Normative Corrections of Causation in Fact in Cartel Damages Law

Dr Patrick Hauser

Junior Prof. Dr Jannik Otto*

Austria; Cartels; Causation; EU law; Germany; Passing on; Private enforcement

Abstract

In its 2019 Otis *ruling*[1] *the European Court of Justice (ECJ) seemingly waived the requisite under Austrian and German law that damages claimed have to be covered by the "objective of protection" that art.101 of the Treaty on the Functioning of the European Union (TFEU) pursues. This article pleads that this is a misunderstanding. Based on the finding that causation in fact between the competition law infringement and the loss suffered may not suffice, but rather has to be distinguished from causation in law, we seek to give an understanding of the Austrian and German concept of the specific connection to the "objective of protection". We argue that the ECJ could make use of this concept in order to reasonably specify the necessary (direct) "causal link" giving rise to a cartel damages claim which is a future task the ECJ will face. Further, we argue that the concept of the specific connection to the "objective of protection" (and other legal modifications of causation in fact) can be upheld in Member States' domestic law, provided that the result to be achieved set out by Union law is accomplished. We likewise argue, damages in the economic and damages in the legal sense have to be distinguished when assessing the passing-on defence. Thus, the passing-on defence may be denied on normative grounds—as the German Federal Court recently ruled.*

I. Introduction

The ECJ continues to shape private enforcement of competition law, most recently in its 2021 *Sumal* ruling.[2] Previously in *Otis* the ECJ (allegedly) waived the Member States' law requisite that losses only have to be compensated if they are covered by the "objective of protection"[3] (or "protective purpose"[4]) art.101 TFEU pursues.[5] Rather, "any loss which has a causal connection with an infringement of Article 101 TFEU must be capable of giving rise to compensation".[6] The judgment raises questions regarding the determination of causation for losses caused by cartels, but also gives cause to have a closer look on the requisite of a specific connection with the "objective of protection" which is well-established in German and Austrian tort law. In this paper we will briefly recap the *Otis* judgment and provide a brief understanding of the criterion of "objective of protection" (II.). Contrary to first impression this criterion may be helpful to restrict causation in fact under EU law with regard to establishing liability (III., IV.) and can be upheld in Member States' law (V.). Therefore, provided that the "objective of protection" is applied correctly, it may serve—in Member States' as well as in EU law—as a criterion to distinguish between causation in fact and causation in law. It could also be of importance to assess and eventually preclude the passing-on defence on a normative basis (VI.). The article finally concludes with a summary of the findings and an outlook (VIII.).

II. The Otis judgment

The facts of the *Otis* case are as follows: The Province of Upper Austria granted loans for construction projects on favourable terms. Elevators were frequently installed in these subsidised construction projects. As the elevator and escalator market[7] was subject to a cartel in the past, the costs of the construction projects may have increased and as a result the Province of Upper Austria thus granted higher (subsidised) loans. The question therefore arose as to whether the Province of Upper Austria, which was neither a supplier nor a buyer on the market affected by the cartel, could claim damages from the cartel members due to the fact that the portion of the granted loans attributable to the excessive elevator costs could not be invested profitably elsewhere. The Austrian Supreme

* The author Patrick Hauser is manager of the Institute for Competition Law (IKartR) at Heinrich Heine University Düsseldorf (HHU); the author Jannik Otto is Junior Professor for business law at HHU and one of the directors of the IKartR at HHU. This article is in part (III., IV. 1. and 4., V. 1.) based on or a is translation of Patrick Hauser and Jannik Otto, "Rechtsnatur des Kartellschadensersatzanspruchs und normative Korrekturen der Kausalität nach EuGH—Otis (Teil 2)" [2020] WRP 970. References to this previous work were omitted.

[1] *Otis GmbH v Land Oberösterreich* (C-435/18) EU:C:2019:1069; [2020] Bus. L.R. 37.

[2] *Sumal SL v Mercedes Benz Trucks Espana SL* (C-882/19) EU:C:2021:800; [2021] Bus. L.R. 1755.

[3] This is the term used in the English language version of the ruling, see e.g. *Otis* (C-435/18) [2020] Bus. L.R. 37 at [31] (ECJ) and will be used throughout this article.

[4] This is the term used in the English language version of the Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [70]–[97]. Both terms seem to be a literal translation of the German "Schutzzweck" that AG Kokott referred to in the original German language version of her Opinion (at [70]–[97]).

[5] *Otis* (C-435/18) [2020] Bus. L.R. 37 at [31].

[6] *Otis* (C-435/18) [2020] Bus. L.R. 37 at [30].

[7] Cf. Summary of Commission Decision of 21 February 2007 relating to a proceeding under Article 81 of the Treaty establishing the European Community (Case COMP/E-1/38.823—Elevators and Escalators) (notified under document number C(2007) 512 final), OJ C 75/19.

Court requesting an ECJ preliminary ruling stated that the damages claim would be denied under Austrian law in application of the requirement of the "objective of protection" of the provision infringed.

The prerequisite of "objective of protection" is well-established in Austrian[8] and German[9] tort law. Both jurisdictions differentiate between causation in fact and causation in law. The prerequisite of "objective of protection" serves—in addition to other criteria such as the theory of adequate causation—as a means to restrict causation in fact through a normative assessment of the objective of protection of the provision infringed. To avoid excessive or unlimited liability, the tortfeasor shall not be liable for all consequences of their actions, but shall rather compensate only those losses the duty of conduct infringed pursues to avoid.[10] This "objective of protection" of the provision in question needs to be identified by interpretation.[11] It, thus, requires an analysis of the aim of the infringed and against which damages it seeks to protect.

The Austrian Supreme Court assumed that the "objective of protection" of art.101 TFEU only requires compensation for damages suffered by operators active on the cartelised market. The ECJ—not surprisingly—in substance did not agree:

> "Subject to the possibility of the participants to a cartel not being held liable to compensate for all the loss that they could have caused, it is not necessary, in that regard, … that the loss suffered by the person concerned present [sic], in addition, a specific connection with the 'objective of protection' pursued by Article 101 TFEU."[12]

On the contrary,

> "any loss which has a causal connection with an infringement of Article 101 TFEU must be capable of giving rise to compensation in order to ensure the effective application of Article 101 TFEU and to guarantee the effectiveness of that provision".[13]

Thus, the losses allegedly suffered by the Province of Upper Austria are eligible for compensation.

III. Consensus: necessity for normative corrections of causation in fact

Causation in fact between the harmful act and the loss suffered is the undisputed basis for any compensation claim (1.) with lack of evidence as a de facto restriction (2.). Causation in fact, however, could lead to an unlimited liability. Therefore, the legal assessment cannot rely on causation in fact only. It is consensus that causation in fact may be restricted on a normative basis to limit liability to a reasonable extent (3.).

1. Causation in fact

It is undisputed that all causality considerations presuppose that a liable person's act "caused" the damage. The minimum prerequisite for a tortious damages claim is therefore that the offender's conduct was causal in the sense of the but-for test (*condicio sine qua non*).[14] Contributory cause suffices in this regard.[15] This provides the basis for ECJ case law.[16]

2. Lack of evidence as a de facto restriction of causation in fact

In practice, this basic causation in fact is already restricted by lack of evidence. The claimant must prove losses that were caused by the cartel before the Member States' courts. The rules on the burden of proof and evidence taking are subject to national law.[17] However, those rules are also subject to the Union law principles of equivalence and effectiveness. Due to the leeway Union law allows the Member States' regulators claimants may be exposed to a lack of evidence,[18] even if there are statutory (cf. art.17 para.2 Cartel Damages Directive[19]) or other presumptions in favour of the claimants.[20] Above all, providing evidence for remote damages or damages passed on along different markets is difficult. Therefore,

[8] See *Otis (C-435/18)* [2020] Bus. L.R. 37 at [14]–[15].
[9] In detail see Hermann Lange and Gottfried Schiemann, *Handbuch des Schuldrechts, Band 1*, 3rd edn (Mohr Siebeck, 2003) § 3 IX.
[10] Lange and Schiemann, *Handbuch des Schuldrechts, Band 1*, 3rd edn (2003) § 3 IX 1, p.101; Dirk Looschelders, *Schuldrecht—Allgemeiner Teil*, 17th edn (Vahlen, 2019), § 45 para.19.
[11] Lange and Schiemann, *Handbuch des Schuldrechts, Band 1*, 3rd edn (2003), § 3 IX 1, p.101; Looschelders, *Schuldrecht—Allgemeiner Teil*, 17th edn (2019), § 45 para.19.
[12] *Otis* (C-435/18) [2020] Bus. L.R. 37 at [31].
[13] *Otis* (C-435/18) [2020] Bus. L.R. 37 at [30].
[14] Lars Klöhn, "'Wertende Kausalität' im Spiegel von Rechtsvergleichung, Rechtsdogmatik und Rechtsökonomik" (2006) 105 ZVglRWiss 455, 455; Marta Infantino and Eleni Zervogianni, "Unravelling Causation in European Tort Laws: Three Commonplaces through the Lens of Comparative Law" (2019) 83 RabelsZ 647, 649–651; Jaap Spier and Olav Haazen, "Comparative Conclusions on Causation" in Jaap Spier (ed.), *Unification of Tort Law: Causation* (Kluwer Law International 2000), p.127; Marta Infantino and Eleni Zervogianni, "Summary and Survey of the Results" in Marta Infantino and Eleni Zervogianni (eds), *Causation in European Tort Law* (Cambridge University Press, 2017), p.601. For flaws of the *condicio sine qua non* formula in need of correction see Christian von Bar, *Gemeineuropäisches Deliktsrecht, Zweiter Band* (C.H. Beck, 1999), pp.440–461; Looschelders, *Schuldrecht—Allgemeiner Teil*, 17th edn (2019), § 45 paras 8–10.
[15] Opinion of AG Kokott in *Kone* (C-557/12) EU:C:2014:45 at [36]–[38] with further references.
[16] *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] (ECJ); *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 [64] (ECJ); *European Commission v Otis* (C-199/11) EU:C:2012:684; [2013] 4 C.M.L.R. 4; [2013] C.E.C. 750 at [41] (ECJ); *Otis* (C-435/18) [2020] Bus. L.R. 37 at [22]; *Sumal* (C-882/19) [2021] Bus. L.R. 1755 at [33].
[17] Cf. *Otis* (C-435/18) [2020] Bus. L.R. 37 at [33]. Likewise BGH KZR 24/17, *Schienenkartell II* [2020] NZKart 136, 138 at[30]; Andreas Weitbrecht, "Kartellschadensersatz 2019" [2020] NZKart 106, 107; Opinion of AG Kokott in *Cogeco* (C-637/17) EU:C:2019:32 at [44]; Patrick Hauser, "Case note on Court of Justice of the European Union, judgment of 12 December 2019 (Case C-435/18, Otis GmbH and Others v Land Oberösterreich and Others)" (2020) 69 GRURInt 554, 554.
[18] Jannik Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 386; Wulf-Henning Roth, "§ 33a GWB" in Wolfgang Jaeger and others (eds), *Frankfurter Kommentar zum Kartellrecht*, 92nd edn (Otto Schmidt), para.29.
[19] Directive 2014/104/EU of the European Parliament and the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1.
[20] Cf. regarding factual presumptions in German law BGH KZR 26/17, *Schienenkartell,* [2019] WuW 91; KZR 24/17 *Schienenkartell II* [2020] NZKart 136.

constellations in which the claimant is unable to prove causal loss remain, so that lack of evidence constitutes a (de facto) restriction on the assertion of damages claims.

3. Need for (further) restrictions

However, there is consensus that further (legal) criterions are necessary to limit causation in fact. One out of many examples demonstrates this necessity: When drinker A learns from the news that beer prices have been inflated by a cartel, the otherwise peaceful A becomes exceptionally furious. Outraged he walks to B's shop and destroys all beer bottles present. If the cartel had not inflated beer prices, A would not have become furious and would not have destroyed B's shop. Thus, if considering only causation in fact, B suffered a loss due to the cartel. Awarding B cartel damages, however, contradicts the sense of justice. The solution to this problem lies in normative restrictions to causation in fact. We find them in Member States' tort law (a)), in Union Law conditions for liability (b)) and in the ECJ's cartel damages claims jurisprudence (c)).

a) Member States' tort law

To avoid unlimited liability Member States' tort laws distinguish between causation in fact and legal causation, as comparative studies show.[21] The respective criteria for determining legal causation inevitably differ in details, terminology and also in the results attained.[22] However, there is general[23] agreement that causation in fact alone does not establish liability,[24] but must be limited by further criteria, irrespective of whether these restrictions are described as the theory of adequate causes, the objective of protection pursued by the provision infringed, remoteness of damage, foreseeability or the necessity of a direct and immediate consequence or even a combination of the aforementioned restrictions is applied.[25] Article VI-2:101(2), (3) Draft Common Frame of Reference (DCFR) also considers loss to be legally relevant damage only where "it would be fair and reasonable for there to be a right to reparation or prevention" or if a specific rule provides that the loss is legally relevant. In assessing whether a right to reparation or prevention would be "fair and reasonable", reference is also made to the aforementioned normative criteria, since

> "the ground of accountability, … the nature and proximity of the damage or impending damage, … the reasonable expectations of the person who suffers or would suffer the damage, and … considerations of public policy"

are to be taken into account.[26] Similar reads art.3:201 Principles of European Tort Law which in lit. e) expressively addresses the "protective purpose of the rule that has been violated". Normative corrections of causation in fact are therefore generally accepted in Member States' tort law systems.

b) Union law conditions of liability

Non-contractual liability of EU bodies and the liability of Member States towards individuals for infringements of EU law depend not only upon causation in fact.[27] Rather, there is generally no non-contractual liability for very remote adverse consequences of unlawful conduct. It is a condition for non-contractual liability of the EU bodies that there has to be "a sufficiently direct causal nexus between the harmful conduct and the damage" alleged.[28] Similarly, according to the ECJ a claim for compensation against a Member State for Union law infringements requires a "direct causal link",[29] even though the ECJ in *Francovich* initially only demanded a

[21] For details and with further reference respectively see von Bar, *Gemeineuropäisches Deliktsrecht, Zweiter Band* (1999), pp.437–504; Wolfgang Wurmnest, *Grundzüge eines europäischen Haftungsrechts* (Mohr Siebeck, 2003), 159–189 (Germany, UK, France); Infantino and Zervogianni, "Unravelling Causation in European Tort Laws: Three Commonplaces through the Lens of Comparative Law" (2019) 83 RabelsZ 647, 649 ("all European jurisdictions"); Klöhn, "'Wertende Kausalität' im Spiegel von Rechtsvergleichung, Rechtsdogmatik und Rechtsökonomik" (2006) 105 ZVglRWiss 455, 458–467. (Germany, UK, US, France, Switzerland, Austria); Infantino and Zervogianni, "Summary and Survey of the Results" in *Causation in European Tort Law* (2017), pp.597–646; Claudio Lombardi, *Causation in Competition Law Damages* (Cambridge University Press, 2020), pp.34–68 (UK, Germany, France, Italy, US). See also for national reports Jaap Spier (ed.), *Unification of Tort Law: Causation* (2000) with comments on Belgian, German, British, French, Greek, Italian, Austrian, South African, Swiss and US law. Summarising Spier and Haazen, "Comparative Conclusions on Causation" in *Unification of Tort Law: Causation* (2000), p.127: "All jurisdictions recognise causation as a requirement of tortious liability and all legal systems consider a *condicio sine qua non* as such a first test. It seems that only in one jurisdiction, *viz*. Belgium, the *condicio sine qua non* is clearly officially regarded as the *sole* requirement for causation to be established." However, Herman Cousy and Anja Vanderspikken, "Belgium: Causation under Belgian Law" in *Unification of Tort Law: Causation* (2000), p. 24 argue in their national report on Belgium, which like all national reports was written before 2000, that although the theory of equivalence of conditions is officially the sole requirement for causality, judges would find a possibility to limit liability. Cf. also Eckart Bueren and Florian Smuda, "Suppliers to a sellers' cartel and the boundaries of the right to damages in U.S. versus EU competition law" (2018) 45 Eur. J. Law Econ. 397, 413–414.

[22] Infantino and Zervogianni, "Unravelling Causation in European Tort Laws: Three Commonplaces through the Lens of Comparative Law" (2019) 83 RabelsZ 647, 656 even report an example case where the Danish legal system, albeit applying the "condicio sine qua non formula", produces a result which differs from that of other Member States. More generally Infantino and Zervogianni, "Summary and Survey of the Results" in *Causation in European Tort Law* (2017), pp.590–646.

[23] See, however, the explanatory notes on Belgian law in fn. 21.

[24] Deviating in terminology von Bar, *Gemeineuropäisches Deliktsrecht, Zweiter Band* (1999), pp.439–504, who considers the distinction between causation in fact and legal causality to be "wrong" from the outset, because in his view what is called causation is always about attribution, so that the notion referred to as "causation" is always a "legal" causation, including "causation in fact". Also rejecting the theory of adequacy, see p.476.

[25] See with further reference to the respective legal systems Infantino and Zervogianni, "Unravelling Causation in European Tort Laws: Three Commonplaces through the Lens of Comparative Law" (2019) 83 RabelsZ 647, 656–657; Infantino and Zervogianni, "Summary and Survey of the Results" in *Causation in European Tort Law* (2017), pp.601–646. In this direction also Opinion of AG Kokott in *Kone* (C-557/12) EU:C:2014:4 at [35].

[26] Referring to this Opinion of AG Kokott in *Kone* (C-557/12) EU:C:2014:4 at [35] (fn.24).

[27] Cf. Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [67]; Opinion of AG *Kokott* in *Kone* (C-557/12) EU:C:2014:4 at [34]. In detail Martin Weitenberg, *Der Begriff der Kausalität in der haftungsrechtlichen Rechtsprechung der Unionsgerichte* (Nomos, 2014).

[28] Cf. Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [67]; Opinion of AG Kokott in *Kone* (C-557/12) EU:C:2014:4 at [34] referring to *P Dumortier Frères SA v Council of Ministers of the European Communities* (Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79) EU:C:1979:223 at [21] (ECJ). See also *CAS Succhi di Frutta SpA* (C-497/06 P) EU:C:2009:273 at [67] (ECJ) (causalité suffisamment direct); *Trubowest Handel GmbH* (C-419/08 P) EU:C:2010:147 at [53] (ECJ).

[29] *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 [51], [65] (ECJ); *Leth v Austria* (C-420/11) EU:C:2013:166; [2013] P.T.S.R. 805; [2013] 3 C.M.L.R. 2 at [41] (ECJ).

"causal link".[30] Since non-contractual liability in the Member States' legal systems as well as European Union law differentiate between causation in fact and legal causation, it even appears to be a general legal principle that causation in fact between the harmful conduct and the occurrence of damage alone cannot constitute ground for liability.

c) ECJ case law prior to Otis

Even if legal modifications of causation in fact are a general legal principle, it does not necessarily follow that it is applicable in competition law as well. However, the ECJ indicated in *Courage* that principles otherwise recognised in Member States' legal systems and in ECJ case law can also be applied in cartel damages cases.[31] Further, the ECJ referenced the case law on state liability in its *Manfredi* ruling,[32] which may suggest that the causality standards developed there should also apply in cartel damages law.[33] Moreover, further ECJ cartel damages case law demonstrates that causation in fact can also be restricted in cartel damages claims.

Initially, in the first *Otis* case the ECJ held in 2012 that the national court has to assess "the existence of loss and of a *direct causal link* between the loss and the agreement or practice in question".[34] The use of the term "direct causal link" emphasises—as generally in Union law conditions for liability—that not every causal link suffices.[35] The ECJ also seems to regard the foreseeability of damages[36] as a necessary causation criterion in cartel damages cases.[37] The ECJ pointed out in *Kone* that umbrella damages are "one of the possible effects of the cartel, that the members thereof cannot disregard".[38] Thus, the ECJ at least implicitly examined the foreseeability of the occurrence of damage.[39] When assessing foreseeability, normative elements cannot be disregarded, since the legislators' decision has to be respected when determining whose perspective and knowledge is decisive.

At first sight, another passage from *Kone* could be invoked to argue against a normative restriction of causation in fact. The ECJ held that

> "full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets".[40]

One could conclude from this passage that a requirement of a "direct causal link" in Member States' law would jeopardise the practical effectiveness of art.101 TFEU and thus be inadmissible under Union law. However, a comprehensive assessment of *Kone* does not favour this interpretation.[41] The ECJ first of all emphasises that national law may not impose certain requirements categorically and regardless of the circumstances of the individual case and thus ultimately emphasises that each case must be considered individually. In this respect, similarities can be found with the reasoning in *Courage* according to which the Member States may not bar across-the-board and from the outset parties to a contract distorting competition from claiming compensation,[42] but may nevertheless do so in individual cases, provided that the claimant "is found to bear significant responsibility for the distortion of competition".[43] Most important, however, the ECJ seems to consider the umbrella damages to be foreseeable and thus, ultimately affirmed the direct causal link. The ECJ, thus, did not abandon the criterion of "direct causal link" in *Kone*, but rather confirmed on the merits that there is a direct causal link between a cartel and resulting umbrella damages. Therefore, causation in fact was not restricted in *Kone*, as the necessary direct causal link existed.

[30] *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 [40] (ECJ).
[31] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [31].
[32] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [84], [89], [93], [96].
[33] Cf. Lombardi, *Causation in Competition Law Damages* (2020), p.53. Cf. also Opinion of AG Kokott in *Kone* (C-557/12) EU:C:2014:4 at [34]; Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [67].
[34] *Otis* (C-199/11) [2013] 4 C.M.L.R. 4; [2013] C.E.C. 750 at [65] (italics added).
[35] Cf. Opinion of AG Kokott in *Kone* (C-557/12) EU:C:2014:4 at [34]; Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [67].
[36] Regarding the concept of foreseeability in the different legal systems of the Member States in general see Infantino and Zervogianni, "Summary and Survey of the Results" in *Causation in European Tort Law* (2017), pp.604–605. Cf. also Lombardi *Causation in Competition Law Damages* (2020), pp.29–68. Regarding Great Britain, where foreseeability is a central part of the examination of remoteness of damages as a limitation to causation in fact see Wurmnest, *Grundzüge eines europäischen Haftungsrechts* (Mohr Siebeck, 2003) 159–168 (Germany, UK, France); W.V.Horton Rogers, "England: Causation under English Law" in Jaap Spier (ed.), *Unification of Tort Law: Causation* (2000) 40–41.
[37] Also Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [83] considers foreseeability to be crucial. Different opinion Jan Heithecker and Josef Hainz, "Anmerkung zu EuGH Otis" [2020] WuW 85, 86.
[38] *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 [30], [34] (ECJ).
[39] Similar Lombardi, *Causation in Competition Law Damages* (2020), p.27 ("loosely referring to the concept of foreseeability").
[40] *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [33].
[41] See also Hauser, "Case note on Court of Justice of the European Union, judgment of 12 December 2019 (Case C-435/18, Otis GmbH and Others v Land Oberösterreich and Others)" (2020) 69 GRURInt 554, 554 fn.8.
[42] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [26], [28].
[43] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [31].

IV. "Objective of protection" in EU cartel damages law

At least until *Otis* the ECJ held that a "direct causal link" between the competition law infringement and the losses claimed was necessary, thus, allowing for normative corrections of causation in fact. Did the ECJ part from this possibility in *Otis* when ruling that "any loss which has a causal connection with an infringement of Article 101 TFEU must be capable of giving rise to compensation"?[44] A more detailed analysis of the ECJ's ruling and the AG's Opinion in *Otis* reveals that normative corrections of causation in fact remain possible (1.). In fact, the ECJ did not even dismiss the criterion of the "objective of protection" as such (2.). Rather, we will argue that requiring a specific connection with the "objective of protection" of arts 101 and 102 TFEU is a suitable way to correct causation in fact in EU law as well. We argue that the ECJ itself will assess future cases of causation by means that would be considered in Germany and Austria as a reasoning based on the "objection of protection" (3., 4.).

1. Normative corrections of causation in fact remain permissible

In our view it cannot be inferred from *Otis* that the ECJ opposes restrictions of causation in fact altogether. On the basis of the example above (see III. 3.) it seems apparent that the effective application of art.101 TFEU does not demand liability for all damages that would not have occurred "but-for" the competition law infringement.[45] Not all legal restrictions of causation in fact inevitably endanger the application of art.101 TFEU and its practical effectiveness. This understanding forms the basis for the Cartel Damages Directive as well. According to rec.11 Member States may provide other conditions for damages claims, "such as imputability, adequacy or culpability … in so far as they comply with the case law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive".

Although the ECJ in *Otis* did not rely on the concept of a "direct causal link" and instead referred to a "causal connection",[46] legal modifications of causation in fact remain permissible in our view.[47] For one, the legal meaning of "causal connection" also needs to be specified[48] and would allow to incorporate restrictions of causation in fact. Further, the ECJ did not explicitly refrain from the notion of a "direct causal link". Arguably, the ECJ could have stressed this point further by responding to the distinction made by the AG between causation in fact and legal causation. AG Kokott elaborated that not all potential losses, however remote, for which the anticompetitive behaviour may have been the cause in the sense of a "condicio sine qua non" had to be compensated, but rather only those losses which have a "sufficiently direct link to their anticompetitive conduct and which they [the cartel members] could therefore have foreseen".[49]

2. ECJ in Otis and the "objective of protection"

The specific connection of the loss suffered with the "objective of protection" pursued by art.101 TFEU has three dimensions under German and Austrian law dogmatics:[50] First, the person suffering loss and second, the kind of loss suffered need to fall under the scope of protection of the provision infringed (personal and objective scope of protection). Third, the risk that realised in the loss suffered also needs to fall under the scope of protection (functional or modal scope of protection). It has to be determined whether the provision infringed aims inter alia to protect against the risk that has been realised in the loss suffered. All three assessments result from a teleological interpretation of the provision infringed.[51] Of course, the objective of protection of art.101 TFEU can only be determined from a Union law perspective.[52] The ECJ has final jurisdiction in this regard, art.19 (1) sentence 2 of the Treaty on the European Union (TEU).

a) What the ECJ did rule on in Otis

In *Otis*, the Commission and the elevator manufacturers argued that the persons suffering loss need to participate on the market where competition is restricted.[53] This argument touches solely upon one dimension of the "objective of protection". They only argue that the Province of Upper Austria is not covered by the personal scope of protection of art.101 TFEU. The ECJ rightly dismissed this argument. It is settled case law since *Courage* that "any individual" is enabled to claim cartel

[44] *Otis* (C-435/18) [2020] Bus. L.R. 37 at [30].
[45] See also Jens-Uwe Franck and Martin Peitz, "Cartel Effects and Component Markers' Right to Damages" [2020] *World Competition* 209, 237.
[46] *Otis* (C-435/18) [2020] Bus. L.R. 37 at [30].
[47] Presumably concurring also Brian Cullen, "Otis: Effet Utile and the Endless Expansion of Article 101 TFEU" (2020) 10 JECLaP 618, 619. Different opinion apparently 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 387, 390, 396–397. In the interpretation of Lombardi, *Causation in Competition Law Damages* (2020), pp.67–68 the ECJ in *Otis* did not even adopt an EU law notion of causality but instead considers the concept of causal relationship to be a matter for the domestic legal systems of the Member States.
[48] See also Heithecker and Hainz, "Anmerkung zu EuGH Otis" [2020] WuW 85, 86.
[49] Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [83].
[50] Regarding German law Gerhard Wagner, "§ 823 BGB" in Franz J. Säcker and others (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 8th edn (C.H. Beck, 2020), paras 507–517, 590. Regarding Austrian law, Ernst Karner, "§ 1295" in Helmut Koziol, Peter Bydlinski and Raimund Bollenberger (eds), *ABGB Allgemeines Bürgerliches Gesetzbuch: Kommentar*, 3rd edn (Springer, 2010), para.9.
[51] Cf. Wagner, "§ 823 BGB" in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 8th edn (2020), para.477; Lange and Schiemann, *Handbuch des Schuldrechts, Band 1*, 3rd edn (2003), § 3 IX 1, p.101; Karner, "§ 1295" in *ABGB Allgemeines Bürgerliches Gesetzbuch: Kommentar*, 3rd edn (2010), para.9.
[52] Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [52]; Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 373.
[53] See only Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [65].

damages.[54] The ECJ, therefore, had already defined the personal scope of protection in the understanding of German and Austrian dogmatics in *Courage*. Article 101 TFEU does not allow to exclude certain groups of claimants from the outset.[55] There is no room for any normative restrictions of causation in fact based on the personal scope of protection. As the answer to the case at hand was obvious, the ECJ did not have to elaborate further on the distinction between causation in fact and causation in law.

b) What the ECJ did not rule on in Otis

While only arguing based on the personal scope of protection the ECJ formulates as dismissing the criterion of a specific connection to the "objective of protection" as such. This wording is, thus, exuberant. However, the ECJ ruled neither on the objective scope of protection nor on the functional scope of protection of art.101 TFEU in *Otis*.

The objective scope of protection of art.101 TFEU has been determined in settled case law: Any loss of the claimant "caused to him by a contract or by conduct liable to restrict or distort competition".[56] As any kind of loss suffered is to be compensated there is no room for restrictions of causation in fact in this regard. Nonetheless, even as it does not restrict causation in fact the ECJ assessed in teleological interpretation what is called the objective scope of protection of art.101 TFEU under German and Austrian dogmatics.

In our understanding the ECJ has ruled on the functional scope of protection of art.101 TFEU for example in *Kone* when it held that umbrella damages are "one of the possible effects of the cartel, that the members thereof cannot disregard".[57] Umbrella damages are, thus, a risk against which art.101 TFEU seeks to protect. Incidentally, the ECJ clarified in *Otis* that art.101 TFEU protects not only against losses obtained on the cartelised or up- or downstream markets, but on other markets. However, it is not clear how these other markets and their participants qualify. Thus, unlike the personal or protective scope of protection, the functional scope of protection of art.101 TFEU has not been extensively defined by the ECJ. Since the ECJ dismissed the criterion of "objective of protection" in *Otis* we do not expect the court to assess it expressively in the future. However, we argue that it is a suitable criterion to reasonably restrict causation in fact. Even if the ECJ or AG Kokott give it another framing, the underlying reasoning of a specific connection with the functional scope of protection of art.101 TFEU can be helpful to assess causation under art.101 TFEU (below 3.) in future cases (4.).

3. How to determine the necessary "direct causal link" or "causal connection"

As argued above, the ECJ has not dismissed normative corrections of causation in fact. Rather, the legal meaning of "causal connection" or "direct causal link" still has to be specified and needs to incorporate a normative correction. In fact, when one closer examines how this "direct causal link" or "causal connection" is understood, the parallel to the objective of protection of art.101 TFEU becomes obvious.

While AG Kokott in *Otis* dismisses the argument that the losses claimed do not present a sufficient connection with the objective pursued by art.101 TFEU[58] she believes that the crucial question in the case is, "whether there is a sufficiently direct causal link between the elevator cartel and the losses for which the Province is seeking compensation".[59] Thus, AG Kokott replaces the criterion of specific connection with the "objective of protection" of art.101 TFEU by "direct causal link", which in her opinion encompasses liability only for foreseeable harm,[60] to limit an "unlimited right to compensation".[61] AG Kokott reaches this conclusion by interpreting art.101 TFEU. Therefore, further specification of which losses have a (direct) causal link and which do not—in her view—can only be conducted by interpreting art.101 TFEU. In German and Austrian dogmatics such a teleological interpretation of art.101 AEUV is exactly what is considered to be an argumentation by the "objective of protection". Given that any individual (personal scope of protection) can claim any kind of damage (objective scope of protection) this understanding of a (direct) causal link assesses the functional scope of protection of art.101 TFEU. By making use of German and Austrian dogmatics a (direct) causal link within the understanding of AG Kokott is given if a risk realises in the loss suffered that art.101 TFEU wanted to protect against.

Considering that the ECJ also relies on the criterion of a "direct causal link" or "causal connection" and has also implicitly considered foreseeability to be relevant (see above III. 3. c. and IV. 1.) German and Austrian dogmatics of the "objective of protection" can, thus, help to further specify the ECJ's criteria. The "objective of protection" is not to be dismissed but can be reconciled with ECJ case law.

[54] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [26].
[55] *Otis* (C-435/18) [2020] Bus. L.R. 37 at [27]; Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [78].
[56] *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]; *Otis* (C-199/11) [2013] 4 C.M.L.R. 4; [2013] C.E.C. 750 at [60], [90]; *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [21]; cf. also *Otis* (C-435/18) [2020] Bus. L.R. 37 at [30].
[57] *Kone* (C-557/12) [2014] 5 C.M.L.R. 5; [2015] C.E.C. 539 at [30], [34].
[58] Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [76]–[84].
[59] Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [84].
[60] Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [83], [142]–[145].
[61] Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [82].

4. Example cases

Such questions of normative corrections of causation in fact will arise for example when shareholders of a company impaired by a cartel raise cartel damages claims for their individual damages that are not merely reflex damages. Based on *Otis*, it seems plausible that, in the opinion of the ECJ, Union law demands that those shareholders must be entitled to claim compensation.[62] Under a legal assessment by the "objective of protection" it is to ask whether art.101 TFEU protects against the risk that realises in such losses that a cartel caused to the shareholders by an impairment of the company.

Similarly, it has to be determined whether art.101 TFEU also protects against the risk to creditors of a (cartel-induced) insolvent company that realises in the loss which exceeds the insolvency quota, provided they can prove that their claims would have been fully satisfied but-for the anti-competitive conduct. Further, does art.101 TFEU protect against the risk that realises in the loss of employees who have been laid because of the cartel?[63] Due to the broad understanding of art.101 TFEU—and its "objective of protection"—that the ECJ tends to, cartel members could in future not only be sued for losses that have been incurred on up- or down-stream markets, which will increase cartel members' exposures. It is unlikely, that the cartel members generated advantages corresponding to these losses, as *Otis* also demonstrates.[64] The interest damages claimed by the Province of Upper Austria (unlike the higher prices the owner of the buildings paid for the elevators) were not initially pocketed by the cartel members through increased prices. This is not necessary as tort law aims to rectify losses caused to the injured party and does not address the enrichment of the tortfeasor. However, this inevitably makes it less predictable for the cartel members which plaintiffs they will have to face in cartel damages proceedings.[65] In addition, the cartel members will probably often be unable to successfully raise the passing-on defence against these groups of plaintiffs (shareholders, insolvency creditors), since they cannot "pass on" such losses or compensate them in any other way. Although it is conceivable that other third parties may benefit, this does not give ground for a deduction of benefits vis-à-vis the injured parties. This will likely increase the probability of the individual claims being raised.

V. "Objective of protection" in Member States' cartel damages law

Despite the ECJ ruling in *Otis* the requisite of the "objection of protection" can be upheld in Member States' law. EU primary law only sets up results the national law has to achieve. It does not touch on the dogmatics of how Member States' law achieves the required results (1.). Further, the Cartel Damages Directive does not affect the Member States' dogmatics on causation either (2.).[66]

1. No requirements for Member States' dogmatics in EU primary law

The ECJ does not rule on Member States' dogmatics. While two mechanisms of EU law influencing Member States' law in cartel damages law exist,[67] Member States' dogmatics remain unaffected. Both mechanisms only allow an examination of national law regarding the result to be achieved. Member States' law must fulfil these minimum requirements. The method to achieve this, however, is solely a matter of Member States' law.

However, the referring court follows its domestic dogmatics and influences the ECJ's approach through the questions referred for a preliminary ruling. As the court answers questions relating to specific characteristics under Member States' law, the framework for the answer and the attribution of the question to a specific element of the claim are pre-determined. Had the Austrian Supreme Court instead denied the Province of Upper Austria the standing to claim damages because it was not a direct operator on the cartelised market, the conflict with the ECJ case-law would have been more obvious. It is evident that such a result incompatible with Union law cannot be obtained by excluding claimants not active on the cartelised market by denying their standing, restricting causation in fact or any other element of the claim giving ground for liability.

[62] Julia Grothaus and Georg Haas, "Besprechung EuGH Otis" [2020] EWiR 61, 62; Hauser, "Case note on Court of Justice of the European Union, judgment of 12 December 2019 (Case C-435/18, Otis GmbH and Others v Land Oberösterreich and Others)" (2020) 69 GRURInt 554. Affirming such a claim Dirk Zetzsche, "'Jedermann' ist jedermann!—Zum Schadensersatz des Aktionärs einer durch Missbrauch einer marktbeherrschenden Stellung geschädigten AG" [2016] WuW 65, 65; Philipp Engelhoven and Bastian Müller, "Kartellschadenersatz für Aktionäre einer kartellgeschädigten AG?" [2018] WuW 602, 602; different view OLG Düsseldorf VI-U (Kart) 22/13, [2014], at [40]–[44]; leaving the question open Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [93]–[94].

[63] Answering in the positive Grothaus and Haas, "Besprechung EuGH Otis" [2020] EWiR 61, 62; in the negative Andreas Fuchs, "§ 4" in Andreas Fuchs and Andreas Weitbrecht (eds), *Handbuch private Kartellrechtsdurchsetzung* (C.H. Beck, 2019) para.8c.

[64] Cf. also (prior to *Otis*) Lombardi, *Causation in Competition Law Damages* (2020), p.26: "The sheer number of different persons connected to a specific market—such as buyers, sellers, service providers and counterfactual buyers—exponentially multiplies the number economic harms that may occur."

[65] Different view apparently Heithecker and Hainz, "Anmerkung zu EuGH Otis" [2020] WuW 85, 86 who consider all consequences of a cartel induced price increase to be foreseeable.

[66] Regarding the following see already Hauser and Otto, "Rechtsnatur des Kartellschadensersatzanspruchs und normative Korrekturen der Kausalität nach EuGH—Otis (Teil 2)" [2020] WRP 970, 973–973.

[67] Hauser and Otto, "Rechtsnatur des Kartellschadensersatzanspruchs und normative Korrekturen der Kausalität nach EuGH—Otis (Teil 1)" [2020] WRP 812, 817–819; Patrick Hauser and Jannik Otto, "Legal Nature of Cartel Damages Claims in the EU" (2021) 14 G.C.L.R. 147, 151–156. The latter article was also published in (2022) 43 E.C.L.R. 2.

a) The principle of effectiveness controls the result to be achieved

The principle of effectiveness requires that Member States' legal systems must not "affect the scope and effectiveness of Community law".[68] Under scrutiny are the relevant provisions of national law as a whole.[69] The principle of effectiveness examines whether the result obtained thereafter can be upheld when measured against the practical effectiveness of Union law.

The *Courage* judgment demonstrates that not the terminology or the dogmatic approach under Member States' law is decisive in this context, but what matters is the result attained. The ECJ made it clear in *Courage* that it does not accept too far-reaching restrictions of the right to damages. However, according to the ECJ Member States' legal systems have the possibility of "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".[70]

From the point of view of Union law, it has to be irrelevant whether, in this case, Member State law for example (i) negates an objectively attributable act of the defendant causing the damage, since the claiming cartel member participated in the cartel of his own accord, (ii) denies a claim for damages on legal grounds with recourse to general principles of law, such as a breach of good faith or contributory negligence excluding claims or (iii) even explicitly enact a provision denying entitlement to damages in this case. Consequently, however, Member States' courts have to be able to refuse compensation for damages among cartel members with significant responsibility for the distortion of competition referring to the fact that such damages are not covered by the objective of protection of the provision infringed, which is in this case art.101 TFEU. Such damages need not be eligible for compensation since the practical effectiveness of art.101 TFEU does not require it.

b) Elements of the cartel damages claim outlined by Union law control the result to be achieved

The same applies, of course, to individual elements of the cartel damages claim as outlined by Union law, insofar as the ECJ has recognised them, in particular inter alia the liable entity[71] and, —especially of relevance for this paper—causation.[72] They do not impose any requirements on Member States' dogmatics either. Even if the ECJ discusses a circumstance in view to a certain condition of liability under Union law, national law dogmatically may allocate the same circumstance to another element of the claim. The result required by Union law only sets a minimum standard that has to be achieved. Member States' law may also provide for more extensive cartel damages claims; they even sometimes have to according to the principle of equivalence.

2. Cartel Damages Directive

Already by definition of a directive in art.288(3) TFEU the Cartel Damages Directive shall only be binding as to the result to be achieved but shall leave to the national authorities the choice of form and methods. Thus, implementing the Cartel Damages Directive does not require the Member States to change their legal traditions and well-established dogmatics as long as these allow to reach the required results. Therefore, the criterion of the "objection of protection" as such can also be upheld under the Cartel Damages Directive.

VI. Normative correction of the passing-on defence

We have argued so far that normative corrections of causation in fact can be necessary to avoid an unlimited liability. We have, thus, used normative corrections of causation in fact as factors limiting the tortfeasor's liability. However, when assessing or calculating a claimant's loss, the question arises how to deal with benefits that resulted out of the tortious act. A benefit that commonly occurs in cartel damages cases is the passing-on of the cartel overcharge (1.). It is common ground that causal benefits may compensate losses depending upon a normative assessment (see 2.). The German Federal Court (*Bundesgerichtshof*, BGH) and the Dutch Supreme Court (*Hoge Raad der Nederlanden*, HR) applied these principles in domestic law and held that the passing-on defence of the tortfeasor may be denied under certain circumstances by distinguishing between damages in the economic and legal sense (3.).[73] The effects are, however, contrary to the normative corrections of causation in fact analysed so far. By excluding certain benefits resulting from a potential passing-on or denying the passing-on defence altogether, the liability of the tortfeasor increases, not necessarily in sum but compared to an assessment under causation in fact only (at least vis-à-vis certain claimants). We consider

[68] *Deutsche Milchkontor* (Joined Cases C-205 to 215/82) EU:C:1983:233; [1984] 3 C.M.L.R. 586 at [22] (ECJ).
[69] Cf. *Cogeco Communications Inc v Sport TV Portugal SA* (C-637/17) EU:C:2019:263; [2020] 5 C.M.L.R. 2 at [45] (ECJ); Opinion of AG Kokott in *Cogeco* (C-637/17) EU:C:2019:32 at [81]; AG Rantos in *Volvo, DAF/ RM* (C-267/20) EU:C:2021:884 at [101]; Hauser and Otto, "Rechtsnatur des Kartellschadensersatzanspruchs und normative Korrekturen der Kausalität nach EuGH—Otis (Teil 1) " [2020] WRP 812, 814.
[70] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [31].
[71] *Vantaan kaupunki v Skanska Industrial Solutions Oy* (C-724/17) EU:C:2019:204; [2019] 4 C.M.L.R. 26 at [28]–[52] (ECJ); *Sumal* (C-882/19) [2021] Bus. L.R. 1755 at [34].
[72] Cf. Hauser and Otto, "Rechtsnatur des Kartellschadensersatzanspruchs und normative Korrekturen der Kausalität nach EuGH—Otis (Teil 1) " [2020] WRP 812, 817–819; Hauser and Otto, "Legal Nature of Cartel Damages Claims in the EU" (2021) 14 G.C.L.R. 147, 153; cf. also KZR 24/17 *Schienenkartell II* [2020] NZKart 136, at [23]–[30].
[73] See for an overview also Patrick Hauser, Jannik Otto and Simon Vande Walle, "Private enforcement of competition law in Germany and the Netherlands", available at SSRN, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4066102*, [28.04.2022] forthcoming as "Chapter 17: Germany and the Netherlands" in Barry Rodger, Miguel Sousa Ferro and Francisco Marcos (eds), *Research Handbook on Competition Law Private Enforcement in the EU* (Edward Elgar, 2022).

this normative restriction of causation in fact within the passing-on defence to be compliant with art.101 TFEU as well as the Cartel Damages Directive (4.).

1. Passing-on leads to causal benefits

A common occurrence in cartel damages cases is the passing-on of the cartel overcharge along the supply chain to subsequent markets or—in the case of a competition law infringement on the buyers' side—an upwards passing-on of the cartelised lower price.[74] The effects of passing-on are twofold: The indirect purchasers suffer loss because they now pay the cartel overcharge. Thus, they can claim cartel damages, the chain of causation has been prolonged by the passing-on. Regarding a normative assessment, it is undisputed that art.101 TFEU and its personal scope of protection cover these indirect purchasers. This already follows from the *Courage* "any individual" ruling.[75] On the other hand, looking at the direct purchasers that were able to pass on the cartel overcharge, they could suffer losses due to volume effects. At the same time, passing-on the cartel overcharge relieves them from losses. This loss is now borne by their customers, the cartelists' indirect purchasers.

2. Principle of deduction of benefits in European law

As loss incurred is commonly to be assessed by a counterfactual scenario the question arises how to account for benefits that arise as a result of the tort. The rule against unjustified enrichment, established in Member States' law and recognised by the ECJ in cartel damages law,[76] generally speaks in favour of taking benefits caused into consideration. The respective legal concept of deduction of benefits is well-established in Member States' law as comparative studies show.[77] Study groups on European (tort) law also include the deduction of benefits in their codification proposals, art.10:103 Principles of European Tort Law and VI.—6:103 DCFR. The latter, however, proposes to account for benefits only as an exception.

All rules and case law on the deduction of benefits in Member States' law have in common that a deduction not only requires that the benefit was caused by the tortious act (causation in fact) but also that a normative assessment is decisive. Article 10:103 Principles of European Tort Law and VI.—6:103 DCFR require that the benefits can "be reconciled with the purpose of the benefit" or that it would be "fair and reasonable to take them into account" respectively. In German law this is an assessment under the "objective of protection" of the provision infringed which is traced back to the much more abstract principle of good faith.[78] The latter is also the decisive criterion in weighing whether benefits are to be deducted under domestic law in other Member States as comparative studies show.[79] The principle of good faith is not a factual assessment, but based on the values of the respective legal system, thus, being a normative correction of causation in fact.

Further, the ECJ recognised this concept in rulings on the non-contractual liability of the EU[80] and in cases regarding the reimbursement of taxes, charges and duties levied in breach of EU law.[81] To avoid an unjust enrichment, the claim for losses may also be reduced if the claimants managed to compensate their losses by increasing their selling prices.

This normative assessment is irrespective of whether the benefits exclude or reduce the loss in the first place (making it an assessment of the damage itself)[82] or subsequently eliminate or reduce the loss[83].[84] Thus, if normative modifications of causation in fact regarding establishing liability is widely accepted in European law, the same must hold true for the assessment of a deduction of benefits. Causation regarding establishing liability is just focusing on the loss the tortious act causes. Once one

[74] For simplification purposes we will refer in the following only to the passing-on of cartel overcharges to indirect customers. However, the reasoning could mutatis mutandis also be applied to cartel damages that were passed on to indirect suppliers.
[75] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28. See above IV. 2. a).
[76] Cf. *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [30]; *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [94], [99]. See for Germany KZR 75/10, *ORWI*, 190 BGHZ 145 at [58] (BGH).
[77] von Bar, *Gemeineuropäisches Deliktsrecht, Zweiter Band* (1999), pp.451–458; for the Netherlands, Franziska Weber, "Tackling pass-on in cartel cases: a comparative analysis of the interplay beetween damages law and economic insights" (2020) 16 ECJ 570, 581–585; Gregor Thüsing, *Wertende Schadensberechnung* (C.H. Beck, 2001), pp.257–332; not as an independent concept, but as one of many aspects when determining the loss suffered under French law Hans J. Sonnenberger, "Der Vorteilsausgleich—rechtsvergleichende Anmerkungen zu einer fragwürdigen Figur" in Friedrich G von Westphalen (ed.), *Lebendiges Recht von den Sumerern bis zur Gegenwart: Festschrift für Reinhold Trinkner zum 65. Geburtstag* (Verlag Recht und Wirtschaft, 1995), pp.727–747; for Austria, Karner, "§ 1295" in *ABGB Allgemeines Bürgerliches Gesetzbuch: Kommentar*, 3rd edn (2010), para.16.
[78] BGH KZR 4/19, [2021] *Schienenkartell V*, NZKart 44, 35, 49 with further references
[79] von Bar, *Gemeineuropäisches Deliktsrecht, Zweiter Band* (1999), p.453; for on overall weighing of normative aspects under French law Sonnenberger, "Der Vorteilsausgleich—rechtsvergleichende Anmerkungen zu einer fragwürdigen Figur" in *Lebendiges Recht von den Sumerern bis zur Gegenwart: Festschrift für Reinhold Trinkner zum 65. Geburtstag* (1995), p.729; for the Netherlands, Weber, "Tackling pass-on in cartel cases: a comparative analysis of the interplay beetween damages law and economic insights" (2020) 16 ECJ 570, 582; cf. for Austria, Karner, "§ 1295" in *ABGB Allgemeines Bürgerliches Gesetzbuch: Kommentar*, 3rd edn (2010), para.16.
[80] *Ireks-Arkady GmbH v Council of Ministers and Commission of the European Communities* (C-238/78) EU:C:1979:226 at [14] (ECJ); *DGV Deutsche Getreideverwertung und Rheinische Kraftfutterwerke GmbH v Council of Ministers and Commission of the European Communities* (Joined Cases C-241, 242 and 245-250/78) EU:C:1979:227 at [15] (ECJ); *Dumortier* (Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79) EU:C:1979:223 at [15]; *Dole Fresh Fruit International Ltd v Council of the European Union* (T-56/00) EU:T:2003:58; [2003] 1 C.M.L.R. 46 at [85] (Court of First Instance); see also *T. Port v Commission* (T-1/99) EU:T:2001:36 at [63]–[67] (Court of First Instance); confirmed by *T. Port v Commission* (C-122/01 P) EU:C:2003:259 at [15] (ECJ).
[81] *Hans Just I/S v Danish Ministry for Fiscal Affairs* (C-68/79) EU:C:1980:57; [1981] 2 C.M.L.R. 714 at [26] (ECJ); *Amministrazione delle Finanze dello Stato v San Giorgio SpA* (C-199/82) EU:C:1983:318; [1985] 2 C.M.L.R. 658 at [13] (ECJ); *Societe Comateb v Directeur General des Douanes et Droits Indirects* (Joined Cases C-192/95 to 218/95) EU:C:1997:12; [1997] S.T.C. 1006; [1997] 2 C.M.L.R. 649 at [21] (ECJ); *Kapniki Michailidis AE v Idrima Kinonikon Asphaliseon (IKA)* (Joined Cases C-441/98 and C-442/98) EU:C:2000:479; [2001] 1 C.M.L.R. 13 at [34] (ECJ); *Weber's Wine World Handels GmbH v Abgabenberufungskommission Wien* (C-147/01) EU:C:2003:533; [2004] 1 C.M.L.R. 7; [2005] All E.R. (EC) 224 at [94] (ECJ).
[82] In this direction *Ireks-Arkady* (C-238/78) EU:C:1979:226 at [14]; *DGV* (Joined Cases C-241, 242 and 245-250/78) EU:C:1979:227 at [15]; *Dumortier* (Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79) EU:C:1979:223 at [15]; *Dole* (T-56/00) [2003] 1 C.M.L.R. 46 at [85].
[83] This is the position of the BGH regarding the passing-on defence see KZR 75/10, *ORWI*, 190 BGHZ 145 at [56]; cf. s.33c(1) Sentence 1, 2 GWB.
[84] Hartmut Oetker, "§ 249" in Franz J. Säcker and others (eds), *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 8th edn (C.H. Beck, 2019), para.230.

widens the focus to benefits, it becomes clear that a normative correction of causation in fact regarding this loss incurred is just the reverse of a normative correction of causation in fact regarding benefits on the side of the passing-on defence. Justice and coherence demand to treat both causal links alike. In a counterfactual scenario the benefits caused need to be treated just alike the losses.[85]

3. German Federal Court and Dutch Supreme Court decisions

Two judgments by the BGH and the HR apply their respective domestic rules on the deduction of benefits and under certain circumstances deny the passing-on defence on normative grounds.[86] Austrian authors argue just alike[87] and normative assessments of the passing-on defence are reported from Spain as well.[88] According to BGH and HR it is decisive whether it is unlikely that indirect purchasers will claim the passed-on cartel overcharge. The normative correction of causation in fact regarding the passing-on defence, thus, avoids a de facto absence of liability.

a) German Federal Court: rails cartel

The BGH has in recent years noticeably shaped German cartel damages law through various judgments rendered in *Trucks* and *Rails* cartel cases. In *Rails V* the BGH ruled in favour of a normative correction of the passing-on defence, completely rejecting the passing-on defence of the competition law infringer.[89] The defendant had claimed that the cartel overcharge on the rails in question had been passed on by the claimant to the individual public transport passengers through an increase in ticketing costs. In its consideration whether the deduction of benefits would relieve the injuring party unreasonably the BGH also factored in the purpose of cartel damages claims. The cartel damages claims purpose is twofold: it serves to provide compensation for damages caused, but is alongside public enforcement also an integral part of competition law enforcement.[90] The public interest in ensuring undistorted competition requires in the reasoning of the BGH that the injuring party has to compensate all damages caused.[91] To avoid an impending de facto absence of liability if damages claims from the indirect purchasers are unlikely the BGH held that the passing-on defence may be denied in such cases.[92] This is particularly the case when losses are passed on to a multitude of end-consumers with scattered and very low individual damages.[93]

b) Dutch Supreme Court: gas insulated switchgear cartel

A similar reasoning to distinguish between damages in the legal and the economic sense is applied by the Dutch courts.[94] The HR held already in 2016 in a cartel damages action between TenneT and ABB stemming from the gas insulated switchgear cartel that benefits or advantages gained by the injured party have to be taken into account only "in so far as this is reasonable".[95] Therefore, according to the HR the passing-on defence can be raised successfully only insofar as this seems reasonable, thus, also introducing a normative correction to the causation in fact.[96] The ruling of the HR did not decide the case at hand, which was instead relegated back to the district court.

The district court dismissed the passing-on defence as it considered it to be unreasonable inter alia because the end-users that the damages were passed on to in this case were unlikely to claim the damage, whereas if the state-owned claimant TenneT received the damages, these would ultimately benefit all Dutch citizens, either through reduced electricity tariffs or a distribution of profits.[97] For these reasons, the court considered granting compensation to be in line with the EU law principle of effectiveness.[98] An appeal is still pending.[99]

[85] Cf. Clemens Höpfner, "§ 249", *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgesetz und Nebengesetzen* (ottoschmidt/de Gruyter, 2021), para.139. See also von Bar, *Gemeineuropäisches Deliktsrecht, Zweiter Band* (1999), pp.453–454.
[86] Cf. also European Commission, "Communication from the Commission—Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser", OJ C 267/13 fn.37, also referring to the *UK's Sainsbury's Supermarkets Ltd v MasterCard Inc* case.
[87] Stephan Polster and Anna-Zoe Steiner, "Zur Passing-on defense im österreichischen Kartellschadenersatzrecht" [2014] ÖZK 43, 47–48
[88] Weber, "Tackling pass-on in cartel cases: a comparative analysis of the interplay beetween damages law and economic insights" (2020) 16 ECJ 570, 585–590.
[89] KZR 4/19, [2021] *Schienenkartell V*, NZKart 44; also see the assessment of the passing-on defence by instance courts 8 O 13/17 (Kart), juris, [122] (LG Dortmund); OLG München U 3497/16, [2018] WuW 486, 233; LG Kiel 6 O 108/18, [2019] NZKart 440, 442.
[90] KZR 4/19, [2021] *Schienenkartell V*, NZKart 44, 50. Regarding the Union law purpose of cartel damages claims see only *Sumal* (C-882/19) [2021] Bus. L.R. 1755 at [36]–[50].
[91] KZR 4/19, [2021] *Schienenkartell V*, NZKart 44, 50. Cf. also KZR 35/19, *LKW-Kartell*, BGHZ 227, 84, at [50] (BGH).
[92] KZR 4/19, [2021] *Schienenkartell V*, NZKart 44, 51. See also KZR 19/20, *LKW-Kartell II*, at [100] (BGH).
[93] KZR 19/20, *LKW-Kartell II*, at [100] (BGH), KZR 4/19, [2021] *Schienenkartell V*, NZKart 44, 51. See already also Hauser, Otto and Vande Walle, "Private enforcement of competition law in Germany and the Netherlands", available at SSRN, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4066102*, [28.04.2022], forthcoming as "Chapter 17: Germany and the Netherlands" in *Research Handbook on Competition Law Private Enforcement in the EU* (Edward Elgar) .
[94] See also Hauser, Otto and Vande Walle, "Private enforcement of competition law in Germany and the Netherlands", available at SSRN, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4066102*, [28.04.2022], forthcoming as "Chapter 17: Germany and the Netherlands" in *Research Handbook on Competition Law Private Enforcement in the EU* (Edward Elgar). Regarding the dogmatics of the passing-on defence in Dutch civil law see 15/00167 NL:HR:2016:1483, paras 4.4.1. et seq (Hoge Raad). See for an in-depth analysis also including the TenneT/Alstom case Weber, "Tackling pass-on in cartel cases: a comparative analysis of the interplay beetween damages law and economic insights" (2020) 16 ECJ 570, 581–585.
[95] 15/00167 NL:HR:2016:1483, para.4.4.2–4.4.3 (Hoge Raad).
[96] Hauser, Otto and Vande Walle, "Private enforcement of competition law in Germany and the Netherlands", available at SSRN, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4066102*, [28.04.2022], forthcoming as "Chapter 17: Germany and the Netherlands" in *Research Handbook on Competition Law Private Enforcement in the EU* (Edward Elgar): The Court "seems to require a 'reasonable' link or 'reasonable' causality between the overcharge imposed by the cartel and the passing-on by the direct purchaser".
[97] 244194 NL:RBGEL:2017:1724, para.4.19–4.22 (Rechtbank Gelderland).
[98] 244194 NL:RBGEL:2017:1724, para.4.20.
[99] 200.220.417 en 200.222.927 NL:GHARL:2018:2186 (Gerechtshof Arnhem-Leeuwarden).

4. Compliance of normative corrections of the passing-on defence with EU Law

As the cartel damages claim is of Member States' law nature[100] the domestic rules on the deduction of benefits apply. EU law only sets up results to be achieved (see V.). According to EU law, the passing-on defence is in general consistent with the purpose of cartel damages claims. It safeguards the infringer from potentially having to compensate the same damage vis-à-vis the direct purchaser as well as the indirect purchaser or seller respectively. The full effectiveness of the compensation right does not demand an overcompensation (cf. art.12(2) Cartel Damages Directive). Allowing the passing-on defence, thus, does not relieve the tortfeasor unreasonably, provided that the direct as well as the indirect purchaser claim damages. However, denying the passing-on defence on a normative basis does not necessarily violate EU law either.

a) Compliance with art.101 TFEU

Denying the passing-on defence results in an overcompensation of the claimant to the detriment of the infringer. On the other hand, it ensures that the infringer compensates the total damages caused, thus, allowing for an effective sanction for infringements of arts 101 and 102 TFEU. Whether such a result is compatible with the objective of protection of art.101 TFEU can ultimately only be answered by the ECJ. However, the ECJ held already in *Courage* and *Manfredi* that national courts may take steps to prevent a claimant's unjust enrichment.[101] As the national courts may take those steps, the ECJ obviously does not consider it to be an art.101 TFEU requirement. Furthermore, the ECJ made it clear in *Manfredi* that even exemplary and punitive damages may be awarded, provided that the principle of equivalence is observed.[102] Therefore, an overcompensation of the injured party and thus a denial of the passing-on defence on a normative basis is compatible with art.101 TFEU as long as the principles of equivalence and effectiveness are adhered to.[103] It secures an effective application of art.101 TFEU with the imperfection of overcompensating some claimants.

b) Compliance with Cartel Damages Directive

However, there are some uncertainties regarding the compatibility of a denial of the passing-on defence on normative grounds with the Cartel Damages Directive which was not applicable *ratione temporis* in either of the cases referenced above. Departing from the *Manfredi* ruling, compensation under the Cartel Damages Directive "shall not lead to overcompensation [of the injured party], whether by means of punitive, multiple or other types of damages" (art.3(3) Cartel Damages Directive) and Member States shall lay down procedural rules to ensure this (art.12(2) Cartel Damages Directive). Further, the passing-on defence must be granted (art.13 Cartel Damages Directive). In light of these provisions, the denial of the passing-on defence on normative grounds seems to be violating the Cartel Damages Directive. However, Member States shall also avoid an "absence of liability of the infringer" (art.12(1) Cartel Damages Directive). How the conflict between these contradicting aims of the Directive is to be resolved in cases of a de facto absence of liability remains unsolved in the Directive.[104] Article 14(2) Cartel Damages Directive tries to avoid this problem in the first place by enabling indirect purchasers to claim on grounds of a statutory presumption in their favour that the cartel overcharge has been passed on to them. However, this approach will not remedy the rational indifference to assert a claim claim in all cases of marginal widespread damages. Introducing an effective collective redress mechanism could serve as a solution to avoid the absence of liability of infringers where end-consumers were harmed and would potentially enable full compensation (cf. art.3(1) Cartel Damages Directive). However, rec.13 of the Cartel Damages Directive explicitly states there is no Directive requirement to introduce such mechanisms.[105]

Considering that the ECJ constantly reiterates the role that private enforcement plays to ensure the full effectiveness of arts 101 and 102 TFEU and that rec.1, 3 and 4 of the Cartel Damages Directive also highlight this role of cartel damages claims, overcompensation of the claimant seems more acceptable also from a Directive perspective—in the light of primary law[106]—than an unjustified relief of the injured party.[107] Thus, we consider a refusal of the passing-on defence on normative grounds to avoid a de facto absence of liability to be compatible

[100] Hauser, "Case note on Court of Justice of the European Union, judgment of 12 December 2019 (Case C-435/18, Otis GmbH and Others v Land Oberösterreich and Others)" (2020) 69 GRURInt 554, 813–814; Hauser and Otto, "Legal Nature of Cartel Damages Claims in the EU" (2021) 14 G.C.L.R. 147, 148–151.
[101] *Courage* (C-453/99) [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [30]; *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] *Manfredi* (Joined Cases C-295/04 to C-298/04) [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [99].
[103] Cf. KZR 4/19, [2021] *Schienenkartell V*, NZKart 44, 52; Otto, "(Kartell-)Betroffenheit und Schadensallokation nach der 9. GWB-Novelle" [2019] ZWeR 354, 385–386; cf. also LG Dortmund 8 O 13/17 (Kart), [2018] NZKart 382, 388 (at [159]–[173]); only for causality considerations see Grothaus and Haas, "Besprechung EuGH Otis" [2020] EWiR 61, 62.
[104] Patrick Hauser, "Schienenkartell V: Einwand des passing-on bei Streuschäden u.U. ausgeschlossen" [2021] WRP Editorial Issue 2.
[105] See also Christian Kersting, "§ 33c GWB" in Ulrich Loewenheim and others (eds), *Kartellrecht*, 4th edn (C.H. Beck, 2020), para.15.
[106] The Directive, of course, needs to be in line with the primary law provisions of arts 101, 102 TFEU. Primary law sets the framework the EU legislator can fill out with secondary law. Unless secondary law infringes primary law, the ECJ is bound to secondary law and cannot rule on the basis of primary law only. In case of a collusion secondary law is to be interpreted in the light of primary law.
[107] Hauser, "Schienenkartell V: Einwand des passing-on bei Streuschäden u.U. ausgeschlossen" [2021] WRP Editorial Issue 2; Kersting, "§ 33c GWB" in *Kartellrecht*, 4th edn (2020), para.15.

with the Cartel Damages Directive.[108] However, lacking an acte clair this question needs to be referred to the ECJ once the Cartel Damages Directive is applicable.[109]

VII. Results and outlook

1) The *Otis* judgment does not preclude a normative restriction of causation in fact. Such a restriction is still required and necessary to prevent unlimited liability.
2) Since both the principle of effectiveness and the elements of the claim outlined by Union law merely constitute a control of results, it is not possible to interfere with the Member States' dogmatic approach. Consequently, the notion of "objective of protection" of the provision infringed can still be applied as a normative restriction of causation in fact in Austrian and German law, provided that the results required by Union law are achieved. This seems to be the understanding of the German Federal Court of Justice as well.[110]
3) Normative restrictions of causation in fact are also of importance in Union law. The ECJ will have to further elaborate on the direct causal link that it set up as a requirement to claim cartel damages. While the court seemingly dismissed the "objective of protection", this criterion might be helpful to establish normative corrections to causation in fact in order to prevent unlimited liability. In fact, the ECJ only dealt with the personal dimension of this criterion. The ECJ already made this personal scope of protection clear: Any individual can claim damages. Therefore, the *Otis* case was clear and a further discussion on the "objective of protection" not necessary. Further, any damage is compensable (objective scope of protection). Lastly, the ECJ has not finally decided yet upon the functional scope of art.101 TFEU. In order to limit liability under this perspective, it is to ask whether art.101 TFEU (inter alia) aims to protect against the risk that ultimately realizes in the loss compensation is claimed for.
4) Normative corrections of causation in fact also apply regarding the passing-on defence. Benefits of the person harmed, such as the passed-on cartel overcharge, can compensate losses if the benefits are also caused by the same tortious act and a normative assessment speaks in favour of a deduction. The latter can be denied if it is unlikely that damages will be claimed by the persons to whom the cartel overcharge was passed on. Such a normative correction of causation in fact regarding the passing-on defence, as it was concluded by courts, is in compliance with art.101 TFEU and the Cartel Damages Directive.
5) Denying the passing-on defence on normative grounds leads to a situation in which the direct purchaser can claim compensation for losses that have been passed on to the indirect purchaser. Going one step further, taking such "shifting of losses" into account, one could consider to entitle entities to claim losses caused to the general public and thus overgo the problem of identifying the entity that was actually damaged. In *Otis* AG Kokott contemplates to have a "representative of the public interest demand compensation for the harm sustained and making the injuring party pay the compensation into a fund that benefits the general public".[111] This idea shows similarities to the reasoning of the district court in TenneT/ABB, justifying a denial of the passing-on defence inter alia because granting damages to the state owned TenneT would ultimately benefit the Dutch taxpayers harmed. In an even broader understanding such a form of private enforcement through representatives (of the public interest) could be extended to cover sustainability considerations under the Green Deal to claim financial compensation for negative externalities to be borne by the public.

[108] Hauser, Otto and Vande Walle, "Private enforcement of competition law in Germany and the Netherlands", available at SSRN, *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4066102*, [28.04.2022], forthcoming as "Chapter 17: Germany and the Netherlands" in *Research Handbook on Competition Law Private Enforcement in the EU* (Edward Elgar). The BGH KZR 4/19, [2021] *Schienenkartell V*, NZKart 44, 53 reached the same conclusion obiter dicta without ruling on the compatibility with the Directive *ratione temporis*. More doubtful, but considering it possible Weber, "Tackling pass-on in cartel cases: a comparative analysis of the interplay beetween damages law and economic insights" (2020) 16 ECJ 570, 591–593.
[109] Andreas Weitbrecht, "Die Passing-on Defense nach Schienenkartell V" [2021] WuW 86, 89.
[110] KZR 24/17 *Schienenkartell II* [2020] NZKart 136, at [24].
[111] Opinion of AG Kokott in *Otis* (C-435/18) EU:C:2019:651 at [130].