clear that the supplier's are any greater than the direct purchaser's.

buyers—are in a good position to be aware of restrictive practices.[66] The implementation of a broad concept of antitrust standing may therefore improve cartel detection and deterrence.

2. *Ensuring Incentives to Bring Suit*

Direct purchasers also may not be as well suited to policing cartels as separate component sellers because direct purchasers may enter into long-range business relationships with the cartels that supply them. Market players that are in a long-standing business relationship with firms that cartelize are arguably more likely to hesitate to take action for fear of retaliation or for the benefit of reaping a share of the cartel overcharge. It has been demonstrated that, through rationing inputs at low prices, an upstream cartel may shield itself from private damages claims by forwarding a share of the cartel profits to its direct purchasers.[67] Limiting standing to direct purchasers therefore entails the significant risk that private antitrust enforcement will be thwarted through (tacit) collusion between a cartel and potential antitrust claimants. Expanding standing to permit a broader class of aggrieved parties—particularly parties such as separate sellers who are not in a direct business relationship with the cartel infringers—reduces the risk of collusion.

3. *Social Costs of Litigation*

The difficulty of calculating damages. Calculating damages for separate sellers and suppliers need be no more complex than calculating the overcharge awarded today to direct purchasers. Calculating the exact and complete amount of damages that a cartel inflicted on a supplier or a separate seller of complementary goods involves an assessment of reduced-demand effects on the cartelized product and of how this, in turn, affected the profits of the producers of the com-

66. Int'l Raw Material v. Stauffer Chem. Co., 978 F.2d 1318, 1329 (3d Cir. 1992) ("Because IRM is neither a producer nor a consumer of soda ash, it is not the plaintiff best suited to challenge ANSAC's allegedly unlawful conduct in the soda ash market.").

67. Maarten Pieter Schinkel, Jan Tuinstra & Jakob Rüggeberg, *Illinois Walls: How Barring Indirect Purchaser Suits Facilitates Collusion*, 39 RAND J. ECON. 683 (2008).

plement.[68] This is necessarily more complex than calculating the cartel overcharge, which omits reduced-demand effects. However, calculating suppliers' damages may also similarly be simplified by omitting the reduced-demand effect. Multiplying the quantity sold under cartelization by the cartel underpayment—i.e. the difference between the price realized and the price with no cartel, which can be calculated following comparator-based approaches—produces a figure that represents the minimum damage inflicted on suppliers. Consequently, the damages calculation for suppliers and separate sellers need be no more costly or prone to error than the overcharge measure currently used for direct purchasers.

Awarding damages for units no longer sold as a result of cartelization should also not be dismissed out of hand. Such a higher level of economic complexity certainly entails higher social costs in terms of costs on the part of the judicial system, such as fees of economic experts and lawyers, as well as error costs. However, this should not be regarded as a compelling argument against such approaches, as that can deprive antitrust plaintiffs of an incentive to find innovative ways to prove damages for lost sales. One should not underestimate the innovative capacity of private plaintiffs and, in particular, of the considerable number of law firms and consulting economists that specialize in cartel damages actions and compete with each other in doing so.[69]

Frivolous litigation. Another potential concern with extending standing to suppliers and separate sellers is that this could trigger a wave of frivolous lawsuits. Private antitrust cases that are brought without merit, in the hope that a defendant

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68. This follows from the economic analysis *supra* Part II.

69. *See* Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, U. ILL. L. REV. 185, 188 (2000) ("But citizen involvement generates other, equally valuable benefits. Citizen participation, for example, produces enforcement innovations . . . ."). *See also id.* at 206 ("In theory, enforcement competition . . . should produce a higher level of innovation. Environmental nonprofits may develop new approaches to developing proof, new theories of liability, new lawsuit efficiencies, or new forms of settlements that are preferable to traditional approaches."); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 92 VA. L. REV. 93, 112 (2005) ("Another potential advantage of private enforcement suits is their capacity to encourage legal innovation—whether in the form of novel legal theories, creative approaches to dispute settlement, or new techniques of investigation and proof.").

might be pushed into a positive settlement or a court might award damages on a whim, are certainly an evil in terms of social welfare. It appears, however, that there is no sound empirical evidence demonstrating that meritless cases do, indeed, result in settlements.[70] What is more, it seems far from clear why granting antitrust standing to firms that supply a cartel or purchasers from a cartel would increase the number of meritless claims. Even if it were to lead to frivolous claims, that should not be considered a sufficient reason to deny standing to certain categories of plaintiffs. Rather, unmeritorious suits should be discouraged through procedural arrangements—for example, by adjusting the standard for defendants to obtain summary judgment[71] and for plaintiffs to survive a motion to dismiss,[72] as well as through appropriate fee allocation rules. Regarding the latter, a "loser pays" rule—the general rule throughout the European Union (E.U.)[73]—could more effectively prevent frivolous claims[74] than the one-way

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70. Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1, 7 (2013).

71. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) ("To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 [Sherman Act] must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently.").

72. In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007), the U.S. Supreme Court modified the pleading standard, holding that a complaint alleging a conspiracy in violation of § 1 of the Sherman Act must provide "enough factual matter (taken as true) to suggest than an agreement was made," and must do so by "identifying facts that are suggestive enough to render a § 1 conspiracy plausible." Meeting this standard prior to discovery appears not to be an easy task for plaintiffs. *See, e.g.*, *In re* Travel Agent Comm'n Antitrust Litig., 583 F.3d 896, 902–11 (6th Cir. 2009), *cert. denied*, 131 S. Ct. 896 (2011); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1048–49 (9th Cir. 2008); *In re* Elevator Antitrust Litig., 502 F.3d 47, 50–52 (2d Cir. 2007) (per curiam).

73. DENIS WAELBROECK, DONALD SLATER & GIL EVEN-SHOSHAN, STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES, COMPARATIVE REPORT 116 (Ashurst 2004).

74. For a summary of the theoretical and empirical literature on the impact of different fee allocation schemes on the incentives to sue, see ANDREA RENDA ET AL., MAKING ANTITRUST DAMAGES ACTIONS MORE EFFECTIVE IN THE EU: WELFARE IMPACT AND POTENTIAL SCENARIOS, FINAL REPORT 176–92 (2007).

fee-shifting regime established under U.S. federal antitrust law.[75]

4. *Optimal Deterrence*

Optimal deterrence theory, associated with the work of economist Gary Becker, holds that wrongdoing can be deterred by ensuring both that wrongdoers cannot profit from their wrongdoing and that they bear losses for their wrongdoing equal to losses borne by others as a result of any reduction in output brought about by the wrongdoing.[76] In economics parlance, optimal deterrence requires that wrongdoers disgorge any profits that they generate from their wrongdoing and pay an additional amount equal to the deadweight losses that they create.[77] This means that the cartel should not only disgorge the entire overcharge it pockets at the expense of its purchasers, which is the amount of the price increase times the volume of sales at the cartel price. It should also pay for the loss from units no longer produced due to the rise in prices. Consumers would have bought those extra units at the

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75. According to Section 4 of the Clayton Act, 15 U.S.C. § 15 (2012), (only) successful plaintiffs are entitled to recover "the cost of suit, including a reasonable attorney's fee."

76. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

77. *See, e.g.*, RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST: CASES, ECONOMIC NOTES AND OTHER MATERIALS 550 (2d ed. 1981); William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 656 (1983); William Breit & Kenneth G. Elzinga, *Private Antitrust Enforcement: The New Learning,* 28 J.L. & ECON. 405, 410–12; Wiliam H. Page, *The Scope of Liability for Antitrust Violations,* 37 STAN. L. REV. 1445, 1455 (1985); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW §10.14, at 394 (9th ed. 2014); John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays,* 34 CARDOZO L. REV. 427, 431–35, 468 (2012). Since it seems undisputed that the cartel overcharge has to be part of optimal antitrust damages, the dispute as to whether the overcharge should be considered part of a welfare loss (for this position, see RICHARD POSNER, ANTITRUST LAW 13–17 (2d ed. 2001) and whether the optimal sanction should be calculated on the basis of the damage caused (harm based) or of the profit made by the cartel (gain based) ultimately concerns only the question of whether efficiency gains that might occur—e.g., due to savings in production costs—should also be disgorged from the cartelists, or whether incentives for an "efficient breach" should be left. For the former position, *see, e.g.*, Wouter P.J. Wils, *Optimal Antitrust Fines: Theory and Practice,* 29 WORLD COMPETITION 183, 191–93 (2006); and for the latter position, see Landes, *supra*, at 652, and RICHARD POSNER, ANTITRUST LAW 267 (2d ed. 2001).

low pre-cartel prices and obtained an extra benefit; direct purchasers would have resold those extra units of the product and, thus, sold their bundled component. As a result, consumers would have obtained a higher benefit and direct purchasers a higher profit, which are wiped out by cartel-induced reduction in consumer demand.[78] The damages to be paid for the value lost to consumers and to the component maker equal deadweight loss—the economic value destroyed by the cartel—whereas the overcharge to be paid out represents the amount of money redistributed by the cartel from both consumers and the component maker. The total amount is the sum of the shaded regions in Figure 1.

Under current law, which focuses entirely on compensating direct purchasers (and partly also umbrella plaintiffs) in the amount of the cartel-induced overcharge,[79] cartels never have to pay out this full amount. Instead, when they are sued by component makers acting as direct purchasers, or when they sell separately to consumers, they disgorge all their extra profit from the scheme, but do not pay for the losses that they inflict on the consumer or the component maker for reduced output; they do not pay for deadweight loss. When cartels buy components from suppliers and sell to consumers, they do not even pay out all their profits, but only the increase in the price of the bundled product, allowing them to keep the extra profits that they make from the demand-reduction-driven fall in the component's price.

Granting suppliers and separate sellers standing to obtain lost profits would bring the current rules closer to imposing optimal deterrence.[80] In the supplier case, wrongdoers would

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78. In an ideal world of deterrence through damages liability, losses resulting from umbrella pricing should not figure in the damages because they are offset by the gains to the innocent sellers. POSNER, *supra* note 77, §10.14, at 395. However, there may be good reasons to award compensation for damages caused by "umbrella pricing" as a second-best solution. *See* Jens-Uwe Franck, *Umbrella Pricing and Cartel Damages Under EU Competition Law*, 11 EUR. COMPETITION J. 135, 140–48 (2015).

79. *See supra* notes 20–21 and accompanying text.

80. Economists have been stressing that cartels can be deterred effectively by making sure that potential cartelists' incentive constraint to sustain the cartel outcome is violated and, consequently, that potential cartelists cannot trust their partners in this illegal activity. For a clear exposition of this point, see, for example, Maria Bigoni et al., *Trust, Leniency, and Deterrence,* 31 J.L. ECON. & ORG. 663, 663–66 (2015). This is the main motivation

be forced to pay out both the profits they generate from paying lower prices to suppliers, and, if the rule were to extend to unsold units, the lost profits on those unsold units as well. Today cartels pay neither in the supplier case.[81] To the extent that they pay anything, they pay to consumers, who demand only the overcharge on the bundled product containing both the component and the cartel product, allowing the cartel to retain the underpayment to the component maker. In the separate seller case,[82] cartels today do pay out all their profits when sued by consumers, including the part that they are able to extract from consumers because consumers pay lower prices to the separate component seller. That portion represents, in effect, the benefit to the cartel of the undercharge loss of the component maker. But cartels here do not pay out the loss of the component maker on unsold units to anyone, making standing for separate sellers deterrence optimizing as well. To avoid duplicative recovery in the separate seller case, consumers receiving overcharge damages would need to be required to pass the part of the overcharge made possible by the undercharge on to separate sellers, something that is—at least in theory—consistent with current antitrust doctrine.[83]

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behind leniency and whistleblower reward programs. Nowadays, leniency programs are standard investigative tools of antitrust authorities, and thus have been implemented by both the U.S. Department of Justice Antitrust Division and the E.U. Commission, among others. In contrast, while whistleblower reward programs are currently deployed in places such as the United Kingdom, South Korea, and Hungary, they have been considered but not yet implemented in the United States or by the E.U. Commission. *See* Kevin R. Sullivan, Kate Ball & Sarah Klebolt, *The Potential Impact of Adding a Whistleblower Rewards Provision to ACPERA, in* ANTITRUST SOURCE 1–6 (2011). Thus, given that a cartel is not a single entity, but contains a group of individual actors, the issue of deterrence is not fully addressed by focusing on the overall level of fines and damages that the cartel pays. Indeed, if firms that are granted leniency have to pay damages in private lawsuits, deterrence might well be more difficult, as a cartel may be sustained more easily. While orthogonal to the main point of our article, this qualifies our remarks on optimal deterrence.

81. *See supra* Section I.B.

82. *See supra* Section I.C.

83. *See* L.A. Mem'l Coliseum Comm'n v. NFL, 791 F.2d 370, 1356, 1366–73 (9th Cir. 1986). There is, however, no precedent for an effective implementation of this rule with regard to cartel-induced price reductions on the part of separate sellers of complementary products. It appears that the courts have not, so far, considered this kind of passing-on defense.

B. *Corrective Justice*

While granting standing to suppliers and separate sellers would bring the deterrent effect of antitrust law closer to optimality, in cases in which the overcharge is large relative to the loss to component makers, the improvement in deterrence would be small, and potentially not justified in relation to the costs of recognizing standing for a new class of plaintiffs. But although the law does recognize deterrence as arguably the major purpose of antitrust remedies, it is not the only purpose.

It is a widely shared supposition that private actions for antitrust damages exist alongside government enforcement of the antitrust laws to "compensate" the victims of cartelization.[84] The U.S. Supreme Court has ruled accordingly.[85] This makes the underlying rationale of antitrust damages the pursuit of "corrective justice"—i.e., "the idea that liability rectifies the injustice inflicted by one person on another."[86] The concept of corrective justice does not require that all injured parties be (fully) compensated.[87] But it does require that a dam-

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84. *See, e.g.*, John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less Than Single Damages*, 100 IOWA L. REV. 1997, 2013–14 (2015) ("The legislative history and case law indicate that compensation is a goal, perhaps the dominant goal, of antitrust's damages remedy.").

85. *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977) ("But §4 has another purpose in addition to deterring violators and depriving them of 'the fruits of their illegality."); Hanover Shoe & Co. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968) ("[I]t is also designed to compensate victims of antitrust violations for their injuries."); Am. Soc'y of Mech. Eng'rs v. Hydrolevel, 456 U.S. 556, 575–76 (1982) ("[T]reble damages serve as a means of deterring antitrust violations and of compensating victims . . . .").

86. Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349 (2002). Weinrib develops a formalist idea of corrective justice that denies that "compensation" or "deterrence" could be conceived as "goals" of tort law. *See, e.g.*, Ernest J. Weinrib, *Formalism and Practical Reason, or How to Avoid Seeing Ghosts in the Empty Sepulchre,* 16 HARV. J.L. & PUB. POL'Y 683, 697–98 (1993).

87. With the objective of corrective justice in mind, it must be taken into account, in any case, that the lawyers pocket a considerable share of the awarded recovery. This is particularly striking in U.S.-style litigation involving contingency fees. Based on a study of forty-five (large) cases, it has been ascertained that the percentage of recovery awarded as attorneys' fees averaged 14.3% (weighted average) or 25.6% (unweighted average). The difference results from the fact that larger cases tend to produce relatively lower attorneys' fees. *See* Davis & Lande, *supra* note 64, at 1294–95 (2013). Another study ascertained that legal fees made up 9.15% (median fees) or 21%

ages remedy be available if the compensation of a certain type of damage appears to be necessary to restore justice.[88]

The main challenge of such a concept is to find normative criteria that can rationalize established doctrines of damages law such as "antitrust injury," the rationality of which is to distinguish between those types of injury that have to be compensated and those that the wrongdoer does *not* have to compensate. In this regard, the notion of "directness" or "remoteness" of injury is often considered crucial. This idea rests upon the legal principle, derived from Roman law, according to which any owner has to bear the risk of *accidental* loss or destruction of his property: *casum sentit dominus*.[89] If applied to commercial conduct, this essentially means that any market player must bear normal business risks. And the less direct the link between antitrust violation and an injury is, the more this injury may be regarded as the materialization of a normal business risk and, thus, an "accidental loss" compensation for which is not required by the pursuit of corrective justice.

It is tempting to rely on this remoteness concept to argue that direct purchasers have the strongest claim to compensation for the intentional act of cartelization, because direct purchasers buy directly from the cartel, paying, before anyone

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(mean fees) of the recovery. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993–2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 262 tbl.5 (2010). In addition, parts of the recoveries have to be used to administer the payment process. According to the study by Davis and Lande, on average, 4.1% of the recoveries were allocated to administration. Davis & Lande, *supra*, at 1307–08 tbl.11.

88. *But see, e.g.*, RENDA ET AL., *supra* note 74, at 46 ("We consider this goal [of corrective justice] to be fully achieved whenever private plaintiffs are granted *restitutio in integrum*, and accordingly neither over- nor under-compensation are likely to be observed."); *id.* at 79 ("We can assume that, in order to achieve perfect . . . corrective justice, all these groups [that potentially sustain an economic loss from a price-fixing conspiracy, including suppliers to the cartel or to other firms who sell products that contain the cartelized input] should be granted access to justice to recover damages."); Davis & Lande, *supra* note 70, at 8–9 ("As to compensation, in an ideal world, we might identify every antitrust violation . . . determine the amount of harm each victim suffered, and assess whether private or public enforcement best compensated victims for harm. We might also determine every time a private plaintiff obtained compensation in excess of actual damages.").

89. *See, e.g.*, REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 154 (1996).

else, the high prices that the cartel was illegally formed to create. But the injury inflicted on suppliers and separate sellers is just as direct; indeed, in the supplier case, it is more direct. The supplier receives a lower price from the cartel *before* the cartel can sell to the direct purchaser, because the cartel must buy the component in order to bundle it with the cartel's product and resell the bundle to direct purchasers. In contrast, in the separate seller case, harm occurs at the same time as the direct purchaser would be harmed: namely, at the moment that the bundle is created. The direct purchaser creates the bundle when the direct purchaser buys the cartel product to combine it with the component. Harm to the direct purchaser takes place at this moment, because the high price charged by the cartel forces the direct purchaser to buy fewer units of the cartel product, reducing the number of component units that the direct purchaser can combine with the cartel product, and thereby reducing the margin that the direct purchaser can extract from the resale price. In the separate seller case, the bundle is created when the consumer buys the component from the separate seller for combination with the cartel product. Harm takes place at that moment because the increase in the price of the cartelized product causes the consumer to buy less of that product and therefore to buy less of the component, driving down the component price.

Even under federal antitrust practice, if umbrella plaintiffs, who, like separate sellers, never do business with the cartel, can escape remoteness concerns and obtain standing,[90] it is hard to see how remoteness concerns can bar standing for suppliers and separate sellers. These groups are always harmed by cartel behaviour, in exactly the same way and at the same moment as, or even earlier than, direct purchasers are.[91] Harm is as direct as can be, and eminently foreseeable.

Ultimately, coherence must be regarded as crucial in implementing corrective justice. Part II showed that cartelization affects producers of complementary product components equally, regardless of whether they purchase from the cartel or supply the cartel or the cartel's customers. This indicates that when compensation for purchasers' overcharges is considered just and fair, the same should hold true for compensating the

90. *See supra* note 6 and accompanying text.
91. This is the gist of our economic analysis; *see supra* Part II.

underpayment to suppliers and separate sellers of complementary products. Otherwise, market organization would become the decisive factor in implementing corrective justice—an idea for which there is no justification.

IV.
Legal Implications

A. *Federal Law*

It should be clear, based on the analysis in Part III, that denial of standing to suppliers and separate sellers of components does not fit the policy considerations underlying antitrust remedies law. Denial of standing does not lessen deterrence concerns, because it leads to under-deterrence by saving wrongdoers from liability for harm that cannot always be compensated through the overcharge damages currently awarded to direct purchasers. The concern of courts and commentators that liability would lead to over-deterrence[92] is simply wrong. While Section 4 of the Clayton Act already provides for treble damages to make up for under-deterrence,[93] treble damages are meant to close deterrence gaps that result from a variety of other shortcomings of cartel damages claims: the probability that a cartel may be detected and prosecuted is below one-

92. *See* Int'l Raw Material v. Stauffer Chem. Co., 978 F.2d 1318 (3d Cir. 1992); Page, *supra* note 77, at 1493 ("[S]uppliers in such cases should not have standing. Because these harms are the result of the violator's attempt to minimize costs, they are entirely offset by a cost saving to the defendant."). Thomas Eilmansberger, *The Green Paper on Damages Actions for Breach of the EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement Through Legislative Action*, 44 Common Mkt. L. Rev. 431, 461 (2007) ("Those affected by the declining fortunes of a firm harmed by conduct restricting competition could be . . . suppliers . . . . Injuries to these persons constitute separate damages in addition to the damages caused by the (primary) injury to the immediate victim of the anti-competitive behavior. Granting claims for those indirect and remote injuries would therefore necessarily lead to multiple damages.").

93. In practice, the vast majority of private antitrust cases settle. Empirical evidence suggests that those victims who settle their cases receive damages at a much lower level than envisaged by the law. *See* Connor & Lande, *supra* note 84, at 2013–14 (finding that the victims in fifty-seven of seventy-one cases received less than their initial damages, and only seven (10%) received more than double damages).

hundred percent;[94] pre-judgment interest is generally not permitted in federal courts;[95] and deadweight loss remains unaccounted for insofar as courts deny standing to non-purchasing consumers.[96] Treble damages cannot close all of these gaps[97] and the under-deterrence associated with lack of standing for component makers as well. Denial of standing also reduces the ability of the law to identify cartels, because suppliers and separate sellers are at least as good at identifying them as are direct purchasers, and can have as much or more financial incentive to do so if allowed to sue for damages.[98] Finally, denial of standing is not needed to avoid burdensome litigation costs, because harm to suppliers and separate sellers is not necessarily harder to measure than is harm to direct purchasers.[99]

Courts should therefore take advantage of the absence of any case law explicitly rejecting standing for suppliers and separate sellers to extend standing to these groups. As the Court of Appeals for the First Circuit remarked, plaintiffs other than competitors and consumers are only "presumptively disfavored," and, therefore, "there can be exceptions, for good cause shown" that the court explained further: "[t]he most obvious reason for conferring standing on a second-best plaintiff is that, in some general category of cases, there may be no first-best with the incentive or ability to sue."[100] Suppliers and separate sellers are first-best plaintiffs, giving courts all the more reason to extend standing to them. In expanding standing, the Supreme Court can make use of the language in *Associated General Contractors* that calls for standing when "more direct

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94. AREEDA ET AL., *supra* note 22, ¶ 330b, at 40. According to a survey of studies and opinions, the detection rate of cartels is estimated to be predominantly in the 10% to 25% range. *See* Connor & Lande, *supra* note 77, at 462–65, 486–90 tbl.3 (2012).

95. Franklin M. Fisher, *Economic Analysis and Antitrust Damages*, 29 WORLD COMPETITION L. ECON. REV. 383, 387 (2006).

96. Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 785–86 (1987).

97. *See* Christopher R. Leslie, *Antitrust Damages and Deadweight Loss,* 51 ANTITRUST BULL. 521, 531–34 (2006).

98. *See supra* Sections III.A.1 and III.A.2.

99. *See supra* Section III.A.3.

100. SAS of Puerto Rico, Inc., v. Puerto Rico Tel. Co., 48 F.3d 39, 45 (1st Cir. 1995).

victims of the alleged conspiracy" exist.[101] This Article has shown that suppliers and separate sellers are direct victims. Regardless of whether the court takes a deterrence or corrective justice view of antitrust remedies, standing for suppliers and separate sellers is required.

B. *State Law*

An expansion of the doctrine of antitrust standing, and, more particularly, of the concept of antitrust injury, appears to be an even more obvious consequence under state antitrust law. Naturally, the U.S. Supreme Court's narrow interpretation of the concept of antitrust standing and rigid definition of antitrust injury are not binding on the courts that have to flesh out those concepts under the state laws. Yet, for the courts that apply state law statutes that essentially reproduce federal law, the U.S. Supreme Court's position is generally considered to be persuasive.

There are, however, good reasons to deviate therefrom, in particular with regard to those states that have enacted *Illinois Brick* repealer legislation,[102] and explicitly to confer standing rights upon indirect purchasers. First of all, this regulatory intervention indicates that the respective state legislator did not come to terms with the rigid concept of antitrust standing as it prevails under federal law. This legislative measure gives the courts the necessary leeway to consider the aforementioned arguments in favor of a broader concept of antitrust standing. Moreover, standing rights for indirect purchasers are generally accompanied by recognition of the passing-on defense.[103] This, however, constitutes a decisive change to the legal framework, as it reinforces that the law on cartel damages in these states is based on a concept that aims to compensate the individual victim's true harm. Therefore, to grant standing to suppliers and separate sellers would coherently complete the ex-

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101. Associated Gen. Contractors v. Cal. State Council of Carpenters, 459 U.S. 519, 545 (1983).

102. *See supra* note 45 and accompanying text.

103. *See* AREEDA & HOVENKAMP, *supra* note 42, ¶ 2412, at 374 ("Minnesota appears to have adopted a nonsymmetrical view of the 'indirect purchaser' rule—simultaneously permitting indirect purchasers to sue for damages but refusing to recognize the defense that a direct purchaser was not injured because its damages were passed on to its customers.").

isting legal framework of those states that grant standing to indirect purchasers and accept passing-on as a defense.

V.
A Sideways Glance at the Law of the European Union

Within the E.U., there is no clearly established right to claim antitrust damages in favor of suppliers of a downstream cartel or of independent sellers who supply the cartelists' customers ("separate sellers"). Yet, unlike in the United States, there is no rule preventing such parties from claiming damages. Indeed, similar to the U.S. states that have adopted *Illinois Brick* repealer statutes, the legal framework under E.U. law contains certain basic choices that indicate that suppliers and separate sellers should be granted antitrust standing under the domestic laws of the Member States. Before we explore this further, it is necessary to clarify some basic features that characterize the integrated, multilevel system of antitrust damages law within the E.U.

Just as under federal and state antitrust law in the United States, cartels—and, in particular, price-fixing agreements—are prohibited in Europe in parallel by the competition law of the E.U.[104] and by the laws of the Member States. In regard to the prohibition of cartels, for the most part the latter simply track E.U. law.[105] However, in contrast to the antitrust rules in the United States, where plaintiffs may invoke cartel damages claims under federal and/or state law, in Europe no parallel remedies are available to private plaintiffs.[106] Hence, regardless of whether a firm has infringed E.U. competition law or

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104. Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

105. *See, e.g.*, Gesetz gegen Wettbewerbsbeschränkungen [Act Against Restraints on Competition], June 26, 2013, BGBl I at 1750, §§ 1, 2(1) (Ger.). The German legislature has autonomously aligned the language of these provisions with Article 101(1) and (3) TFEU, leaving out, first, the inter-state clause and, secondly, the catalogue of examples of restrictive practices, which is of only marginal importance anyway.

106. While the ECJ established that Article 101 of the TFEU contains an implicit right for persons affected by a breach of EU competition law to claim damages from the infringer, it remains a matter of national law to provide a legal basis upon which the aggrieved party can rely before a national court. Case C-453/99, Courage Ltd. v. Crehan, 2001 E.C.R. I-6297, para. 26. *See, e.g.*, Assimakis P. Komninos, *New Prospects for Private Enforcement*

the domestic competition law of an E.U. Member State, the legal basis for a cartel damages action lies in the E.U. Member States' laws.[107]

What makes things so complex, however, is that the E.U. Member States' laws have to comply with two different layers of E.U. law rules. First, starting from its seminal judgment in *Courage*,[108] the European Court of Justice ("ECJ") derived directly from the cartel prohibition in Article 101 of the Treaty on the Functioning of the European Union ("TFEU") a right to damages as well as a minimum standard for actions for cartel damages that is binding on the E.U. Member States. Consequently, these rules apply only in the event of a breach of E.U. competition law, but not if the domestic law of the Member States has been infringed. Second, the E.U. legislature has adopted the Directive on Actions for Competition Damages,[109] which contains provisions on a number of essential issues on damages actions that the E.U. Member States have to transpose into their respective domestic laws. These rules apply in the event of infringements both of E.U. competition law and of the Member States' competition laws. In sum, the integrated European legal framework on cartel damages actions consists of overlapping and divergent rules established partly by the E.U.—through the ECJ and the E.U. legislature—and partly by the Member States.

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of EC Competition Law: Courage v. Crehan *and the Community Right to Damages*, 39 COMMON MKT. L. REV. 447, 480 (2002).

107. *See, e.g.*, Section 33a and Section 33(1) of the German Competition Act, in which the cause of a damages action for an infringement of both Article 101 of TFEU and Section 1 of the German Competition Act is provided. Gesetz gegen Wettbewerbsbeschränkungen [Act Against Restraints on Competition], June 26, 2013, BGBL I at 1750, §§ 33a, 33(1) (Ger.). Under English law, the cause of action is in most cases based on the tort of breach of statutory duty. *See, e.g.*, Garden Cottage Foods v. Milk Marketing Board [1984] AC 130. In other cases, the courts have recognized the tort of conspiracy by unlawful means as a potential cause of action. *See, e.g.*, WH Newson Ltd. v. IMI plc [2013] EWCA (Civ) 1377. *See also* RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 325–26 (9th ed. 2018).

108. *Courage*, 2001 E.C.R. I-6297, para. 26.

109. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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, 2014 O.J. (L 349) 1 [hereinafter E.U. Directive on Actions for Competition Damages or Directive].

Like Section 4 of the Clayton Act, E.U. law contains, *on the one hand*, language suggesting that standing should be extended to all parties injured by anticompetitive practices. The ECJ stated in *Courage* that the "full effectiveness" of the prohibition on price fixing contained in Article 101 of TFEU "would be put at risk if it were not open *to any individual* to claim damages for loss caused to him."[110] The E.U. legislature's approach to standing tracks the ECJ's. Article 3(1) of the E.U. Directive on Actions for Competition Damages states that "Member States shall ensure that any . . . person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation of that harm."[111] However, on the other hand, the ECJ does not deny the E.U. Member States any leeway to prevent excessive awards of damages to plaintiffs—in particular, to deny standing to plaintiffs who themselves may be responsible for the anticompetitive conduct,[112] and to decide what counts as harm caused by anticompetitive conduct.[113] In the same vein, the Directive limits standing to those suffering "harm caused by an infringement" and leaves open the door for the E.U. Member States[114] to use doctrines such as remoteness, proximate causation, or direct-

110. *Courage*, 2001 E.C.R. I-6297, para. 26 (emphasis added). In *Courage*, the Court referred to the role of this right to damages as an effective mechanism of (private) enforcement of the competition law rules. *Id.* at para. 27. Whereas in *Donau Chemie*, the Court extended its understanding of the "practical effect" by referring to corrective justice as an additional purpose. *See* Case C-536/11, Bundeswettbewerbsbehörde v. Donau Chemie AG, 4 C.M.L.R. 19, para. 24 ("Secondly, that right constitutes effective protection against the adverse effects that any infringement of Article 101(1) TFEU is liable to cause to individuals, as it allows persons who have suffered harm due to that infringement to seek full compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest.") (citation omitted).

111. E.U. Directive on Actions for Competition Damages, 2014 O.J. (L 349) 1.

112. *Courage*, 2001 E.C.R. I-6314, paras. 30–31.

113. Joined Cases C-295/04 to C-298/04, Manfredi v. Lloyd Adriatico Assicurazioni SpA, 2006 E.C.R. I-6624, 6637, para. 64.

114. *See* E.U. Directive on Actions for Competition Damages, para. 11, at 3 ("All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principle of effectiveness and equivalence.").

ness of injury to massage their rules on causation to deny standing to classes of plaintiffs suffering harms caused in certain ways.[115]

As under U.S. antitrust law,[116] the E.U. Directive on Actions for Competition Damages explicitly allows for standing for suppliers harmed by monopsony underpayment by a cartel. But the Directive does not state explicitly whether suppliers to a downstream cartel, or indeed separate sellers of components, have standing. There is, however, language in the preamble to the Directive (called a "Recital"), against which courts and enforcers are required to interpret the Directive, that suggests that suppliers may have standing.[117] Recital 43 of the Directive states that "infringements of competition law . . . may also concern supplies to the infringer (for example in the case of a buyers' cartel)."[118] The "buyers' cartel" referred to in the text is the case of harm to suppliers from monopsony underpayment. The key thing about this language, however, is that a buyer's cartel is listed only as one conceivable example of possible harm done to suppliers, rather than as the only example, suggesting that the Directive has not settled the issue but left the door open to granting standing to suppliers based on other harms, such as that arising from reduced demand.

In sum, the Member States of the E.U. today have discretion to decide whether to grant standing to suppliers or separate sellers. The Directive leaves the Member States' legislatures sufficient discretion to adopt the broad concept of antitrust standing proposed in this article. In particular, it is worth pointing out that standing for suppliers and separate sellers would be consistent with other parts of the current Directive that the E.U. Member States have to transpose into domestic law. Articles 12(2) and 13 of the Directive grant standing for

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115. *See id.* ("Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive.").

116. *See supra* note 35 and accompanying text.

117. *See, e.g.*, Joined Cases C-402/07 and C-432/07, Sturgeon v. Condor Flugdienst GmbH, 2009 E.C.R. I-10923, paras. 41–44.

118. E.U. Directive on Actions for Competition Damages, para. 43, 2014 O.J. (L 349) 1, 8.

indirect purchasers and provide for recognition of a passing-on defense.[119] This suggests that the E.U. legislature has, at least in principle, committed itself to a concept whereby the right to claim cartel damages is based on individual true harm caused by a cartel infringement. To grant standing to suppliers and separate sellers of complements would amount to a coherent completion of this legal framework. In addition, and equally consistent with a principle of cartel damages claims based on "true harm," Article 3(3) of the E.U. Cartel Damages Directive forbids E.U. Member States to take punitive or multiple damages and other types of over-compensatory damages into account in fashioning remedies rules.[120] Therefore, E.U. Member States are not allowed to offset risks of systematic under-compensation that a refusal of standing for suppliers and separate sellers of complementary goods will cause by means of a deliberate over-compensation of direct purchasers. Hence, to grant standing to the suppliers and separate sellers[121] is the only way to avoid under-enforcement of E.U. competition law.

Furthermore, the national courts can seek to clarify, by way of a preliminary reference to the ECJ,[122] whether the principle of effectiveness, as adopted for the law of competition damages in *Courage,* requires that E.U. Member States grant standing to suppliers or separate sellers. Of course, there is much to be said for the cautious use of the principle of effectiveness in the context of Article 101 TFEU.[123] Yet, in particular, the ECJ's extending of standing to umbrella plaintiffs in

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119. *Id.* art. 12, cl. 2, art. 13, at 16.

120. *Id.* art. 3, cl. 3, at 12. At the Member State level, over-compensatory damages were available in England and Wales, Ireland, and Cyprus. *See* DAVID ASHTON & DAVID HENRY, COMPETITION DAMAGES ACTIONS IN THE EU: LAW AND PRACTICE ¶ 5.24 (2013).

121. When firms that sell complementary products to the cartel's purchasers can sue for damages due to underpayment, for coherence, the cartelists should have a right to invoke a passing-on defense against claims by direct purchasers, because those purchasers benefit as well, as they pay less for the components that they purchased from the separate sellers.

122. *See* TFEU art. 267, Oct. 26, 2012, 2012 O.J. (C 326) 47.

123. *See* Jens-Uwe Franck, *Striking a Balance of Power between the Court of Justice and the EU Legislature: The Law on Competition Damages Actions as a Paradigm*, 43 EUR. L. REV. 837 (2018).

Kone[124] indicates that the ECJ seems to be willing to use that principle to impose a broad concept of antitrust standing. In *Kone*, the Court asked the Member States to grant standing to "umbrella plaintiffs," even though their compensation created risks of over-deterrence,[125] and it can hardly be argued that "umbrella plaintiffs" were in a better position to provide information on infringements of competition law or that they had stronger incentives to bring suit than suppliers and independent sellers of complements. It is also not apparent that compensation for "umbrella plaintiffs" was warranted more than was compensation for the harm done to suppliers and independent producers of complements in order to achieve corrective justice. In addition, the calculation of a cartel's underpayment to suppliers or separate sellers of complements is not necessarily more burdensome than a calculation of losses sustained by umbrella transactions. In the light of its *Kone* judgment, it would seem to be consistent that the ECJ—if asked—declared that an outright denial of antitrust standing to suppliers and separate sellers of complements was in breach of Article 101 TFEU in conjunction with the principle of effectiveness.

We are not, however, aware of any court in the E.U. that has yet considered whether suppliers or separate sellers should have a right to have their cartel-induced loss compensated. The apparent absence of any cases dealing with this question might at first seem perplexing, especially given that economic commentary in Europe on the problem of cartel damages has discussed the potential for suppliers and separate sellers of components to suffer cartel injuries,[126] and that the administrative organ that enforces E.U. law, the European Commission, itself has explicitly recognized that suppliers and separate

124. Case C-557/12, Kone AG v. ÖBB-Infrastruktur AG, 2014 EUR-Lex CELEX (Jan. 30, 2014), http://curia.europa.eu/juris/celex.jsf?celex=62012CC0557&lang1=en&type=TXT&ancre=.

125. *See supra* note 78 and accompanying text.

126. *See, e.g.*, OXERA CONSULTING LTD., QUANTIFYING ANTITRUST DAMAGES, TOWARDS NON-BINDING GUIDANCE FOR COURTS 27 (2009); Frank Maier-Rigaud & Ulrich Schwalbe, *Quantification of Antitrust Damages*, *in* COMPETITION DAMAGES ACTIONS IN THE EU, *supra* note 118, ¶¶ 8.024–.028, 8.032.

sellers may suffer harm.[127] But private enforcement of competition law is still at a relatively early stage of development in Europe, and it is still quite a challenge even for direct purchasers to have their cartel overcharge compensated, notwithstanding the support for such a remedy in the law. The number of final judgments awarding cartel damages of any kind is still relatively low compared with that in the United States (although numerous cases are still pending or have been settled).[128] Against this backdrop, it is understandable that neither the E.U. Commission nor academic writers have considered it a pressing issue to push the envelope on standing.[129] The fact that U.S. law, which serves as a functioning model of private antitrust enforcement for European policymakers, does not at present appear to support standing for suppliers or separate sellers has certainly contributed to the inertia on this issue in Europe.

CONCLUSION

Wrongdoers should not be held liable for every harm linked to their illegal activity. But the dividing line between recoverable and non-recoverable antitrust injuries should not be drawn in a way that excludes the harm done to firms that supply cartelists or firms that sell complementary products to the cartel's customers. While, under federal law, an extension of standing to suppliers and separate sellers would probably require Supreme Court sanction, and therefore is not likely to happen in the near future, it is supported by the underlying

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127. *See* EUR. COMM'N, PRACTICAL GUIDE: QUANTIFYING HARM IN ACTIONS FOR DAMAGES BASED ON BREACHES OF ARTICLE 101 OR 102 OF THE TREATY OF THE FUNCTIONING OF THE EUROPEAN UNION 12 (2013).

128. In Europe, competition damages actions are most frequently filed with the courts in the Netherlands, the United Kingdom, and Germany. A good overview of court practice in these countries over the last years is provided by Matthijs Kuijpers et al., *Actions for Damages in the Netherlands, the United Kingdom and Germany*, 9 J. EUR. COMPETITION L. & PRACTICE 55 (2018) (relating to the period from July 2016 to September 2017); Matthijs Kuijpers et al., *Actions for Damages in the Netherlands, the United Kingdom and Germany*, 8 J. EUR. COMPETITION L. & PRACTICE 47 (2017) (relating to the period from July 2014 to July 2016); Matthijs Kuijpers et al., *Actions for Damages in the Netherlands, the United Kingdom and Germany*, 6 J. EUR. COMPETITION L. & PRACTICE 129 (2015) (relating to the period from July 2013 to July 2014).

129. *But see, e.g.*, Bueren & Smuda, *supra* note 52 (arguing for a broad concept of standing that includes cartel suppliers).

policies of antitrust remedies cases recognized by the Court. The implementation of a broader concept of antitrust standing suggests itself even more with regard to those states that have enacted *Illinois Brick* repealer statutes. Where state law grants standing rights even to indirect purchasers and allows cartelists to invoke the passing on of the cartel-induced overcharge as a defense, it would amount to a coherent completion of the legal framework to include suppliers and separate sellers of complements in the classes of potential antitrust plaintiffs.

In contrast, the current doctrine that essentially limits damages claims to a recovery of the overcharge incurred by customers may substantially underestimate the extent of the damages necessary to create sufficient deterrence. Moreover, the approach in which producers of complements enjoy antitrust standing to sue for recovery of the cartel overcharge when they have purchased the cartelized product, but they are declined standing to sue for compensation of their underpayment when they supply a cartel or the cartel's purchasers, is incoherent. The many policy considerations that go into the decision whether to grant standing—including economic factors, such as private information on cartel infringements, incentives to bring suit, and the social costs of litigation, as well as corrective justice—all support this result.