

2ND E.CA COMPETITION LAW AND ECONOMICS
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Policy Round Table: Cartels: Detection, Prosecution and Litigation

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- One of the main objectives of the proposed directive
 - consumers must be able to claim damages caused by an upstream cartel
 - Two main problems
 - Atomised damages
 - no or very little means for collective redress in the Member States
 - difficulty to prove that overcharge has been passed down
 - proposed solutions
 - collective redress: new instrument to be proposed by GD JUSTIZ
 - rebuttable presumption that overcharge has been passed down (Art. 13 of the draft directive)

Article 13 of the Directive

Indirect purchasers

1. Member States shall ensure that, where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether – or to what degree – an overcharge was passed on to the claimant, the burden of proving the existence and scope of such pass-on shall rest with the claimant.
2. In the situation referred to in paragraph 1 of this Article, **the indirect purchaser shall be deemed to have proven that a passing-on to him occurred** where he has shown that:
 - (a) the defendant has committed an infringement of competition law;
 - (b) the infringement resulted in an overcharge for the direct purchaser of the defendant;
and
 - (c) he purchased the goods or services that were the subject of the infringement, or purchased goods or services derived from or containing the goods or services that were the subject of the infringement.

Member States shall ensure that the court has the power to estimate which share of that overcharge was passed on.

This paragraph shall be without prejudice to the infringer's right to show that the overcharge was not, or not entirely, passed on to the indirect purchaser.

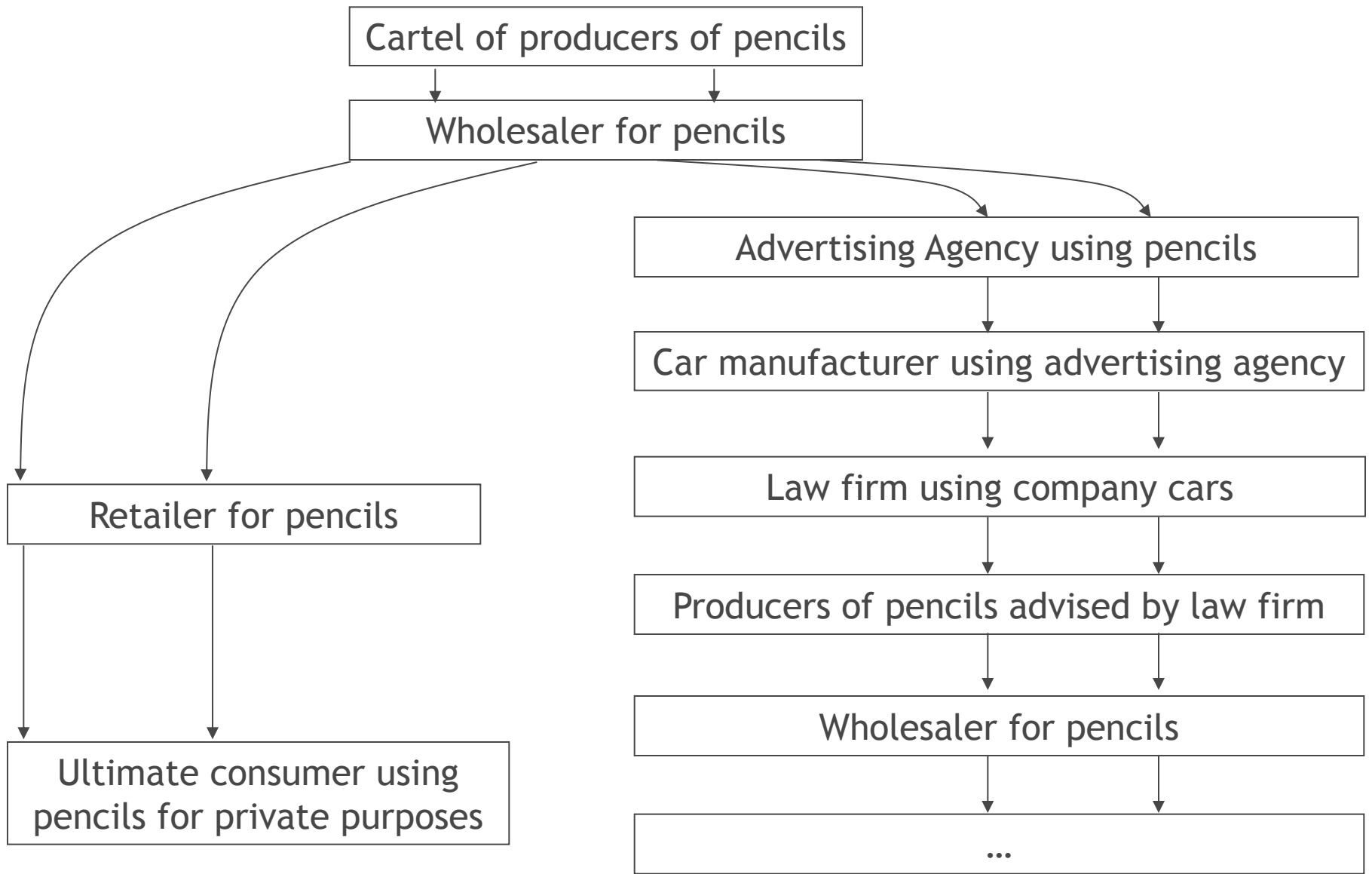
Article 15 of the Directive

Actions for damages by claimants from different levels in the supply chain

1. Member States shall ensure that, in assessing whether the burden of proof resulting from the application of Article 13 is satisfied, national courts seized of an action for damages take due account of
 - (a) actions for damages that are related to the same infringement of competition law, but are brought by claimants from other levels in the supply chain; or
 - (b) judgments resulting from such actions.
2. This Article shall be without prejudice to the rights and obligations of national courts under Article 30 of Regulation (EU) No 1215/2012.

■ Where are we heading to?

- Standing for indirect purchaser
- Burden of proof has to be taken seriously
 - Will lead to an advantage of the direct purchaser when passing-on can not be shown
 - Passing-on will be very difficult to show in cases where a lot of value has been added on the level of the direct purchaser
 - Indirect purchaser often will have difficulties in showing that the overcharge has been passed on (not every increase in prices must be caused by the overcharge)
 - Especially difficult for distant indirect purchases with many levels between him and the cartel
 - Any easing of the burden of proof carried by indirect purchaser may lead to a multiplication of damages
 - This is especially true for any presumption as suggested by the Commission



■ Criticism

- Multiplication of damages will be the result. Proposal assumes simple situation where a product is sold down the distribution chain
- Presumption will apply to all levels of indirect purchasers all the way down the distribution chain; each indirect purchaser will have the right to the presumption
- it will be nearly impossible for the cartel member to rebut the presumption

■ Criticism (...)

- The idea expressed by the commission that a multiplication of damages can be prevented by reasonable rules of procedure and by reasonable case management is at the best naive, in anycase not feasible
- Third party notice does not work: The judge who decides a case in the morning in favour of a direct purchaser on the grounds that a pass-on of the overcharge to the customers of the direct purchaser has not been established by the cartel member will have to adopt the Article13 presumption in the afternoon when deciding over a claim of the indirect purchaser

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■ Consequence

- Multiplication of damages, not only double, but triple...
- does not fit the concept of compensation
- Will function as a death penalty for the cartel

