

National law cannot exclude damages claims of public lenders against cartelists, *Otis v. Land Oberösterreich (Otis II)*

Case C-435/18, *Otis Gesellschaft GmbH and Others v. Land Oberösterreich and Others*, Judgment of the Court (Fifth Chamber) of 12 December 2019, EU:C:2019:1069

1. Introduction

The ECJ judgment in *Otis II* is the latest in the field of EU competition damages actions. The Court held that public lenders that are harmed indirectly by a cartel, but are neither its purchasers nor suppliers, cannot be barred from claiming damages. Setting aside national provisions regulating civil liability in the name of the effectiveness of EU law, it dealt the third blow in a row to national procedural autonomy in the area of competition damages after the important recent decisions in *Cogeco* and *Skanska*.¹ That being said, the Court shied away from explicitly adopting a uniform EU concept of normative causation to achieve that result, as suggested by Advocate General Kokott. It thus appeared to prefer not to Europeanize fully the requisite elements of the right to claim damages. Nonetheless, the exact workings of the relationship between uniform EU concepts and national law remain arcane and a source of controversy. *Otis II*, read together with the other recent judgments, can perhaps reveal some kind of pattern.

The enforcement rationale of competition damages actions is crucial in understanding this pattern. Damages claims are an integral component of the wider scheme of enforcement of European competition law, along with the more traditional public enforcement. The ECJ, through its case law starting from the seminal case *Courage v. Crehan*, and the Commission, by proposing Directive 2014/104, have partially harmonized the law applicable in this area.² Taken together, they unreservedly recognize the right of “any

1. Case C-637/17, *Cogeco*, EU:C:2019:263; Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions Oy*, EU:C:2019:204. On national procedural autonomy and its status in EU law, see Lenaerts, “National remedies for private parties in the light of the EU law principles of equivalence and effectiveness”, 46 *Irish Jurist* (2011), 13–37.

2. See Case C-453/99, *Courage Ltd v. Crehan*, EU:C:2001:465 and Directive 2014/104/EU of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, O.J. L 349/1 (hereafter: Damages Directive).

individual” to claim damages for infringements of competition law.³ This serves not only to protect private rights to compensation but achieves a wider deterrence/enforcement goal.⁴ However, under national law not every individual can always claim damages. Laws of the Member States invariably demand the existence of a certain link between the infringement and the loss suffered, aiming to reduce the scope of potential exposure to liability, often for policy or equity reasons.⁵ *Otis II* sheds some light on the question of when a national legal system has to accept the existence of such a link, even when national law would deny it. The Court did not enter the theoretical debate on the concept of the causal link and all its intricacies. Nonetheless by taking its usual functional approach and by emphasizing that national law cannot exclude State lender claimants, its judgment in *Otis II* inevitably has a significant bearing on this discussion.

2. Factual and legal background

In 2007 several elevator companies were fined hundreds of millions of euros by the Commission as a result of their participation in the (in)famous cartel which since the 1980s had been fixing prices and allocating customers in several countries.⁶ The cartel had also been heavily fined by the Austrian Courts in separate proceedings.⁷ Their hardships did not stop there, however, as they had to face numerous civil actions. One such action for damages was initiated in 2010 by the Province of Upper Austria and 14 other entities before the Vienna Commercial Court.⁸ Out of all claimants, the Province was unique in that it did not claim to have suffered loss as a *customer* of the cartel – the typical profile of claimants in cartel proceedings⁹ – but rather because, during the cartel period, it had granted promotional loans for the financing of building projects on the basis of statutory provisions. The amount of these loans was directly dependent on the construction costs. Overall, building costs increased due to the cartel and as a result Upper Austria was forced to grant a higher amount in low-interest loans, while these funds could have been

3. Case C-637/17, *Cogeco*, paras. 39, 41; Art. 1(1), Damages Directive.

4. Case C-536/11, *Donau Chemie and Others*, EU:C:2013:366, para 24; Opinion of A.G. Wahl in Case C-724/17, *Skanska*, EU:C:2019:100, paras. 29 et seq. Cf. A.G. Jääskinen, Opinion in Case C-536/11, *Donau Chemie and Others*, EU:C:2013:67, para 48.

5. Von Bar, *The Common European Law of Torts: Volume One* (OUP, 1998), pp. 434–436.

6. Commission Decision of 21 Feb. 2007, COMP/E-1/38.823, O.J. 2008, C 75/19.

7. *Oberster Gerichtshof*, Judgment of 8 Oct. 2008, RdW 2008, 780, AT: OGH0002:2008:0160OK00005.08.1008.000.

8. Judgment, para 8.

9. See e.g. Peyer in “Private antitrust litigation in Germany from 2005 to 2007: Empirical evidence”, 8 *Journal of Competition Law & Economics* (2012), 331–359, at 345.

profitably invested instead, or used to repay older loans. Thus, the Province requested that the cartelists pay the sum corresponding to this difference in interest costs. The Vienna Commercial Court rejected the claim.¹⁰ There was no direct damage suffered by Upper Austria in the sense of Articles 1295 and 1311 of the Austrian Civil Code (ABGB) as the Province did not even operate in the market for elevators. However, that decision was quashed on appeal and referred back to the Commercial Court.¹¹

The defendants reacted to the decision of the Appeals Court and filed an action before the Supreme Court. The latter, having doubts whether the directness criterion could pass the muster of EU law, chose to refer the question, stating that according to Austrian Law so-called “pure material losses” (*Reine Vermögensschäden*) are not protected as such and a claim is granted only when the loss is of the type that a protective provision aims to shield against. The Supreme Court considered that Article 101 TFEU, which is the provision in question, aims to ensure the maintenance of undistorted competition, and only protects participants in the relevant market and not third parties such as public law bodies.¹² However, the Supreme Court was more than familiar with the ECJ’s assertion that “any individual” can claim compensation for damage caused by the breach of competition law as an expression of the principle of full effectiveness of Article 101 TFEU since *Courage v. Crehan* and *Kone*.¹³ Consequently, it asked whether it was compelled to recognize Upper Austria’s right to claim compensation.

3. Opinion of the Advocate General

Advocate General Kokott, following the example she set in *Kone* delivered an intricate and extensive Opinion that does not diverge from the position she supported there.¹⁴ Her Opinion is also evocative of Advocate General Wahl’s conclusions in the recent *Skanska* case, which likewise dealt with the complex interaction between uniform EU and national law in competition damages.¹⁵ In *Skanska*, Advocate General Wahl argued that the concept of “undertaking” is governed directly by EU law and should be understood uniformly in both public and private enforcement, with the Court siding with him. Similarly,

10. Judgment, para 11.

11. *Ibid.*, para 12.

12. *Oberster Gerichtshof*, Judgment of 17 May 2018, RdW 2018, 704, AT: OGH0002:2018:0090OB00044.17M.0517.001.

13. Case C-557/12, *Kone*, EU:C:2014:1317.

14. Opinion of A.G. Kokott in C-435/18, *Otis*, EU:C:2019:651. See also Opinion of A.G. Kokott in Case C-557/12, *Kone*, EU:C:2014:45.

15. Opinion of A.G. Wahl in Case C-724/17, *Skanska*.

Advocate General Kokott took the view that the full effectiveness of Article 101 TFEU would be undermined if damages were only limited to operators active on the market affected by the cartel, concluding that an EU concept of normative causation applies.¹⁶

The first issue that she grappled with was whether EU law applied directly or whether national law was applicable, albeit under the twin limitations of equivalence and effectiveness. As in *Kone*, Advocate General Kokott chose to emphasize that “the right of any person to claim damages caused by a cartel is rooted directly in Article 101 TFEU”.¹⁷ Under her scheme, EU law regulates exclusively certain crucial aspects of the right to claim damages: (i) the categories of claimants that have standing; (ii) the types of damages; and (iii) the scope of the damages. All those elements are the “constitutive conditions of the right” and are subject to an autonomous EU interpretation.¹⁸ The formula “national law under the principles restricted by effectiveness and equivalence” only applies to the “detailed procedural rule[s] concerning the exercise of the right to compensation”.¹⁹ Therefore, after the Opinions in *Skanska* and *Kone*, the Opinion in *Otis II* reiterated that all substantive legal questions related to the enforcement of rights, including aspects of (legal) causation, are rooted directly in Article 101 TFEU and are governed by EU, not national, law. This uniform application of EU law creates a level playing field for the parties in proceedings throughout the EU and ensures legal certainty.²⁰

More specifically, in regard to causation, Advocate General Kokott countered the arguments of the applicants in the main proceedings, who claimed that, as the Court held in *Manfredi* and as is laid down in Recital 11 of Directive 2014/104, it is for Member State law to regulate the substantive conditions to liability, such as causation and fault.²¹ She claimed that causation is a multifaceted concept and that the case at hand involves only the *normative* component of the causal analysis. Separating it from the factual

16. Opinion, paras. 62 and 97. See Lianos, “Causal uncertainty and damages claims for the infringement of competition law in Europe”, 34 YEL (2015), 170–231, at 218 et seq.

17. Opinion, para 40. The Opinion is, at the time of writing, not available in an official English translation; our translation is based on the identical wording in the earlier Opinions cited.

18. In French, the term is *conditions matérielles* and in the original German *materielle Anspruchsvoraussetzungen*.

19. The “detailed procedural rules governing the exercise of the right to compensation” (*modalités de mise en oeuvre procédurale, Modalitäten der Durchsetzung*), para 44.

20. Opinion, para 55.

21. Opinion, para 49 and, referring to Joined Cases C-295–298/04, *Vincenzo Manfredi and Others*, EU:C: 2006:461, para 64.

component, she argued that the normative leg belongs to EU law.²² Indeed, the case concerns the so-called “sufficient connection between the breach and the damage” which Austrian law requires (*Rechtswidrigkeitzusammenhang*).²³ This causation analysis does not involve the procedural, but rather the substantive conditions for the recognition of this right i.e. the question of whether such a right is granted in the first place. In essence, it has to do with the protective scope of Article 101 TFEU, and is thus directly regulated by EU law, whereas the pronouncements of the Court in *Manfredi* and Recital 11 of the Directive only refer to the factual analysis.²⁴

Advocate General Kokott, having accepted that EU law is directly applicable, adopted a three-tier structure to her analysis of normative causation in competition damages. First, a “protective scope” analysis has to be undertaken, i.e. it has to be examined whether the purpose of Article 101 TFEU means that certain claims are excluded (*Schutzzweck*). The second step would be to investigate whether the loss itself is eligible for reparation (*Ersatzfähigkeit*). Finally, it is necessary to examine whether there is a “sufficiently direct” causal link between the damage suffered and the cartel infringement (*hinreichend unmittelbarer Zusammenhang*).²⁵ As to that last point, the Advocate General underlined that the only permissible causation conditions are similar to those in *Francovich* and Article 340 TFEU.²⁶

Starting with the first step, the Advocate General adopted a very broad view of the protective scope of Article 101 TFEU, stating that it covers any loss that is in causal connection with the infringement.²⁷ Any additional conditions imposed by national law, such as “activity in the affected market”, are immaterial. Moreover, policy-wise, excluding public lenders would lessen the deterrent effect of private enforcement, as public lenders are effective enforcers, their losses being typically higher and not dispersed.²⁸ Moving to the second step, the Advocate General emphasized that the loss suffered by Upper Austria is not hypothetical, but real economic loss.²⁹ In practice, the Advocate General helpfully added, the province of Upper Austria did not have

22. Commentators remarked on this separation of the causal analysis and its impact on applicable law already in respect of the A.G.’s Opinion in *Kone*. See e.g. Monti, “Umbrella pricing as a sword: Case C-557/12, *Kone A.G. and Others v. ÖBB Infrastruktur AG*, Judgment of 5 June 2014”, 21 MJ (2014), 464–475, at 470.

23. Opinion, para 51.

24. *Ibid.*, para 57. In that way, she appeared to disregard the fact that Recital 11 of the Damages Directive refers to such concepts as “fault” and “adequacy”, which have a normative dimension.

25. *Ibid.*, para 69.

26. *Ibid.*, para 67. Joined Cases C-6 & 9/90, *Francovich*, EU:C:1991:428.

27. *Ibid.*, para 84.

28. *Ibid.*, para 88.

29. *Ibid.*, para 104.

to prove where it would have invested these funds otherwise, but only that it had the competence to invest the funds in other places, such as bonds or repaying old loans, and that it had the statutory obligation to do so.³⁰ Interest increases the amount of the compensation from the date on which it is due, even for damages claims prior to the entry into force of the Damages Directive.³¹

Lastly, she dismissed all objections as to the issue of sufficient connection and that of directness of damages.³² She emphasized that after *Kone*, it is almost impossible to argue that no direct connection existed between infringement and loss.³³ Neither was the damage suffered by Upper Austria unforeseeable: economic actors active in the construction sector should have been well aware that such measures of support are routinely provided by States.³⁴ All in all, the categorical exclusion of selected groups of claimants is incompatible with the aim of Article 101 TFEU. Countering a “floodgates” argument put forward by the elevator firms, she posited that the factual “but for” causality test will still be enough to exclude unmeritorious claims and avoid unlimited liability.³⁵

4. The judgment of the Court

Unlike the Opinion, and again following the example set by *Kone* – maybe even exactly due to the example already set by *Kone* – the Court’s judgment is brief in its extent and laconic in its pronouncements. The Court needed only 14 paragraphs to analyse the substance of the referred question. The answer it gave was, if anything, to be expected and in line with predictions by commentators.³⁶ The ECJ in essence agreed with Advocate General Kokott and accepted that parties outside affected markets may bring claims for damages. In terms of justification, however, the Court based its conclusions on a distinct line of reasoning, avoiding the clear separation into areas of national and EU law along the lines taken by the Advocate General.

30. Opinion, para 124.

31. Ibid., paras. 114 et seq. On this contentious issue see Monti (Ed.), *EU law and interest on damages for infringements of competition law: A comparative report*, EUI Working Papers LAW, 2016/11.

32. See *infra* section 5.3.

33. Opinion, paras. 136–137.

34. Ibid., paras. 149–150.

35. Ibid., paras. 82–83.

36. See e.g. Maier-Rigaud, “Auf Dem Holzweg: Zu Streuschäden, Betroffenheit und Zurechnung im Rahmen von Schadensersatzklagen”, SSRN Scholarly Paper, available at <papers.ssrn.com/abstract=3444778> (last visited 6 July 2020).

Furthermore, it did not enter into the specificities concerning regulation of the causal link by EU law.³⁷

The Court started by recalling that Article 101(1) TFEU has direct legal effect and creates rights for individuals, citing its previous *Courage* case law on that matter.³⁸ According to this standing case law, the full effectiveness of EU competition law would be put at risk if it was not open to any individual to claim compensation. If there is a causal connection, individuals who suffered loss should be able to claim damages. Crucially, the ECJ emphasized that this right not only serves to procure compensation, but also to strengthen the working of EU competition law and to discourage agreements that would violate it. In that way, it contributes substantially towards maintaining effective competition in the EU.³⁹ For that reason, and invoking *Kone*, the Court made clear that national rules must not jeopardize the effective application of Article 101(1) TFEU. National law therefore has no option but to recognize the right of any individual to claim compensation for loss suffered. In that context, the ECJ emphasized that the protection against infringement would be seriously undermined if the ability to request compensation was limited to suppliers and customers of the cartel. This would systematically deprive potential victims of the possibility of vindicating their rights and of contributing towards effective and undistorted competition.

Therefore, even though the Province of Upper Austria was not a customer of the cartel, this is no argument for excluding compensation.⁴⁰ Any loss causally connected to an illegal practice must be able to give rise to claims of compensation so that effective application of Article 101 TFEU is ensured and the effectiveness of the provision is guaranteed.⁴¹ Citing Advocate General Kokott's Opinion, the Court affirmed that there is no need to prove that the loss suffered presents a specific connection with the objective of protection pursued by Article 101 TFEU.⁴² However the Court importantly clarified that it is up to the Province of Upper Austria to prove that it actually suffered such loss, with the national court needing to verify on a case-by-case basis whether Upper Austria could in fact have made more profitable investments.⁴³

37. See *supra* section 3.

38. Judgment, para 21.

39. *Ibid.*, para 24.

40. *Ibid.*, paras. 28–29.

41. *Ibid.*, para 30.

42. *Ibid.*, para 31. As set out *supra*, A.G. Kokott seemed to suggest adopting a very broad protective scope approach, and not to consider it as completely irrelevant.

43. *Ibid.*, para 33.

5. Comment

5.1. *The interaction between national and EU law concerning the substantive conditions of liability*

In *Otis II*, the Court held that national legal systems cannot categorically exclude claims for compensation for damages suffered by public lenders. This was not an obvious solution by any means. The damage suffered by public lenders is quite remote and several national legal orders would probably treat it as irrecoverable.⁴⁴ However, as in the previous *Kone* case, which dealt with so-called “umbrella” claimants⁴⁵ – which many legal systems also considered remote – the Court sees it otherwise: the effectiveness of the EU system of private enforcement would be compromised should such a test pose a hurdle to damages claims. “Any individual” must be able to claim damages for an infringement of Article 101 TFEU or the practical effect of the provision would be compromised. Therefore, national autonomy to regulate the conditions of liability is limited substantively in that regard by the principle of effectiveness of EU law. Public lenders, like umbrella claimants in *Kone*, cannot be excluded categorically from suing for damages. Nonetheless Advocate General Kokott went even further, claiming that there is no autonomy at all in respect to the normative aspect of causation, as it is regulated directly by EU law. That means that national tests of causation would not apply here; the relevant test is provided by EU law directly. The following section will show that in doing so, the Advocate General follows a conceptual scheme that has been developed by many advocates general in a number of cases. This scheme, though, has never been accepted fully by the Court for a variety of reasons.

44. See e.g. the German law that explicitly limits claims to operators active in the market affected, Sections 33(1), 33(3) and 33a(1) of the Act Against Restraints of Competition, *Federal Gazette* I 1750, 3245. This has served to exclude indirect claimants such as shareholders, and could potentially have excluded public lenders like Upper Austria too; see Franck, “§ 33a” in Immenga and Mestmäcker, *Wettbewerbsrecht Band 2 – GWB*, 6th ed. (CH Beck, 2020), paras. 20, 65 and 66; *Oberlandesgericht Düsseldorf*, Judgment of 2 July 2014, VI-U (Kart) 22/13, DE:OLGD:2014:0702.VI.U.KART22.13.00. Cf. *Bundesgerichtshof*, Judgment of 28 Jan. 2020, KZR 24/17, DE:BGH:2020:280120UKZR24.17.0, in which the Federal Court of Justice appeared to relax the requirements of German law, referring to the ECJ’s case law including *Otis II*.

45. Umbrella claimants are those who claim compensation from cartelists because of the overcharge suffered due to the cartelists’ *competitors* increasing their own prices as a reaction to the cartel (because of the softening of price competition in the relevant market); on Case C-557/12, *Kone*, see generally Dunne, “It never rains but it pours: Liability for umbrella effects under EU competition law in *Kone*”, 51 CML Rev. (2014), 1813–1828.

To begin with, irrespective of whether the problem was correctly analysed as one concerning causation, which will be analysed below, the Advocate General's insistence on the direct regulation of the substantive conditions of liability by EU law is noteworthy. The problem arises from the fact that causation (factual or normative) as an area of law was not regulated by the Damages Directive, which only partially harmonized damages claims.⁴⁶ It is indisputable that general EU law applies to areas not regulated by the Directive, but confusion reigns as to the extent that it does so directly or rather gives precedence to national autonomy under the requirements of effectiveness and equivalence. In *Courage*, the Court made it clear that individuals have an EU *right* to claim damages arising from harm caused by a violation of EU competition law, and therefore cannot in principle be barred from claiming damages even if they were party to the illegal agreement.⁴⁷ However, in the absence of EU rules governing the matter, it was for domestic legal systems to set the parameters of this right, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).⁴⁸ Then, in *Manfredi*, the Court showed its willingness to utilize the principles of effectiveness and equivalence in order to shape the further conditions for damages actions.⁴⁹ Crucially, the Court held that a causal relationship between the harm and the conduct prohibited under Article 101 TFEU was required as a condition for an award of damages, but that it was regulated by national law and always subject to the scrutiny of the aforementioned principles.⁵⁰ However, it is with *Kone* that *Otis II* shares more similarities; in fact, it can be understood as the direct continuation of *Kone*, as it handles the same subject matter, concerns the same cartel, and has been referred by the same court. In *Kone*, the ECJ held that Article 101 TFEU precludes any rule that excludes the possibility for claiming umbrella damages.⁵¹ Austrian law considered this type of damage too remote, but was set aside by the ECJ in the name of effectiveness. However, otherwise the ECJ still seemed to subscribe to the view that even though there is an EU *right* to damages, it is national law that regulates the *conditions* for this right to arise, contrary to Advocate General Kokott's Opinion.⁵²

46. See the title of the Damages Directive: "on certain rules governing actions for damages ...".

47. Case C-453/99, *Courage*, para 21.

48. *Ibid.*, paras. 29 and 31.

49. Joined Cases C-295–298/04, *Manfredi*, para 62.

50. *Ibid.*, para 63.

51. Case C-557/12, *Kone*, paras. 32 and 33.

52. Opinion of A.G. Kokott in Case C-557/12, *Kone*, para 28.

The Court's case law up to *Kone* was further consolidated and clarified by *Skanska* and *Cogeco*, both decided in 2019. In *Skanska* the ECJ held that the EU law notion of an "undertaking" in the context of public enforcement is also applicable in relation to competition damages. Contrary to national law, an acquiring company was held liable for the acquiree's competition infringements, as they belonged to the same economic unit.⁵³ Thus, the ECJ was led to this conclusion not through the principle of effectiveness but rather by direct application of Article 101 TFEU. *Skanska* was a landmark decision in that it diverged from *Kone* by applying EU and not national law, following Advocate General Wahl's suggestion. That said, the ECJ judgment did diverge slightly from the Advocate General's Opinion, which argued that the reason that persons liable are determined by direct application of Article 101 TFEU is that this concerns the "constitutive conditions of the right to claim compensation [which] are examined by reference to Article 101 TFEU". Contrary to that, the classic test of equivalence and effectiveness applies only to "rules relating to the application" of the right to claim compensation.⁵⁴ It must be noted that the Court did not adopt this terminology, leaving many questions unanswered. In the subsequent *Cogeco* case, which concerned limitation periods, the ECJ held clearly that those are governed by national law, with Advocate General Kokott agreeing with that assessment, as even under her (and Wahl's) scheme, limitation periods concern the "detailed procedural rules" and not the "constitutive conditions". Therefore, in *Cogeco* the problem of delimitation between EU and national law did not arise as sharply, given that both the ECJ and the advocates general would agree that, before the Damages Directive, limitation periods are not regulated uniformly by EU law.

In sum, it is evident that the case law until *Otis II* was characterized by the insistence of many advocates general on separating the wider category of conditions on liability into "constitutive conditions" and "detailed procedural rules".⁵⁵ The former are governed by EU law and the latter by national law, constrained by effectiveness and equivalence. This dualistic scheme actually goes back to Advocate General Van Gerven's Opinion in *Banks* and has had many prominent supporters in the literature.⁵⁶ However, the Court only

53. Therefore, it cannot avoid its debts by restructuring or by going bankrupt and being sold.

54. Opinion of A.G. Wahl in Case C-724/17, *Skanska*, para 40 et seq.

55. Aside from the two A.G.s mentioned above, see also Opinion of A.G. Jääskinen in Case C-352/13, *CDC*, EU:C:2014:2443, para 30.

56. Opinion of A.G. van Gerven in Case C-128/92, *Banks*, EU:C:1993:860. See also Van Gerven's expanded analysis of the view expounded in *Banks* in "Of rights, remedies and procedures", 37 CML Rev. (2000), 501–536. For an overview of the topic see Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing, 2008), p. 167 et seq.

seemed to lean in this direction in *Skanska*, where it agreed that the notion of undertaking is uniform and derived from EU law, without though adopting explicitly the constitutive conditions/procedural rules separation. *Otis II* helps provide some doctrinal clarity. Dealing with an issue similar to *Kone*, the Court appears to persist in its conclusion that it is national law that applies and not EU law directly. It seems that the concept of undertaking in *Skanska* and normative causation in *Kone* and *Otis II* are not regulated in the same way. The reason for this distinction, however, does not seem to lie in the elegant separation that the advocates general prefer.

More precisely, as regards the concept of “undertaking”, the rationale for adopting a uniform EU concept rather than sticking to national law concepts of legal personality can be surmised from the judgment in *Skanska* itself. Article 101 TFEU explicitly mentions the term, and the Court made clear that an “undertaking” is an autonomous concept of EU law, whereas we hardly have one for normative causation in competition damages.⁵⁷ As private and public enforcement form a coherent whole, a distinction between the term “undertaking” in the two fields cannot be accepted as it would lead to paradoxical results, whereas causation plays different roles in public and private enforcement.⁵⁸ In addition, even the EU legislature steered clear of regulating causation directly in the face of national differences.⁵⁹ This seems to indicate a preference for leaving Member States a degree of discretion. After all, even if not mentioned by the Court, it has correctly been pointed out that the variety of approaches is not necessarily detrimental to creating effective liability rules, as each system exhibits its own particular advantages and disadvantages.⁶⁰ In contrast, as the Court notes in *Skanska*,⁶¹ the Directive itself refers to the concept of “undertaking” in Article 2. Furthermore, one could add on policy grounds that forum shopping is arguably much more likely to happen if economic units can escape liability simply by going bankrupt than by adopting one or the other concept of causation.

More broadly, the concept of causation, being intimately linked to that of personal responsibility, is central to ideas of corrective justice rather than deterrence and the Court could well be more hesitant in imposing its own view

57. Case C-724/17, *Skanska*, paras. 28–30. On the divergence in issues of causation see Waelbroeck et al., *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules* (Ashurst, 2004).

58. Abele, Davis and Nebbia, “Proving causation in private antitrust cases”, 7 *Journal of Competition Law & Economics* (2011), 847–869, at 853.

59. Lianos, Davis and Nebbia, *Damages Claims for the Infringement of EU Competition Law* (OUP, 2015), p. 116.

60. Faure, “The harmonisation of EU tort law: A law and economics analysis” in Giliker (Ed.), *Research Handbook on EU Tort Law* (Edward Elgar Publishing, 2017), p. 452.

61. Case C-724/17, *Skanska*, para 36.

of the topic.⁶² Different legal systems reserve a very different role for causation; thus harmonization would present a complex problem. Namely, the same questions dealt with under the heading of causation in certain legal orders are dealt with under unlawfulness, fault, a mix of procedural rules, or legal standing in others.⁶³ Of course, that is not to say that the interference with the institution of personal liability in national law by the imposition of a uniform concept of undertaking is not grave, however it is necessary in a sense that harmonization of causation is not. Most legal tests already in force in the Member States, whether they are called proximity, adequacy or foreseeability, can perfectly serve the needs of private enforcement, albeit with some adjustments.⁶⁴ National courts need not abandon their intricate causation analysis and substitute it with an unfamiliar EU wide test as Advocate General Kokott suggested, by referring to the direct application of the *Francoovich* (or the Art. 340(2) TFEU) criteria, as this would probably lead to legal uncertainty.⁶⁵ In any case, the Court may have considered that the application of the principle of effectiveness was sufficient for present purposes and deemed no further intrusion necessary. This may leave some policy space for Member States, for example with regard to excluding shareholders and employees from legal standing, a restriction that even Advocate General Kokott considers sensible.⁶⁶

In sum, it remains doubtful whether the *constitutive conditions/detailed procedural* rules approach holds water. There is a range of policy and legal considerations that seem to explain the ECJ's choice to refrain from the outright harmonization of the normative causation test. These include the need to maintain the coherence of national private laws, the absence of detailed causation rules at the EU level that could substitute the national ones, as well as the lack of an equivalent concept in public enforcement. Policy reasons such as the urgency (or not) of a harmonization of a specific area in order to avoid forum shopping and generally providing for an effective private enforcement regime also appear to play a role. As a result, the ECJ seems to prefer to let

62. Cf. the developments in other areas of EU tort law, Verbruggen and Kryla-Cudna, "The Union's liability for failure to adjudicate within a reasonable time: EU tort law after *Gascogne*, *Kendrion* and *ASPLA*", 57 CML Rev. (2020), 191–226, at 211.

63. Markesinis et al., *Markesinis's German Law of Torts* (Bloomsbury Publishing, 2019), pp. 70–71.

64. On the various national causation tests see generally Infantino and Zervogianni, "The European ways to causation" in Infantino and Zervogianni (Eds.), *Causation in European Tort Law* (CUP, 2017).

65. See Verbruggen and Kryla-Cudna, op. cit. *supra* note 62, 211 et seq. (arguing that the ECJ deliberately leaves the assessment of causation requirements with the national courts in most areas of EU tort law).

66. See however Lianos et al., op. cit. *supra* note 59, p. 36, who argue that current case law seems to indicate otherwise.

national law regulate the conditions of liability (*Kone*, *Otis II*) and enforce uniform EU law directly when there is direct anchoring in the Treaties as in *Skanska*. This doctrinal separation, however, should not obscure the reality on the ground: in both cases EU law, either directly or under the guise of effectiveness, intervened substantially in national law. Central principles of national civil liability are set aside in order to make way for enforcement considerations derived from EU law. Thus, even if the ECJ did not end up adopting a uniform concept of normative causation, it is highly doubtful whether any policy space is left for Member States to exclude even very remote categories of claimants from claiming compensation. As we shall see further below this far-reaching use of effectiveness to alter national rules has been severely criticized.

5.2. *The notion of normative causation in competition damages and its connection to standing*

Setting aside the dual distinction mentioned above, it is interesting that Advocate General Kokott tackled the issue mainly as a causation question, and more specifically as one concerning the scope of liability or cause in law (in her terminology “normative causation”).⁶⁷ A closer look, however, reveals that Austrian law also regulates this problem under the heading of “unlawfulness”, which is a distinct substantive condition from causation. Indeed, the question referred to the ECJ concerns the protective scope of the rule awarding damages for competition infringements, namely whether operators not active in the market, such as public lenders, suffer legally relevant loss.⁶⁸ This query can be classified as a problem of normative causation (is this cause relevant?), or one of unlawfulness (have the elevator firms committed a relevant unlawful act against Upper Austria?). The crux of the issue, however, is that in both cases national law barred certain claimants. In fact, the same problem was dealt with in *Kone*. In both cases, the Court did not delve deeply into the intricacies of national law, but approached the issue functionally as a question essentially concerning the standing of certain claimants.⁶⁹ Normative causation and standing are closely linked.

67. Opinion in Case C-557/12, *Kone*, paras. 47 and 50 respectively. On normative (or legal) causation see generally van Dam, *European Tort Law*, 2nd ed. (OUP, 2013), pp. 363–377.

68. See the referral by the *Oberster Gerichtshof*, Judgment of 17 May 2018, RdW 2018, 704.

69. Standing can have many meanings and can be understood as a concept of procedural or substantive law. I presently use standing as a placeholder for all substantive or procedural requirements that determine who is eligible to bring a competition damages action. Cf. recital 12, Damages Directive.

Indeed, generally, the causation test across all legal orders contains two different prongs: a factual causation test and a legal (or normative) causation test.⁷⁰ The former commonly refers to a “but for” test, otherwise known as the *conditio sine qua non* approach, which considers the infringement causal if its occurrence is a necessary condition to the harm suffered.⁷¹ Factual causation presents a particularly tough problem in competition damages, as the economic repercussions of cartelized prices reverberate across the whole market, with other market (and non-market) actors responding to price signals in often unpredictable ways.⁷² Legal/normative causation on the other hand is not dependent on a certain factual chain of events, but rather employs policy arguments in order to limit or expand claims.⁷³ Different Member States use different tests of legal causation (adequacy, foreseeability, remoteness, scope of law). Advocate General Kokott accurately observed that the issue in *Otis II* belongs to the normative analysis of the law. She then went on to add that causation, namely the “but for” test, should in fact be regulated mostly by national law. The same can be said about evidentiary standards and questions about the burden of proof. Such standards have, however, been partly harmonized through Directive 2014/104.⁷⁴

The reason for this delicate delineation of competences has to do with the fact that factual causation refers to specific cases, whereas normative causation rules implement wider policy decisions that have a discernible impact across many cases. Many national legal causation tests can potentially exclude whole categories of claimants. As a result, it has been correctly pointed out that – in functional if not also conceptual terms – normative causation bears many similarities to the issue of standing.⁷⁵ It also seems to come close to the US concept of “antitrust injury” which excludes certain losses that do not constitute anticompetitive harm.⁷⁶ Therefore, normative causation, like standing in the US, essentially plays the role of barring or allowing claims on policy grounds. However, the ECJ tends to gravitate towards the view that the only grounds relevant should be the ones intrinsic to

70. Ashton and Henry, *Competition Damages Actions in the EU: Law and Practice*, 2nd ed. (Edward Elgar Publishing, 2018), p. 173.

71. Lianos, op. cit. *supra* note 16, 11.

72. Abele et al., op. cit. *supra* note 58, 848.

73. See generally on this distinction Moore, “Causation in the law” in Zalta (Ed.), *The Stanford Encyclopedia of Philosophy*, available at <plato.stanford.edu/archives/win2019/entries/causation-law/>.

74. See e.g. Damages Directive, Arts. 12–15 which concern indirect purchasers and passing on, and Art. 17(2) on the presumption that cartels cause harm, both issues intimately related to causation.

75. Lianos et al., op. cit. *supra* note 59, p. 72.

76. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). For a brief description of this concept see Ashton and Henry op. cit. *supra* note 70, p. 78.

Article 101 TFEU and that in principle no claimant should be denied standing. Thus, given that it has so far not given any indications as to what these grounds could be, the claim should fail only if the claimant does not provide enough evidence to show factual causation. In that sense, Advocate General Kokott's conceptual distinction is reasonable and could provide the basis for a workable integration of EU and national law.

However, apart from the fact that the Court seems not to accept this distinction, a problem inherent with Advocate General Kokott's approach is that normative and factual aspects of causation are often hard to distinguish.⁷⁷ Many voices in the literature insist that the factual prong of the causal analysis inevitably contains policy considerations and point out that many legal systems do not even distinguish strictly between the two. Legal theorists have also long argued that factual causation is never entirely factual.⁷⁸ Therefore, a neat separation of applicable law, depending on whether an issue concerns factual or normative questions will create serious problems of interpretation and application, adding to the reasons mentioned in the previous subsection as to why the Advocate General's conceptual scheme fails to capture the entire complexity of the problem and provide a satisfactory solution. The ECJ's functional, case-by-case approach to issues of causation, subjecting national normative causation tests to a strict effectiveness control, seems better suited to handle the doctrinal variety of approaches to causation.

5.3. *Would barring certain claims in competition damages be desirable?*

From the above it can be surmised that the Court's approach boils down to not excluding whole categories of claimants, be it through normative causation, unlawfulness, or standing rules of national law. It is worth noting that this approach has found supporters in parts of the literature claiming that remoteness and/or foreseeability tests are almost always inappropriate in the area of competition actions. The complexity and the specific characteristics of competition damages litigation render such "legalistic" tests ineffective in regulating those claims, as they do not necessarily correspond to insights from competition economics.⁷⁹ At the very least, normative causation should be interpreted in such a way as not to bar potential claimants, i.e. by not employing arbitrary, non-economic based criteria, such as whether the claimant is active in the same supply chain or market as the cartel.

77. Lombardi, *Causation in Competition Law Damages Actions* (CUP, 2020), p. 28.

78. Similarly, in essence von Bar, op. cit. *supra* note 5, p. 461.

79. See Maier-Rigaud, op. cit. *supra* note 36. On the comparison of the economic and legal notions of causation with reference to competition damages see Lianos et al., op. cit. *supra* note 59, p. 126.

Economic models prove and quantify the loss suffered and show that both “umbrella” purchasers and public lenders can be potential victims of anticompetitive behaviour. This ties in with the wider theme of competition damages as an area of private law requiring a specific balancing of “deterrence” and “corrective justice” considerations compared to general national tort law.⁸⁰ The ECJ in *Otis II* seems to recognize this, leading to the setting aside of national rules of tort law such as the one in question which are not appropriate as they unduly limit the deterrence potential of damages claims. In short, the ECJ seems to believe that the broadest possible access to competition remedies is the best solution to both safeguard the rights of claimants and create a robust enforcement regime.

However, it is worth noting that this approach to the topic of normative causation is not indisputable. Quite often, limiting access to remedies for certain categories of ineffective claimants can help enhance deterrence.⁸¹ As is widely accepted in US antitrust law, courts should not hesitate to exclude “inefficient” enforcers, like consumers or indirect purchasers, that would contribute little to enforcement while tying up judicial resources.⁸² Those claimants have little incentive to bring a suit as their individual loss is too modest to justify the expense and, being several levels removed from the market where the violation took place, they find it more difficult to detect and prove antitrust infringements. The damages they seek can be highly speculative and lead to complex apportionment problems in a typical chain of distribution.⁸³ Instead, the right to bring an action should be given to those best positioned to vindicate the goals of antitrust law, for example the direct purchasers of the cartelists.⁸⁴ This could be argued to be all the more true in Europe, where most Member States lack an effective class action regime that could help aggregate small consumer claims and present a real threat to cartelists.⁸⁵ In that sense, the ECJ’s approach could be criticized for increasing the potential quantity of enforcement, but not necessarily its quality.

80. Cf. Lombardi, *op. cit. supra* note 77, p. 192.

81. See e.g. Berger and Bernstein, “An analytical framework for antitrust standing”, 86 *Yale Law Journal* (1977), 809–883, at 813 et seq.

82. This was one of the reasons why the US Supreme Court denies indirect purchasers standing to seek damages under S.4 of the Clayton Act ever since the seminal case of *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746-7 (1977). Later, the US Supreme Court accepted that plaintiffs must establish that they are efficient enforcers to be granted standing, see *Associated Gen. Contractors of Cal., Inc. v. Cal. St. Council of Carpenters*, 459 U.S. 519 (1983).

83. Foster, “Antitrust efficient enforcer and the financial products benchmark manipulation litigation”, 13 *Ohio State Business Law Journal* (2019), 99–150, at 120–121.

84. Landes and Posner, “Should indirect purchasers have standing to sue under the antitrust laws? An economic analysis of the rule of *Illinois Brick*,” 46 *University of Chicago Law Review* (1979), 602–635 at 634.

85. Crane, *The Institutional Structure of Antitrust Enforcement* (OUP, 2011), pp. 208–209.

Therefore, one cannot be sure whether this is the correct path to follow, even if one adopts an instrumentalist/economic approach to causality. After all, there are positive aspects to bright line rules in private law and that is why almost all legal systems have traditionally opted for them.⁸⁶ Complex antitrust proceedings put a strain on scarce judicial resources and such rules help bar those claims that in the vast majority are destined to fail. Moreover, the argument for limiting liability in antitrust proceedings can be turned on its head: abstract limits to claims help avoid unlimited and unpredictable liability, something especially crucial in competition damages where the damage potentially ripples through the whole economy. Therefore, the private enforcement of competition law should be able to balance optimally corrective justice, deterrence, and judicial efficiency and that could mean excluding some claimants.⁸⁷

Connected to this last point, there is an additional argument to be made against the expansion of access to remedies by the ECJ in the context of EU competition law. It has been pointed out that the Court has to respect the EU legislature's power enshrined in Article 103 TFEU and should only exercise limited judicial review of national rules when the legislature chose not to intervene.⁸⁸ In utilizing effectiveness to widen the right to sue, the ECJ fails to give due respect to the competence of the EU legislative institutions and disregards its own limitations as a court with respect to democratic legitimacy, accountability, and expertise in setting liability rules. It is for the EU legislature to find the right "mix" between corrective justice, deterrence, and judicial efficiency, not the ECJ. Therefore, as long as the effect of allowing public lenders or, for that matter, umbrella claimants, remains ambiguous, the Court should refrain for reasons of institutional balance, and ultimately legitimacy, from overstretching the principle of effectiveness in order to confer wide standing.⁸⁹

Nonetheless the Court's approach seems not to take any of the above considerations against expanding standing into account in *Otis II* and insists on promoting a very broad access to remedies in competition damages. It is

86. Monti, op. cit. *supra* note 22, 472.

87. See also the US Supreme Court approach in *Blue Shield of Virginia et al. v. McCready*, 457 U.S. 465 (1982), at 476–77, where it observed that there should be "a point beyond which the wrongdoer should not be held liable".

88. 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 EL Rev. (2018), 837–857, at 847, 856.

89. Ibid., at 855 et seq. Cf. the critical comments on Case C-557/12, *Kone* by Sanchez-Graells and Peyer, "When the CJEU opens the umbrella, lawyers and economists get ready for a warm shower of damages claims (C-557/12)", How to crack a nut, 10 June 2014, available at <www.howtocrackanut.com/blog/2014/06/when-cjeu-opens-umbrella-lawyers-and.html?rq=kone>.

intriguing that the ECJ's stance on guaranteeing wide standing seems to find a parallel in the recent tendency of the US Supreme Court towards broadening the right to sue, which was signalled in last year's *Apple v. Pepper* judgment. In that case, the same court adopted a wide definition of the term "direct purchasers" who are allowed to sue.⁹⁰ The dissent in the same *Apple v. Pepper* case is also relevant to the matter at hand, as it argued that sensible rules on proximate cause (normative causation) are not only closely linked to standing, but are "intelligible, principled and administrable" and therefore should not be set aside, mirroring the debate on how to optimally balance the various considerations inherent in private enforcement.⁹¹ Without a doubt, it would be worth exploring further the parallels between the two regimes of private enforcement and whether they are converging towards a more liberal stance in allowing diverse categories of claimants to claim damages.

5.4. Practical implications: encouragement of indirect claims?

Since the landmark *Courage* judgment, the ECJ has constantly promoted the development of the private enforcement of EU competition law. The Court doubling down in *Otis II* against national liability conditions that create limitations to claims for damages continues on this path. It is quite probable that *Otis II* will encourage indirect victims to sue more often. The hurdle of causation seems progressively less menacing. As a result, increased enforcement is likely to follow. Furthermore, contrary to *Kone*, where many commentators criticized the Court's stance towards broadening access to damages claims as increasing enforcement only in quantity and not in quality, in *Otis II* this does not seem to be the case.⁹² As Advocate General Kokott correctly notes, State entities are potent actors that can contribute significantly to private enforcement.⁹³ Their damage is concentrated and not dispersed, as is the case with consumers, and they can generally afford to enter a lengthy process of expensive litigation. That being said, the Court's brief decision does not give such claimants many indications about what they need to prove in order to substantiate their claims, or how they can prove it, being content with confirming that they can sue for damages.⁹⁴ In practice, it remains to be seen to what degree the judgment will incentivize them to litigate their claims.

90. *Apple Inc. v. Pepper*, 587 U.S. (2019).

91. *Apple Inc. v. Pepper*, Gorsuch N. (dissenting opinion).

92. See e.g. Franck, "Umbrella pricing and cartel damages under EU competition law", 11 *European Competition Journal* (2015), 135–167.

93. Opinion, para 88.

94. The ECJ only instructed the referring court to verify whether Upper Austria could make more profitable investments and then whether it could adduce the necessary evidence to prove that. Judgment, para 33. However, it remains doubtful whether the court could have given any

The development in *Otis II* could be particularly important in the context of public procurement. Corruption and bid rigging have traditionally plagued this sector of the economy.⁹⁵ National competition authorities have turned their attention to the problem and have been active in exposing such schemes. Furthermore, the EU has taken many initiatives in trying to foster competition in public procurement, even outside the area of competition law.⁹⁶ After *Otis II*, cartelists would have to face not only public authorities as the “operators”, but also in their capacity as public funders, enhancing the deterrence of private enforcement.

Even Advocate General Kokott’s ambitious proposal concerning recovery for damage to society as a whole should be seriously considered. This would ideally allow for such claims through mechanisms that straddle the line between private and public enforcement such as *cy pres* schemes, where any compensation for such loss will be directed to a public account.⁹⁷ It may sound like a quite radical measure, but it could prove useful in solving the chronic problem of underdeterrence, while avoiding overcompensation.⁹⁸

6. Concluding remarks

The judgment in *Otis II* is less remarkable for its innovation than for the surprising insistence of the Court on effectiveness trumping national law in the area of private enforcement. Even though the Damages Directive is not applicable in this case *ratione temporis* and causation escapes its ambit anyway, it shows that there is an EU law *acquis* on the type of claimants who can bring proceedings, which has a strong bearing on competition law litigation. It appears, however, to be left to the principles of effectiveness and equivalence to regulate the substantive conditions of the remedy and not for EU law to do so directly. Issues of causation, fault, and possibly standing

indications in the first place, considering that, as in C-557/12, *Kone*, the ECJ was asked to answer a question essentially concerning the right to sue and not the exact causation test to be applied (even if the A.G. did try and give some indications). See *supra* sections 2 and 3.

95. See generally Heimler, “Cartels in public procurement”, 8 *Journal of Competition Law and Economics* (2012), 849–862.

96. See e.g. Sanchez-Graells, *Prevention and Deterrence of Bid Rigging: A Look from the New EU Directive on Public Procurement’s Integrity and Efficiency in Sustainable Public Contracts* (Bruylant, 2014).

97. Opinion, paras. 128–130. On such schemes see Whish and Bailey, *Competition Law* (OUP, 2015), pp. 11 et seq.

98. State attorney generals, for example, are very active in the private enforcement context in the United States. See Ioannidou, *Consumer Involvement in Private EU Competition Law Enforcement* (OUP, 2015), p. 123.

remain primarily for national law to regulate, albeit under a very strong effectiveness test.

Notwithstanding the demarcation between EU and national law, the Court's substantive conclusion was to be expected. Its aversion to blanket bans and categorical exclusions was evident from its previous case law. As effectiveness takes a central role in upgrading national law, liability rules should be shaped in a way to create a level playing field and impede undertakings from escaping liability, even for remote consequences of their actions. In the meantime, the ECJ has already received the next referral for a preliminary ruling in the competition damages context.⁹⁹ The question concerns the reverse side of the coin from *Skanska*, inquiring whether a subsidiary can be held liable for its parent company's conduct. In that sense, it deals again with the uniform concept of "undertaking", i.e. with directly applicable EU law, and not with the national law-effectiveness axis.

In sum, maybe the most important takeaway is that the principle of effectiveness alters national tort law and disrupts the pre-existing relationship between national and EU law in civil liability matters. In the span of under a year, the ECJ cast aside essential concepts of personal liability in private law (*Skanska*), national limitation periods (*Cogeco*) and tried and tested causation rules (*Otis II*). This serves to solidify an existing trend towards more robust EU private enforcement in place of national tort doctrine, a trend which could significantly influence many areas of civil liability.

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99. Case C-882/19, *Sumal*, pending.

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