

Direct and Indirect Purchaser Claims

Double standards for pass on

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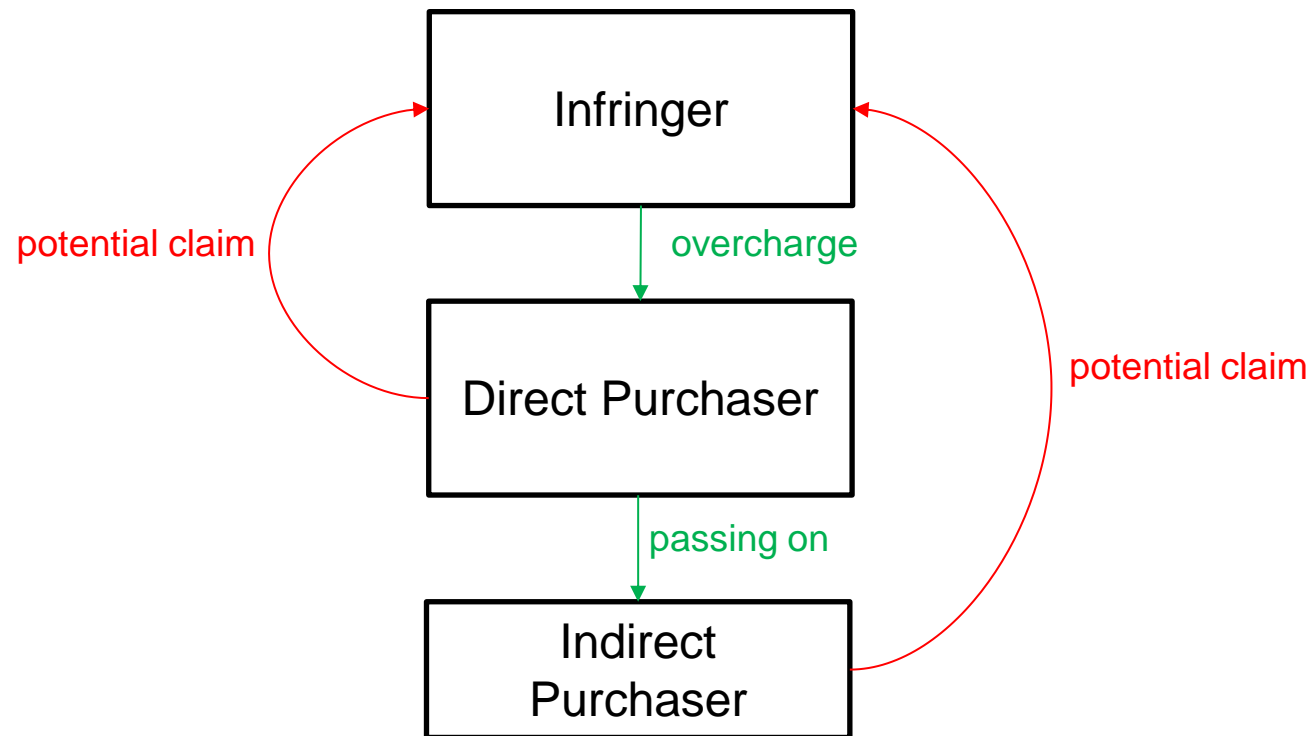
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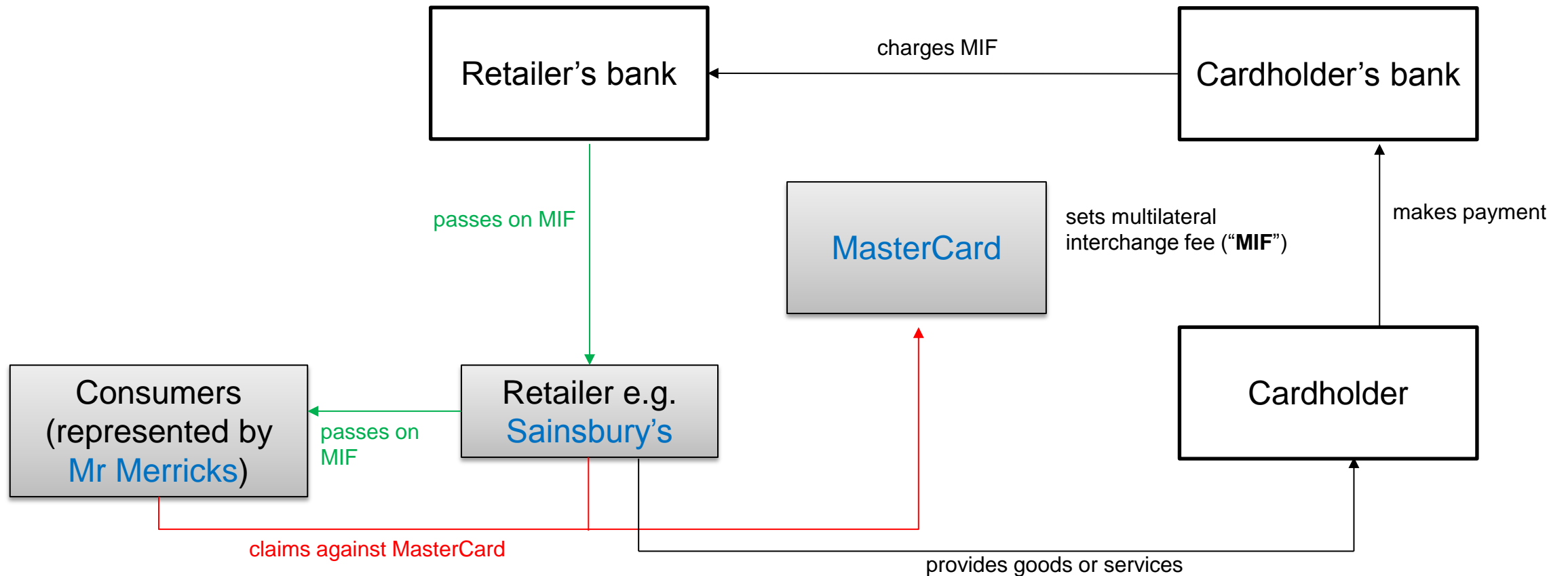
Setting the scene

“...compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer...”

Art.12(1) Damages Directive



Pass on in action: *Sainsbury's v MasterCard* and *Merricks v MasterCard*



NB: Cases are not subject to Damages Directive regime

What is passing on?

“

When an injured party has reduced its actual loss by passing it on, entirely or in part, to its own purchasers, the loss which has been passed on no longer constitutes harm for which the party that passed it on needs to be compensated.

– *Damages Directive, Recital 39*

”

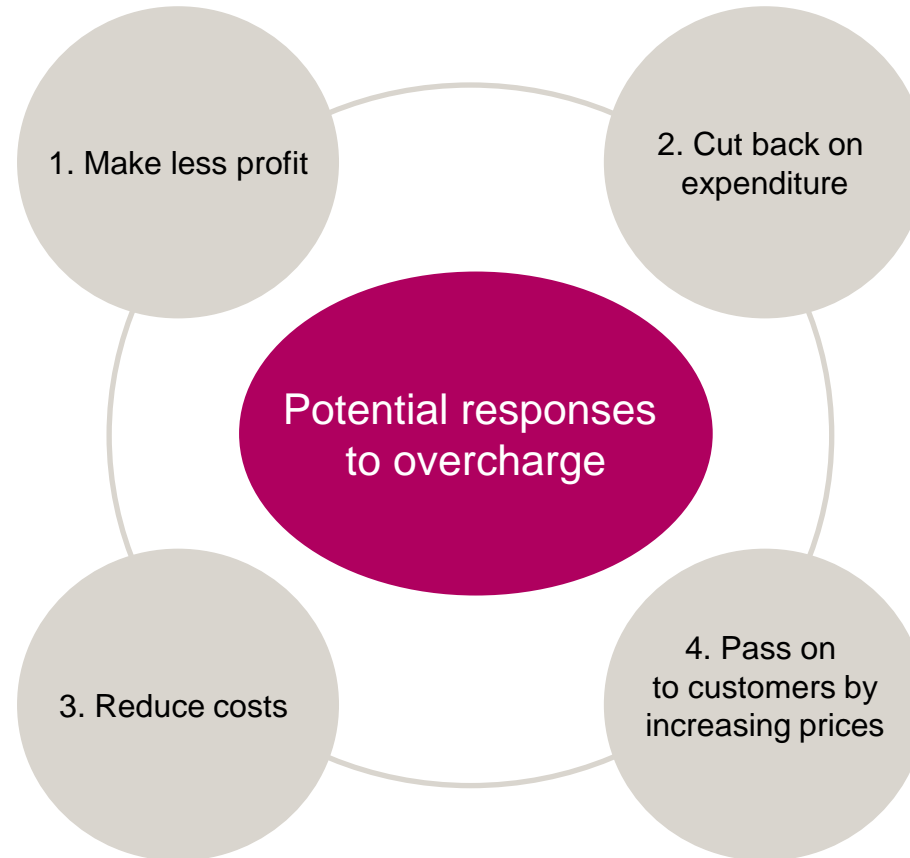
“

The pass-on defence is in reality not a defence at all: it simply reflects the need to ensure that a claimant is sufficiently compensated and not over-compensated by a defendant

– *Sainsbury's v MasterCard* §483(3)

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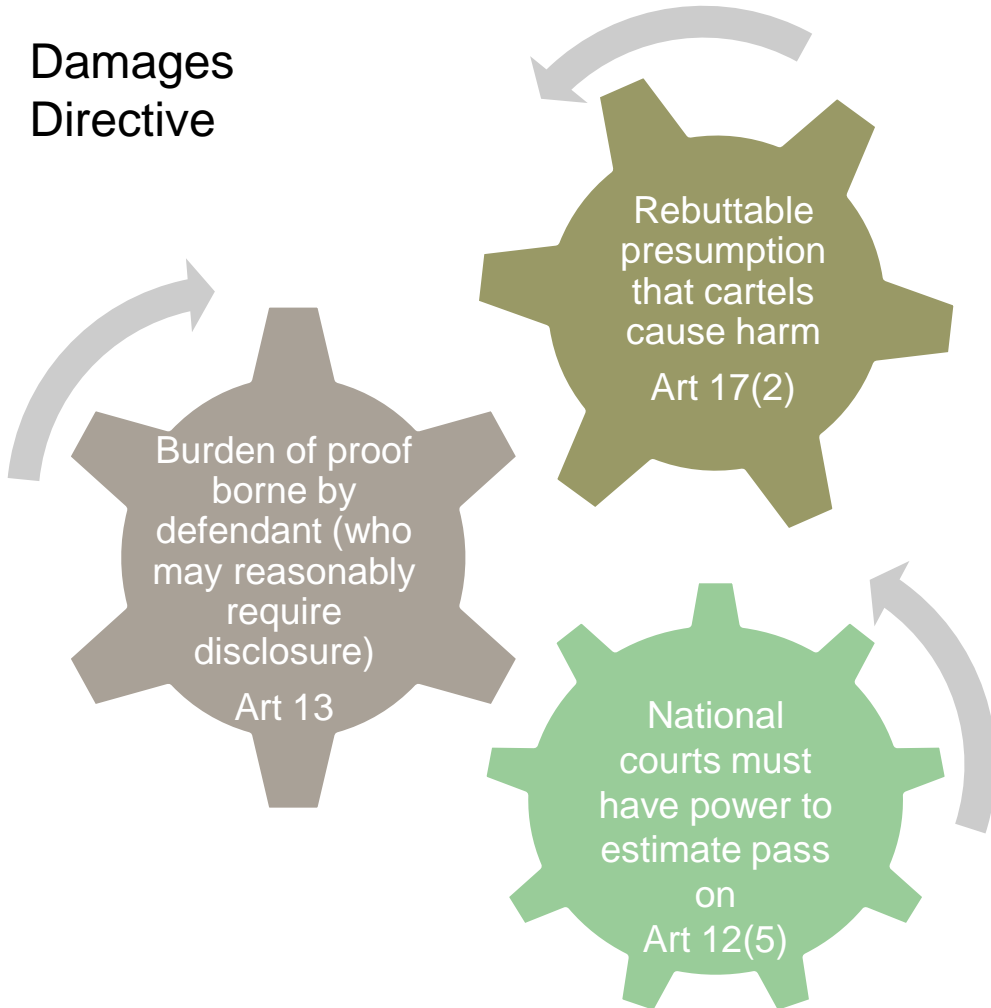
What is passing on? Legal v economic definitions



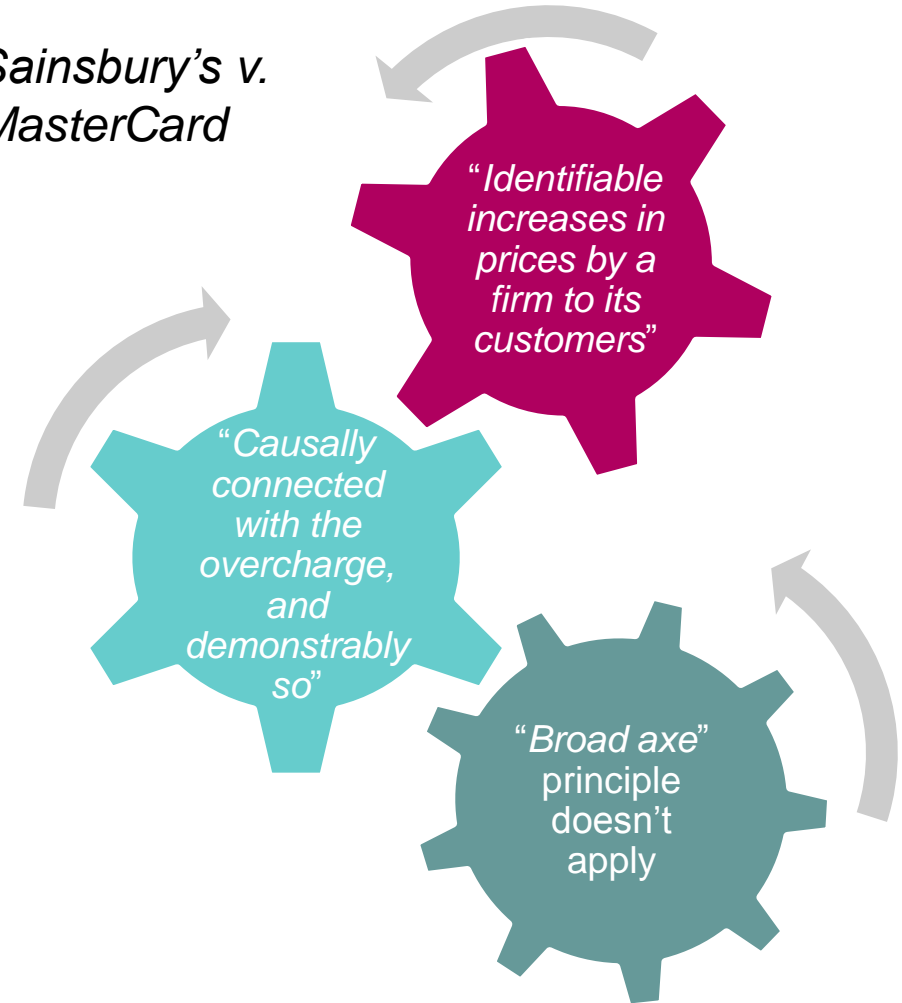
Sainsbury's v MasterCard, legal defence only concerned with pass on by “*identifiable increases in prices to its customers*” ⁴

Pass on as a “shield”: What must be proved?

Damages Directive

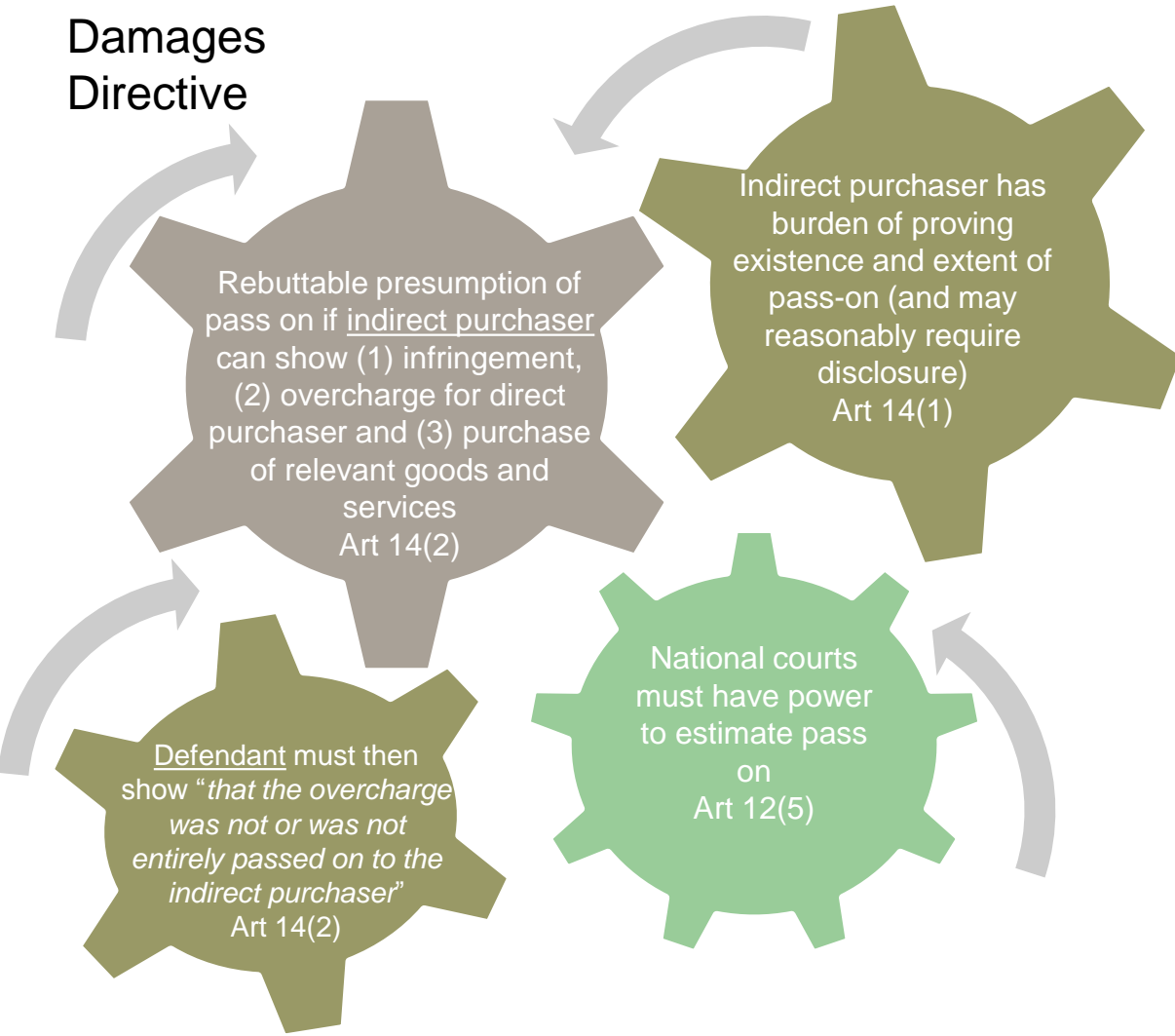


Sainsbury's v. MasterCard

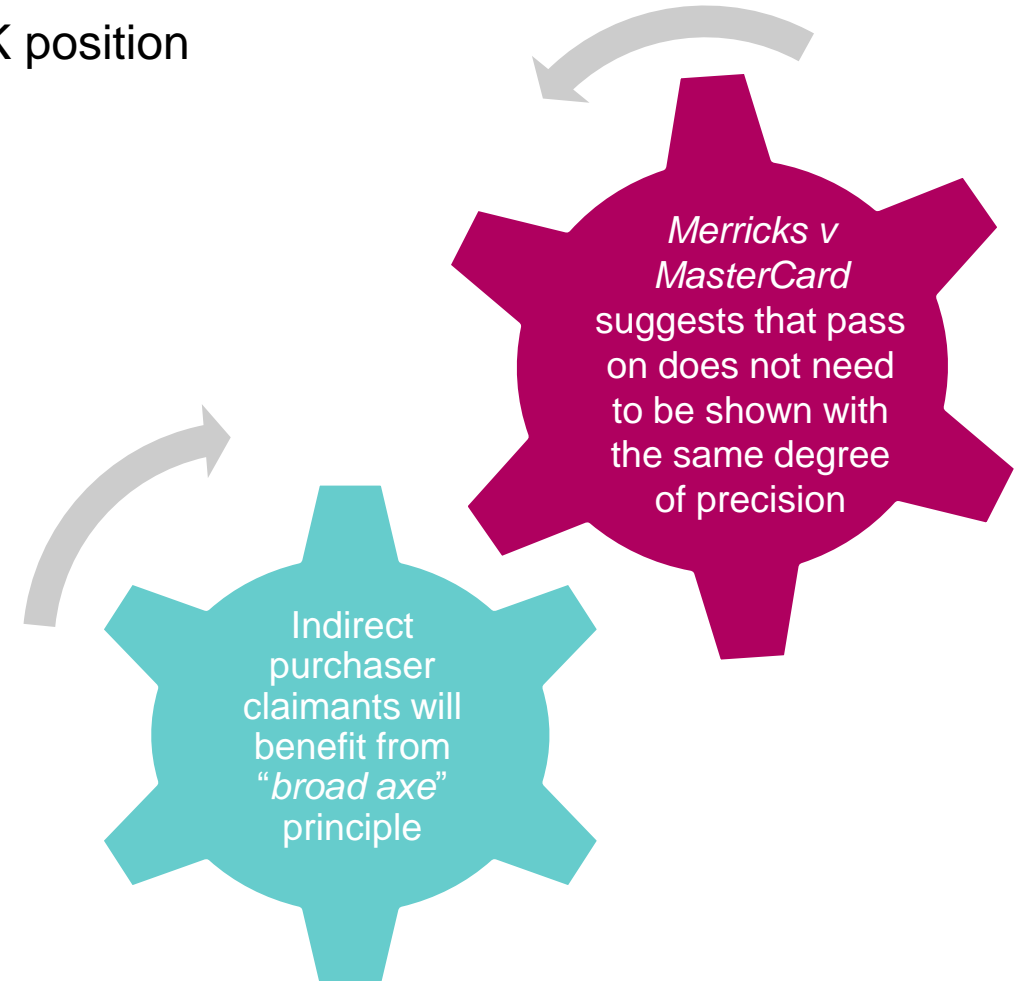


Pass on as a “shield”: What must be proved?

Damages Directive



UK position



Double standards for pass-on

| Defendant | Indirect Purchaser Claimant |
|---|--|
| Burden of proof | Burden of proof (pre Damages Directive) or benefit of presumption (Damages Directive) |
| Needs to show precise causal relationship between overcharge and (specific?) price increase | Showing more general relationship between overcharge and price increase appears to suffice |
| No “ <i>broad axe</i> ” | “ <i>Broad axe</i> ” principle applies |

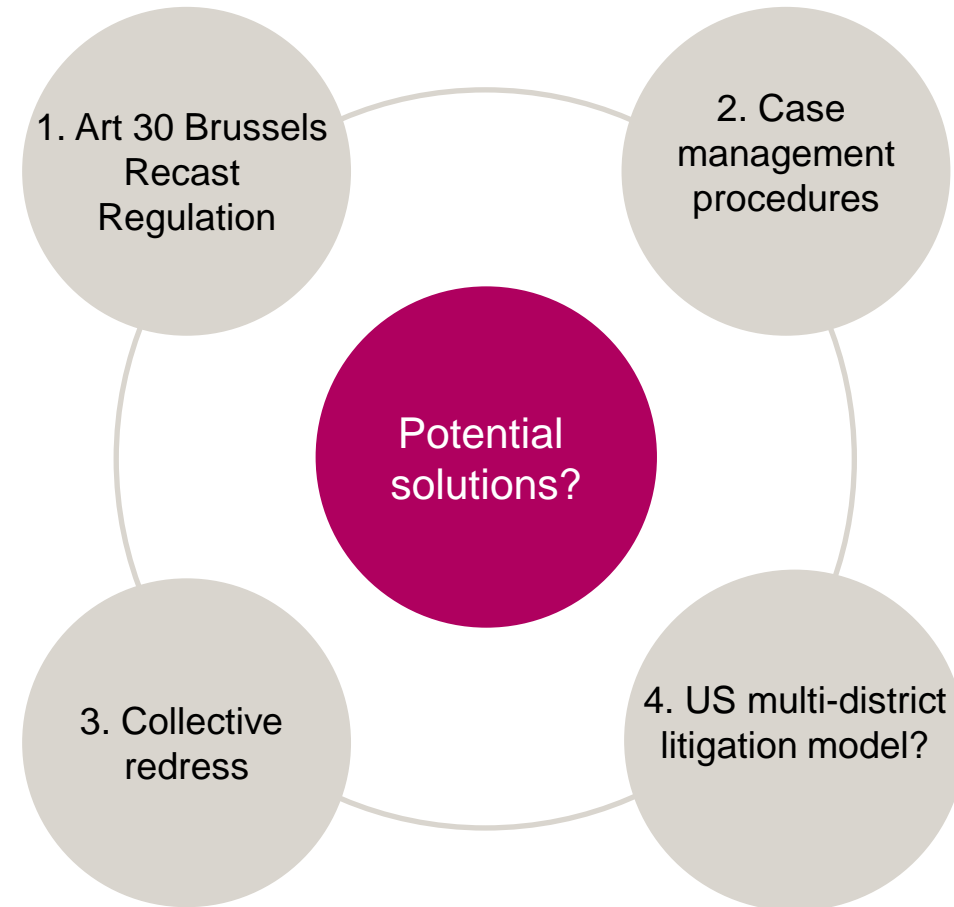
⇒ Real risk of multiple liability for defendants



Can the risk of multiple liability be avoided?

> “Full compensation under this Directive shall not lead to overcompensation...” (Art 3(1))

> To avoid multiple liability, national courts must be able to take account of actions for damages at different levels of the supply chain (and related judgments) (Art 15(1))



Question for the audience

Have the rules on pass on gone too far in favouring claimants?