4. Respective roles of EU and national law

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I INTRODUCTION

As a multi-layered legal system, the European Union (EU) legal system is well accustomed to questions concerning the tracing of the frontier between EU law and national law. Indeed, there is no lack of examples illustrating the often complex division of judicial, regulatory and implementing tasks and competences between EU and Member State law, EU and Member State authorities and EU and Member State judges.

Private enforcement of EU competition law, that is actions where the infringement of EU competition rules is invoked before the courts of the Member States, other than in the context of public enforcement, adds yet another stone to that colourful mosaic.

Private enforcement of EU competition law is indeed a good example of the multifarious interplay between EU law and national law because the right to compensation for cartel damages results directly from the treaty provisions, whereas the enforcement of such actions before the national courts takes place according to national law as shaped by the principles of equivalence and effectiveness and, now, the rules of the Directive on Damages Actions for Competition Law infringements (the 'Antitrust Damages Directive').[2]

No later than in November 2021, in its judgment in *Stichting Cartel Compensation and Equilib Netherlands*, the Court confirmed the general competence of the Members States' courts to apply Article 101 of the Treaty on the Functioning of the EU (TFEU) in order to protect the right of compensation granted to each person by that provision. The case concerned cartel damage claims in the air transport sector. This sector had been excluded from the competence of the Commission for public competition law enforcement for some time. The Court made clear, however, that this exclusion had not restricted the competence of the national courts to apply Article 101 TFEU in the sector at issue.[3] Indeed, the competence of the national courts to apply this provision is independent from the competence of the competition authorities in respect of public enforcement of competition law. It is only if there is already

[1] The views expressed in this chapter are attributable to the authors in a personal capacity only. The developments contained in this chapter are to a large extent based on the findings elaborated in the opinions of Advocate General Kokott in the ECJ cases *Kone and Others* (C-557/12, EU:C:2014:45) and *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:651).

[2] 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 (OJ 2014 L 349, p. 1).

[3] ECJ, judgment of 11 November 2021, *Stichting Cartel Compensation and Equilib Netherlands* (C-819/19, EU:C:2021:904, paragraph 44 et seq.); see also opinion of Advocate General Bobek in that case (EU:C:2021:373, point 34 et seq.).

a Commission decision or an ongoing investigation on a certain practice that national courts are required to take it into account.[4]

Yet once national courts deal with an antitrust private enforcement action, which aspects of this action are governed by EU law and which aspects are governed by national law?

The Court of Justice has made clear that every individual has a direct right pursuant to Articles 101 and 102 TFEU to demand damages for losses incurred as a result of infringement of the prohibition on anti-competitive agreements, decisions and concerted practices under EU law. This means that any individual can demand compensation for their losses, provided that there is a causal relationship between those losses and an infringement of competition rules, without that right being in any way dependent on the national law of the Member States.[5]

On the other hand, in the absence of EU rules, it is for the domestic legal system of each Member State to lay down detailed rules governing the exercise of that right to compensation in the national courts, provided that the principles of equivalence and effectiveness and, now, the rules of the Antitrust Damages Directive are observed.[6]

However, despite the illusive clarity of the division thus established, the question arises anew in each case as to which issues of an antitrust damages action fall specifically under EU law and which issues of such an action are governed by the national law of the Member States.[7]

In this chapter, we will outline, first, how the frontier between EU law and national law in the field of private enforcement of EU competition law runs along a demarcation line between substantive claim and procedural enforcement (Section II). Second, we will illustrate, on the basis of examples from the jurisprudence of the Court, the concrete expressions of this demarcation line as regards the application of the conditions for antitrust liability and damage compensation under Articles 101 and 102 TFEU (Section III). Finally we will make some concluding remarks (Section IV).

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[4] ECJ, judgments of 11 November 2021, *Stichting Cartel Compensation and Equilib Netherlands* (C-819/19, EU:C:2021:904, paragraph 55 et seq.), and of 6 October 2021, *Sumal* (C-882/19, EU:C:2021:800, paragraph 55 et seq.).

[5] See, to that effect, ECJ, judgments of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraphs 23 to 26); of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraphs 58 to 61 and 63); of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraphs 20 to 22); and of 14 March 2019, *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:204, paragraphs 24 to 26). See also opinion of Advocate General Kokott in *Kone and Others* (C-557/12, EU:C:2014:45, point 26).

[6] See ECJ, judgments of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraph 29); of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraphs 62 and 64); of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraphs 24 to 26); and of 14 March 2019, *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:204, paragraph 27).

[7] See opinion of Advocate General Wahl in *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:100, point 33): 'Yet which issues regarding actions for damages are governed by EU law and which are, instead, governed by the domestic laws of the Member States?'

II THE DEMARCATION LINE BETWEEN EU LAW AND MEMBER STATE LAW IN THE FIELD OF ANTITRUST DAMAGES: SUBSTANTIVE CLAIM VS. PROCEDURAL ENFORCEMENT

In the field of private enforcement of EU competition law, the substantive claim, that is the constitutive conditions of the right to compensation under Articles 101 and 102 TFEU, are determined by EU law (Section II.A). By contrast, the rules for the exercise of that right, that is the rules actually governing actions for compensation, have to be determined by national law (Section II.B).

A The Constitutive Conditions of the Right to Compensation under Articles 101 and 102 TFEU: A Question of EU Law

When EU competition law is applicable, competence in the field of antitrust private enforcement actions is divided between EU law and Member State law along a demarcation line between substantive claim and procedural enforcement. This means that the question of the *existence* of a right to compensation (i.e. the question of *whether* compensation is, in principle, to be granted) must be answered in light of EU law. By contrast, *details of the application* of such claims and *rules for their actual enforcement* (i.e. the question of *how* compensation is to be granted), in particular issues of jurisdiction, procedure, time limits and the furnishing of proof, must be regulated under national law.[8] In other words, as Advocate General Wahl noted in his Opinion in *Skanska*, only the rules relating to the *application* of the right to claim compensation fall under national law, whereas the *preconditions* that form the *constitutive conditions* and thus the actual ground for that right are determined directly by Article 101 TFEU.[9]

This means that it is only EU law that determines the manner in which Articles 101 and 102 TFEU confer a right to compensation to injured parties and the eligibility of damage for compensation. Likewise, it is only on the basis of EU law that the question of whether a certain damage presents a sufficiently direct causal link with an anti-competitive behaviour must be answered. This is nothing but coherent because what is at issue here is the interpretation of the core content of the right to compensation for cartel damage based directly on Articles 101 and 102 TFEU, and thus an autonomous notion of EU law. Consequently, the Court has made clear that the question of who can be held liable for compensation of antitrust damage also concerns a constitutive condition of the right to such compensation and must therefore equally be answered on the basis of EU law.[10]

It would not, in fact, be appropriate to leave the answer to these questions of the interpretation of a provision of EU law to the national legal systems and to measure their answers in turn

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[8] See opinion of Advocate General Kokott in *Kone and Others* (C-557/12, EU:C:2014:45, point 23) and, by way of example of such rules governing enforcement of the right to compensation, ECJ, judgment of 28 March 2019, *Cogeco Communications* (C-637/17, EU:C:2019:263, paragraphs 42 et. seq. and 56 et seq.), and opinion of Advocate General Kokott in that case (EU:C:2019:32, points 75 et seq. and 87 et seq.).

[9] Opinion of Advocate General Wahl in *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:100, points 40 and 41).

[10] ECJ, Judgments of 14 March 2019, *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:204, paragraph 28), and of 6 October 2021, *Sumal* (C-882/19, EU:C:2021:800, paragraph 34).

against the principle of effectiveness under EU law. After all, according to settled case-law of the Court of Justice, the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the EU, having regard to the context of the provision and the object pursued by the legislation in question. This follows from the need for uniform application of EU law and from the principle of equality before the law.[11] Accordingly, a uniform interpretation of the right to compensation under Articles 101 and 102 TFEU is required across the EU if these provisions are to achieve their full effectiveness. That is because these provisions serve the fundamental objective of European competition law, which is to create framework conditions that are as uniform as possible ('*level playing field*') on the internal market for all undertakings active in it.[12] That objective would be undermined if the legal criteria by which national courts assess the civil liability which the perpetrators of infringements to Articles 101 and 102 TFEU owe to certain persons for certain kinds of loss were to differ fundamentally from one Member State to another. Furthermore, such a situation would also be an invitation to '*forum shopping*'.[13]

It follows from the foregoing that the constitutive conditions of liability under Articles 101 and 102 TFEU derive directly from EU law. This does not imply, of course, that the answer to the question of whether, *in a concrete case*, compensation is actually to be granted, is in no way dependent on the application of rules stemming from national law. However, those rules can only concern the modalities governing enforcement and proof of the existence of the conditions for the right to compensation in each individual case. By contrast, the question of whether these conditions are, in principle, met in a certain case must be answered solely on the basis of EU law because national rules cannot themselves establish conditions for the very existence of a right to compensation under Articles 101 and 102 TFEU in an abstract and general way.

As to the division of tasks between the Court of Justice and the national courts, it is apparent from the case-law that the Court of Justice is required in preliminary ruling proceedings to examine, in an abstract and general way, whether the constitutive conditions for compensation are satisfied with regard to the harm disputed in the main proceedings. If they are, it is then for the referring national court to examine if those conditions are actually satisfied in the specific case in question.[14] This division of tasks is in keeping with the fact that, although it is ultimately for the national court to determine whether the conditions for compensation are satisfied in a particular case, it is for the Court of Justice to provide guidance (based on the

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[11] ECJ, judgments of 18 January 1984, *Ekro* (327/82, EU:C:1984:11, paragraph 11); of 11 July 2006, *Chacón Navas* (C-13/05, EU:C:2006:456, paragraph 40); and of 21 December 2016, *Associazione Italia Nostra Onlus* (C-444/15, EU:C:2016:978, paragraph 66).

[12] On the concept of 'level playing field', see, for example, opinions of Advocate General Kokott in *Akzo Nobel Chemicals and Akcros Chemicals v Commission* (C-550/07 P, EU:C:2010:229, point 169), *Toshiba Corporation and Others* (C-17/10, EU:C:2011:552, point 118), *Expedia* (C-226/11, EU:C:2012:544, point 37), and *Schenker and Others* (C-681/11, EU:C:2013:126, point 48).

[13] See on this point opinions of Advocate General Kokott in *Kone and Others* (C-557/12, EU:C:2014:45, point 29) and *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:651, point 54 et seq.).

[14] See ECJ, judgments of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 34) and of 12 December 2019, *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:1069, paragraph 28 et seq.). See also to that effect, judgment of 6 November 2012, *Otis and Others* (C-199/11, EU:C:2012:684, paragraph 66).

file in the main proceedings and the written and oral observations submitted to it), in order to enable that court to give judgment on the dispute before it.[15]

B The Rules for the Exercise of the Right to Compensation under Articles 101 and 102 TFEU: A Question of National Law in Combination with the Principles of Equivalence and Effectiveness and the Rules of the Antitrust Damages Directive

As has just been outlined, whereas the constitutive conditions of the right to compensation under Articles 101 and 102 TFEU are determined directly by EU law, the detailed rules that govern how the effective fulfilment of these conditions for compensation has to be concretely proven in each individual case stem from national law. Thus, the rules for the implementation of the right to compensation under Articles 101 and 102 TFEU – that is the rules for the exercise of the corresponding judicial actions – are national law rules established by the Members States under their respective procedural autonomy.

Accordingly, it is for national law to determine, for instance, which jurisdiction is competent to hear an action for damages,[16] which procedural delays apply for the introduction and follow-up of such actions, and which procedural rules are to be followed by the competent court, or how the existence of actual damage has to be proven by the allegedly injured party. It is then only these rules that are to be measured against the principles of equivalence and effectiveness to evaluate their conformity with EU law.

Indeed, in the field of private enforcement of Articles 101 and 102 TFEU, the difference between a situation 'governed directly by EU law' and a situation 'governed by national law in combination with the principles of equivalence and effectiveness' has the same signification as in other fields in which EU law is applicable. That means that, in the first case, EU law directly determines the applicable rules, whereas in the latter case, national law determines the applicable rules that are then measured against the principles of equivalence and effectiveness.[17]

However, since the entry into force of the Antitrust Damages Directive, the division outlined before according to which the rules governing the enforcement of antitrust damages claims are to be established by national law has been somewhat changed in that EU law now also contains some relatively detailed rules concerning the enforcement of the right to compensation under Articles 101 and 102 TFEU. The crucial importance of uniform procedural rules for competition damages actions is furthermore underpinned by Recitals 8 and 9 of the Directive. Accordingly, since the entry into force of the Antitrust Damages Directive, the conformity with EU law of national law rules for antitrust private enforcement is to be measured no longer only against the principles of equivalence and effectiveness, but also against the rules of the Directive that further concretise these principles in the domain concerned and that have to be transposed into national law.

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[15] See, to that effect, judgment of 11 September 2018, *IR* (C-68/17, EU:C:2018:696, paragraph 56).

[16] Subject to the rules established by Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1); see in this context judgment of 15 July 2021, *Volvo and Others* (C-30/20, EU:C:2021:604).

[17] See on this point opinion of Advocate General Wahl in *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:100, point 39).

As its name ('Directive 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') and first article state, the Directive 'sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association'. This shows that the rules the Directive is concerned with are indeed about the effective exercise of the right to claim compensation, not about its constitutive conditions like the fact that anyone is entitled to exercise that right or that the latter entails the right to full compensation. These constitutive conditions of the right to compensation that derive directly from the treaty and that have already been established by the Court of Justice are only codified in a declaratory manner by the Directive (notably by its Articles 1 and 3). Nevertheless, beside provisions of that kind, what the Directive is really concerned with are rules on the procedural enforcement of the right to damages. Here, it has introduced new rules of law, concerning, in particular, the disclosure of evidence, limitation periods, the quantification of the damage etc.

As Article 22 of the Directive, which establishes a distinction between substantive and non-substantive provisions thereof, shows, and as Advocate General Rantos set out in his recent opinion in *Volvo and DAF Trucks*, this does not mean, however, that the Directive only contains non-substantive rules.[18] According to Article 22, the distinction between substantive and non-substantive provisions of the Directive commands the temporal application of the respective provisions. Thus, national measures adopted to comply with substantive provisions of the Directive shall not apply retroactively, whereas national measures adopted to comply with non-substantive provisions of the Directive can apply to actions brought after the Directive had entered into force.[19] This is in keeping with the general principle of EU law according to which, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, substantive rules must be interpreted as applying to situations existing before their entry into force only in so far as it follows clearly from their terms, objectives or general scheme that such effect must be given to them.[20] Thus, for example, a provision that determines *whether* certain conduct will give rise to liability cannot be applied retroactively, because the actors involved must be able to foresee this possibility at the time they commit the respective action.

However, the qualification of the rules of the Antitrust Damages Directive as substantive or not is currently the subject of a major debate. There is notably a whole bundle of cases pending before the Court on this matter. To begin with, as has been made clear by Advocate General Rantos in his opinion in *Volvo and DAF Trucks*, general notions decisive for the interpretation and application of the rules of the Directive itself, such as 'retroactive application' or 'rules of a substantive nature' are autonomous notions of EU law that must be interpreted in a uniform way.[21] As to the classification of the rules of the Directive, what seems particularly difficult

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[18] See opinion of Advocate General Rantos in *Volvo and DAF Trucks* (C-267/20, EU:C:2021:884, point 53 et seq.); see also opinion of Advocate General Kokott in *Cogeco Communications* (C-637/17, EU:C:2019:32, point 60 et seq.).

[19] See Kirst, Chapter 5 in this book.

[20] See ECJ, judgment of 24 March 2011, *ISD Polska and Others* (C-369/09 P, EU:C:2011:175, paragraph 98 and the case-law cited).

[21] Opinion of Advocate General Rantos in *Volvo and DAF Trucks* (C-267/20, EU:C:2021:884, points 43 et seq. and 60 et seq.).

is to figure out whether the rules concerning evidence (Articles 5 and 6),[22] limitation periods (Article 10)[23] or the possibility to estimate the amount of harm and the presumption that cartel infringements cause harm (Article 17),[24] are of a substantive nature or not.

It certainly needs to be acknowledged that this kind of provision can determine the enforceability of a right to damages respectively of an obligation to provide compensation for damages *in a concrete case.*[25] Thus, for example, the question of whether an action can still be brought or whether it is on the contrary time-barred because of the application of a certain limitation period is decisive for the enforceability of a right to compensation and an obligation to compensate in the case at hand. Indeed, even if a right to compensation exists in general terms, if it is no longer enforceable because an action would be time-barred, it can no longer give rise to compensation in the case concerned. On the other hand, in particular, the possibility to estimate the amount of harm and the presumption that cartels cause harm could possibly lead to the enforceability of a right to compensation in a case where, without these rules, the existence of real and concrete damage would not have been considered to be proven to the requisite legal standard. The same might hold true for the rules on disclosure of evidence.

Nevertheless, the mere fact that the rules of the Antitrust Damages Directive on proof, time limits or harm can be decisive for the enforceability of the right to damages and the obligation to provide compensation *in a concrete case* does not necessarily lead to a qualification of these rules as substantial. After all, as has just been highlighted, the prohibition of a retroactive application of substantial rules is ultimately an expression of the principle of the legality of penalties and the protection of legitimate expectations. However, does the reliance on the fact that responsibility for an anti-competitive conduct will be more difficult to prove because of short time limits or high hurdles in terms of evidence and the proof of the existence of harm deserve protection?[26]

In any case, even if it would be admitted that the rules of the Directive on proof, time limits or quantification of harm are substantive in the sense of Article 22 thereof (i.e. not applicable retroactively), they still concern the procedural enforcement (the 'how') of the right to compensation under Articles 101 and 102 TFEU, and not the constitutive conditions (the 'whether') for the existence of that right. Indeed, those rules do not determine whether, in general and abstract terms, a certain person or a certain damage qualify for compensation. Rather, they only determine whether such an existing right can really be enforced in a concrete case. It remains to be seen how the Court will resolve the issue of classification of these rules as substantive or not in the pending cases referenced above.

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[22] These rules are notably at stake in cases C-57/21, *RegioJet* and C-163/21, *PACCAR and Others.* See opinions of Advocate General Szpunar in *RegioJet* (C-57/21, EU:C:2022:363), and in *PACCAR and Others* (C-163/21, EU:C:2022:286).

[23] These rules are notably at stake in cases C-267/20, *Volvo and DAF Trucks*; C-605/21, *Heureka Group*, and C-198/22 and C-199/22, *Deutsche Bank*. See opinion of Advocate General Rantos in *Volvo and DAF Trucks* (C-267/20, EU:C:2021:884, points 64 et seq.); see, also, opinion of Advocate General Kokott in *Cogeco Communications* (C-637/17, EU:C:2019:32, point 63).

[24] These rules are notably at stake in cases C-267/20, *Volvo and DAF Trucks*, and C-312/21, *Tráficos Manuel Ferrer*; see opinion of Advocate General Rantos in *Volvo and DAF Trucks* (C-267/20, EU:C:2021:884, points 70 et seq.).

[25] See opinion of Advocate General Rantos in *Volvo and DAF Trucks* (C-267/20, EU:C:2021:884, point 49).

[26] See on this question opinion of Advocate General Kokott in *Taricco and Others* (C-105/14, EU:C:2015:293, points 114 and 115).

To conclude on this point, it must be stated that the distribution of competence according to which 'EU law governs the substantive aspects of antitrust damage claims' vs 'national law governs the procedural enforcement of such claims' has been amended by the Antitrust Damages Directive because there are now also EU law rules for the procedural enforcement of antitrust damages claims. Nevertheless, it is still EU law alone that determines the constitutive conditions of liability under Articles 101 and 102 TFEU.

III ILLUSTRATIONS OF THE DIVISION BETWEEN EU LAW AND MEMBER STATE LAW IN THE FIELD OF ANTITRUST DAMAGES

It follows from the jurisprudence of the Court, in particular the judgment in *Kone*, that the conditions governing the liability of cartel members for the harm caused by a cartel are ultimately similar to the conditions governing the non-contractual liability of EU bodies and the liability of Member States towards individuals for infringements of EU law.[27] Those conditions are, essentially, that the infringed rule must grant rights to the injured party, that actual harm must have been caused and that there must be a sufficiently direct causal link between the harmful conduct and the harm claimed.[28]

The case-law of the Court, especially the judgments in the *Kone*[29] and *Otis*[30] cases, is illustrative of the respective roles of EU law and national law when it comes to the contouring of these conditions for antitrust liability and damage compensation under Article 101 TFEU. Albeit these two judgments concerned Article 101 TFEU, the findings on the respective roles of EU law and national law made therein as a matter of principle also apply as regards Article 102 TFEU. In the following sections, we will respectively demonstrate this as regards the protective purpose of Articles 101 and 102 TFEU and the question of who can claim compensation for what kind of damage (Section III.A); the existence of a causal link between a competition law infringement and a damage (Section III.B); and, lastly, the determination of the persons that can be held liable for compensation of such damage (Section III.C).

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[27] In its judgment in *Kone*, the Court of Justice examined not only whether the protective purpose of Article 101 TFEU prevented the liability of cartel members for certain harm from being categorically excluded, but also whether there was a sufficiently direct link between harm caused by umbrella pricing and a cartel that managed to keep the price of particular products artificially high; see ECJ, judgment of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 27 et seq.). See also in that sense, ECJ, judgment of 6 November 2012, *Otis and Others* (C-199/11, EU:C:2012:684, paragraph 65).

[28] See, with regard to the conditions governing the non-contractual liability of EU bodies, ECJ, judgments of 29 September 1982, *Oleifici Mediterranei v EEC* (26/81, EU:C:1982:318, paragraph 16), and of 18 March 2010, *Trubowest Handel and Makarov v Council and Commission* (C-419/08 P, EU:C:2010:147, paragraph 40). See, for compensation claims by individuals against Member States on the grounds of infringement of EU law, judgments of 19 November 1991, *Francovich and Others* (C-6/90 and C-9/90, EU:C:1991:428, paragraph 40); of 5 March 1996, *Brasserie du pêcheur and Factortame* (C-46/93 and C-48/93, EU:C:1996:79, paragraph 51); and of 14 March 2013, *Leth* (C-420/11, EU:C:2013:166, paragraph 41).

[29] ECJ, case C-557/12, *Kone and Others.*

[30] ECJ, case C-435/18, *Otis Gesellschaft and Others.*

A The Protective Purpose of Articles 101 and 102 TFEU or: Who Can Claim Compensation for What Kind of Damage?

The answer to the question of who can claim compensation for what kind of damage follows clearly from the case-law of the Court. As already stated above, *any individual* is entitled to claim damage for the harm *caused to him by an infringement of Articles 101 and 102 TFEU*. This means that there cannot be a categorical blanket exclusion of a certain category of persons nor of a certain category of damage from compensation under these provisions. Rather, to be eligible for compensation, it is necessary to show that the damage that has allegedly been suffered is due to a competition law infringement. Consequently, anybody can claim compensation for any kind of damage provided he demonstrates a causal link between this damage and such an infringement.[31]

This principle might seem simple at first sight but the cases brought before the Court show that in reality it is not. This is because, in many legal orders, to prevent unlimited and unreasonable liability the perspective of which would prevent any form of action and private initiative in a society, normative elements form part of the assessment of the right to compensation. Thus, for example, the Austrian legal order at issue in the *Kone* and *Otis* cases requires a so-called 'link of unlawfulness' between the protective purpose of the infringed rule and the harm claimed for that harm to be eligible for compensation.[32]

The background to both the *Kone* and the *Otis* cases was the 'elevator cartel'.[33] In *Kone*, the damage at issue resulted from 'umbrella pricing', which occurs when undertakings that are not themselves party to a cartel, benefiting from the protection of the cartel's practices (operating 'under the cartel's umbrella', so to speak), knowingly or unknowingly set their own prices higher than they would otherwise have been able to under competitive conditions. In the main proceedings, an undertaking that had purchased from a manufacturer that was *not* involved in the cartel elevators at a price which, in its opinion, had been set under the protection of the elevator cartel and was as such higher than would otherwise have been expected, under competitive conditions, sued the undertakings involved in the elevator cartel for damages before the Austrian civil courts.[34] In *Otis*, the damage claimed for was that of a government lender, the Province of Upper Austria, which had sustained losses because it granted promotional loans on preferential terms to a greater extent than it would have done in the absence of an anti-competitive agreement. The Province had granted promotional loans to customers of the elevator cartel members for social housing development projects. As a result of concerted overpricing of the elevators installed in the funded housing, the loan amounts were substantially higher than they would have been had the prices been determined on the

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[31] See ECJ, Judgments of 6 October 2021, *Sumal* (C-882/19, EU:C:2021:800, paragraph 34 and the case-law cited), and of 11 November 2021, *Stichting Cartel Compensation and Equilib Netherlands* (C-819/19, EU:C:2021:904, paragraph 49 and the case-law cited).

[32] See ECJ, judgment of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 13 et seq.), and opinion of Advocate General Kokott in that case (EU:C:2014:45, point 14), as well as ECJ, judgment of 12 December 2019, *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:1069, paragraph 15 et seq.), and opinion of Advocate General Kokott in that case (EU:C:2019:651, point 18).

[33] See on the elevator cartel opinion of Advocate General Kokott in *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:651, point 9 et seq., with further references).

[34] See opinion of Advocate General Kokott in *Kone and Others* (C-557/12, EU:C:2014:45, point 2 et seq.).

basis of free competition, depriving the province of the possibility to use the price difference more profitably.[35]

In both cases, the referring court stated that, under Austrian law, the alleged damages could not give rise to compensation because they were, in essence, not covered by the protective purpose of the prohibition on cartels. Thus, in the case of *Kone*, the loss caused by the umbrella pricing would have qualified as a side-effect of an independent decision that a person not involved in the cartel had taken based on his own business considerations and would thus not have been attributable to the cartel members.[36] In *Otis*, it would have been considered under Austrian law that the claimant, the Province of Upper Austria, did not sustain a loss as a supplier or customer on the market affected by the price-fixing and that there was therefore not a sufficient link between its loss and the purpose of the prohibition on anti-competitive agreements, which is to maintain competition in the market affected by the cartel.[37]

Before the Court of Justice some of the parties involved in those cases contended that, likewise, it should be decided that neither the claimants nor the alleged damages could qualify for compensation under Article 101 TFEU. In *Otis*, those parties notably considered that the Province of Upper Austria, in its capacity as a government lender, was not covered by the protective purpose of Article 101 TFEU as it had not acted in that capacity as a market participant. Furthermore, those parties argued that the losses claimed by the province could not qualify for compensation, because the harm claimed was either purely political, because fewer social housing projects had been funded than would have been without the cartel, or in any case purely hypothetical, as the funds earmarked for housing funding could anyway not have been profitably invested elsewhere.[38]

The Court, however, dismissed these objections. Thus, in *Kone*, it held that Article 101 TFEU precludes the application of national rules which categorically exclude, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from umbrella pricing.[39] Likewise, in *Otis*, it stated that limiting the possibility to request compensation to suppliers and customers of the market affected by the cartel would from the outset systematically deprive potential victims of that possibility and therefore seriously undermine the full effectiveness of Article 101 TFEU and the effective protection against the adverse effects of an infringement of competition law. Furthermore, according to the Court, any loss which has a causal connection with an infringement of Article 101 TFEU must be capable of giving rise to compensation in order to ensure the effective application and to guarantee the effectiveness of that provision. Consequently, the Court confirmed that persons in the situation of the Province of Upper Austria must be able to request compensation for loss resulting from the fact that, as a result

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[35] See opinion of Advocate General Kokott in *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:651, points 1 et seq. and 15).

[36] ECJ, judgment of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 14 et seq.).

[37] ECJ, judgment of 12 December 2019, *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:1069, paragraph 14).

[38] See opinion of Advocate General Kokott in *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:651, points 70 et seq. and 98 et seq.).

[39] ECJ, judgment of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 19 et seq.).

of a cartel, they were obliged to grant subsidies which were higher than if that cartel had not existed and, consequently, were unable to use that difference more profitably.[40]

These examples show that the question of whether cartel members can be held liable for damages caused by umbrella pricing – like in *Kone* – or through inflated public subsidies – like in *Otis* – must be answered directly on the basis of EU law. After all, if there is a need to assess whether the members of a cartel have to make good losses sustained as a result of umbrella pricing or inflated public subsidies, that assessment will not only be concerned with the rules for enforcing and calculating compensation claims and the furnishing of evidence before national courts (in other words, the 'how' of the compensation). The focus of such an assessment will, rather, be the much more fundamental question of whether cartel members can be held civilly liable at all for this kind of loss and whether they can be sued by persons who are not their direct or indirect customers (that is to say, the 'whether' of compensation). That question cannot be left to the legal orders of the Member States alone. Indeed, national legal concepts cannot be decisive for the very question of whether compensation is due under EU law.

If the legal criteria by which national courts assess the civil liability which those participating in an agreement, decision or concerted practice within the meaning of Article 101 or an abuse within the meaning of Article 102 TFEU owe to certain persons for certain kinds of loss were to differ fundamentally from one Member State to another, there would be a risk of economic operators being treated differently. As already stated above, this would not only run counter to the fundamental objective of EU competition law, which is to create framework conditions that are as uniform as possible for all undertakings active on the internal market ('*level playing field*'),[41] it would also be an invitation to '*forum shopping*'. Imagine a situation in which, in one Member State, victims of umbrella pricing could claim damages from cartel, members whereas in another Member State their claims would be categorically excluded from compensation, independently of the concrete circumstances of the individual case. Likewise, consider a situation in which, in one Member State, a government lender like the Province of Upper Austria could ask for compensation of harm caused by the inflation of promotional loans due to a cartel whereas in another Member State, a public entity in its capacity as a government lender would be categorically excluded from the circle of persons entitled to damages. It seems like common sense that such an approach cannot possibly be compatible with the exigence of uniform interpretation of EU competition law.

All in all, the objective of the uniform and effective enforcement of the competition rules of the European internal market therefore requires an answer to the question of principle as to whether or not cartel members must provide compensation for a certain type of loss caused to a certain type of persons that is uniform throughout the EU.[42]

It is true that the overturning of principles of national law that may come with such a uniform interpretation may sometimes seem revolutionary, as the case of *Otis* shows. Here, the referring court, after receiving the response of the Court of Justice, agreed that the Province of Upper Austria was entitled to claim compensation for the damage caused by the elevator

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[40] ECJ, judgment of 12 December 2019, *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:1069, paragraph 27 et seq.).

[41] See on the concept of 'level playing field', the references in footnote 13 above.

[42] Opinion of Advocate General Kokott in *Kone and Others* (C-557/12, EU:C:2014:45, point 28 et seq.).

cartel provided that a causal link existed between the two. However, the referring court held that this was only true for the period during which Austria had been a member of the EU and during which the issue was therefore determined by EU law. On the other hand, it explicitly stated that the Province of Upper Austria was not entitled to claim compensation for the damage caused in the previous period, during which the provisions of national law had been decisive for the assessment of the right to compensation.[43]

EU law itself does not deny the necessity for national legal systems to impose some limits on civil responsibility and compensation. However, as will be shown below, this is ensured via the application of the concept of the existence of a 'sufficiently direct causal link' between a competition law infringement and the harm claimed. By contrast, restricting unlimited responsibility by excluding, in an abstract and general way which may vary from one Member State legal order to another, certain categories of persons or damages from the eligibility to compensation would not only lead to a patchwork of compensation regimes incompatible with the uniform application of Articles 101 and 102 TFEU, but would above all be incompatible with the very purpose of these provisions. This is because, as the Court has repeatedly held (here as regards Article 101, but the same holds true as regards Article 102 TFEU):

> the full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down in paragraph 1 of that provision would be put at risk if it were not open to any individual to claim damages for loss caused to him or her by a contract or by conduct liable to restrict or distort competition. The right for any person to seek compensation for such harm strengthens the working of the EU competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, by contributing to the maintenance of effective competition in the European Union. Beyond the compensation itself for the harm alleged, the establishment of such an entitlement contributes to the objective of dissuasion. That entitlement is thus capable not only of providing a remedy for the direct damage alleged to have been suffered by the person in question, but also the indirect harm done to the structure and operation of the market, which was not able to reach full economic efficacy, in particular as regards benefits to the consumers concerned. Just as is the case for the implementation of the EU competition rules by public authorities (public enforcement), actions for damages for infringement of those rules (private enforcement) are an integral part of the system for enforcement of those rules, which are intended to punish anticompetitive behaviour on the part of undertakings and to deter them from engaging in such conduct.[44]

However, the solution adopted by the Court of Justice does not lead, as feared by the elevator manufacturers in *Kone* and *Otis*, to an unlimited right to compensation that would result in unlimited liability on the part of the cartel members, irrespective of the circumstances of the particular case, for all potential losses, however remote, for which their anti-competitive conduct may have been the cause in the sense of a '*conditio sine qua non*'. On the contrary, the fact that the cartel members are only liable for harm for which there is a sufficiently direct link to their anti-competitive conduct and which they could therefore have foreseen takes account of the right of the cartel members to legal certainty and of the need to curb unlimited liability.

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[43] Supreme Court, Austria, judgment of 21 October 2020, 9 Ob 86/19s. See also, for a very critical voice as regards the approach of the Court, Axel Reidlinger, 'Das autonome EU-Kartellschadensersatzrecht des EuGH: Uferlose Haftung jenseits zivilrechtlicher Grenzen?', in *Das Unternehmen in der Wettbewerbsordnung – Festschrift für Gerhard Wiedemann*, Munich: Beck, 2020, p. 643 et seq.

[44] See ECJ, judgment of 6 October 2021, *Sumal* (C-882/19, EU:C:2021:800, paragraphs 33 to 37 and the case-law cited).

B The Causal Link between the Harmful Conduct and the Harm Claimed

The demarcation line between aspects governed by EU law and aspects governed by national law is particularly difficult to draw when it comes to the concept of a 'causal link' between a competition law infringement and a damage. As Advocate General Rantos noted, the questions of the existence of harm as well as of the existence of a causal link between that harm and the infringement form part of the constituent elements of responsibility.[45] As concerns the causal link, it is thus again important to distinguish between aspects that determine the right to compensation in an abstract and general way on the one hand and aspects that concern the enforcement of that right on the other.

The *Kone* and *Otis* cases are, here again, very instructive. Thus, from a legal standpoint, the question of the eligibility for compensation of the losses of the Province of Upper Austria in *Otis* was, just like the question of the eligibility for compensation of losses caused by umbrella pricing in *Kone*, a problem concerning the causal link. The question that arose was whether there was a sufficiently close link between the elevator cartel and the losses at issue or whether those were excessively remote losses for which damages could not reasonably be awarded against the members of the cartel. In that context, some of the parties took the view that the question of the existence of a 'causal relationship' between an infringement and harm must be answered on the basis of national law, in conjunction with the principles of equivalence and effectiveness, rather than directly on the basis of EU law. Those parties based that view on the finding by the Court of Justice in *Manfredi*, that 'it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of [the] right [to compensation], *including those on the application of the concept of "causal relationship"*'.[46] That finding has been included in Recital 11 of Directive 2014/104, which does not otherwise address the concept of the causal relationship between an infringement and damage. On the contrary, Recital 11 suggests that the Member States may retain any other existing conditions to compensation, such as imputability, adequacy or culpability, in their national law, in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence and the provisions of the Directive. It is certainly true that, at the time of the adoption of the Directive, the expectation of the EU legislator and its understanding of *Manfredi* was that the conditions for causality (including its normative aspects) would be governed by national law. However, as the case-law has made clear since, the application of normative conditions for causality such as imputability, adequacy or culpability under national law is not compatible with the principle of uniform interpretation of EU law and the fact that the constitutive conditions of antitrust liability directly derive from Articles 101 and 102 TFEU.

Indeed, it transpires on closer consideration that the construct of a 'causal relationship' between a harmful event and damage under compensation law is a multi-layered legal concept. Thus, the purpose of examining the causal relationship is not only to establish if a particular event was in fact the cause of particular damage. On the contrary, examination of the causal

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[45] Opinion of Advocate General Rantos in *Volvo and DAF Trucks* (C-267/20, EU:C:2021:884, point 80).

[46] ECJ, judgment of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraph 64) (emphasis added).

link may also involve normative elements regarding the question of whether there is a sufficient link between the harm claimed and the purpose of the infringed rule.[47]

This normative aspect of the causal link was illustrated in the proceedings in *Otis* by the parties' discussion of whether, in the case of the Province of Upper Austria, there was a 'link of unlawfulness' between the infringement and the harm sustained, as required under Austrian law in order to substantiate a claim to compensation. As already mentioned above, according to the parties' submissions, in that legal order, such a link only exists if the legal norm infringed by the injuring party is specifically intended to protect the injured party. According to the referring court, such a link did not exist under Austrian law in the case at hand because, although the personal scope of the Article 101 TFEU prohibition extends to persons active on a market affected by a cartel as suppliers or customers, it does not apply to government lenders who provide funding to make it easier for particular groups of customers to purchase the product affected by the cartel. Consequently, under Austrian law, such lenders' claims to compensation would be dismissed, as there would not be a sufficient link between their losses and the purpose of the prohibition on anti-competitive agreements, which is to maintain competition on the market affected by the cartel. In *Kone*, in the absence of a contractual link with a member of the cartel, the causal link between the loss sustained and that cartel would have been considered to have been broken by the autonomous decision of the undertaking not party to the cartel to apply umbrella pricing.

These discussions alone illustrate that the questions at issue here were about one aspect of the examination of the causal link that concerns the substantive preconditions of the right to antitrust damages rather than the rules governing the procedural enforcement of that right. Indeed, what was at issue here was whether Article 101 TFEU also confers a right to compensation for losses incurred as a result of a cartel on persons who were not active on a market affected by the cartel either as suppliers or as customers, and on persons who had no direct contractual link with the cartel members. This concerns the scope of protection afforded by Article 101 TFEU and is thus a question of the interpretation of a provision of EU law which must be answered on the basis of EU law alone.

As already noted before, it would not be appropriate to leave the answer to these questions of the interpretation of a provision of EU law to the national legal systems and to measure their answers in turn against the principle of effectiveness under EU law, because the terms of a provision of EU law which makes no express reference to the law of the Member States must normally be given an autonomous and uniform interpretation throughout the EU.[48] That means, in this context, that dogmatic constructs of national law conceived to limit boundless liability, such as the theories on the protective purpose of the norm or the adequacy of the causal link between an infringement and harm, cannot be the crucial factor in terms of determining the scope of Article 101 TFEU. On the contrary, a uniform interpretation of the prohibition on price-fixing as a rule by which to establish harm is needed across the EU if Article 101 TFEU is to achieve its full effectiveness.

Based on the demarcation line between substantive claim and procedural enforcement, the 'detailed rules on the application of the concept of "causal relationship"', which, according to the Court of Justice in *Manfredi* and Recital 11 of Directive 2014/104, it is for the domestic

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[47] See, in this regard, opinion of Advocate General Kokott in *Kone and Others* (C-557/12, EU:C:2014:45, points 35 and 53 et seq.).

[48] See the references in footnote 12 above.

legal system of each Member State to lay down, can therefore only consist in the modalities governing how a causal link between a harmful event and damage is actually established in each particular case. This is in keeping with the fact that, in its judgment in *Manfredi*, the Court of Justice included the 'detailed rules on the application of the concept of "causal relationship"' under the 'detailed rules governing the *exercise* of [the] right [to compensation]'.[49] The issue is the enforcement of compensation claims, not the *existence* of such claims.

The modalities for actually establishing a causal link between a harmful event and harm in each particular case concern, for example, the question of how many expert opinions of what type or what level of scientific expertise are needed in order to prove that the harm suffered by a person who fell victim to an accident or an illness due to certain working conditions (e.g. the fact of being exposed to harmful substances) can actually be ascribed to the accident or working conditions in question, rather than to a pre-existing illness. Likewise, the modalities governing the enforcement of compensation claims concern the type of proof demanded from a claimant wishing, for example, to prove that damage to a building was in fact caused by a construction defect rather than by weather conditions beyond the construction firm's control. In competition matters, such kind of issues concern, for example, the assessment of expert evidence for establishing loss.

In terms of the main proceedings in *Otis*, the modalities for actually establishing a causal link between the elevator cartel and the financial losses claimed by the Province of Upper Austria concerned, for example, the type of evidence demanded in order to demonstrate that the funding was actually granted in the amount claimed, that the additional costs claimed were actually attributable to the cost of the elevators installed in the funded buildings or that the average yield on federal bonds in the relevant period was actually equal to the yield based on which the province calculated its losses.

These aspects indeed concern the modalities of the procedural enforcement of the right to antitrust damages established under EU law, which have to be regulated under national law, measured against the principles of equivalence and effectiveness (and, now, eventually, the rules of the Antitrust Damages Directive). On the other hand, as explained above, the question of whether there is a sufficient link between harm such as that incurred by the Province of Upper Austria in *Otis* and victims of umbrella pricing like those in *Kone* and the protective purpose of Article 101 TFEU, concerns the substantive preconditions to the right to antitrust damages under EU law and must therefore be answered directly on the basis of EU law. After all, the ultimate question here is *who* is *entitled* under Article 101 TFEU to demand compensation for *what* harm and, thus, what the preconditions are to a claim to antitrust damages under EU law. As with the question as to *who* is *required* under Article 101 TFEU to provide compensation, which will be addressed below, these are matters governed by EU law.

In keeping with the principle according to which there can be no categorical blanket exclusion from the outset of a certain category of persons or damages from the entitlement to compensation, the Court stated in its judgment in *Otis* that 'any loss which has a causal connection with an infringement' must be eligible for damages.[50] Furthermore, in *Kone* and *Otis*, the Court examined whether such a causal connection was established in the cases at hand in a general way, it being then for the respective national courts to determine whether

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[49] *Manfredi*, above note 46, para. 64 (emphasis added).

[50] ECJ, judgment of 12 December 2019, *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:1069, paragraph 30).

this connection was concretely proven as to the harm quantified before it by the parties. Thus, the Court concluded in *Kone* that 'the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, where it is established that the cartel at issue was … liable to have the effect of umbrella pricing being applied by third parties acting independently, and that [this] could not be ignored by the members of that cartel'.[51] Likewise, in *Otis*, the Court stated that 'persons not acting as suppliers or customers on the market affected by the cartel must be able to request compensation for loss resulting from the fact that, as a result of that cartel, they were obliged to grant subsidies which were higher than if that cartel had not existed and, consequently, were unable to use that difference more profitably'.[52]

It is true that, in neither of these cases, the Court defined in an abstract and general way the criterion of a 'sufficiently direct' causal link between an infringement and the harm claimed. Rather, the fulfilment of the condition of sufficient directness, that makes sure that the responsibility for harm caused stays reasonable and adequate and does not become boundless, is assessed on a case-by-case basis. However, it is apparent from the analyses of the Court that it pays attention to this criterion, which includes, notably, a sufficiently direct connection that ensures that the harm claimed was a common and foreseeable consequence of the anti-competitive behaviour that could therefore not have been ignored by the perpetrators.[53] Furthermore, it is to be expected that the Court will gradually clarify the applicable causality test, as it was called to do regarding the liability of Member States for infringements of EU law. As already noted above, the fact that the cartel members are only liable for harm for which there is a sufficiently direct link to their anti-competitive conduct and which they could therefore have foreseen takes account of the right of the cartel members to legal certainty and of the need to curb unlimited liability. At the same time, this principle guarantees effective compensation for cartel damages and, thus, effective competition law enforcement. Thus, for example, in the *Otis* case, the link between the inflated price of the elevators installed and the size of each funding loan, calculated as a percentage thereof, could in principle be specifically proven in each individual case.[54] There was therefore a sufficiently direct link between the losses incurred by the Province of Upper Austria and the inflated prices on the Austrian elevator market caused by the cartel, and to acknowledge that link was by no means tantamount to establishing unlimited liability on the part of the cartel members.

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[51] ECJ, judgment of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 34.

[52] ECJ, judgment of 12 December 2019, *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:1069, paragraph 32).

[53] See explicitly ECJ, judgment of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraphs 29 and 30); see also, to that effect, judgment of 12 December 2019, *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:1069, paragraphs 28 and 32). See on the concept of the sufficiently direct causal link also opinion of Advocate General Kokott in *Kone and Others* (C-557/12, EU:C:2014:45, point 35 et seq.).

[54] See opinion of Advocate General Kokott in *Otis Gesellschaft and Others* (C-435/18, EU:C:2019:651, point 132 et seq.).

C The Persons Who Can Be Held Liable for the Payment of Compensation

The question of who is obliged to compensate the victims of cartel damages was at the very centre of the *Skanska*[55] and *Sumal*[56] cases.[57]

In *Skanska*, the Court had to determine for the first time whether the answer to the question of who is liable to compensate for damage caused by an infringement of Article 101 TFEU must be answered directly on the basis of EU law or, on the contrary, on the basis of national law.[58] The case concerned claims for compensation for damage caused by a cartel in Finland in a situation where some of the companies that had participated in the cartel had subsequently been taken over by other companies. These companies argued that, under Finnish liability rules, they were not liable for damages caused by the legally independent companies involved in the cartel.

However, the Court held that the determination of who is liable to pay damages for harm caused by a cartel is not a question of how, but rather a question of whether compensation is awarded, and thus falls directly under EU law.[59]

Accordingly, the Court recalled that Article 101 TFEU applies to 'undertakings' as defined by the case-law, i.e. any entity engaged in an economic activity, irrespective of its legal status. According to the Court, this concept of 'undertaking', used to determine liability for fines, is also relevant for determining the entity liable for damages. Thus, the entities liable to make good the damage caused by a cartel prohibited by Article 101 TFEU are the undertakings, within the meaning of that provision, which participated in that cartel.[60]

This solution strikes the right balance between the liability of undertakings for infringements of competition law on the one hand, and the effective and efficient enforcement of EU competition law on the other. Indeed, if it is established that two entities are part of the same 'undertaking' within the meaning of EU law and that one of these entities has engaged in anti-competitive activity, the undertaking as a whole has benefited from this activity and must therefore bear the consequences. Otherwise, companies could avoid liability simply by changing their legal form, which would lead to insufficient enforcement of competition law.

In the *Sumal* case, the question was whether this solution is also valid when it is the parent company of an undertaking that has taken part in an anti-competitive activity and the action for damages is brought against a subsidiary of that parent company.[61] In this case, the situation is more delicate. When the parent company is liable for the behaviour of its subsidiary, this is justified by the fact that the subsidiary does not autonomously determine its behaviour on the market, but follows the directives of its parent company. On the other hand, is a subsidiary which forms an economic unit with its parent company also liable for the conduct of its parent company, even if it does not determine the conduct of its parent company?

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55 ECJ, case C-724/17, *Skanska Industrial Solutions and Others*.

56 ECJ, case C-882/19, *Sumal*.

57 See Whelan, Chapter 7 in this book.

58 See opinion of Advocate General Wahl in *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:100, point 24).

59 ECJ, judgment of 14 March 2019, *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:204, paragraph 28).

60 *Ibid.*, paragraphs 29 to 32.

61 See opinion of Advocate General Pitruzzella in *Sumal* (C-882/19, EU:C:2021:293, point 19), and ECJ, judgment of 6 October 2021, *Sumal* (C-882/19, EU:C:2021:800, paragraph 31).

The Court, following the opinion of Advocate General Pitruzzella, found a balanced answer to this thorny question. It has ruled that the victim of the anti-competitive conduct of a parent company may not bring an action for liability against any of the subsidiaries of that parent company which form part of the same economic unit. Such an action can only be brought against a subsidiary which carries out an activity with a concrete link to the subject matter of the infringement for which the parent company has been held liable, for example by marketing the products which are the subject of the cartel and which are manufactured by the parent company. On the other hand, a subsidiary cannot be held liable for infringements committed in the context of economic activities which have no connection with its own activity and in which it was not involved in any way, even indirectly.[62]

Moreover, in the proceedings before the national court seized of the action against the subsidiary, the subsidiary should be given the opportunity to contest that it belongs to the same undertaking as its parent company and to deny its liability for the alleged damage. It is only the infringement committed by the parent company and established in a Commission decision that cannot be challenged in the course of the damages proceedings before the national court.[63]

Here again, the solution shows a fair balance between potentially unlimited liability of companies and excessive limitations on the implementation of competition law. The possibility of bringing an action for damages against a subsidiary operating in the country where the victim of the damage caused by a cartel resides, or even against the subsidiary from which this victim acquired the goods which were the subject of the cartel, greatly facilitates the effective enforcement of competition law in the context of private enforcement.[64] On the other hand, the limitation to subsidiaries having taken part in the activity concerned by the cartel and the possibility for these subsidiaries to contest their liability in the context of the procedure before the national court takes into account the need to restrict an unlimited liability of economic operators for competition law infringements.

Last but not least, these cases illustrate again the need to determine, in a uniform manner for all Members States, criteria governing the question of who can be held liable for a competition law infringement, as this is a constitutive element of cartel responsibility and not a question concerning the procedural modalities for the enforcement of that responsibility.[65]

IV CONCLUSION

The issue of private enforcement of EU competition law, which has already led to a long-standing body of case-law by the Court, is gaining more and more momentum. Thus, there are currently still many significant and challenging cases pending before the Court,[66] and there will certainly be more to follow in the years to come. The current boom is probably due

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[62] ECJ, judgment of 6 October 2021, *Sumal* (C-882/19, EU:C:2021:800, paragraphs 46 to 52); see also opinion of Advocate General Pitruzzella in that case (EU:C:2021:293, points 52 et seq.).

[63] ECJ, judgment of 6 October 2021, *Sumal* (C-882/19, EU:C:2021:800, paragraph 53 et seq.).

[64] See on this point opinion of Advocate General Pitruzzella in *Sumal* (C-882/19, EU:C:2021:293, point 68).

[65] See on this subject Eva Fischer, 'Grundlegungen zur Konzernhaftung – Der Standard der Haftungszurechnung im Kartellrecht', *ZfPW* 3/2021, p. 310 et seq.

[66] See, for example, ECJ, pending cases C-267/20, *Volvo and DAF Trucks*; C-721/20, *DB Station & Service*; C-25/21, *Repsol Comercial de Productos Petrolíferos*; C-57/21, *RegioJet*; C-163/21, *PACCAR*

to the entry into force of the Antitrust Damages Directive, leading to more and more questions on the interpretation thereof. However, the cases discussed in this chapter show that not only questions on the Directive, but also questions on fundamental issues about the constitutive conditions of cartel responsibility under Article 101 TFEU and the respective roles of EU law and national law in that context are being raised before the Court and still need to be answered.

The case-law analysed in this chapter furnishes a solid basis for the further concretisation of these conditions of antitrust responsibility under Articles 101 and 102 TFEU. It is hoped that the ratio underlying the approach of the Court will convince its critics that it strikes a good balance between unlimited, disproportionate antitrust responsibility on the one hand and under-enforcement of competition law and under-compensation of antitrust damages on the other, as well as between the necessity of uniform substantive conditions for antitrust responsibility throughout the EU on the one hand and on the other the procedural autonomy of the Member States for the regulation of actions where the infringement of EU competition rules is invoked before their courts, other than in the context of public enforcement.

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and Others; C-312/21, *Tráficos Manuel Ferrer*; C-344/21, *Groupe AA e.a.*; C-605/21, *Heureka Group*; C-198/22 and C-199/22, *Deutsche Bank*.

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