Legal Nature of Cartel Damages Claims in the EU[1]

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Cartels; EU law; Principle of effectiveness; Private enforcement

Abstract

The European Court of Justice (ECJ) again did not explicitly rule on the legal nature of the cartel damages claim following a breach of arts 101 and 102 TFEU. An understanding of the legal nature is, however, a prerequisite to apply the principles set out in ECJ case law since Courage*. This article argues that the cartel damages claim is of Member State's law nature. However, the ECJ has developed specific Union law requirements for the right to cartel damages based on infringements of arts 101 and 102 TFEU, that go beyond the requirements of the Union law principles of equivalence and effectiveness which remain applicable still. By both means Union law influences national law, but it is only binding as to the result to be achieved.*

I. Introduction

Private competition law enforcement in the EU has been promoted and shaped significantly by ECJ case law. Ever since its landmark *Courage* judgment in which the ECJ held that "any individual" must be able to claim compensation for loss suffered through breaches of EU competition law,[2] the ECJ emphasised the important role private enforcement plays in serving as a deterrent factor and complementing public enforcement of EU competition law.[3] The subsequent rulings inter alia in *Manfredi*,[4]*Kone*,[5]*Cogeco*[6], *Skanska*[7]*Otis*[8] and now *Sumal*[9]. This decision was rendered after completion of the manuscript. Thus, it could not be analysed in detail. are in line with the principles laid down in *Courage* and have progressively shaped EU cartel damages law which generally speaking can be considered to be favourable for plaintiffs. Driven by the aim to give full effectiveness to arts 101 and 102 TFEU the ECJ clarified that (i) "any individual"[10] must be able to claim compensation for losses (ii) from the "undertakings" that are responsible for the breach of competition law.[11] Regarding the loss suffered it is clear that (iii) there needs to be a "causal relationship"[12] between the competition law infringement and the harm suffered and (iv) that umbrella damages also have to be compensated for.[13]

The objective of the ECJ case law is clear. It is to guarantee the full effectiveness of arts 101 and 102 TFEU—a requirement by arts 101 and 102 TFEU themselves. The objective to guarantee the full effectiveness of arts 101 and 102 TFEU has to be distinguished from the principle of effectiveness. The latter sets up Union law requirements for national law. The distinction between the full effectiveness of arts 101 and 102 TFEU and the principle of effectiveness is somewhat fuzzy regarding the right to compensation following EU competition law infringements. While it is settled case law on the one hand that "it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation".[14] The ECJ on the other hand considers some aspects of the cartel damages claim to be governed directly by EU primary law, for example the determination of the legal entity liable to provide compensation.[15]

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[2] *Courage Ltd v Crehan* (C-453/99) EU:C:2001:465; [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [26].

[3] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [27]; *Manfredi v Lloyd Adriatico Assicurazioni SpA* (Joined Cases C-295/04 to C-298/04) EU:C:2006:461; [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [91]; *Kone AG v OBB-Infrastruktur AG* (C-557/12) EU:C:2014:1317; [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [23]; *Vantaan kaupunki v Skanska Industrial Solutions Oy* (C-724/17) EU:C:2019:204; [2019] 4 C.M.L.R. 26 at [4445 et seq.]; *Otis GmbH v Land Oberosterreich* (C-435/18) EU:C:2019:1069; [2020] Bus. L.R. 37 at [24]. Cf. also Opinion of Advocate General Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [28], [80].

[4] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17.

[5] *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539.

[6] *Cogeco Communications Inc v Sport TV Portugal SA* (C-637/17) EU:C:2019:263; [2020] 5 C.M.L.R. 2 at [38] et seq.

[7] *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26.

[8] *Otis* (C-435/18) EU:C:2019:1069.

[9] *Sumal S.L. v Mercedes Benz Trucks Espana S.L.* (C-822/19) EU:C:2021:800

[10] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [26]; *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [60], [90]; *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [21] et seq; *Cogeco* (C-637/17) [2020] 5 C.M.L.R. 2 at [38] et seq; *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [25] et seq; *Otis* (C-435/18) [2020] Bus. L.R. 37 at [22] et seq.

[11] *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [46] et seq.

[12] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [61]; *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [26]; *Otis* (C-435/18) [2020] Bus. L.R. 37 at [23] ([30]: "causal connection").

[13] *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [34].

[14] *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [27], referencing *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [24]; *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [64].

[15] *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [28].

This distinction gives cause to consider the relationship between Union law and Member States' law on cartel damages claims. In this paper we will therefore answer the crucial question, whether the cartel damages claim following an infringement of EU competition law is of Union law or Member State's law nature. In order to be of Union law nature the cartel damages claim would need to find its basis in arts 101 and 102 TFEU itself, which it does not (II.). However, already starting with *Courage* the ECJ goes beyond the principle of effectiveness, which leads to the finding, that two different mechanisms influencing Member State's domestic law exists. Based on this finding we draw conclusions on the interplay between EU and Member States' law on cartel damages claims (III.). Finally, we take a glance at the impact of our findings on cartel damages claims following the Cartel Damages Directive (IV.).

II. No cartel damages claim of Union law nature

The opinion of Advocate General Kokott in *Otis*[16] (and previously in *Kone*[17]) indicates that she—like Advocate General Wahl in *Skanska*[18]—seems to regard the cartel damages claim as of genuine Union law nature. The court has not yet explicitly addressed the question of the legal nature of the cartel damages claim, neither in *Skanska*, *Otis*nor *Sumal*, nor before. Rather, the case law of the ECJ partly lacks transparency and is probably still in flux. The direct applicability of arts 101 and 102 TFEU form the basis of the cartel damages law reasoning. Although arts 101 and 102 TFEU confer "rights for the individuals concerned" vis-à-vis other private individuals, this reasoning does not support a Union law claim for cartel damages. Rather, as will be shown below, Union law only influences national law, which provides the legal basis for the claim (see III.).

ECJ has not explicitly ruled on the legal nature of the cartel damages claim

Neither the *Otis* judgement nor the judgments in *Courage*, *Manfredi*, *Kone*, *Skanska* or *Sumal* contain an explicit statement as to the legal nature of the cartel damages claim. In *Skanska*, for example, the ECJ states that "the determination of the entity which is required to provide compensation … is directly governed by EU law".[19] In *Donau Chemie*, the ECJ refers to a right to compensation that parties "derive directly from European Union law".[20] This might lead to the conclusion that the ECJ assumes a right to damages under Union law.[21] However, this is contradicted by the fact that according to the ECJ the right to compensation only "derives" from or is "governed" by Union law and does not see it as "founded directly on" or "contained" in art.101 TFEU. In *Otis*, the ECJ summarising its previous case law states that "national legislation must recognise the right of any individual to claim compensation for loss sustained."[22]

The *Francovich*[23] judgment could have served as an example, in case the ECJ considered the cartel damages claim to be of Union law nature. In *Francovich* the court states explicitly that the individual is entitled "to obtain reparation, a right founded directly on Community law"[24] (see also below). In any case, the ECJ has not (yet) taken this path in cartel damages law.

Basis of reasoning: direct application of arts 101 and 102 TFEU

The ECJ's cartel damages case law is based on the direct applicability of arts 101 and 102 TFEU.[25] The ECJ draws two conclusions from this direct applicability, which need to be assessed separately. First, the national courts must apply primary law directly within the scope of their jurisdiction.[26] This first branch of reasoning is generally given less attention (see III).[27] Second, the ECJ states that arts 101 and 102 TFEU (or their respective predecessors) "produce direct effects in relations between individuals

[16] Opinion of Advocate General Kokott in *Otis* (C-435/18) EU:C:2019:651 at [44] et seq.
[17] Opinion of Advocate General Kokott in *Kone* (C-557/12) EU:C:2014:45 at [23].
[18] Opinion of Advocate General Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [40] et seq.
[19] *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [28], confirmed in *Sumal* at [34].
[20] *Donau Chemie* (C-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19 at [32].
[21] Assuming a claim under Union law see Gerald Mäsch, "Private Ansprüche bei Verstößen gegen das europäische Kartellverbot—'Courage' und die Folgen" [2003] EuR 825, 841 et seq. Concerning art.102 TFEU also Thomas Eilmansberger and Florian Bien, "Art. 102 AEUV" in Joachim Bornkamm, Frank Montag and Franz J Säcker (eds), *Münchener Kommentar Europäisches und Deutsches Wettbewerbsrecht: Kartellrecht, Missbrauchs- und Fusionskontrolle*, 2nd edn (C.H. Beck 2015), para.678 In this direction also Csongor I. Nagy, "Has the time come to federalize private competition law? The autonomous concept of undertaking in the ECJ's ruling in Case C-724/17 Vantaa v. Skanska" (2019) 26 *Maastricht Journal of European and Comparative Law* 720, 721 et seq. Contrary Christian Kersting, "Kartellrechtliche Haftung des Unternehmens nach Art. 101 AEUV: Folgerungen aus EuGH, Urt. v. 14.03.2019, C-724/14—Skanska" [2019] WuW 290, 292 et seq. english adaption at *https://ssrn.com /abstract=3439973* [Accessed 17 October 2021], there p.5 et seq; Jens-Uwe Franck and Martin Peitz, "Suppliers As Forgotten Cartel Victims" (2018) 15 *NYU Journal of Law & Business* 17, 53; Xiaowen Tan, "The overarching principle of full effectiveness in compensation for indirect losses: the lesson from C-435/18 Otis and Others" (2020) 16 ECJ (*European Competition Journal*) 387, 400. Probably also considering the damages claim to be of Member State law nature Philipp Kirst, "Skanska, Cogeco and Otis: harmonisation throught the back door?" (2020) 5 E.C.L.R. 245, 247 et seq; Jon Turner, Anneli Howard and Michael Armitage, "Litigating Infringements in the National Courts" in David Bailey and Laura E John (eds), *Bellamy & Child, European Union Law of Competition*, 8th edn (2018), para.16.055.
[22] *Otis* (C-435/18) [2020] Bus. L.R. 37 at [26]. Other than the English and French version, the German version of the judgment reads somewhat more ambiguous which could be construed to indicate that only the procedural rules are subject to Member States' law.
[23] Coming from this basis and assuming a claim under Union law see Mäsch, "Private Ansprüche bei Verstößen gegen das europäische Kartellverbot—'Courage' und die Folgen" [2003] EuR 825, 841 et seq.
[24] *Francovich v Italy* (Joined Cases C-6/90 and C-9/90) EU:C:1991:428; [1993] 2 C.M.L.R. 66; [1995] I.C.R. 722 at [41].
[25] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [23]; *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [39]; *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [20]; *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [24]; *Otis* (C-435/18) [2020] Bus. L.R. 37 at [21].
[26] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [25]. See Opinion of Advocate General Mischo in *Courage* (C-453/99) EU:C:2001:181 at [58].
[27] Even the ECJ does not reproduce the reasoning in the following judgments, but only reiterates that the "full effectiveness" of art.81 EC Treaty, in particular of the prohibition contained therein, requires that any individual must be able to claim damages for loss caused by a cartel, cf. *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [60].

and create rights for the individuals concerned which the national courts must safeguard".[28] This statement of the court only emphasises that subjective rights arise from arts 101 and 102 TFEU, but does not determine which rights these are. Hereinafter, it is therefore necessary to identify the rights arising directly from art.101 TFEU. Only these rights are of genuine Union law nature.

No legal basis for a "right to compensation" in arts 101 and 102 TFEU

Advocates General Kokott and Wahl believe that a "right to compensation"[29] arises directly from art.101 TFEU according to ECJ case law. The subjective right that arises from art.101 TFEU in this interpretation is the cartel damages claim itself. The Advocates General must therefore understand the cartel damages claim to be of Union law nature.[30] Parts of academic literature agree.[31] However, this understanding is not covered by arts 101 and 102 TFEU.

The determination of the subjective rights that arts 101 and 102 TFEU confer is a question solely of Union law. Articles 101 and 102 TFEU first of all prohibit a certain conduct. The subjective rights which they confer can only be determined from the objective of protection they pursue. Articles 101 and 102 TFEU can confer subjective rights upon individuals only as far as these individuals are protected under arts 101 and 102 TFEU.[32]Article 101 TFEU protects primarily competition as a process. In addition to the protection of competition as a process in and of itself, this also includes the individual protection of those involved in the competition process. Involved in this process are the other market participants, whereby only direct market participants are covered, since only they compete on the market in question and take part in the competition process on this particular market.[33] Competition parameters such as the price may be distorted by the cartel in up- or downstream markets, but the participants on these markets act in an undistorted competition process.[34] In fact, there is no arts 101 and 102 TFEU infringement on these secondary markets. The market participants in the market affected by the cartel, however, are protected in their freedom to act on a market with undistorted competition. Accordingly, arts 101 and 102 TFEU confer legal positions and subjective rights to defend against the distortion of competition in the market concerned upon these market participants. These rights are directed against the undertakings distorting competition, understood as the addressees of the prohibition stipulated in arts 101 and 102 TFEU.[35] Accordingly, claims for removal and injunctive relief of these market participants against the undertakings infringing arts 101 and 102 TFEU derive directly from arts 101 and 102 TFEU. Thus, these claims are genuine Union law claims. This aforementioned individual position to defend against distortions of the competition process on the market concerned constitutes the right of the individual that arises from arts 101 and 102 TFEU and which the ECJ has recognised in *Courage* and subsequently upheld.[36]

In order to protect the individual position to defend against distortions of competition, but primarily to ensure the full effectiveness of the EU competition rules, cartel damages claims must be granted.[37] Cartel damages claims "ensure the effective application of Article 101 TFEU".[38] However, the ECJ does not apply art.101 TFEU directly in this regard.[39] Rather, cartel damages claims are a means of private enforcement of arts 101 and 102 TFEU.[40] Accordingly, while cartel damages claims result from an arts 101 and 102 TFEU infringement, they do not find their legal basis in these provisions. A different interpretation might be conceivable at the very most with regard to market participants on the cartelised market itself, who already derive an individual position to defend against distortions of competition from arts 101 and 102 TFEU directly. However, the ECJ does not take this approach either, but considers any individual to be entitled to claim and thus emphasises the importance of private enforcement, which goes beyond the protection of subjective rights to protect the competition process itself. The cartel damages claim can therefore only be derived from arts 101 and 102 TFEU with recourse to the *effet utile*. Moreover, there is a risk of "overtaxing" arts 101

[28] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [23]. Almost identical *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [24]; *Otis* (C-435/18) [2020] Bus. L.R. 37 at [21]; *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [20].
[29] Explicitly Opinion of Advocate General Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [78]. Similarly Opinion of Advocate General Kokott in *Otis* (C-435/18) EU:C:2019:651 at [52]. The ECJ (e.g. *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [95]) simply refers to a "right of any individual to seek compensation for loss", whereas the legal nature of this right is to be examined in this paper.
[30] Admittedly, terminological ambiguities remain, cf. Opinion of Advocate General Kokott in *Otis* (C-435/18) EU:C:2019:651 at [44] et seq. Nevertheless, despite terminological vagueness, there is much to suggest that Kokott regards the claim as an EU law right. Similarly, Opinion of Advocate General Wahl in *Skanska* (C-724-17) EU:C:2019:100 at [39] et seq probably understands the claim for damages as a direct right under Union law and referred to the opinion Kokott rendered in *Kone*.
[31] See fn.21.
[32] Jannik Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 370, 372.
[33] Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 369 et seq.
[34] Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 363 et seq.
[35] Cf. Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 371.
[36] More detailed Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 369 et seq.
[37] Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 369 et seq, 372 et seq.
[38] *Otis* (C-435/18) [2020] Bus. L.R. 37 at [30]
[39] Nothing else follows from *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [28], where it says that "the determination of the entity which is required to provide compensation for damage caused by an infringement of Article 101 TFEU is directly governed by EU law". This only concerns the Union law definition of the persons liable in order to ensure the practical effectiveness of art.101 TFEU (see III, Elements constituting a claim). This interpretation is confirmed in *Otis* (C-435/18) [2020] Bus. L.R. 37 at [30], [22], with reference to *Skanska*.
[40] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [27]; *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [91]; *European Commission v Otis* (C-199/11) EU:C:2012:684; [2013] 4 C.M.L.R. 4; [2013] C.E.C. 750 at [42]; *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [23]; *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [44]; *Otis* (C-435/18) [2020] Bus. L.R. 37 at [24]; Opinion of Advocate General Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [31]; Opinion of Advocate General Kokott in *Kone* (C-557/12) EU:C:2014:45 at [59].

and 102 TFEU if one wanted to read in it all the prerequisites for a claim in the necessary level of detail for its application in practice.[41]

Distinguishing from Francovich

Another approach is to compare the ECJ's case law on cartel damages with the ECJ's state liability case law based on the *Francovich* judgment.[42][43] In *Francovich*, the ECJ considered a state liability claim for failure to transpose a directive to be a "principle of Community law"[44] and developed a damages claim "founded directly on Community law".[45] As in *Courage*, the ECJ's argument took its starting point in the direct applicability of Union law, which confers rights on individuals.[46] Here, too, the "full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals" cannot claim for compensation.[47] In comparison to cartel damages law, the ECJ went one step further and expressly derived the prerequisites for the claim from Union law. It formulated that "the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled".[48]

Even if the ECJ's reasoning runs parallel at first sight, a closer look reveals a significant difference. The difference is not that *Francovich* concerns the relationship between citizens and state whereas in cartel damages law the relationship between private individuals is affected.[49] The ECJ emphasises in both cases that primary law confers rights on individuals. The difference, however, is that the subjective right recognised in *Francovich* is directly enforced by the claim for compensation and thus the claim constitutes the subjective right. It is a subjective right to compensation for losses caused by a Member State not implementing a directive. Since the subjective right originates in Union law, and since Union law thus at the same time shapes the claims for its defence, it follows that it is a claim of Union law nature.[50] This is different in competition law. Here—as explained above—the protection of the subjective right is overlapped by the supplementary protection of the legal system. Cartel damages claims are a means of enforcing the competition law regime.[51] At the same time the subjective right to participate in undistorted competition is enforced. This right is available only to participants on the market immediately affected and is directed against the undertakings as the addressees of the prohibitions in arts 101 and 102 TFEU.[52] Thus, the protection of individual rights and the protection of the competition law regime by securing the "full effectiveness" of Union law are not congruent.

The subjective right in state liability as well as in competition law is reflected in the claims for their protection developed through the *effet utile*. These claims must not fall short of the respective subjective rights and thus cover their entirety. It follows that the infringement of the Union law subjective right (i.e. the competition law infringement) must be assessed under Union law. Similarly, the parties liable for the damage caused by an infringement against art.101 TFEU must be the undertakings in the sense of the norm addressees of arts 101 and 102 TFEU,[53] at least as far as the enforcement of the subjective right is concerned. However, this subjective right is conferred only on the participants in the cartelised market.[54] Nevertheless, the legal nature of the cartel damages claim cannot be inferred from the legal nature of the subjective right.[55] The cartel damages claim does not constitute the subjective right. The subjective right exists—in contrast to state liability law—even without a claim for damages. The cartel damages claim is two-stage in the sense that it requires first the violation of the subjective right and second a loss arising from this individual violation.[56] The owner of the subjective right and the party incurring loss can diverge.[57] The group of persons eligible to claim cartel damages is thus larger than that of the owners of the subjective right which need to be participants on the cartelised market.[58] This difference can easily be explained by the fact that the

[41] Cf. also Kersting, "Kartellrechtliche Haftung des Unternehmens nach Art. 101 AEUV" [2019] WuW 290, 293 (SSRN, p.5 et seq.).
[42] *Francovich* (Joined Cases C-6/90 and C-9/90) [1993] 2 C.M.L.R. 66; [1995] I.C.R. 722.
[43] See Mäsch, "Private Ansprüche bei Verstößen gegen das europäische Kartellverbot—'Courage' und die Folgen" [2003] EuR 825, 839 et seq; Robert Schütze, *European Constitutional Law*, 2nd edn (Cambridge University Press 2016), pp.422 et seq; Opinion of Advocate General van Gerven in *Banks* (C-128/92) EU:C:1993:860 at [40].
[44] *Francovich* (Joined Cases C-6/90 and C-9/90) [1993] 2 C.M.L.R. 66; [1995] I.C.R. 722 at [37].
[45] *Francovich* (Joined Cases C-6/90 and C-9/90) [1993] 2 C.M.L.R. 66; [1995] I.C.R. 722 at [41]. In the end also *Brasserie du pêcheur SA v Germany* (Joined Cases C-46/93 and C-48/93) EU:C:1996:79; [1996] Q.B. 404; [1996] 2 W.L.R. 506 at [67] ("the right to reparation which flows directly from Community law").
[46] *Francovich* (Joined Cases C-6/90 and C-9/90) [1993] 2 C.M.L.R. 66; [1995] I.C.R. 722 at [31] et seq.
[47] *Francovich* (Joined Cases C-6/90 and C-9/90) [1993] 2 C.M.L.R. 66; [1995] I.C.R. 722 at [33].
[48] *Francovich* (Joined Cases C-6/90 and C-9/90) [1993] 2 C.M.L.R. 66; [1995] I.C.R. 722 at [39] et seq. See also *Brasserie du pêcheur* (Joined Cases C-46/93 and C-48/93) [1996] Q.B. 404; [1996] 2 W.L.R. 506 at [51].
[49] Mäsch, "Private Ansprüche bei Verstößen gegen das europäische Kartellverbot—'Courage' und die Folgen" [2003] EuR 825, 844.
[50] Mäsch, "Private Ansprüche bei Verstößen gegen das europäische Kartellverbot—'Courage' und die Folgen" [2003] EuR 825, 845 et seq.
[51] See fn.40.
[52] See II. No legal basis for a "right to compensation" in arts 101 and 102 TFEU.
[53] Without the following differentiation also *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [28].
[54] Since the group of persons entitled to compensation for cartel damages and the owners of the subjective rights diverge, there is no compelling reason at least with regard to the persons entitled to compensation that are not simultaneously owners of the subjective rights that the debtor of the cartel damages claim is stipulated directly by arts 101 and 102 TFEU. In this respect, an additional justification is required, which can be seen in guaranteeing the practical effectiveness of arts 101 and 102 TFEU. Sharing this conclusion but at the time with recourse to the *effet utile* see Patrick Hauser, "Der Ersatzpflichtige im Kartelldeliktsrecht: Anwendung des Grundsatzes wirtschaftlicher Kontinuität?" [2019] WuW 123, 124 et seq., particularly 128, albeit without differentiating between owners of the subjective rights and other claimants. The ECJ does not differentiate in *Skanska* either, but determines the obligated parties of the claim for damages uniformly for both groups of claimants directly from arts 101 and 102 TFEU.
[55] For a different view see Mäsch, "Private Ansprüche bei Verstößen gegen das europäische Kartellverbot—'Courage' und die Folgen" [2003] EuR 825, 845 et seq.
[56] Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 369 et seq.
[57] Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 370 et seq.
[58] Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 370 et seq.

cartel damages claim serves not only to defend the subjective right but also to enforce the objective competition law regime.[59]

No legal basis in general Union law principles

The cartel damages claim does not find its legal basis in arts 101 and 102 TFEU and cannot be derived from the subjective right thereof. However, the ECJ could still develop a cartel damages claim of Union law nature derived from general Union law principles. In order to establish general Union law principles, the ECJ would have to conduct a comparative analysis of Member States' law and weigh and interpret these common principles in a way that best secures the "practical effectiveness" of arts 101 and 102 TFEU. This method could probably bring forth a cartel damages claim of Union law nature with about the shape and content already developed by the court. However, the ECJ has not taken this path. First, it cannot be deduced from the court's case law that it conducts a comparison of Member States' law. This further distinguishes the case law on cartel damages claims from that on state liability.[60] Secondly, the ECJ continues to regard the primary law requirements it established as requirements to be met by Member State law.[61] It formulates its responses to the questions referred accordingly. If the claim for damages was of Union law nature, this claim would take primacy of application and not only "preclude"[62] national law.

Conclusion: cartel damages claim is a national law claim

Although the ECJ has not explicitly ruled on the legal nature of the cartel damages claim, an analysis of the ECJ case law reveals that there is no cartel damages claim of Union law nature and one cannot be established based on the reasoning of the court. Articles 101 and 102 TFEU could at the very most provide the legal basis for a right to compensation of the market participants on the cartelised market itself, in order to defend the subjective rights arts 101 and 102 TFEU confer only upon them. However, the ECJ judicature constantly emphasises the importance of private enforcement to uphold the competition law regime, which extends beyond the protection of these subjective rights. The cartel damages claim for any individual can therefore only be derived from arts 101 and 102 TFEU with recourse to the *effet utile* and must be of Member State law nature. A comparison with the *Francovich* ruling confirms this. Also, as of now, the ECJ has not developed the cartel damages claim from general Union law principles either.

III. Union law requirements for national law

ECJ case law is based on the direct applicability of arts 101 and 102 TFEU, from which the court draws two conclusions. Our analysis of the ECJ case law has shown that the reasoning based on the individual rights conferred by arts 101 and 102 TFEU does not establish a cartel damages claim of Union law nature. The other line of the court's reasoning is based on the direct application of arts 101 and 102 TFEU by the national courts, which, in accordance with the principle of sincere cooperation laid down in art.4(3) TEU, have to guarantee the "full effectiveness" of arts 101 and 102 TFEU. However, this reasoning has to be distinguished from the (common) principle of effectiveness. Ultimately, two different mechanisms influencing Member States' law exist, whereby the reasoning based on the "full effectiveness" of arts 101 and 102 TFEU establishes a strong Union law mechanism influencing national law. While national law provides the legal basis for the claim some elements of the claim are outlined by Union law. The principle of effectiveness stipulates further requirements for Member States' national law. As a result, Union law sets a minimum standard for a cartel damages claim that Member States law have to guarantee.

Distinction between "full effectiveness" of arts 101 and 102 TFEU and principles of equivalence and effectiveness

The ECJ established in *Courage* that "any individual" is eligible to claim cartel damages following infringements of arts 101 and 102 TFEU. Contrary to first impressions, the ECJ does not only apply the principle of effectiveness, but in fact goes even further than the principle of effectiveness would allow and instead refers to the "full effectiveness of Article 85 of the Treaty [now art.101 TFEU]".[63]

The principle of effectiveness requires that "the application of national law must not affect the scope and effectiveness of Community law".[64] According to this principle, national law must not "render practically impossible or excessively difficult the exercise of rights

[59] Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 370 et seq.
[60] cf. *Brasserie du pêcheur* (Joined Cases C-46/93 and C-48/93) EU:C:1996:79; [1996] Q.B. 404; [1996] 2 W.L.R. 506 at [27] et seq, [41].
[61] See most recently in *Otis* (C-435/18) [2020] Bus. L.R. 37 at [26]: "It is for the purposes of guaranteeing that effectiveness of EU law that the Court has held, … that *national legislation* must recognise the right of any individual to claim compensation for loss sustained" (emphasis added).
[62] Cf. the answer to the question referred for a preliminary ruling in *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [37]: "the answer to the question referred is that Article 101 TFEU must be interpreted as meaning *that it precludes the interpretation and application of domestic legislation* enacted by a Member State" (emphasis added). See also the answer to the question referred for a preliminary ruling in *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26: "Article 101 TFEU must be interpreted as meaning that, in a case such as that in the main proceedings, … the acquiring companies *may be held liable* for the damage caused by the cartel in question." (emphasis added). They may be held liable under national law.
[63] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [26].
[64] *Deutsche Milchkontor GmbH v Germany* (205/82) (Joined Cases 205/82 to 215/82) EU:C:1983:233; [1984] 3 C.M.L.R. 586 at [22]. See also Stephan Schill and Christoph Krenn, "Art. 4 EUV" in Eberhard Grabitz, Hilf Meinhard and Martin Nettesheim (eds), *Das Recht der Europäischen Union*, 66th edn (C.H. Beck 2019) para.93.

conferred by Community law".[65] Through preliminary rulings the ECJ can determine, on a case-by-case basis, whether the application of national law renders the effects of Union law practically impossible or excessively difficult. The decisive factor is thereby not whether individual provisions of Member States' law by themselves unduly deny a claim or restrict the enforcement thereof, but whether the provisions as a whole make it practically impossible or excessively difficult to exercise the rights conferred, as the ECJ has pointed out, for example, with regard to the rules of limitation under cartel damages law.[66] Under the principle of effectiveness the interplay of the relevant national regulation as a whole has to be assessed. The ECJ can only review national law to ensure the practical effectiveness of Union law, but it cannot develop specific rules.

Therefore, the principle of effectiveness does not permit to impose requirements such as that "any individual" has to be eligible to claim damages, as Member States' law (as a whole) could in other ways than enabling "any individual" to claim damages be sufficiently deterrent, which could compensate for limiting claims to a certain qualified group of plaintiffs in the overall context. The court's focus on the criterion that "any individual" be eligible to claim cartel damages, however, does not allow a review of national law as a whole. It rather stipulates a genuine Union law criterion which applies at all times and thus independently of the other cartel damages claim's requirements under national law. However, as soon as the court actively shapes an element of a cartel damages law claim, it does not only review Member States' law, thus leaving the ground of the principle of effectiveness and instead choosing another more extensive approach.

The ECJ has adhered to this in subsequent judgments without fully disclosing this approach. However, in *Kone*, the ECJ hints at the distinction between its approach and the principle of effectiveness and explains (referencing *Courage*)

> "that it is, in principle, for the domestic legal system of each Member State to lay down the detailed rules governing the application of the concept of the 'causal link' [complying with the principle of effectiveness]"

but

> "that national legislation must ensure that European Union competition law is fully effective … In those circumstances, the Court has held … that national legislation must recognise the right of any individual to claim compensation for loss sustained".[67]

The court thereby reveals that it goes beyond the principle of effectiveness. However, it should be noted that the ECJ does not always distinguish between these two mechanisms of influence and sometimes blends them together.[68] Therefore, the distinction can ultimately only be made on a case-by-case basis on the merits and the result achieved by the ECJ.

Elements of the cartel damages claim outlined by Union law

The two mechanisms through which Union law influences national law differ in their intensity.[69] The direct applicability of arts 101 and 102 TFEU in conjunction with the principle of sincere cooperation pursuant to art.4(3) TEU leads to a significantly stronger impact on national law. They can be referred to as elements of the cartel damages claim that are outlined by Union law.

Direct application of arts 101 and 102 TFEU in conjunction with the principle of sincere cooperation, art.4(3) TEU: obligation of the national judge to ensure "full effectiveness"

This ECJ line of reasoning takes its starting point in *Courage*:

> "As regards the possibility of seeking compensation for loss caused by a contract or by conduct liable to restrict or distort competition, it should be remembered from the outset that, in accordance with settled case-law, the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals."[70]

First of all, the national court must apply arts 101 and 102 TFEU by virtue of their direct applicability, since the plaintiff in the preliminary ruling procedure seeks damages for breach of arts 101 and 102 TFEU under national law. The obligation of the national court to ensure the "full effectiveness" of arts 101 and 102 TFEU is reinforced by the principle of sincere cooperation pursuant

[65] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [29]; *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [62]. See also *Adeneler v Ellinikos Organismos Galaktos (ELOG)* (C-212/04) EU:C:2006:443; [2006] 3 C.M.L.R. 30; [2007] All E.R. (EC) 82 at [95]; *Peterbroeck Van Campenhout & Cie SCS v Belgium* (C-312/93) EU:C:1995:437; 1996] 1 C.M.L.R. 793; [1996] All E.R. (E.C.) 242 at [12].

[66] In particular *Cogeco* (C-637/17) [2020] 5 C.M.L.R. 2 at [45] ("it is necessary, … to take all elements of the Portuguese rules on limitation into consideration"); Opinion of Advocate General Kokott in *Cogeco* (C-637/17) EU:C:2019:32 at [81]. Cf. also *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [78] et seq. See also Kirst, "Skanska, Cogeco and Otis: harmonisation throught the back door?" (2020) 5 E.C.L.R. 245, 249 et seq.

[67] *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [32] (internal quotations omitted). See also fn.79.

[68] See fn.79.

[69] In this respect Opinion of Advocate General Wahl in *Skanska* (C-724/17) EU:C:2019:100 at [38] et seq, is correct, but its conclusion that this is a Union right is not to be accepted; hereinafter Oliver Mörsdorf, "Nachfolger- und Konzernhaftung wegen Verstößen gegen das Unionskartellrecht: Zugleich Besprechung EuGH v. 14. 3. 2019 - Rs. C-724/17, ZIP 2019, 1087 - Skanska" [2020] ZIP 489, 491; Andreas Weitbrecht, "Kartellschadensersatz 2019" [2020] NZKart 106, 106. Different opinion then (but before the *Skanska* and *Otis* decisions) Hauser, "Der Ersatzpflichtige im Kartelldeliktsrecht: Anwendung des Grundsatzes wirtschaftlicher Kontinuität?" [2019] WuW 123, 125. See also the comments in fn.79.

[70] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [25].

to art.4(3) TEU.[71] According to this principle, when applying national law, the courts of the Member States must comply with the requirement of Union law to be applied effectively and uniformly. This also explains the remark of the ECJ in *Kone*, according to which "it is clear from the case-law of the Court … that national legislation must ensure that European Union competition law is fully effective".[72] The Member States' courts have to ensure the "full effectiveness" of arts 101 and 102 TFEU. Based on this obligation of the national judge and the primacy of Union law, national law[73] must be applied in such a way that it meets the Union law requirements. If national law does not comply with those requirements, it cannot be applied from the perspective of Union law.

Elements constituting a claim

The ECJ identified certain elements of the cartel damages claim which the court outlines solely relying on Union law, namely the direct applicability of arts 101 and 102 TFEU and the principle of sincere cooperation of art.4(3) TEU. Up to now, the ECJ has limited this approach to elements that constitute the conditions of liability, in contrast to those of the extent of liability and the grounds of exemption thereof.

In *Otis*, the ECJ stated, referencing its case law, that "any person is thus entitled to claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101 TFEU".[74] Under Union law, any individual must be eligible to claim cartel damages. Otherwise "[t]he full effectiveness of Article 85 of the [EC] Treaty and, in particular, the practical effect of the prohibition laid down in Article 85(1) would be put at risk".[75] Moreover, "any loss which has a causal connection with an infringement of Article 101 TFEU must be capable of giving rise to compensation".[76] This also applies "in order to ensure the effective application of Article 101 TFEU and to guarantee the effectiveness of that provision".[77] In *Kone*,[78] at least retrospectively[79], and clearly in *Otis*[80] the court overruled its previous *Manfredi* judgment in which it understood the requirement of a "causal link" between the infringement of arts 101 and 102 TFEU and the damages the plaintiff sustained to be governed by Member States' law by only referring to the principles of equivalence and effectiveness.[81] Causality is now a constituent element of the cartel damages claim outlined by Union law.[82] This also applies to the extent that questions of causality determine the amount of damages to be compensated.[83] In any case, the actual loss (*damnum emergens*) and the loss of profit (*lucrum cessans*) must be compensated.[84] The latter also must be compensated in full if it is caused by the competition law infringement.[85] Ultimately, by stipulating which losses along the chain of causation at least have to be compensated, a standard of legal causation is specified by Union law. The factual assessment of the damages in

[71] Similar Carsten Nowak, "Anmerkung zu EuGH, Urteil vom 20. 9. 2001 - Rs. C-453/99 Courage Ltd/Bernard Crehan und Bernard Crehan/Courage Ltd u.a." [2001] EuZW 717, 718. Cf. also Turner, Howard and Armitage, "Litigating Infringements in the National Courts" in *Bellamy & Child, European Union Law of Competition*, 8th edn (2018), para.16.019.

[72] *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [32].

[73] It is unclear whether *VEBIC VZW v Raad voor de Mededinging* (C-439/08) EU:C:2010:739; [2011] 4 C.M.L.R. 12; [2011] C.E.C. 575 at [63] et seq. thus imposes these requirements on national procedural law or whether only the principles of equivalence and effectiveness apply in this respect by virtue of the procedural autonomy of the Member States.

[74] *Otis* (C-435/18) [2020] Bus. L.R. 37 at [23].

[75] Established case law since *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [26], see *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [60]; *Otis* (C-199/11) [2013] 4 C.M.L.R. 4; [2013] C.E.C. 750 at [41]; *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [21]; *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [25]; *Otis* (C-435/18) [2020] Bus. L.R. 37 at [22].

[76] *Otis* (C-435/18) [2020] Bus. L.R. 37 at [30] with reference to the case law in fn.75.

[77] *Otis* (C-435/18) [2020] Bus. L.R. 37 at [30] with reference to the case law in fn.75.

[78] *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [25] et seq. and [32].

[79] *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [25] et seq did not clearly distinguish between the principles of equivalence and effectiveness and full effectiveness of art.101 TFEU so that particularly against the background of *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [64], *Kone* could be understood, at least before *Otis*, as meaning that the requirements for causality are subject to Member State law in compliance with the principles of equivalence and effectiveness (see also Hauser, "Der Ersatzpflichtige im Kartelldeliktsrecht: Anwendung des Grundsatzes wirtschaftlicher Kontinuität?" [2019] WuW 123, 125; Claudio Lombardi, *Causation in Competition Law Damages* (Cambridge University Press, 2020), pp.66 et seq; Nagy, "Has the time come to federalize private competition law? The autonomous concept of undertaking in the ECJ's ruling in Case C-724/17 Vantaa v. Skanska" (2019) 26*Maastricht Journal of European and Comparative Law* 720, 727). Cf. also rec.11 Cartel Damages Directive (Directive 2014/104/EU). See also Tan, "The overarching principle of full effectiveness in compensation for indirect losses: the lesson from C-435/18 Otis and Others" (2020) 16 ECJ 387, 396 who argues that the ECJ neither in *Kone* nor in *Otis* examined the issues of causation directly based on art.101 TFEU.

[80] *Otis* (C-435/18) [2020] Bus. L.R. 37 at [30]. Cf. also *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [32].

[81] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [64].

[82] Probably of the same opinion BGH KZR 24/17, *Schienenkartell II* (2020), NZKart 136, 138 (at [30]). Similar in the distinction from the principle of effectiveness Jan Heithecker and Josef Hainz, "Anmerkung zu EuGH Otis" [2020] WuW 85, 86; Christoph Weinert, "BB-Kommentar zu EuGH Otis" [2020] BB 270, 271. Contrary Tan, "The overarching principle of full effectiveness in compensation for indirect losses: the lesson from C-435/18 Otis and Others" (2020) 16 ECJ 387, 396.

[83] In so far as the position in *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [95] still draws on "the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition", this can also be regarded as outdated subsequent *Otis*. In order to ensure the full effectiveness of art.101 TFEU, compensation must be available for "any loss which has a causal connection with an infringement of Article 101 TFEU" (*Otis* (C-435/18) [2020] Bus. L.R. 37 at [30]).

[84] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [95].

[85] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [95]; *Otis* (C-435/18) [2020] Bus. L.R. 37 at [30] et seq. Ambiguous in this respect *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [96] according to which "*[t]otal exclusion* of loss of profit as a head of damage for which compensation may be awarded *cannot be accepted* in the case of a breach of Community law" (emphasis added).

court remains, of course, a matter of national law in compliance with the Union law principles of equivalence and effectiveness).

Under Union law compensation further encompasses the payment of interest.[86] This is another requirement of the full effectiveness of arts 101 and 102 TFEU.[87] Interest on monetary claims is a means of ensuring full compensation, since "factors, such as the effluxion of time [between occurrence of damage and compensation], … may in fact reduce its [the monetary claims'] value".[88] According to this understanding, an interest payment presupposes that a loss which has to be compensated in money has already occurred. This interest must be distinguished from the loss of interest (plus interest) which the Province of Upper Austria asserts in the national referral leading to the *Otis* preliminary ruling.[89] The Province of Upper Austria asserting to have given higher subsidised loans to constructors due to cartel inflated lift prices claims loss of interest on loans not granted at market rates as a result of the competition law infringement. The loss of interest claimed is the primary damage itself. The interest claimed constitutes lost profits. The statutory interest on the other hand serves to compensate for the fact that the indemnification for damages would have had to be granted some time ago (i.e. at the time the loss occurred) and that the monetary claim loses value over time. The statutory interest does not require proof of an actual reduction in value of the claim, whereas an injured party claiming loss of interest as a primary damage must first present and, if necessary, prove this damage and causality according to national procedural law. It is, therefore, correct that the ECJ does not agree with the Advocate General in *Otis*,[90] who considers that there is no need to prove the claimed interest loss.[91] Rather, the ECJ instructs the referring court to examine in particular

> "whether that authority had the possibility of making more profitable investments and, if that is the case, whether that authority adduces the evidence necessary of the existence of a causal connection between that loss and the cartel at issue".[92]

Finally, the entire undertaking, i.e. the entities constituting this undertaking, understood as the economic unit that committed the cartel infringement, must be liable for compensation.[93] This already follows—at least within its scope—from the subjective right of the individual market participant, which the cartel damages claims are meant to enforce besides the competition law regime.[94] National law must not fall short of this, for example by limiting liability to some legal entities of the economic unit.[95]

Principles of equivalence and effectiveness

Insofar as the "full effectiveness" of arts 101 and 102 TFEU does not require elements of the cartel damages claim to be outlined by Union law, the principles of equivalence and effectiveness—as in state liability law[96]—impose requirements upon national law. A particularity of cartel damages case law is that the ECJ has not only developed procedural requirements (a)) but requirements for the substantive law of the Member States referring to the principle of effectiveness (b)). Therefore, all elements of the cartel damages claim, that are not already outlined by Union law are subject to the principles of equivalence and effectiveness (c)).

Requirements for national procedural law

We again have to revert to *Courage* for our analysis. In *Courage*, the ECJ formulates Union law requirements for cartel damages claims regarding infringements of arts 101 and 102 TFEU, but at the same time states that

> "[i]n the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law",

[86] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [95] et seq.
[87] Dissenting *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [95], although the subjective right to seek compensation for damages which the ECJ refers to in addition to the principle of effectiveness, arises according to the view advanced here from the direct application of arts 101 and 102 TFEU in conjunction with the principle of sincere cooperation as a requirement for national law and not as a legal position under Union law. The reference to the principle of effectiveness is, however, misleading because the ECJ does not review national law as a whole (see III. Distinction between "full effectiveness" of arts 101 and 102 TFEU and principles of equivalence and effectiveness), but rather outlines one of the constituent elements of the cartel damages claim in more detail.
[88] *Marshall v Southampton and South West Hampshire AHA* (C-271/91) EU:C:1993:335; [1994] Q.B. 126; [1993] 3 W.L.R. 1054 at [31]. Also referred to in *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [91].
[89] See *Otis* (C-435/18) [2020] Bus. L.R. 37 at [9].
[90] Opinion of Advocate General Kokott in *Otis* (C-435/18) EU:C:2019:651 at [105] et seq.
[91] Also Heithecker and Hainz, "Anmerkung zu EuGH Otis" [2020] WuW 85.
[92] *Otis* (C-435/18) [2020] Bus. L.R. 37 at [33].
[93] *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [28] et seq; *Sumal* (C-822/19) EU:C.2021:800 at [44]; Jannik Otto, "Die wirtschaftliche Einheit und ihre Träger in der Rechtsanwendung—Teil 1" [2020] NZKart 285, 287. Cf. also Kirst, "Skanska, Cogeco and Otis: harmonisation throught the back door?" (2020) 5 E.C.L.R. 245, 247.
[94] See above II. No legal basis for a "right to compensation" in arts 101 and 102 TFEU.
[95] Regarding the (by now outdated) debate in German legal literatur on this subject see Christian Kersting, "Kap. 7 Kartellschadensersatz: Haftungstatbestand—Bindungswirkung" in Christian Kersting and Rupprecht Podszun (eds), *Die 9. GWB-Novelle: Kartellschadensersatz, Digitale Ökonomie, Fusionskontrolle, Bußgeldrecht, Verbraucherschutz* (C.H. Beck, 2017), paras 23 et seq. with further references.
[96] See *Brasserie du pêcheur* (Joined Cases C-46/93 and C-48/93) [1996] Q.B. 404; [1996] 2 W.L.R. 506 at [67]; *Francovich* (Joined Cases C-6/90 and C-9/90) [1993] 2 C.M.L.R. 66; [1995] I.C.R. 722 at [43].

whereby those procedural rules are subject to the principles of equivalence and effectiveness.[97] Therefore, Union law sets up (minimum) requirements for Member States' procedural law so as not to frustrate the full effectiveness of Union law.

Extension to national substantive law requirements

The particularity of the court's case law on cartel damages claims is that the ECJ goes beyond the traditional understanding of the principles of equivalence and effectiveness by also laying down substantive law requirements. The ECJ took this step already in *Courage*.[98] Over three paragraphs the court carries out a step-by-step evolution of the principles of equivalence and effectiveness from their traditional understanding of setting up requirements for Member States' procedural law to a basis for imposing requirements regarding substantive law.[99] Ultimately:

> "Community law does not preclude national law from denying a party who is found to bear significant responsibility for the distortion of competition the right to obtain damages from the other contracting party."[100]

As a result, the ECJ accepts restrictions of the cartel damages claim in order to prevent unjust enrichment of the claimant[101] and in cases of considerable responsibility for the competition law infringement.[102] However, both limitations are subject to the principles of equivalence and effectiveness.[103] In addition, the ECJ has subsequently established (minimum) requirements for national statutes of limitation referring to the principle of effectiveness.[104] Be the latter not qualified as substantive law under every single Member States' law (in Austria, Germany and Portugal[105] it is for example), the first two restrictions of cartel damages claims can widely be qualified as substantive law among Member States' law.

The ECJ has thus not only identified certain elements of the cartel damages claim that are outlined by Union law but has also extended the principle of effectiveness into substantive national law. The ECJ thus also applies the principle of effectiveness to the conditions of liability and grounds of exemptions. It must again be emphasised that it remains unaltered that the principle of effectiveness only imposes requirements on national law. The basis for cartel damages claims is thus to be found in national law according to the reasoning of the ECJ. The court's formula, which goes back to the traditional understanding of the principle of effectiveness,[106] that "it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation",[107] therefore contains no clear distinction between procedural and substantive law. Both the procedural law of the Member States and the prerequisites of the cartel damages claim are subject to the requirements of the principles of effectiveness and equivalence and thus need to equally comply with Union law.

Further elements of cartel damages claims

The principles of equivalence and effectiveness apply to the entire damages claim under national law, insofar as Union law does not impose more extensive requirements to ensure the "full effectiveness" of arts 101 and 102 TFEU. As shown,[108] the latter is the case to a large extent for the constituent elements of the cartel damages claim. Subject to the principles of equivalence and effectiveness, on the other hand, is not only national procedural law but also the (material) objections already dealt with, namely a prohibition of unjust enrichment under tort law,[109] denial of a claim in case of significant responsibility for the distortion of competition[110] and the statute of limitation.[111] The determination of the amount of damages is also subject only to the less stringent requirements of the principles of equivalence and effectiveness.[112] This applies, in particular, to the methods used to calculate actual loss, including deduction of potential benefits[113] or at least under primary law an award of punitive damages [114]. The amount of damages is determined on a case-by-case basis depending on the facts of the case brought before the national courts according to the procedural law of the Member State which is subject to the principles of effectiveness and equivalence. The

[97] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [29].
[98] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [29].
[99] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [29] et seq.
[100] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [31].
[101] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [30]. See also *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [94].
[102] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [31]. From a Union law perspective, it is irrelevant through which (legal) mechanism Member States deny cartel damages claims in such constellations. See Hauser and Otto, ""Normative corrections of causation in fact in cartel damages law" (forthcoming).
[103] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at[29], [31].
[104] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [78]; *Cogeco* (C-637/17) [2020] 5 C.M.L.R. 2 at [47] et seq.
[105] Cf. Opinion of Advocate General Kokott in *Cogeco* (C-637/17) EU:C:2019:32 at [63].
[106] See the linguistic development of *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28, according to which it is "for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions" [29], the derogation in *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17, relating to the "organisation of appeal procedures" [62] and *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539, which assigns to national law the "rules governing the exercise of the right to claim compensation" [24] and the "the rules applicable to actions" [25].
[107] *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [27].
[108] Above III. Elements constituting a claim).
[109] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [30].
[110] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [31].
[111] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [78] et seq; *Cogeco* (C-637/17) [2020] 5 C.M.L.R. 2 at [45] et seq.
[112] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [92], [98].
[113] Patrick Hauser and Jannik Otto, "Normative corrections of causation in fact in cartel damages law" (forthcoming) and in German [2020] WRP 970, 973.
[114] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [92] et seq. However, see now rec.13 and art.3(3) Cartel Damages Directive.

interest rate applied to the damages claim required to ensure the practical effectiveness of arts 101 and 102 TFEU on the other hand is a normative decision. The determination of this interest rate is a matter of national law, which must comply with the principles of effectiveness and equivalence under Union law.[115] Here too, national law may go beyond the minimum interest rate required by Union law, but cannot fall short of it. Finally, any condition of culpability under national law is subject solely to the principles of equivalence and effectiveness.[116]

Implication: Union law sets minimum standard

Since the practical effectiveness of arts 101 and 102 TFEU requires a cartel damages claim, primary Union law imposes requirements upon this claim.[117] As shown above, this is done partly through certain elements of the cartel damages claim that are outlined by Union law and partly by imposing requirements on national substantive law by means of the principle of effectiveness. Together and in sum these Union law requirements establish a minimum standard for a cartel damages claim which national law must guarantee.[118] The cartel damages claim is, however, still based on national law. The principle of equivalence supplements the principle of effectiveness. Should national procedural or substantive law surpass this minimum standard for domestic cases, it is required that this level of protection offered to the injured party be guaranteed for cases under Union law as well.[119]

The ECJ has derived some of the constituent elements of the cartel damages claim from Union law and outlined them. Member States' law may not fall short of this standard. Therefore, at the very least, it must be possible to direct the claim against the infringing undertakings within the meaning of arts 101 and 102 TFEU.[120] However, Member States' law may enlarge the group of obligated parties. In German law, for example, ss.830 and 840 of the German Civil Code (BGB) extend liability to participants in the tortious act. It seems also conceivable to extend liability to shareholders of the legal entities constituting the economic unit or a group liability extending beyond the economic unit, for example by covering legal entities that are active on a different market and thus do not belong to the same economic unit.[121]

There is also no doubt that the right to compensation must encompass actual loss and loss of profit as well as a payment of interest. Member States' law may again extend the right to compensation, at least under primary law, and must do so in accordance with the Union law principle of equivalence, if it does so for domestic cases.[122]

While the ECJ derives the constituent elements of the cartel damages claim from the direct applicability of arts 101 and 102 TFEU in conjunction with the principle of sincere cooperation of art.4(3) TEU, the calculation of damages in court proceedings and the objections precluding a claim are subject to the less stringent requirements of the Union law principles of equivalence and effectiveness. Regarding the latter objections the principle of effectiveness determines the upper limit for the admissibility of such objections under Member States' law. Union law permits—in each case taking into consideration the principles of equivalence and effectiveness—to deny claims to cartel members who bear significant responsibility for the distortion of competition[123] as well as to prevent unjust enrichment.[124] On the other hand, a short limitation period, which starts to run on the day the cartel is implemented and cannot be suspended or interrupted, is not permissible under EU law.[125]

IV. Impact on Cartel Damages Directive

In this understanding, the Cartel Damages Directive[126] retains its scope of application.[127] It reflects the considerations of the legislator. The Directive builds upon the ECJ case law.[128] The Directive is based on the assumption that a "right to compensation" is "guaranteed by the TFEU".[129] According to the aforementioned, this can only be understood as meaning that to ensure the "full effectiveness" of arts 101 and 102 TFEU Union law imposes requirements on national law. The Directive reaffirms these Union law requirements.[130] There is no

[115] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [97].
[116] Cartel Damages Directive rec.11.
[117] Cf. Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 373.
[118] Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 370, 372, 373 et seq. Cf. also Kersting, "Kartellrechtliche Haftung des Unternehmens nach Art. 101 AEUV: Folgerungen aus EuGH, Urt. v. 14.03.2019, C-724/14—Skanska" [2019] WuW 290, 292 et seq (SSRN, p.5 et seq).
[119] On punitive damages see *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [93] on the one hand and art.3 para.3 Cartel Damages Directive on the other hand.
[120] *Skanska* (C-724/17) [2019] 4 C.M.L.R. 26 at [28] et seq, confirmed in *Sumal* (C-822/19) EU C.2021:800 at [38] et seq.
[121] Christian Kersting and Jannik Otto, "Die Marktbezogenheit der wirtschaftlichen Einheit" in Tobias Klose, Martin Klusmann and Stefan Thomas (eds), *Das Unternehmen in der Wettbewerbsordnung, Festschrift für Gerhard Wiedemann*, 1st edn (C.H. Beck 2020), pp.235 et seq. Cf. also Opinion of Advocate General Pitruzzella in *Sumal* (C-882/19) EU:C:2021:293 at [56] et seq.
[122] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [93].
[123] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [31].
[124] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [94].
[125] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [78] et seq. Cf. also *Cogeco* (C-637/17) [2020] 5 C.M.L.R. 2 at [47] et seq.
[126] 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 breach of the competition laws of the Member States and of the European Union, OJ 2014 L 349, p.1.
[127] Otto,"(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 373 et seq.
[128] Cartel Damages Directive rec.12.
[129] Cartel Damages Directive rec.11.
[130] One can even argue that the Directive's provisions that can be derived directly from arts 101 and 102 TFEU—in our understanding the elements constituting the claim (see III. Elements constituting a claim).)—are directly applicable, even where the Directive was transposed incorrectly or belated. In this direction Kirst, "Skanska, Cogeco and Otis: harmonisation throught the back door?" (2020) 5 E.C.L.R. 245, 248.

cartel damages claim of Union law nature. Otherwise, a directive would be superfluous as a directive by its very nature (see the third paragraph of art.288 TFEU) imposes requirements on national law. For this reason, too, the basis of the claim can only be found in national law.[131] Finally, the Directive does not intend to pre-empt any further development of the *acquis communautaire*.[132] This can only be understood to mean that the legislator, bound by primary law itself, entrusts the ultimately binding interpretation of primary law to the ECJ. In any case, art.103 TFEU, on which the Directive was based in addition to art.114 TFEU, provides no legal basis for alterations of arts 101 and 102 TFEU.[133] Thus the Cartel Damages Directive is likely to inhibit the ECJ from developing a Union law claim.

V. Results and outlook

The cartel damages claim is of national law nature. There is therefore no Union law "right to damages", but Union law requires national laws to provide for specific cartel damages claims. The ECJ has further applied two principles of Union law influencing national law: (i) the requirement for national judges to ensure the "full effectiveness" of arts 101 and 102 TFEU through the direct applicability of these provisions in connection with the principle of sincere cooperation in art.4(3) TEU and (ii) the principles of equivalence and effectiveness. Both Union law mechanisms predetermine and shape the national cartel damages claim. By defining certain results which the national law claims have to achieve, Union law sets a minimum standard that national laws have to guarantee and cannot fall short of in cases of infringements of arts 101 and 102 TFEU. law m, which is influenced by Union law, makes it possible—as in state liability law[134]—for domestic legislation to grant a more extensive damages claim than is mandatory under Union law. As Union law merely sets a minimum standard binding as to the results to be achieved, Union law cannot interfere with dogmatics of national law as such.

It remains to be seen how the ECJ case law develops, especially as the ECJ has not explicitly addressed the legal nature of the claim. It seems at least conceivable that the ECJ finds further elements of the cartel damages claim to be outlined by Union law that would in their entirety allow to award damages in very simple cases based solely on Union law.[135] This approach seems feasible at the utmost—in vague parallel to the direct application of directive provisions which were contrary to Union law not transposed into national law[136]—if Member State law lacks such a claim and leaves no room for interpretation in this regard.[137] However, since a potential cartel damages claim concerns only monetary compensation, a state liability claim against the Member State concerned would be preferable in this case.

The jurisdiction of the ECJ is also limited by primary law. The level of detail that a Union law claim would require in order to be usable in practice demands careful weighing up of conflicting interests. According to the EU's order of competences, this task falls in the competence of the legislature.[138] The court's responsibility is merely to supervise and to adjudicate compliance with primary law requirements.[139] Therefore, the court is only authorised to identify the minimum requirements of the claim.

[131] Kersting, "Kartellrechtliche Haftung des Unternehmens nach Art. 101 AEUV: Folgerungen aus EuGH, Urt. v. 14.03.2019, C-724/14—Skanska" [2019] WuW 290, 293 (SSRN, p.6).
[132] Cartel Damages Directive rec.12.
[133] See only Kurt L. Ritter and Markus Wirtz, "Art. 103 AEUV" in Ulrich Immenga, Ernst-Joachim Mestmäcker and Torsten Körber (eds), *Wettbewerbsrecht: EU. Kommentar zum Europäischen Kartellrecht*, 6th edn (C.H. Beck, 2019), Vol.1, para.2; Detlef-Holger Sturhahn, "Art. 103 AEUV" in Ulrich Loewenheim and others (eds), *Kartellrecht: Europäisches und Deutsches Recht*, 4th edn (C.H. Beck, 2020), para.4; Daniel-Erasmus Khan and Chun-Kyung P. Suh, "Art. 103 TFEU" in Rudolf Geiger, Daniel-Erasmus Khan and Markus Kotzur (eds), *European Union Treaties* (C.H. Beck; Hart, 2015), para.2.
[134] Cf. *Brasserie du pêcheur* (Joined Cases C-46/93 and C-48/93) [1996] Q.B. 404; [1996] 2 W.L.R. 506 at [66], [89].
[135] Cf. also Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 374.
[136] See *Van Duyn v Home Office* (41/74) EU:C:1974:133; [1975] Ch. 358; [1975] 2 W.L.R. 760 at [12]; *Becker v Finanzamt Munster-Innenstadt* (8/81) EU:C:1982:7; [1982] 1 C.M.L.R. 499 at [25]; *Oberkreisdirektor des Kreises Borken v Handelsonderneming Moormann BV* (190/87) EU:C:1988:424; [1990] 1 C.M.L.R. 656 at [24].
[137] Cf. Walter Obwexer, "Art. 4 EUV" in Hans von der Groeben, Jürgen Schwarze and Armin Hatje (eds), *Europäisches Unionsrecht: Vertrag über die Europäische Union Vertrag über die Arbeitsweise der Europäischen Union Charta der Grundrechte der Europäischen Union*, 7th edn (Bd. 2, Nomos, 2015), para.119.
[138] Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 373.
[139] Cf. Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 373 et seq.