Chapter 9: Causation

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Abstract

Causation is an essential feature of damages cases for infringements of competition law. The Chapter explores the conceptual foundations of causation in competition law in this context, with the aim to provide a general introduction that would be useful for understanding the important challenges that the requirement of causal link poses to competition law enforcers, judges or competition authorities, in particular in a complex factual setting. We explore the interplay between the national and EU levels in regulating legal causation in competition law damages cases, the presumptions that have developed in order to facilitate evidence of a causal link, the thorny issue of establishing causation for the indirect victims of anticompetitive conduct, and new challenges in establishing the causal link, in particular the counterfactual test in situations of factual uncertainty, the complexities of establishing causation on the basis of economic and econometric evidence as well as data science evidence. Finally, the Chapter delves into the analysis of the legal aspects for the quantification of damages and some related issues for passing on.

1. Introduction

The requirement of causation is a common feature of tort law in the EU Member States for damages actions and in EU Law relating to liability for infringements of Articles 101 and 102 TFEU. The application of the national requirements for causation is subject to the double discipline of the principles of equivalence and effectiveness, and in particular the latter may "influence" notions of causation as existing in national civil law and eventually lead to their clarification as a matter of EU law[1]. The principal effort of EU harmonization in this area, the Damages Directive has mostly stayed silent on the nature of the causality requirements (strong or weak) in the context of a competition damages claim. It is simply observed in the Directive that the issue of the causal relationship "is not dealt with in this Directive" and makes explicit reference to national rules and procedures to deal with this issue, under the dual framing of the principles of effectiveness and equivalence, following the well-established case law of the EU Courts on this issue[2]. Yet, for the Directive, causation is an essential element of the damages action [3]. This is probably because of important "cultural" differences in the national tort law systems and the way they assess causation, and the difficulties arising out of the need to integrate the economic concept of causality to a common legal core.

Causation is also only briefly mentioned in the Practical Guide on quantifying harm, as essentially a matter for national law[4], in the absence of rules at the EU level on this matter. It is also noted in this document that national requirements on causality or proximity that link the illegal act and the harm should observe the principles of equivalence and effectiveness However, the exact application of these two principles, in particular the second one, and the nature of the obligations they impose to Member States' legal systems remain unclear, the only limit so far explicitly mentioned being that victims of anticompetitive practices enjoying standing should not be, as a group, denied the possibility

[1] Commission Staff Working paper, Annex to the Green paper, Damages for breach of the EC antitrust rules, COM(2005) 672 final, para. 276.
[2] Directive, Recital 11.
[3] Ibid.
[4] Commission Staff Working Document – Practical Guide Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440.

to claim damages, because of a restrictive interpretation by the national court of domestic causation requirements.

The *Ashurst study on the conditions of claims for damages* also acknowledged that "the test of causation is approached in very different ways in the Member States"[5]. Indeed, a cursory view of the different general tort law regimes of the most significant, in terms of the number of damages actions, EU Member States show important differences as to the choice of causation in fact tests and the interaction between causation in fact and the scope of liability rules (causation in law).

However, there has been the last few years some effort to announce broader principles about causation in the jurisprudence of the EU Court. This is particularly important as some categories of consumers, such as indirect purchasers, umbrella customers and counterfactual (potential) customers, may find it difficult to establish a direct causal link between the anticompetitive conduct and the damage they suffer, in view of the restrictive approach followed in certain European tort law systems on the causal link required by domestic tort law. Identifying the causation nexus in order to trace the overcharge may also prove impossible in some cases in which the anticompetitive practice affected various successive market levels, sometimes not vertically linked to the infringer. The twin concepts of causation and damage apportionment, in practice, have the potential to play the filtering or limiting function that other procedural and substantive rules have played in the development of private actions for damages in US antitrust law. The most recent jurisprudence of the CJEU has been filling these gaps and employing the principle of "full effectiveness" of EU law and the right to claim damages, thus proceeding to some effort of harmonization.

The first Section of the Chapter explores the conceptual foundations of causation in competition law, in the context of private enforcement and actions for damages, with the aim to provide a general introduction that would be useful for understanding the important challenges that the requirement of causal link poses to competition law enforcers, judges or competition authorities, in particular in a complex factual setting. The next Section delves into the way competition law has dealt with causation so far, both from the perspective of the Damages Directive and the case-law of the EU courts in enforcing Articles 101 and 102 TFEU. The following Section examines new challenges for establishing causation in the context of a competition law case, in particular looking to the way the counterfactual test has been interpreted and implemented by the courts, as well as to the specificities of proving causation with the use of social science evidence (economics or econometrics) or Big Data/computational methods. The legal aspects of the quantification of damages and passing on are examined in the next Section. The final Section concludes.

[5] Ashurst, Study on the conditions of claims for damages in case of infringement of EC competition rules, Comparative Report, August 31, 2004, pp. 73-76.

2. Causation in Competition Law: A Primer

1. An Introduction to Legal Causation[6]

Scholars, practitioners, and judges have provided multiple definitions of the causal link in law[7] although within legal proceedings, causation is generally considered a monistic concept. The law often relies on a single definition of causation to construe a judicial decision. Otherwise, one may reach the paradoxical outcome of having found a causative link and the lack of it simultaneously because parties relied on two valid definitions of the same concept.

Causative events can either refer to a general class or specific events[8]. General causation asks whether a type of action can produce an outcome. For instance, can a cartel on car parts cause an economic harm to final customers (car buyers)? The question is usually answered through causal associations between the alleged cause and the damage[9]. Often, statistics and econometrics establish the link between the abstract action (a cartel) and a general consequence (economic damage). Specific causation asks whether action x caused harm y. Did the cartel on car parts x cause the economic harm z to the consumer-claimant y? In this case, it is indispensable to establish a factual and legal connection between the action and the damage on a specific occasion[10].

Judges make their decisions according to specific causation, as what matters for the attribution of liability is whether the defendant's action caused the actual damage, not if potentially it is able to do so. However, the role of general causation is to provide an important part of the evidence for specific causation. If the former is not possible, neither will be the latter. Disputes over general and specific causation hence arise in case of causal uncertainty, which is when it is unclear whether a class of events can cause a certain damage (uncertainty over general causation) or it is not possible or particularly difficult to

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[6] This issue is examined in great detail in I. Lianos, P. Davis & P. Nebbia, *Damages Claims for the Infringement of EU Competition Law* (OUP, 2015), Chapter 4; Ioannis Lianos, Causal Uncertainty and Damages Claims for the Infringement of Competition Law in Europe, (2015) Yearbook of European Law 170 and Claudio Lombardi, *Causation in Competition Damages Actions* (Cambridge University Press 2020) Chapters 1-2.

[7] HLA Hart and Tony Honoré, *Causation in the Law* (Oxford University Press 1985); Michael S Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford University Press 2010); Ken Oliphant, 'Causation in Cases of Evidential Uncertainty: Juridical Techniques and Fundamental Issues' (2016) 91 Chi.-Kent L. Rev. 587; Richard A Epstein, 'Causation and Corrective Justice: A Reply to Two Critics' (1979) 8 The Journal of Legal Studies 477.

[8] HLA Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 1985) 41 ff. For an analysis of general and specific causation, see John Leslie Mackie, *The Cement of the Universe: A Study of Causation* (Clarendon Press, 1980) 29 ff.

[9] Lara Khoury, *Uncertain Causation in Medical Liability* (Bloomsbury Publishing, 2006) 50.

[10] Sandy Steel, *Proof of Causation in Tort Law* (Cambridge University Press, 2015) 6.

prove the individual connection between the harm claimed and the defendant's action (uncertainty over specific causation).

The principal function of legal causation is to explain the occurrence of particular events, to control events, and to attribute moral responsibility to agents whose action has provoked the events. The idea is that among the variety of relationships between events (e.g. agency and harm), only some will be considered to constitute a legally causal relationship. Which relationships are selected as causal, will depend on the aims pursued by the law. Legal causation may thus serve two main purposes: (i) it is backward looking/explanatory; and (ii) it is attributive (e.g. establishing the responsibility of agents for the outcomes that follow their actions). When the concept of causation is used for the first, explanatory, purposes, it is usually referred to as *causation in fact.* When it is employed for the second, attributive, purpose, causation is usually referred to as *causation in law*. Determining legal causation is influenced by policy objectives. For instance, the causal link between the infringement and the loss cannot be too speculative or too remote. It must be reasonably foreseeable.

These two functions are not always pursued when one employs the concept of causation in social science. For example, statistical causality adopts an empirical view of causation focusing on regulatory or constant conjunction as a necessary condition for causation. In general, this would not be considered as sufficient to establish legal causation, as causality employed in science usually relies on a causal generalization (that events of a type similar to event A almost always or regularly occur jointly or simultaneously with events of a type similar to event B, without it being possible to substantiate this finding for *all* the events of types A and B as there might be some instances in which this conjunction cannot be observed). The legal concept of causation would require instead a *concrete instantiation* of a causal law on the *particular* occasion, regarding the existence of a causal link between the specific event A and the specific event B.

On the basis of the importance of a finding of causation on particularised evidence, we distinguish between individualizing and generalising theories of causation[11].

An alternative account to the all-or-nothing approaches has been provided by the *causal proportional theories of liability*[12]. A first method determines responsibility in relation to the probability of the action to cause the specific harm. The judge determines probability *ex post* and establishes the causal contribution of the defendant's action on a scale of 1 to 100, and attributes responsibility according to such contribution[13]. A second approach examines the creation of risk of causation of future harm. This account posits that it is possible to examine the *ex ante* increase in risk caused by the defendant's action to

[11] Ioannis Lianos, Causal Uncertainty (n6), 170.
[12] For a discussion, see Ioannis Lianos, Peter Davis & Paolisa Nebbia, (n6), 87-90. See also, in particular, Israel Gilead and others, *Proportional Liability: Analytical and Comparative Perspectives* (De Gruyter, 2013). See also,
[13] Ibid 50.

determine their responsibility for the 'derivative harms', such as the prevention costs, but also for the lost chances[14].

Finally, we need to distinguish causation from alternatives to causation in fact, such as the establishment of *causal presumptions* and the reversal of the burden of proof[15]. The relative uncertainty which may characterize a complex causal inquiry has led legal doctrine to develop auxiliary methods of establishing legal causation, without proceeding to an in-depth analysis of factual causation, according to the theories mentioned above. One may advance three possible instances of causation ersatz: the 'scope of the rule' doctrine, which derives from the *Lex Aquila*, the concept of 'loss of chance' (or 'loss of opportunity') and the interrelated concept of 'causal proportional liability', and finally the development of factual presumptions or procedural alternatives. Although the use of the term 'ersatz' to refer to these concepts may not be entirely correct, as some, such as the "scope of the rule" doctrine, do not dispense with a separate analysis, this analysis ultimately depends on the meaning provided to the concept of factual causation by the 'scope of the rule' doctrine. This involves the existence of a link between the interests affected and those protected by the rule/norm violated.

2. The emergence of the causal requirement in the private damages for infringement of EU competition law

Starting with *Manfredi,* and drawing on the principle of procedural autonomy, the CJEU had ruled that "it is for the domestic legal system of each member State to prescribe the detailed rules governing the exercise of the [right] to compensation, including those on the application of the concept of causal relationship"[16]. Recital 11 of Directive 2014/104 also stipulated that national rules governing the exercise of the right to compensation , including the notion of causal relationship must observe the principles of effectiveness and equivalence. However, with time, the CJEU has shed light on some of the characteristics of the causal connection for antitrust actions. It remains still to be determined how the causal concepts so far sketched out by the EU courts[17]. National courts follow different paths to determine causation. Whilst each one of them may equally satisfy the requirements set by the CJEU, it is important to appreciate their differences and similarities within the legal system in which they operate[18].

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[14] Ibid 51 ff.
[15] For a discussion, see Ioannis Lianos, Peter Davis & Paolisa Nebbia, (n6), 90-91.
[16] Joined cases C-295/04 to C-298/04, Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA et al., ECLI:EU:C:2006:461, para. 64.
[17] A direct cause that contributed to the harm, which was a foreseeable outcome of the anticompetitive action.
[18] This section briefly illustrates three different approaches to the finding of causation and its proof, but it does not aim to be exhaustive or provide the detail of these national laws. For more information, see Lombardi (n 6) Chapter 2.

(a) Diversity of national rules regarding causation

In England, Wales, and Scotland,[19] the right to seek redress in a competition damages action results from the defendant's failure to comply with a statutory obligation. This is a tort conceptually independent from the general tort of negligence[20]. However, the definition of causation and the rules applicable to its proof are, by and large, the same as in torts. The Regulations 2017 on *The Claims in Respect of Loss or Damage Arising from Competition Infringements*[21] has implemented the EU Directive 2014/104, without, however, including a specific definition of causation. The factual connection is established on the basis of the but-for test[22] and the standard for its proof is 'more probable than not'[23]. Causation in law is generally established using the concept of remoteness[24], whereby the defendant is responsible only if the damage was a foreseeable consequence of the breach of duty irrespective to its extent[25]. It makes no difference what form the damage takes, even if it is unusual, as long as it is a foreseeable outcome of the unlawful conduct[26]. The cause is too remote when it could not have been foreseen by a "reasonable person" [27]. The reasonable foreseeability of damages test can be used both backward and forward to identify causation and liability, as they both determine the defendant's culpability[28]. To put it another way, while factual causation demonstrates the link between the injury and the activity that caused it, culpability indicates whether the agent could have foreseen or had to foresee the causation of a future harm and failed to do so negligently or intentionally. Although they serve different purposes, causation and culpability are therefore related. Determining culpability is the legal premise to justify the generation of a moral and legal

[19] We are aware of the fact that the UK is not part of the EU anymore, but it is a particularly useful case study to illustrate different approaches to the actual definition and proof of causation in courts. The rules of causation in these jurisdictions are largely the same. Most of the cases cited below refer to the English law but Scots law has developed equivalent principles, see McWilliatm v Sir William Arrol & Co Ltd 1962 SC (HL) 70; Porter v Strathclyde Regional Council 1991 SLT 446; Binnie v, Rederij Theodoro BV 1993SC 71, Martin A Hogg, 'Re-Establishing Orthodoxy in the Realm of Causation' (2007) 11 Edinburgh Law Review 8.

[20] Simon Deakin, Angus Johnston and Basil Markesinis, *Markesinis and Deakin Tort Law* (Oxford University Press, 2012) 294.

[21] Competition Act 1998 and Other Enactments (Amendment), SI 2017/385.

[22] Deakin, Johnston and Markesinis (n 20) 223. *Barnett* v *Chelsea & Kensington Hospital Management Committee* [1968] 1 All ER 1068.

[23] Richard Goldberg, *Perspectives on Causation* (Hart Publishing, 2011) 23, see infra Chapter 5.

[24] See Anthony M Honoré, 'Causation and Remoteness of Damage' in A. Tunc (ed), *International Encyclopedia of Comparative Law*, vol 6 (Mohr Siebeck 1983) 26 ff; Claudio Lombardi, Foreseeability of the Harm in Competition Damages Actions' (2018) 14 GCLR.

[25] *Re Polemis and Furness, Withy & Co* [1921] 3 KB 560; *Overseas Tankship (UK) Ltd* v *The Miller Steamship Co Pty (The Wagon Mound No2)* [1966] UKPC 1 (UKPC (1966)); *Overseas Tankship (UK) Ltd* v *Morts Dock & Engineering Company Ltd* [1961] UKPC 1 (UKPC (1961)).

[26] *Bradford* v *Robinson Rentals Ltd* [1967] 1 All ER 267; *Hughes* v *Lord Advocate* [1963] AC 837; *Doughty* v *Turner Manufacturing Company* [1964] 1 QB 518; *Smith* v *Leech Brain & Co* [1962] 2 QB 405; *Gabriel* v *Kirklees Metropolitan Council* [2004] EWCA Civ 345.

[27] Sarah Green, *Causation in Negligence*, (Bloomsbury Publishing, 2015) 134. See also *Fulton Shipping Inc of Panama* v *Globalia Business Travel SAU (formerly Travelplan SAU) of Spain* (2014) EWHC 1547 (Comm).

[28] This does not mean that the examination should be ex ante or ex post but only reflects the direction that the analysis of the remoteness of the damage has to take.

duty to compensate, particularly in competition law infringements where a number of different economic actors may intervene or contribute to the production of a damage. Alternatively to the concept of remoteness, English courts have also used the adequate causation test, borrowed from German jurisprudence[29].

The German Law against Restraints of Competition (ARC)[30], similarly to the UK law, has no special rules on the assessment of causation. Therefore, the general principles of tort law continue to apply. The *conditio sine qua non formula* (*Äquivalenztheorie*) determines the existence of factual causation[31]. In addition to this test, German scholars developed the adequate causal theory approach (*Adäquanztheorie*)[32], to determine compensable losses. A cause is adequate "if it has in a general and appreciable way enhanced the objective possibility of a consequence of the kind that occurred"[33]. Thus, the test builds on the proof of general causation to infer causation in the specific case. This approach has been often criticized for excessively relying on general rather than specific causation. Furthermore, the test has proven unreliable in case of scarce general probability of realisation of the event[34].

Challenged by the downsides of the *Adäquanztheorie*, German scholars formulated the 'scope of the rule'[35] theory or 'legal policy theory' (*Schutzzweck der Norm*). This approach maintains that the injury claimed, in order to be compensable, should be protected by the specific rule of law that was infringed[36].

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[29] It is although sometimes difficult to neatly define the test used by a court as it is admittedly more fact based and rooted in arguments on the facts. For example, the courts in Stellantis (23) and Royal Mail (35 and 215) have defined their tests as of proximate legal causation.

[30] Act against Restraints of Competition 26 June 2013 (Bundesgesetzblatt (Federal Law Gazette) I, 2013, p. 1750, 3245), as last amended by Article 4 of the Act of 9 July 2021 (Federal Law Gazette I, p. 2506).

[31] Helmut Koziol, *Basic Questions of Tort Law from a Germanic Perspective* (Jan Sramek Verlag Vienna, 2012) 133–134; Marta Infantino and Eleni Zervogianni, *Causation in European Tort Law* (Cambridge University Press 2017) 103.

[32] Initially postulated by Carl Ludwig von Bar, *Zur Lehre von Versuch und Theilnahme am Verbrechen* (Hahn, 1859), and Johannes Von Kries , *Die Principien Der Wahrscheinlichkeitsrechnung* (JCB Mohr-Siebeck 1886) – later developed by Träger, Ludwig, *Der Kausalbegriff Im Straf- Und Zivilrecht* (Keip 1904), and refined by Guido Calabresi, 'Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.' 49 *The University of Chicago L. Rev.*, 1975, 69–108.

[33] BS Markesinis and Hannes Unberath, *The German Law of Torts: A Comparative Treatise* (Hart Publishing, 2002) 107. For an application of the *adäquanztheorie* in competition law, see OLG Stuttgart, 22.05.1998, 2 U 223/97 NZV 1999, 169.

[34] Marta Infantino and Eleni Zervogianni, *Causation in European Tort Law* (Cambridge University Press 2017), 114 and 411.

[35] This theory is applied within the framework of § 823 II BGB (breach of statutory duty); § 839 (governmental liability); and § 823 I as regards safety duties (*Verkehrspflichten*), the right to business (*das Recht am Gewerbebetrieb*) and the general personality right (*allgemeine Persönlichkeitsrecht*). In competition law, see eg. BGH, 12.05.1998, KZR 23/96 NJW-RR 1999, 189; BGH, 04.04.1975, KZR 6/74 NJW 1975, 1223; OLG Bremen, Az. U (Kart) 1/88, [1989] ZIP 1085.

[36] It is defined, within the notes to the art. 4:101 of DCFR as 'an obligation to make reparation will only arise, if the damage claimed, according to its type and its origin, stems from a sphere of danger which the infringed norm was enacted to protect against'; see Christian von Bar, *Non-Contractual Liability Arising Out of Damage Caused to Another (PEL Liab. Dam.)* (Sellier, 2009) 759.

As the previous two legal systems, also the French liability system for competition law damages actions is based on general tort law rules complemented by French Commercial Code (FCC). The but-for test determines the causation in fact.[37] Whilst the legal causal link is defined according to Article 1151 CC whereby only the 'immediate and direct consequences' of the unlawful conduct are subject to compensation[38]. To determine what is an immediate and direct consequence of a breach of the law, courts have used the German theory of adequate causation[39], or relied on a discrete definition 'certain and direct' in the specific case[40].

(b) Proving causation in national courts

Proof rules of causation are directly linked to the causal concepts used, as they provide the basis on which the proof of causation can be construed. The causal link is not a fact. It is, instead, a relationship between two known facts, also defined as "an empirical relation between concrete conditions"[41]. As a result, causation can be proven using logic, statistics, and common sense, and it must be supported by both broad scientific theories and detailed justification of the single causation. These logic tools are used in competition law to establish conclusions based on statistical and economic facts, and they are an important element of the range of proof methods available. In general, the plaintiff can establish the existence of a causal link by presenting documentary evidence or gaining it through inspections, witness testimony or interrogation, and expert opinions. When the claimant's plead is based on certain theories (such as passing-on or umbrella effects), the evidence might be used to create a presumption of harm. As a result, causal generalisations may lead to presumptions that shift the burden of proof to the claimant.

Inferential reasoning finds application to reach a preliminary or *prima facie* conclusion regarding the anticompetitive conduct's causative effects. What constitutes enough factual evidence to establish an inference varies from case to case, but there must be enough factual information to establish a "reasonable inference of proximate cause"[42]. European courts tend to use different standards of proof (or standard of persuasion) intended as the level of belief that the judge has to reach to establish that some evidence has probative value[43].

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[37] Based on Article 1382 of the French civil code requiring a 'direct cause'.

[38] François Terré, Philippe Simler and Yves Lequette, *Droit civil: Les obligations* (Dalloz, 1999) 592; Duncan Fairgrieve and Florence G'Sell-Macrez, 'Causation in French Law: Pragmatism and Policy' in Richard Goldberg (ed), *Perspectives on Causation* (Hart Publishing, 2011) 113.

[39] Jacques Ghestin and others, *Traité de droit civil: Les conditions de la responsabilité* (LGDJ 1998).

[40] Walter Van Gerven, Jeremy Lever and Pierre Larouche, *Cases, Materials and Text on National, Supranational and International Tort Law* (Hart, 2000) 424.

[41] Richard W Wright, 'Proving Causation: Probability versus Belief' in Richard Goldberg (ed), *Perspectives on Causation* (Hart Publishing 2011) 205.

[42] Judgment - Stellantis NV v NTN Corp, para 23.

[43] For a general overview, see Richard Glover, *Murphy on Evidence* (Oxford University Press 2013) 74; Lombardi (n 6) Chapter 5.

The elusive nature of the economic harm caused by an infringement of competition law has driven, however, courts to adapt the traditional tort law approaches to causation and its proof. The anticompetitive harm is a pure economic loss, thus the causal nexus between the infringement and the harm does not find an explanation in the physical world, as for injuries and damage to property. In addition to this, the harm may also include the action of a third party, which intervenes without 'breaking the causal chain'[44], for instance due to passing-on of a price overcharge or to 'umbrella effects'. This pure economic loss is sometimes passed on or mitigated. In other cases, the same economic harm may have multiple causes, thus again adding complexity to the finding of a causal connection between the harm claimed and the anticompetitive conduct. Also for this reason, courts include extensive demonstrations of the causal requirements in antitrust damages claims characterised by causal uncertainty.

The factual connection between the unlawful conduct and the harm can be either determined through inferences or presumptions or on the basis of the but-for test[45]. In addition or alternatively to the counterfactual but-for test courts can use mechanistic accounts of causality whereby the judge establishes the 'causal chain' by connecting all the events that led from the anticompetitive behaviour to the harm.

In either case, there can be a 'superseding' or intervening event, which 'breaks the causal chain'.[46] There is an intervention in the flow of events when a superseding cause has independent causal force. According to the CJEU, it is not necessary for the intervening action to be the only cause. Rather, the judge should be able to establish that the harm is not directly connected to the unlawful action, as a consequence of the intervening event[47]. Another way to determine whether an activity breaks the chain of causation is to assess whether the conduct is "the result of the exercise of a choice of action substantially independent of the breach of duty"[48]. In this case, the defendant is responsible only for the injury caused regardless of the consequences created by the subsequent event[49]. If the negligent act of the claimant has not independent causal force but interferes with the causation of damages, the judge has the power to reduce the compensation accordingly (i.e. contributory negligence)[50].

The mere demonstration of a connection between the conduct and the claimant's action, however, is not sufficient. The plaintiff has to plead and prove an economic harm causally connected to the infringement So that, in a follow-on action, the German Supreme

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[44] That is to introduce an independent and sufficient cause of the damage.

[45] Deakin, Johnston and Markesinis (n 20) 223. *Barnett* v *Chelsea & Kensington Hospital Management Committee* [1968] 1 All ER 1068.

[46] William Lloyd Prosser, *Handbook of the Law of Torts* (West Pub Co, 1971) 244 ff.; Michael S Moore, *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford University Press 2010) 102 ff.

[47] European Union v Plasticos Espanoles SA (ASPLA) (C-174/17 P).

[48] Arkin v Borchard Lines Ltd (Permission to Appeal, par. 14.

[49] *Baker* v *Willoughby* [1969] UKHL 8, [1969] 3 All ER 1528.

[50] Ibid.

Court has established that it is possible to infer the causation of harm if the plaintiff has acquired the goods subject to the infringement decision of the antitrust authority. However, there is no prima facie proof of loss sustained by the plaintiff, and thus no automatic causal inference, in the absence of sufficiently typical facts from which it may be deduced with a high degree of probability that there was a cartel-related price effect[51].

When causation is uncertain due to multiple causal events concurring to the generation of the economic harm, judges have used several scientific methods to establish the causative link between the harm and the unlawful action[52]. In competition damages actions, this may include forensic accounting, regression analysis and similar expert assessment to determine the likelihood and the extent of the damage caused to the claimant[53].

However, the expert evidence submitted cannot simply rely on broad economic theory to support a reasonable inference of causation[54]. These techniques – especially when they imply the mere demonstration of causation through economic theories - should not be equated to proof of causation. This would otherwise mean to conflate the proof of general causation with specific causation[55]. Moreover, accepting the proof of causation only through general theories would de facto imply a reversal of the burden of proof onto the defendant that would be charged with a heavy *onus probandi*. Thus, it is generally required a "sufficient degree of probability" [56] or finding the 'most likely' chain of causation[57], to discharge the burden of proof. Despite some differences in the standards of proofs adopted by national courts[58], it seems that national judges apply a standard of proof establishing the causal link 'with a sufficient degree of probability' or 'relative plausibility' as well as a lower standard that does not make it impossible or excessively difficult to exercise the right to compensation of damages[59].

3. Developing presumptions of causal link in EU law

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[51] See also BGH, NZKart 2019, 101 para. 57 – Rail Cartel I.

[52] *McGhee* v *National Coal Board*, [1972] 3 All E.R. 1008, 1 W.L.R. 1.

[53] See for example the discussion in *Royal Mail Group Limited v Daf Trucks Limited & Others BT Group Plc & Others v Daf Trucks Limited & Others* CAT [2021] CAT 10, 5ff.

[54] Royal Mail, para 36, and Judgment - Stellantis NV v NTN Corp, para 36.

[55] See below, Sections … and …, for more details on the burden of proof.

[56] Case 61/80 *Coöperatieve Stremsel- en Kleurselfabriek* v *Commission* ECLI:EU:C:1981:75 para 14.

[57] Case C-12/03 P *Commission of the European Communities* v *Tetra Laval BV ECR* [2005] ECR I-987. Although these are public enforcement cases, it has been pointed out that the civil law standard may be the same but not higher than the administrative standards applied in EU competition cases, see ECtHR in *Ringvold* v *Norway*, no. 34964/97, ECHR 2003-II, § 38 and *Lundkvist* v *Sweden* (dec), no. 48518/99, ECHR 2003-XI.

[58] See Lombardi (n 6) Chapter 5.

[59] For instance, re the use of economic theory, English courts have required a "plausible factual foundation for the application of the broad economic theory" for there being a causative connection, see *Royal Mail Group Limited v Daf Trucks Limited & Others BT Group Plc & Others v Daf Trucks Limited & Others* CAT [2021] CAT 10 para 43.

Rules concerning the existence of presumptions or the allocation of the burden of proof may also introduce policy considerations in the assessment of causation in fact, eventually operating as alternatives to it (ersatz to factual causation). Causal presumptions or evidential short-cuts constitute an alternative tool to dispose of difficult factual causation issues. The reversal of the burden of proof may also constitute an additional ersatz of causation in fact. Inevitably, principles of public policy exercise a significant influence in the design of these causal presumptions, which may lead to inferences of a causal link or a reversal of the burden of proof to the defendant, dispensing the claimants of any real obligation to show a factual causal connection between a conduct and a harm or loss suffered. In particular, causal presumptions avoid the hurdle of establishing a direct causal link between the conduct of the defendant and a hypothetical but probable loss. The limited institutional competence of judges argues against such presumptions being established by the judiciary, although a significant experience with a certain type of cases and evidence may lead the judiciary to develop inferences of causation, under specific circumstances. The legislator may nevertheless take the initiative to establish causal presumptions in order to facilitate proof for certain categories of claimants. Inevitably, policy considerations and distributive justice concerns, in particular, may explain the choice for such an approach.

With regard to the use of presumptions in private enforcement, the Damages Directive puts in place a presumption of causality for the benefit of indirect purchasers only, in view of the difficulties of "consumers or undertakings that did not themselves make any purchase from the infringer to prove the scope of that harm"[60]. Hence, as it is explained by the Directive, "taking into account the commercial practice that price increases are passed on down the supply chain[61]", it is "appropriate to provide that, where the existence of a claim for damages or the amount to be awarded depends on whether or to what degree an overcharge paid by the direct purchaser of the infringer has been passed on to the indirect purchaser, the latter is regarded as having brought the proof that an overcharge paid by that direct purchaser has been passed on to his level, where he is able to show *prima facie* that such passing-on has occurred, unless the infringer can credibly demonstrate to the satisfaction of the court that the actual loss has not or not entirely been passed on to the indirect purchaser"[62]. The indirect purchaser may carry more easily the burden of proof of the existence and scope of pass on by simply providing *prima facie* evidence that "(a) the defendant has committed an infringement of competition law; (b) the infringement of competition law resulted in an overcharge for the direct purchaser of the defendant; and (c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them"[63].

The Damages Directive also sets up a causal presumption for cartels in order to "remedy the information asymmetry and some of the difficulties associated with

[60] Damages Directive, Recital 36.
[61] Damages Directive, Article 16(1).
[62] Damages Directive, Recital 36.
[63] Damages Directive, Article 16(2).

quantifying antitrust harm, and to ensure the effectiveness of claims for damages"[64]. As explained in the Directive,

> "it is appropriate to presume that cartel infringements result in harm, in particular via an effect on prices. Depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel. This presumption should not cover the concrete amount of harm"[65].

Such presumption may result from the Commission's reliance on studies indicating that only 7 per cent of cartels do not lead to overcharging and more generally enforcement priorities[66]. Accordingly, the Directive requires Member States to establish a presumption that cartel infringements cause harm, also recognizing the right to the infringer to rebut this presumption[67].

This presumption came again to the attention of the CJEU in the recent Opinion of AG Rantos in the *Volvo* case[68]. AG Rantos found that Article 17(2) of Directive 2014/104, constitutes a rule closely linked to the origin, attribution and extent of the non-contractual liability of undertakings which have infringed Article 101 TFEU by their participation in a cartel and could therefore be qualified as a substantive provision of EU law; thus it cannot apply retroactively to 'situations existing' before the entry into force of the Damages Directive[69]. Hence, if the facts occurred prior to the transposition of the Directive, national courts should apply national law regarding causation in this context, but always in conformity to the principles of equivalence and effectiveness[70]. At this stage, and in view of the existing EU harmonization rules of the Damages Directive, it might go way too far to claim that the principles of equivalence and effectiveness would require the development of additional EU legal presumptions on the basis of the EU jurisprudence only, as this might set limits to the procedural autonomy of member states and the need to develop a judicial space for experimentation by taking advantage of the diversity of the legal systems of the Member States, with the aim to guarantee a more effective system of private enforcement that would fully protect the right to damages.

4. Indirect Victims of Anticompetitive Conduct and the interplay between national and EU law on causation: *Kone*, *Skanska* and *Otis Gesellschaft*

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[64] Damages Directive, Recital 42.
[65] Damages Directive, Recital 42.
[66] See, Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf , 44, referring to the results of an External study prepared for the Commission 'Quantifying antitrust damages' (2009), pages 88 *ff.*, available at http://ec.europa.eu/competition/antitrust/actionsdamages/index.html (finding that in 93 % of all cartel cases considered, cartels do lead to an overcharge).
[67] Damages Directive, Article 17(2).
[68] Opinion of AG Rantos in Case C-267/20. Volvo and DAF Trucks, ECLI:EU:C:2021:884.
[69] Ibid., para. 81 & 83.
[70] Ibid. 140.

The compensation of indirect victims of anticompetitive conduct raises difficult issues relating to causation.

One of the first issues explored by the EU Courts has been the interplay of EU and national competition law in view of the difficulties some theories of domestic law, in particular the German (and Austrian) "scope of the rule" doctrine ("*Schutzzweck der Norm*"), posed for limiting an expansive view of the causal link with regard to the indirect "victims" of anticompetitive conduct[71]. Linked to the Roman law doctrine of *Lex Aquilia*, the rule postulates that "an obligation to make reparation will only arise, if the damage claimed, according to its type and its origin, stems from a sphere of danger which the infringed norm was enacted to protect against"[72]. The theory inevitably introduces normative and policy considerations in the assessment of causation in fact, thus conflating with "causation as a foundation of liability" ("*Haftungsbegrüdende Kausalität*"), which forms part of the normative phase of the causal inquiry. The concept offers the necessary degree of flexibility to take into account the interests protected by the norm and the sphere of risks each of them should be expected to bear. As this involves the existence of a link between the interests affected and those protected by the rule/norm that has been violated, the question that has occupied the courts has been which norm should be taken into account: EU law or domestic law. A strict application of the scope of the rule doctrine would in fact lead to limit the categories of persons that the transgressed rule seeks to protect and who may demand reparation. .

The second issue relates to the extent to which some conduct that has contributed to the harm to competition may fall under the scope of the causal link in view of the complexity of economic relations in markets and the uncertainty that exists as to the *real* cause of events. Note that there is no question as to the legal principle that direct and indirect purchasers of the products may be affected by the anticompetitive conduct, but things become more complex when we expand the causal chain to indirect victims of the anticompetitive conduct.

The CJEU intervened in subsequent case law in order to determine the conceptual contours of the causal relationship and resolve these two issues. We will examine the *Kone*, *Skanska* and *Otis* judgments of the CJEU.

(a) Kone

The preliminary ruling from the Austrian Supreme Court to the CJEU in *KONE* arising against the background of the elevator cartel case[73], illustrates the emergence of EU rules on legal causation. We will focus first in the AG Kokkot's opinion, in view of the rich

[71] For a more detailed discussion of this issue, see Ioannis Lianos, Peter Davis & Paolisa Nebbia, (n6), 85-86.

[72] Notes to VI.-4.101 of the Common Frame of Reference, available at http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf , p. 3432.

[73] Case C-557/12, Kone AG and Others v ÖBB-Infrastruktur AG**,** ECLI:EU:C:2014:1317.

discussion offered and the relevance of this for the theoretical framework used in the most recent case law, before examining the judgment of the CJEU.

The injured party claiming damages had purchased elevators from a manufacturer not involved in the cartel, paying a price which in its opinion was set under the protection of the elevator cartel and was thus higher than would otherwise have been expected under competitive conditions. The Austrian Supreme Court questioned the CJEU on standing (whether "*any person* may claim from members of a cartel damages") as well as about the nature of the loss. In this context, the damage was caused by a person not party to the cartel who, benefiting from the protection of the increased market prices, raised its own prices more than it would have done without the cartel ("umbrella" pricing or "umbrella" effects)[74]".

Kokott reformulated the question as essentially a question relating to the determination of the law applicable on this matter.[75]

A further issue involved whether there was a sufficiently close connection between the cartel and the losses resulting from umbrella pricing caused by a cartel, or whether these were "excessively remote losses for which damages cannot reasonably be awarded against the members of the cartel"[76].

The implementation of Austrian tort law dismissed "from the outset" a claim for compensation for "umbrella prices", because according to the Austrian courts the loss on account of which the injured party had brought its action could not be attributed to the parties to the cartel on legal grounds. First, the adequate causal link required under Austrian law was not present, and second, the loss alleged was not deemed covered by the protective purpose of the competition rules[77].

AG Kokott developed a threefold strategy in order to provide a reply to the referring court, bringing causation issues to the fore of EU law.

The first part consisted in bringing the issue of causation within the ambit of EU law. To do so, AG Kokott introduced a distinction between the existence or the constitutive rules of the right to claim damages for competition law infringement ("the question of *whether* compensation is to be granted"), which is an issue of EU law, and "the details of application of such claims and the rules for their actual enforcement" ("the question of *how* compensation is to be granted"), which are left to domestic legal systems[78]. The AG then mentioned the "direct anchoring" of the principle that any individual is entitled to claim compensation for loss sustained in the presence of a causal relationship between the loss and the infringement of EU law. Having established that constitutive principles emanate from and are determined by EU law, the AG classified the question of the recoverability of losses engendered by umbrella pricing as relating to the "fundamental question of whether

[74] Emphasis added.
[75] Opinion of AG Kokott, Case C-557/12, *KONE AG and Others*, para 2. Emphasis added.
[76] Ibid.,para. 19.
[77] Ibid., para. 14.
[78] Emphasis added.

(cartel members) can be sued by persons who are not their direct or indirect customers[79]", thus formulating the issue as being conceptually close to the questions of standing and the types of losses that are recoverable under EU law, which have already been determined by EU law[80]. Consequently, the AG felt that EU law also regulated the issue of the establishment of a causal link.

The second part of AG's Opinion considered "the specific conditions" that "may be attached under European law to the establishment of a causal link between a cartel and umbrella pricing"[81]. One may consider that this issue relates more to the question of "how compensation is to be granted", the modalities of compensation, rather than the constitutive rules of "whether compensation should be granted". Yet, the *a priori* practically exclusion of claims introduced by umbrella customers under Austrian law enabled the AG to conflate the two issues in order to provide a useful answer to the national court. She proceeded to elaborate on some broad principles of EU causation law, such as a reference to the *conditio sine qua non* or "but for causal link", the requirement of a "sufficiently direct causal nexus" in the implementation of Article 340 TFEU on the liability of Member States for infringement of EU law or some EU merger cases, and the importance of a "normative examination" in establishing legal causation leading to the identification in all European legal systems, despite the different terminology employed ("legal causation, *adaquat Kausalität* and the like"), of normative principles that "inform the concept of a sufficiently direct causal link"[82].

By separating the causation in fact from the causation in law or "scope of the liability" element, AG Kokott seems to have aimed to bring the second within the scope of the constitutive rules of the right to claim damages, and thus under the ambit of EU law, while leaving causation in fact to be determined according to the techniques developed in each domestic legal system. Of course, as shown elsewhere[83], the distinction is somehow artificial as ultimately the two issues are profoundly interlinked. Yet, this approach enabled AG Kokott to comment freely on the way the requirement of causal link should be interpreted as a matter of EU law. She stressed that the requirement of "a direct causal link must not be regarded as being the same as a single causal link" and that "there is sufficient support for the assumption of a direct causal link if the cartel was at least a *contributory cause* of the umbrella pricing"[84]. The AG considers that the causal uncertainty, typical of EU competition law, and mostly due to causal redundancy, a relatively broad concept of cause, by accepting that a simple contribution of the conduct "towards a distortion of the price formation mechanisms that normally apply on the market in question" may constitute

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[79] AG Kokott(n75), para.28.
[80] See, for instance, *Courage/Crehan, Manfredi*.
[81] AG Kokott(n75), para. 31.
[82] Ibid., paras 32-35.
[83] Ioannis Lianos, Peter Davis & Paolisa Nebbia, (n6), 75-78.
[84] AG Kokott, (n75), para. 36. Emphasis in the original.

relevant cause[85]. This loose interpretation of the causation in fact was tempered by the adoption of the 'scope of the rule' and foreseeability tests[86].
But more important for the reasoning of the AG was to link such an interpretation of the causation in law requirement with the emergence of an EU doctrine for the protective scope of Articles 101 and 102 TFEU[87].

This is linked to the compensatory aim of EU competition law enforcement and to deterrence[88]. Such interpretation of the scope of protection of EU competition law opens the gate to enforcement by anyone incurring some form of harm (economic and moral?) to which a competition law infringement may have contributed. This is not a narrow definition of the scope of protection, and AG Kokott understands that well, as she mentions that no overloading of national courts with claims from injured parties by umbrella pricing is to be expected, in view of "the relatively high hurdles in terms of burden of proof" that await such claimants in the civil courts, suggesting that "any potential 'umbrella plaintiff" "weigh up carefully the pros and cons of taking out a civil action against cartel members"[89]. Finally, no evidence of fault or intent is required, the existence of a causal link being based on "purely objective criteria", hence, mere negligence is sufficient[90]. The only limit to the extent of the losses that umbrella customers may request compensation from cartel members is the principle of "overcompensation". This is conceptually linked to the issue of causation, as it "requires cartel members only to make good the loss which they have caused (or to which they have contributed) on the market in question by their anti-competitive practices", which is actually somewhat tautological in view of the weak standard of causation required by the AG (a simple "contribution"). In essence, harm resulting from umbrella pricing is neither "speculative", nor "uncertain"[91]. Looking at the facts, a "categorical exclusion" of such harm (through standing or causation rules), would not make much sense[92].

Coming now to the CJEU, the Court agreed with the AG that "a loss being suffered by the customer of an undertaking not party to a cartel, but benefiting from the economic conditions of umbrella pricing, because of an offer price higher than it would have been but for the existence of that cartel is one of the possible effects of the cartel, that the members thereof cannot disregard", although it did not get into a detailed examination of the topic. The possibility that a cartel contributed to high prices for umbrella customers "cannot be ruled out", which implies that a categorical rule excluding umbrella customers, would affect the legitimate right of certain victims of competition law infringements to

[85] Ibid., para. 37.
[86] Ibid., para.40.
[87] Ibid., paras 54-70.
[88] This is the interpretation that one may have of the following excerpt of AG Kokott's Opinion, (n75), para. 66.
[89] AG Kokott, (n75), para. 69.
[90] Ibid., paras 74-75.
[91] Ibid., para. 86.
[92] Ibid., para. 87.

receive compensation. The third party intervention in this context does not break the causal link between the cartel and the damage. However, the CJEU did not provide guidance as to the causal test that would apply in order to assess the individual circumstances of the case and conclude, or not, on the existence of a causal link. The only guidance provided consists in affirming that "contribution" may be a sufficient factor in establishing causation. Neither did the CJEU mention the principle of foreseeability (although this was mentioned by the referring national court[93]) or for that purpose anything specific to causation in law.

The following conclusions may be drawn from AG Kokott's Opinion: First, her conception of the causal link as "contribution", which was accepted by the CJEU, opened the way to a broad interpretation of the causation in fact but also causation in law requirements. Second, her broad interpretation of the scope of protection of competition law provided the basis for the development by the case law of the EU Courts of flexible causation rules for damages actions brought for EU competition law infringements that will take into account the specificities of antitrust damages claims, in comparison with torts for other kinds of injuries.

By also choosing to rely on a broad concept of the causal link (causation in fact), defined as "contribution", the CJEU is able to assist the claimant(s) in putting forward a causation narrative. This broad conception may potentially also favour defendants, when these argue a pass on defence. While not being open-ended, this concept of causation in fact remains extremely broad and offers considerable discretion to national judges to frame it according to the circumstances of the case and the requirements of their legal system. By emphasizing "contribution" as a sufficient element for establishing causation in fact in these circumstances, the CJEU seems also to frame the minimum core required in the definition of causation in fact in order to ensure the effectiveness of EU competition law prohibitions. The exclusion of a category of victims, umbrella customers, is not compatible with this minimum EU law defined core. This raises nevertheless the question of the limits set by the concept of causation in law (the requirement of foreseeability), something that the CJEU did not delve into the specific judgment.

(b) Skanska

The case involved a preliminary reference to the CJEU from the Supreme Court of Finland regarding the possibility to attribute liability for damage caused by a competition law infringement to a successor company to the competition law infringer, on the basis of the economic continuity principle. This raised indirectly an issue of causal link as the rules on civil liability in Finnish law stipulated that only the legal entity that caused the damage is liable, with the possible limited exception of lifting the corporate veil if the operators

[93] Case C-557/12, Kone AG and Others v ÖBB-Infrastruktur AG, ECLI:EU:C:2014:1317

concerned used the group structure, the relationship between the companies or the shareholder's control "in a reprehensible or artificial manner" with the result to avoid legal liability[94]. The referring domestic court queried as to the determination of this issue by EU law or in accordance to domestic law in conjunction with the principle of effectiveness of EU law.

Again, we will first examine the Opinion of AG Wahl, because of the slightly different premises it had in comparison to AG Kokott's Opinion, before delving into the CJEU's position.

As with AG Kokott, AG Wahl referred to the principle of the "full effectiveness of EU competition law and deterrence" when examining situations in which the "constitutive conditions of the right to claim compensation are at stake (such as causation)", which he examined by reference to the substantive EU law provision (here Art. 101 TFEU), and contrasted this with the simple application of the principle of assessment based on the principles of equivalence and effectiveness, for situations relating to the "application of the right to claim compensation before a court of law", which are governed by domestic law[95]. This emphasis on deterrence led AG Wahl to hold as contrary to EU law a domestic rule that excludes from the outset the possibility for claiming damages for certain categories of persons, thus explaining through the angle of deterrence the case law of the CJEU in *Kone* regarding the victims of umbrella pricing, even if this harm was provoked by the independent pricing decisions of undertakings that were not involved in the impugned anticompetitive conduct but through their action (keeping the prices at the level of the cartel price) *contributed* to the harm. This emphasis on the principle of "full effectiveness" in this context is explained by the complementary role of private enforcement to public enforcement of competition law in order to promote specific and general deterrence to anticompetitive behaviour – thus any domestic rule that may jeopardize this full effectiveness (and the deterrent effect of private enforcement) has the potential to fall under the scope of EU law, rather than being left to domestic law[96].

In contrast however with the position of AG Kokott, this emphasis on deterrence does not lead to an open-ended scope for EU law in regulating the concept of causation in fact. In phase with his beliefs about the primary role of economic efficiency as a goal of competition law, expressed in other cases[97], AG Wahl understands deterrence, according

[94] C-724/17, Vantaan kaupunki v Skanska Industrial Solutions Oy and Others (hereinafter Skanska), ECLI:EU:C:2019:204, para. 15.
[95] Opinion of AG Wahl in Case C-724/17, Vantaan kaupunki v Skanska Industrial Solutions Oy and Others (hereinafter Skanska), paras 36-45, spec. paras 40-41.
[96] Opinion of AG Wahl in Case C-724/17, Skanska, paras 47 (for specific deterrence), 48 (for general deterrence). See also AG Pitruzzella in Case C-882/19 Sumal, S.L. v Mercedes Benz Trucks España, S.L., para 67.
[97] See, e.g. Opinion of AG Wahl in Case C-413/14P, Intel Corporation Inc. v. Commission, ECLI:EU:C:2016:788, para. 41.

to the precepts of "wealth maximization theory". As explained elsewhere[98], deterrence (considered as a facet of the general principle of wealth maximization) may be based on the view that tort law's function is to provide a tool of specific but also general deterrence), with the aim to provide the potential tortfeasor sufficient disincentive to engage in the activity in the future. Hnce, penalties should be sufficient to induce offenders to internalize the full social costs of their behavior (the so called internalization thesis), which supposes that if there is perfect detection and no social cost of imposing punishment, the optimal sanction will be equal to the net social (efficiency) loss post violation (compared to the situation prior the violation). Hence, the penalty should be equal to the net harm to everyone but the offender. It is well known that for the tenants of economic efficiency as wealth maximization, the concepts of economic efficiency and corrective justice may collapse to each other.

However, this is not the only possible perspective of the deterrence principle. Deterrence might also serve as an objective of corrective justice. Hence, one should distinguish between two forms of deterrence: deterrence as wealth maximization and deterrence as a moral requirement for corrective justice to work effectively (thus a form of efficiency independent from wealth maximization)[99]. Both forms of deterrence lead to some discretion, but the deterrence as wealth maximization may however have the effect to provide more limits to the definition of the "victims" of the conduct found anticompetitive or the harm it causes.

The difference becomes apparent if one examines the narrow interpretation of deterrence as wealth maximization principle provided by AG Wahl:

> "(i)t should be called to mind that harm caused by anticompetitive conduct is usually purely economic harm. Although it may be relatively straight-forward to identify and prove direct harm to certain persons' economic interests, it is worth emphasising that infringements of competition law also involve indirect harm and, more generally, negative consequences on the structure and functioning of the market. Needless to say, quantifying or proving harm, let alone causation, on the basis of a counterfactual chain of events, raises a plethora of problems.
>
> Fundamentally, however, the *real harm* caused by illegal restrictions of competition is the *dead weight loss* resulting from such restrictions, that is to say a *loss of economic efficiency* caused by the anticompetitive conduct in question. This means that the harm identified in actions for damages based on an infringement of competition law is in reality a *proxy for the economic inefficiencies resulting from the infringement* and the *corollary loss to society as a whole in terms of reduced consumer welfare*. In the final analysis, therefore, the compensatory function of an action for damages for an infringement of competition law remains in my view subordinate to that of its deterrent function"[100].

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[98] See, Ioannis Lianos, Competition Law Remedies: In Search of a Theory, in Ioannis Lianos & Daniel Sokol (eds.), The Global Limits of Competition Law (Stanford Univ. press, 2012), 177.

[99] Ibid.,

[100] Opinion of AG Wahl in Case C-413/14P, Intel Corporation Inc. v. Commission, paras 49-50. Emphasis added.

In essence, AG Wahl argues that what is at play is the compensation of the deadweight loss in consumer (and producer) surplus, which is compatible with the definition of the concept of "consumer welfare" by the Chicago school antitruster Robert Bork but not that of the European caselaw[101]. If one adopts this approach, it will be possible to compensate the reduction of consumer surplus arising out of the volume (reduced demand) effect of a cartel price, but not any wealth transfers from consumers continuing to buy the cartelized product at a cartel price that is higher than the counterfactual price to the members of the cartel or other producers in the relevant market that benefit from the cartel price (umbrella pricing)[102].

This interpretation is of course contrary to the goal of Directive 2014/104 to ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm, and that full compensation "shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed"[103]. The concept of "harm" certainly includes the wealth transfer resulting from the cartel overcharge, either directly or indirectly. By emphasizing only deterrence as wealth maximization, AG Wahl also seems to undervalue the right in Union law to compensation for anticompetitive harm that is nonetheless very clearly endorsed as the primary goal of Directive 104/104, which contains multiple references to it, and also makes efforts not to sacrifice the principle of full compensation, even if this may lead to reduce the effectiveness of public enforcement[104].

The question explored in this case was whether the possibility for an individual to seek damages for infringement of competition law against a company that has continued the cartel activity of a cartel participant related to the constitutive condition of liability for

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[101] On the different approaches in interpreting the concept of "consumer welfare" see, Barak Orbach, The Antitrust Consumer Welfare Paradox, (2011) 7(1) Journal of Competition Law and Economics 133; Ioannis Lianos, Some reflections on the question of the goals of EU competition law, in Ioannis Lianos & Damien Geradin (eds.) Handbook on European Competition Law (Edward Elgar, 2013), 1 (distinguishing the consumer welfare concept as defined by Robert Bork in his book The Antitrust Paradox, which is focusing on deadweight loss, and the broader perspective of consumer welfare that also focuses on wealth transfers from producers to consumers and consumer choice).

[102] For a discussion, see Ioannis Lianos, Peter Davis & Paolisa Nebbia, (n6), 163-166.

[103] Article 3, Directive 2014/104 [2014] OJ L 349/1.

[104] See, for instance, at the time of the writing of the AG Wahl Opinion, the position adopted in Case C-557/12 Kone, paras 32-33, which expressly refers to "the right of any individual to claim compensation for harm suffered", when referring to effectiveness ("guarantee effective and undistorted competition in the internal market"), but also the case law and subsequent legislative provisions in Directive 2014/104 regarding the balance between the effectiveness of private enforcement (and in particular the language used about the need to guarantee effective legal protection to the victims of competition law infringements, according to the interpretation of Article 19(1) sentence 2 TEU) and the effectiveness of public enforcement (e.g. leniency applications): see, for instance, Case C-360/09, Pfleiderer AG v Bundeskartellamt, ECLI:EU:C:2011:389; Case C-536/11, Bundeswettbewerbsbehörde v Donau Chemie AG and Others, ECLI:EU:C:2013:366; Case C-557/12 Kone) as well as the provisions regarding disclosure in art. 6 of the Damages Directive and joint and several liability in art. 11 of the Damages Directive. For a discussion, see see Ioannis Lianos, Peter Davis & Paolisa Nebbia(n6), Chapter 7.

competition law infringements and thus, in view of the previous case law, should be governed by EU law. In the words of AG Wahl, this "constitutes a question of fundamental importance, on par with the right to claim damages itself"[105]. For Wahl, the absence of a uniform interpretation of that condition would affect the deterrent function of actions for damages and the effectiveness of EU competition law enforcement[106]. By concluding on the similarity of the definition of "undertaking" in both private and public enforcement, AG Wahl highlighted the uniform way the principle of economic continuity should apply in actions for damages, bringing the issue of not only who is entitled to compensation (as in *Kone*) but also that of who is required to provide compensation within the scope of EU law[107].

The CJEU relied on the principle of full deterrence of EU law to find 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, and not national law[108]. Interestingly however, the CJEU did not adopt the "deterrence as wealth maximization" rationale put forward by AG Wahl. Deterrence is seen more in the sense of effectiveness in ensuring the maintenance of effective competition in the European Union, and this is in turn linked to the right to claim compensation for damages caused by anticompetitive conduct, that is corrective justice[109]. The causal link between the undertaking's anticompetitive conduct and the damage is not affected by legal or organizational change to the entity that committed the infringement. What counts is that from an economic point of view there is a continuity between the entity that infringed competition law and its successor, in the sense that the new entity takes over both the assets and the liabilities of the old entity[110]. This ensures more effectively corrective justice but at the same time may expand the boundaries of the concept of causation in fact.

(c) Otis Gesellschaft

A similar issue concerning the application of national law in order to exclude a category of victims of an anticompetitive conduct was raised in *Otis*[111] following the elevators' cartel Commission decision. The question was referred by the Austrian Supreme Court regarding an antitrust damages litigation between the Province of Upper Austria and the members of the elevators' cartel. The Province had started a damage compensation claim, arguing that the elevators' cartel had increased construction costs for new buildings and that it had

[105] Opinion of AG Wahl in Case C-724/17, Skanska,, para. 66.
[106] Ibid., para. 68.
[107] Ibid., paras 77 & 80.
[108] Case C-724/17, Skanska, paras 25 & 28.
[109] Ibid., paras 43-45.
[110] Ibid., para 40.
[111] Case C-435/18 Otis Gesellschaft m.b.H. and Others v Land Oberösterreich and Others, ECLI:EU:C:2019:1069, para. 15.

suffered indirect damage as it had granted higher loans to finance the construction of new buildings. The Province had to provide loans at favourable interest rates in order to facilitate housing, subsidizing a certain percentage of the total construction costs. These loans were granted to a number of persons at a lower interest rate than the market rate. According to the argument, as the costs connected with the installation of the elevators included in the overall building costs paid by these beneficiaries increased because of the cartel, the Province was obliged to grant loans in higher amounts. This led it to invest larger sums than in the absence of the cartel loans, and to incur a loss as it could have invested the difference compared to the average interest rate of federal loans, which is higher than the level of interest rates it benefitted from lending for housing.

The elevator manufacturers and the Commission opposed the inclusion of a government lender in the group of the "victims" of the cartel that could be compensated by the award of damages, thinking that this would unduly expand the concept of causal link required by the case law as only harms that have been caused by conduct found illegal and that are within the scope of the protection afforded by the infringed norm (here Art. 101 TFEU) could be compensated. In their view, the infringed norms were "abstract risk prohibitions" that were however intended to protect the members of a group of people against the infringement of specific legal interests – because of the realization of a risk "on account of which certain conduct (was) required or forbidden"[112]. They alleged the harm was merely indirect and resulted from a side effect in a sphere of interests, which was not protected by the infringed norm. They argued that the Province of Upper Austria was not harmed as a direct market participant in the product and geographic market affected by the elevators cartel, but indirectly as the cartel through the provision of subsidies – therefore this did not constitute a loss that was "sufficiently connected with the purpose of the prohibition of cartel agreements, which seeks to maintain competition on the market affected by the cartel".[113] The issue was resolved by the criteria used in Austrian law as to the non-finding of a causal link because of the absence of a sufficient connection between the illegal conduct and the harm suffered by the Province of Upper Austria, as in Austrian law such a link only existed if the legal norm infringed was specifically intended to protect the injured party.

The case therefore was again about the interplay of EU and national law as to the definition of the concept of the "causal relationship" between the damage suffered and the violation of Article 101 TFEU. The analysis of AG Kokott's Opinion presents a great interest, as it confirms the broad approach adopted in *Kone.* In her Opinion, AG Kokott clarifies "(t)he purpose of examining the causal relationship" which "is not only to establish if a particular event was in fact the cause of particular damage" but may also involve normative elements regarding the question of whether there is a sufficient link between the

[112] Case C-435/18 Otis, para. 32
[113] Ibid., para. 16.

harm claimed and the purpose of the infringed rule"[114] This "normative aspect" of causation concerns, according to AG Kokott, "the substantive preconditions of the right to antitrust damages" and therefore more broadly the scope of protection afforded by the competition law provision, here Art. 101 TFEU, and "is thus a question of the interpretation of a provision of EU law which must be answered on the basis of EU law alone"[115]. AG Kokott cites the Opinion of AG Wahl in *Skanska* who made a similar distinction between the determination of the right to ask for compensation and the enforcement of that right, but in contrast to Wahl, she does not equate the principle of full effectiveness to deterrence, and certainly does not adopt the deterrence as wealth maximization perspective. "Full effectiveness" is here understood by reference to the need to ensure uniformity and equality before the law for all undertakings active in the EU Internal Market[116], but it is also related like in her Opinion in *Kone* to the *right* of *any* individual to claim compensation[117].

Drawing on this principle of "full effectiveness" of EU law and insisting on the "need for a uniform application of EU law" so as to establish a "level playing field", AG Kokott castigates the "dogmatic constructs of national law conceived to limit boundless liability, such as the theories on the protective purpose of the norm or the adequacy of the causal link between an infringement and harm" which cannot in her view determine the scope of Article 101 TFEU[118]. This casts doubt on the validity, from an EU law perspective, of national scope of the rule doctrine. Further clarifications provided by the AG nevertheless show her concern to accommodate some space for domestic law. Issues such as "who is entitled" to demand compensation and "who is required" to provide compensation under Article 101 TFEU are matters governed by EU law, whereas issues relating to the "modalities for actually establishing a causal link", such as the type of evidence demanded to substantiate the causal link in the specific circumstances of the case are matters governed by national law, provided of course that the principles of equivalence and effectiveness are observed[119]. Hence, the principle of "full effectiveness" may expand the EU regulation of the condition of the "causal relationship" to the extent that this affects the "normative aspect" of the causal link[120].

With regard to the protective purpose of Article 101 TFEU, she rejected the arguments of the elevator manufacturers that the Province of Upper Austria sustained losses when exercising its not for profit political competences , by arguing that the jurisprudence of the CJEU finds incompatible with the protective purpose of Article 101 TFEU any categorical restriction of the right to antitrust damages, and neither the specific political/governmental dimension of the Province of Upper Austria nor the fact that it was

[114] Opinion of AG Kokott in Case C-435/18 Otis, ECLI:EU:C:2019:651, para. 50.
[115] Ibid., para. 52.
[116] Ibid., paras 54-55.
[117] Ibid., para 52. Emphasis added.
[118] Ibid., para 54.
[119] Ibid., para 59.
[120] Ibid., para 51.

an indirect market participant (as lender) would call this conclusion into question[121]. Drawing not only on the principle of deterrence, as AG Wahl did in *Skanska*, but also on the fact that the right to damages provides "effective protection against the adverse effects" of an infringement to Article 101 TFEU, AG Kokott affirmed that the right to demand compensation for losses caused by a cartel cannot be denied at the outset and deprive a category of claimants from compensation, without an adequate analysis of the existence of a sufficiently direct causal link between the infringing conduct and the damage[122]. The harm caused may not only occur on the market affected by the infringing conduct (here cartel) or an upstream, downstream or neighbouring market nor it can only be caused by an infringing act (cartel) "in connection with the supply of or demand for products or services on the market", but the protective purpose of Article 101 TFEU may cover "variety of the types of harm that can be caused by the anticompetitive conduct, which is not confined to harm suffered by direct or indirect suppliers or customers on the market affected by a cartel or a neighbouring market or to harm suffered in the exercise of an activity for profit"[123]. The risk that this would lead to an unlimited right to compensation and therefore unlimited liability of the infringers for any spillover effect of the anticompetitive conduct, however remote that is, remains, according to AG Kokott, limited in view of the requirement of the sufficiently direct link of the harm to the anticompetitive conduct, thus bringing an element of foreseeability of the damage that may increase the legal certainty of undertakings[124].

AG Kokott concluded that the exclusion of the Province of Upper Austria from the right to demand compensation was not justified and would "disregard the complexity of market activities and the intervention of government operators in connection with market activities"[125].

With regard to the characteristics of the sufficiently direct legal and factual link, AG Kokott noted that is up to the domestic courts to examine if the damages could have "reasonably" be foreseen by the elevator manufacturers. Nonetheless, she provided a detailed answer in favour of reasonable foreseeability: First, the elevator manufacturers expected the construction industry developers to borrow to finance their projects and therefore any overcharge they imposed to them to pass to the construction industry lenders, such as the Province of Upper Austria; second, the funding measures in question were implemented within a fixed legal framework, which was known to the elevator manufacturers; third, the deprivation of a certain amount of money by the Province of Upper Austria because of the overcharge could have been depicted as a loss of interest[126]. This more restrictive interpretation of causation in law may avoid a broad interpretation of

[121] Ibid., para 75.

[125] Ibid., para 91.
[126] Ibid., paras 148-150.

the causation requirement, in view of the quite expansive view of the concept of causation in fact.

Of particular significance is also the analysis of the nature of the loss in this case incurred by the Province of Upper Austria that may also be instructive as to the role of the causal link inquiry. The Province did not claim to be compensated for the actual overpayments made as a result of the cartel, as these were paid by the funding beneficiaries out of the soft loans granted to them, but only for the interest that would have accrued on the overpayments made by the beneficiaries because of the cartel at the standard interest rate, less the discounted interest already paid to the Province by the beneficiaries[127]. The elevators' manufacturers and the Commission argued that the alleged harm in this case could only be analyzed as a lost profit (*lucrum cessans*) and that in this case the funds of the Province that were earmarked for funding housing developments could not have been used for other purposes, the remaining funds each year being appropriated the following year for the same objective. They alleged that the only harm therefore incurred by the Province was political, in the sense that it would have probably granted more loans during the specific period of time in the absence of the cartel, thus incurring "political damage"[128]. Similarly, it was argued that the loss of interest as a result of the overcharge was purely speculative and hypothetical as the funds for the same reason could not have been profitably invested elsewhere[129]. AG Kokott rejected these arguments. She found that the loss of interest was not hypothetical as, first, fewer social construction projects could be funded than without the cartel. Second, the Province would have needed to raise less additional money from financial markets and the lost interest could have been used to repay outstanding loans; Third, the additional funding required that was disbursed at a discounted interest rate to the beneficiaries could have been invested at a higher interest rate[130].

The price overcharge could also give rise to harm on two different counts: the harm sustained by the beneficiaries of the housing projects (the price surcharge plus the discounted interest paid back to the Province for the additional amount of funding because of the cartel) and the harm sustained by the Province in view of the difference of interest between the discounted rate and the standard rate for the additional part of the soft loans to which the cartel gave rise. These losses could be analyzed as loss sustained (*damnum emergens*), the Province being deprived of this interest over the relevant period[131]. The fact that the Province would have received the standard rate in the counterfactual was demonstrated by the requirement in Austrian law for government bodies to invest available funds in fixed-yield government bonds and the use of the relevant benchmark for calculating losses incurred as a result of a periodic lack of such funds[132].

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[127] Ibid., para 116.
[128] Ibid., paras 100-101.
[129] Ibid., para 102.
[130] Ibid., paras 109-111.
[131] Ibid., para 121.
[132] Ibid., paras 123-124.

The harm caused to the general public, according to the AG, may be quantified using economic model calculations or even being conceptualized as non-material damage and its compensation may be contemplated by a representative of the public interest that would have asked the injuring entity to pay the compensation into a fund that benefits the general public[133].

The CJEU accepted the theoretical framework put forward by AG Kokott in her Opinion. Drawing on the principle that "(a)ny individual" can claim damage compensation if there is a "causal relationship" between the harm and a competition law infringement[134], the Court followed its *Kone* precedent and highlighted that national rules which "from the outset systematically deprive potential victims of the possibility of requesting damage compensation" breach the "full effectiveness" of EU competition rules[135]. According to the CJEU, "*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"[136]. The Court confirmed that there is no additional requirement that the loss suffered by the person concerned presents a specific connection with the objective of protection pursued by Article 101 TFEU[137]. Consequently, even persons not acting as suppliers or customers on the market affected by the cartel "must be able to request compensation for loss", such as, for instance, public entities that were forced to grant higher loans due to the cartel[138] This openness as to standing reinforces the importance of the assessment of the existence of a causal link between the harm and the violation by the national courts. These should verify, "in particular, whether the authority had the possibility of making more profitable investments and, if that is the case, whether the authority adduces the evidence necessary of the existence of a causal connection between that loss and the cartel at issue"[139]. The Court does not provide further guidance, hence the Opinion of AG Kokott may serve as a reference point for future caselaw on the way the concept of the causal link (both causation in fact and causation in law) may be interpreted by the EU courts.

3. New Challenges in Establishing Causation

The case law so far has focused on the causal uncertainty resulting from the expansion of standing for an action for damages to "any" person affected by the anticompetitive conduct and on the related difficulties to deal with indirect victims of cartel activity. However, as

[133] Ibid., para 130.
[134] Case C-435/18 , para 23.
[135] Ibid., para 27.
[136] Ibid., para 30. Emphasis added.
[137] Ibid., para 31.
[138] Ibid., para 32.
[139] Ibid., para 33.

private enforcement in the EU matures, and these issues become settled by the case law of the EU and domestic courts, new issues relating to the evidence of the causal link, in the presence of either factual or scientific uncertainty as to its existence, will come to the fore. This Section aims to discuss the current state of play and to proceed to some limited effort of legal foresight, so as to prepare policymakers for future challenges.

1. Causation Counterfactual: variations on a theme?

Broadly referred to as the "but for" test, counterfactual analysis is a comparative study of at least two different outcomes with regard to the fact pattern in question: one with the envisaged intervention and one without[140]. Although there is not significant experience with this test in the context of establishing the causal link between the allegedly anticompetitive conduct and the damage, some recent national case law provides some interesting insights on the complexity of the counterfactual analysis and highlights the risk that domestic courts could take different perspectives, even for a similar fact pattern[141].

The issue of the counterfactual was examined by the CAT when it handed down its judgment in 2021 in relation to applications to amend defense pleadings on the matter of quantum in the damages actions of the retailers against Mastercard and Visa in relation to the finding that default multilateral interchange fees (MIFs) within the Mastercard and Visa payment card systems infringed Article 101 of the TFEU[142]. The CAT examined Mastercard's argument that the claimants suffered no loss because if the Mastercard MIF's were significantly lower or reduced to zero (the counterfactual) issuers would have switched to other cards and cardholders to other cards, or even to other payment methods such as PayPal, that would have offered lower fees to cardholders, as they could subsidize from the higher fees paid by the merchants. In essence, Mastercard was putting forward an "asymmetric counterfactual" that there would be a significant diversion of card usage to Visa or other methods of payment when it comes to the quantification of damages incurred by the retailers. The CAT recognized that "the relevant counterfactual is not necessarily the same for all purposes"[143], and with regard to the counterfactual relating to the assessment of damages, it held that this involved a comparison between the MSCs which the retailers had in fact paid to the acquiring banks in respect to Mastercard transactions and those they would have paid, had Mastercard operated with zero MIFs, as the claim here concerned a loss suffered by reason of Mastercard's MIFs. However, this was a

[140] Communication from the Commission— Notice— Guidelines on the application of Article 101(3) of the Treaty [2004] OJ C 101/ 97, paras 17-18.
[141] Sainsbury's v MasterCard [2016] CAT 11; Asda Stores Ltd & Others v Mastercard [2017] EWHC 93 (Comm); Sainsbury's vs Visa [2017] EWHC 3047 (Comm); Supermarkets Ltd v Visa Europe Services LLC [2020] UKSC 24. For a discussion, see Cento Veljanovski, 'Credit Cards, Counterfactuals and Antitrust Damages: The UK MasterCard Litigations' (2018) 9(3) J European Competition L & Practice 146
[142] ASDA Stores Ltd, Argos Ltd, WM Morrison Supermarkets Plc v. Mastercard Inc., [2021] CAT 16.
[143] Ibid., para 31.

counterfactual world that never existed, and the CAT refused to calculate the loss on the basis of a counterfactual "divorced from reality". It also rejected Mastercard's argument regarding diversion of card use to Visa in order to avoid liability or reduce the quantum of damages, as accepting this would have led to the result that each of Mastercard and Visa could avoid liability in damages, totally or partly, by relying on the effects of competition arising from the other's unlawful scheme[144].

The inherent complexities of the counterfactual test have led some to question its relevance in a damages case, noting that it was "flawed"[145] to the extent that its application depended on the overall theory of competition each court would adopt, for instance either one focusing on the competitive process or one focusing on competitive outcomes (e.g. level of pricing), with the UK Supreme Court, as it was the case with the CJEU in Mastercard to lean towards a competitive process inspired counterfactual. Similarly, the focus in *Kone* on "contribution" as a sufficient element for establishing a causal link (see the previous Section.) seems to question the importance of the counterfactual test and accommodates a more pluralist view of the causal link, that also fits better with causal inquiry in social science[146].

There are several tools to determine counterfactuals in damages actions[147].

It is possible to use a comparator-based model[148] whereby the anticompetitive prices are compared with a non-infringement scenario. This empirical analysis can be operated on the same market before or after the infringement, on a similar geographic market, or on similar product markets[149].

When it is not possible to utilize the comparator model because of irreconcilable differences between geographical or product markets, competition authorities usually recur

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[144] Ibid., para 33.

[145] See, Cento Veljanovski, Credit Cards, Counterfactuals, and Antitrust Damages - The UK MasterCard Litigations, (2018) 9(3) Journal of Competition Law & Practice 146.

[146] For a discussion, see Ioannis Lianos & Christos Genakos, Econometric Evidence in EU Competition Law: An Empirical and Theoretical Analysis, in Ioannis Lianos and Damien Geradin (eds.), *Handbook on European Competition Law- Enforcement and Procedure* (Edward Elgar, Chelthenham, 2013), 1-83.

[147] Laborde, in his empirical study, concluded that, out of the 58 damages awards across Europe, courts used the comparison over time (i.e. "before and-after") in 22 cases, the comparison with an unaffected market ("yardstick") in 6 cases, the cost-based and financial methods in 9 cases, the regression analysis ("econometrics") in 4 cases, and 'other methods' in the remaining 23 cases, see Jean-François Laborde, 'Cartel Damages Actions in Europe: How Courts Have Assessed Cartel Overcharges' (2021) 3 Concurrences 232, 238.

[148] European Commission, 'Communication from the Commission on Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union' 2013/C 167/07 par. 3. The Commission sets out the background usage of these methods in order to quantify damages. However, they are based on the counterfactual method that, in the same words of the Commission, 'is based on comparing the actual position of claimants with the position they would find themselves in had the infringement not occurred. In any hypothetical assessment of how market conditions and the interactions of market participants would have evolved without the infringement, complex and specific economic and competition law issues often arise. Courts and parties are increasingly confronted with these matters and with considering the methods and techniques available to address them'.

[149] Ibid., para 33.

to a simulation model[150]. This second technique consists in the simulation of market outcomes on the basis of economic models.[151] Here econometrics finds wide application since the proof of causation consists in finding average patterns through the analysis of set of data interpreted on the basis of the economic theories.

Other approaches can also be distinguished on the basis of the benchmark of evaluation adopted. For instance, it is possible to analyse the differences in prices on a case-by-case basis or through average patterns gained from statistical data. When damages claims involve a large number of transactions, performing a case-by-case analysis may become extremely complex. In these situations, a statistical analysis is required to infer effects from general market patterns[152]. This demonstration implies a comparison between different versions of reality in order to ascertain which of them is the most likely[153].

While the assessment of causation is generally left to the evaluation of the judge, the evidence provided by economic experts has naturally gained a fundamental importance in gauging economic data submitted to the court[154]. For example, through econometrics, economists infer causal links between causes and effects using average quantitative data. However, these results should not be confused with causation in law which requires a demonstration of specific causation of a loss that is factually proven by the claimant.

2. Causation and the Challenge of Economic and Econometric evidence

The rules of the law of evidence were framed with the view that most evidence will be factual. Yet, sources of evidence are diverse and may include, in competition law enforcement, contemporaneous documents, such as emails or statements by market participants (competitors, customers and consumers), but also more complex items of evidence, such as economic models and econometric studies performed by forensic expert economists. The probative value attached to a piece of evidence depends on the 'reliability of that evidence', which is 'the sole criterion relevant for evaluating freely adduced evidence'[155].

Economic theory drives the selection of observations (through a data generation process that goes from sample population on whose characteristics observations are based to observations, that is data that the researcher has constructed with the help of a theory

[150] Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205 2013 paras 96 ff.

[151] Commission's Practical Guide, para. 96.

[152] Ibid.

[153] Case C-12/03 P, *Commission* v *Tetra Laval* [2005] ECR I-987, para 42.

[154] Ioannis Lianos, '"Judging" Economists: Economic Expertise in Competition Law Litigation - A European View' in Ioannis, Lianos and Ioannis Kokkoris (eds), *The Reform of EC Competition Law: New Challenges* (Kluwer Law International 2009) 206 ff. <Available at SSRN: http://ssrn.com/abstract=1468502 or http://dx.doi.org/10.2139/ssrn.1468502>.

[155] Case T-110/07, *Siemens AG v. Commission,* [2011] ECR II-477, para. 54.

forming part of the data universe, 'in which all the pertinent data variables reside'), as well as the interpretation of the specific theory that will be used (the theory universe) and which will interact with the data universe through the bridge principles[156]. *Ceteris paribus* clauses enable the generalization of hypotheses made to the real world. As explained in Section 2.1. inferences are not to what happens but to the probability that it happens'[157].

Econometric analysis may help to address the issue of causation between a specific anticompetitive practice and harm to competition, although as it was noted in the OXERA report prepared for the Commission on "Quantifying Antitrust Damages", "econometric analysis does not prove causality as such, but seeks to identify statistically significant relationships between a 'dependent variable' and various 'explanatory variables"[158]. Yet, a carefully designed and well implemented study is going to get as close to proving causality as anyone can – by design. At least it will allow one to interpret a relationship as being causal if assumptions X,Y and Z are true. A judge can then consider whether those assumptions are true, if the underlying narrative provides the best explanation[159]. As econometric models typically control for a range of possible explanatory factors that may impact on the dependent variable in question, they can sometimes enable the isolation of the impact of the infringement itself from other explanatory factors. The model construction, usually based on theory may thus allow us to isolate multiple effects from one another and infer causation, when the model does sufficiently account for other explanations in addition to the infringement[160]. However, inspired by the narrow perspective of the counterfactual causation principle, judges seem to be reticent to frequentist theories of causation inspired econometric tools, such as regression analysis.

For instance, in *Britned Development Ltd*, the High Court noted, with regard to the regression presented: "(j)ust as with correlation, however, regression analyses do not allow analysts to claim a *causal* association. There is correlation, from which causation may be inferred, at most"[161]. The High Court also recognizes that "to be reliable, a regression analysis must (1) Be based upon a sufficiently large data-set" and (2) "(b)e well specified"[162]. In this case, the High Court judge proceeded to a detailed analysis of the regression models presented by the experts of the parties, referring to the significance test and other methodological intricacies, looking to how "straightforward" their models were, the reliability of the data used, as well as of the parameters of the models presented by the experts. Of particular interest is also the reference of the High Court judge to the interplay

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[156] Bernt Stigum, Stylized facts, the purport of an economic theory, and scientific explanation in economics and econometrics available at https://www.eco.uc3m.es/temp/stigum.pdf , 5.

[157] Ken Hoover, The Methodology of econometrics, 10.

[158] OXERA, Quantifying Antitrust Damages – Towards non-binding guidance for courts, December 2009, p. iv.

[159] Peter Lipton, *Inference to the Best Explanation* (London, Routledge, 1993).

[160] OXERA, Quantifying Antitrust Damages, available at https://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf , p. 42.

[161] Britned Development Ltd v. ABB Ab et al., [2018] EWHC 2616 (Ch), para. 299.

[162] Ibid., para. 302.

between econometric conventions and legal proof, by finding that it "would be unconventional to use a 51% confidence interval for the analogy to the balance of probabilities test used by lawyers" which is "is entirely spurious"[163]. Hence, it seems that more effort needs to occur, in order to develop a better understanding in econometrics about legal theories of the causal link and standards of evidence. We suggest that the Bayesian approach may offer a more optimal theoretical framework than frequentist theories to promote the dialogue and mutual comprehension between economist and lawyers in this complex litigation.

3. Causation and Computational Competition Law and Economics

The use of Big Data and algorithms in order to build causal inferences or theories of harm may have important implications on the requirement of a causal link and the different tools and methodologies to establish it. At a more fundamental level, to the extent that scientists may rely on just correlations to predict how economic actors or individuals will act, the concept of causality could lose relevance[164].

Similar concerns than for econometrics may also be raised with regard to evidential inferences made on the basis of data science, although descriptive uses of data analysis may not be judged problematic from a law of evidence perspective. Indeed, in this context we may be closer to the dominant conception of causality in law, which refers to causal connections between events and involves a concrete instantiation of a causal law on the particular occasion, regarding the existence of a causal link between the specific event A and the specific event B, rather than the more "theoretical" and categorical approach of causation followed in econometrics, where the inferential direction runs from theory to data requiring the matching of the remaining conditions in the set against the applicable causal generalization. However, some predictive data analytics techniques, such as predictive coding, may face similar difficulties to those confronted by econometrics. Courts should therefore develop a more hospitable tradition to such type of evidential material. This has already been the case in some jurisdictions, which has already accepted the technology of predictive coding or technology assisted review of documents[165].

In contrast to economics, where models are constructed for the purposes of prediction and are derived from a set of first principles, which often include assumptions as to the abilities and motives of the underlying agents[166], the computational models are used as mapping tools.[167] They aim to generate only inductive proof. In these models,

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[163] Ibid., para. 418.

[164] Oliver Halpern, A History of Vision and Reason since 1945 (Duke University press, 2015).

[165] For instance, *in Pyrrho Investments, which is not a competition law case, the UK High court accepted predictive coding as an acceptable technique to analyse document evidence: Pyrrho Investments Ltd v MWB Property Ltd*, [2016] EWHC 256 (Ch).

[166] J. Miller and S. Page, *Complex Adaptive Systems* (Princeton University Press, 2007), 59.

[167] *Ibid*, 36.

"abstractions maintain a close association with the real-world agents of interest": "uncovering the implications of these abstractions requires a sequential set of computations involving these abstractions".[168]

Of course, this raises interesting questions about causal claims with Big Data, which seem to rely on "variational induction" and eventually "the identification of phenomenological laws which may hold only locally in specific contexts", and how different this is with regard to causal claims that are built on the hypothetico-deductive model of economics, that is very much dependent on theoretical hypothesis, on the basis of deduction from certain generalised features of our experience and practices (premises) to infer that the world must be like to make the existence of these experiences and practices possible (conclusion), then to verified or disproved by empirical evidence[169]. For Big Data, the purpose of the inquiry is to grasp structures, powers, mechanisms and tendencies that form the background conditions of the examined economic phenomenon.

4. Legal aspects for the quantification of damages and passing on

Through causal enquiries, the law determines who is responsible and for what part of the damage. What is generally referred to as legal causation[170] sets out the connection between the unlawful conduct and determines the type and amount of the harm caused.

The jurisprudence considered in the previous sections confirmed that the harmed party will not necessarily be compensated for the full amount of the losses received, as the harm need not be too remote[171]. In competition law cases, two major considerations have emerged: The remoteness of the harm and the proximity of the mitigation of the same harm. Both these aspects are key to the quantification of the final amount of the compensation that the claimant is entitled to receive.

According to the Quantification Guidelines, the primary concern in the quantification of antitrust damages is to identify what would have happened if the infringement had not occurred. Because this hypothetical circumstance cannot be witnessed directly, some form of estimate is required to provide a reference scenario (the 'non-infringement scenario' or 'counterfactual scenario') against which the actual event can

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[168] *Ibid*, 65.

[169] For an interesting discussion, see Wolfgang Pietsch, *Big Data* (CUP, 2021).

[170] See supra Section …

[171] In full, Justice Popplewell stated: "The principle does not, however, mean that a claimant always recovers for the amount of the losses which arise from the breach. Principles of causation mean that his losses may be factually too remote from the breach to be recoverable despite the fact that they would not have been suffered but for the breach. His losses may be too remote in law. Conversely, he may end up better off as a result of the breach than he would otherwise have been, without having to give credit for such benefit against his recoverable loss", *Fulton Shipping Inc of Panama v Globalia Business Travel SAU of Spain [2014] EWHC 1547*.

be compared[172]. Moreover, as already observed with regard to the Damages Directive and the case law, when the quantification of damages is excessively difficult, national courts can estimate damages following their respective national procedural law, which in turn leave ample discretionary powers to the judge[173].

1. Passing on and quantification of the harm

(a) General

Anticompetitive conducts often imply the imposition of an overcharge on the goods or services sold (eg. a cartel overcharge due to price fixing)[174]. The buyers of such goods or services, however, may pass on the overcharge, in whole or in part, onto their customers. Indeed, a price increase by the direct purchaser may indicate that the overcharge was passed on downstream. Since competition damages actions have a corrective purpose, the transmission of the damage also signifies the loss of the right to claim the correspondent damage for whom passed on the overcharge. Thus, the defendant can object to the plaintiff's right to claim damages due to the passing on the price overcharge and quash the action.

Article 12(1) of the Damages Directive[175] lays down the general principle establishing the right of indirect purchasers to claim damages. At the same time, it grants the defendant a passing-on defence.[176] Finally, Article 12(2), gives application to the compensatory and unjust enrichment principles, establishing that 'compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level'.

Against this background, Article 14(2) lays out a rebuttable presumption of passing on of the overcharge to the benefit of the indirect purchaser dependent on the realisation of three conditions: (1) that there was a competition law infringement by the defendant; (2) that the defendant applied an overcharge to the goods or services, which was causally linked to the infringement; and (3) that the claimant purchased those or derived goods or services. Thus, an indirect purchaser can infer causation of damages by proving the

[172] Commission Staff Working Document – Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union SWD(2013) 205 (n 185) 12.

[173] Out of the 58 damages actions considered by Laborde in his empirical study, 14 cases involved the estimation of damages, with courts explaining that, in most cases they opted for this solution as "the cost of obtaining the opinion of a court-appointed expert would be disproportionate relative to the potential amount of damages", Laborde (n 182) 238. See also below on the use of the 'broad axe' principle.

[174] See this external study prepared for the EC finding that in 93% of cases cartels generate a price overcharge, Oxera, *'Quantifying Antitrust Damages - Towards Non-Binding Guidance for Courts' ('the Quantification Study').* (2009) 91 <http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf.>.

[175] Directive 2014/104.

[176] Article 13, Dir. 2014/104.

anticompetitive agreement and the connected overcharge paid by the direct purchaser[177].

However, there is no similar presumption of passing on for the defendant that exercises its passing on defence.[178] In Royal Mail, the Court asserts that the passing on is "a question of legal or proximate causation", which has to be answered on a factual basis.[179] The question to be answered is the following: "has the claimant in the course of its business recovered from others the costs of the MSC, including the overcharge contained therein?". The primary issue in Royal Mail was what constitutes an acceptable causation plea (in the sense of having a realistic chance of success) and the establishment of a proximate causative link. This developed in the context of a debate regarding claimant's cost-cutting as a means of mitigating an overcharge.

It has also been observed that, from a legal perspective, the passing-on does not eliminate the harm, as this realises when the goods are purchased by the claimant. The mitigation of such damages, instead, has to be proved according to the same standards required for the causation of the harm.[180]

Most of the late case law in private antitrust enforcement in Europe has concentrated on establishing a causal link between the anticompetitive practice and the amount of the damage that was actually caused to the claimant, on one hand, and the causal nexus between the cost reduction and the economic harm, on the other.

In considering the aspect of quantification and mitigation of damages, the Supreme Court in Sainsbury's stated that a supermarket, as a sophisticated retailer, can respond to an overcharge in one of four ways:[181]

> "(i) a merchant can do nothing in response to the increased cost and thereby suffer a corresponding reduction of profits or an enhanced loss; or (ii) the merchant can respond by reducing discretionary expenditure on its business such as by reducing its marketing and advertising budget or restricting its capital expenditure; or (iii) the merchant can seek to reduce its costs by negotiation with its many suppliers; or

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[177] For more on this aspects, see in this volume, chapter 10, Antonio Robles Martín-Laborda, Indirect purchasers and passing on, Marco Botta, 'The Principle of Passing on in EU Competition Law in the Aftermath of the Damages Directive' (2017) 25 European Review of Private Law 881; Firat Cengiz, 'Passing-On Defense and Indirect Purchaser Standing in Actions for Damages against the Violations of Competition Law: What Can the EC Learn from the US?' [2007] University of East Anglia Centre for Competition Policy, Working Paper 07; Claudio Lombardi, 'The Passing-On of Price Overcharges in European Competition Damages Actions: A Matter of Causation and an Issue of Policy' [2015] Discussion Paper, Europa-Kolleg Hamburg, Institute for European Integration <https://ssrn.com/abstract=2700042 or http://dx.doi.org/10.2139/ssrn.2700042>; Lombardi (n 6) Chapter 7.

[178] The following section considers the burden of proof for the defendant in this case.

[179] *R Royal Mail Group Limited v Daf Trucks Limited & Others BT Group Plc & Others v Daf Trucks Limited & Others* CAT [2021] CAT 10, 215. See also Amministrazione Delle Finanze Dello Stato v San Giorgio Spa at [12]-[14]; Case C-192/95 Société Comateb v Directeur général des douanes et droits indirects [1997] ECR I-165, [1997] STC 1006 (unlawful dock dues) at [23] and [25]; Case C-147/01 Weber's Wine World Handels GmbH v Abgabenberufungskommission, where it is also stated that the burden of proof of such fact lies on the defendant.

[180] BGH, judgements of 19 May 2020 – KZR 8/18, WuW 2020, 597 para. 46 – Rails Cartel IV; of 28 June 2011 – KZR 75/10, BGHZ 190, 145 para. 58 – ORWI.

[181] Sainsbury's Supermarkets Ltd v MasterCard Inc [2016] CAT 11 ("the CAT Sainsbury's judgement")

(iv) the merchant can pass on the costs by increasing the prices which it charges its customers. "[182] The option choice will be determined by the market in which it operates and the level of competitive pressure.

Only options (iii) and (iv) bring about a diminution of the loss and a correspondent diminution of the compensation that can be obtained. The SC remarked that this is "a question of legal or proximate causation" which needs to be answered by proving what strategies the claimant used to recover the overcharge costs[183].

Besides the passing on, a plea of mitigation is possible also when the claimant has alleviated the loss by reducing other costs. The claimant may cut costs as a response to the price overcharge or mitigate otherwise this expenditure. Recent case law has confirmed this as equivalent to a passing on.[184] However, the defendant has the burden of establishing a causative link between the cost reduction and the overcharge.

The Court of Appeals has also pointed out that harmed parties have a 'duty' to mitigate their losses due to market distortions caused by anticompetitive practices[185]. This would be part of their duty to act reasonably as a way to avoid contributory fault in the causation of the harm. The obiter dictum should be however interpreted narrowly, to include only cases where it was completely irrational to continue investing in a market. It would, otherwise, transfer the responsibility for damages onto the harmed party which has invested in its business to become more competitive. In other words, a broad interpretation of this observation would, paradoxically, promote non-competitive conducts.

(b) Mitigation of losses and legal causation

As a response to a price increase, the *Sainsbury's* case[186] considers that firms' cost saving strategies can take three forms: reduction of discretionary expenditure; price's renegotiation with suppliers; and pass-on of the overcharge. However, only renegotiation and pass-on, according to the SC, count as a mitigation of the expense which diminishes the compensation that the claimant has the right to recover[187]. This approach seeks the

[182] Para 205.
[183] Para 215.
[184] *Stellantis NV v NTN Corp*; *Royal Mail Group Limited v Daf Trucks Limited & Others BT Group Plc & Others v Daf Trucks Limited & Others* (n 73); *Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others [2016] CAT 11*.
[185] The Court stated that "if there comes a time when no rational trader would continue to trade then their obligation to mitigate may require them to come out of their market and trade if they can in another. They cannot be entitled to keep on irrationally throwing money away simply because the tortfeasor is in breach of his duty.", *Yeheskel Arkin v Borchard Lines Limited & Ors, Camomile Lines Plc, Furness Withy (Shipping) Ltd, Manchester Liners Ltd* [2004] EWCA Civ 1873 par. 22.
[186] Supermarkets Limited v Visa Europe Services LLC [2020] UKSC 24.
[187] This approach was derived from of *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673, where, at 689, the court states ""[W]hen

fulfilment of the compensatory principle whereby the claimant is only entitled to the losses actually suffered as a result of the unlawful conduct. Any sum superior to that amount would result in over-compensation[188]. In regard to discretionary expenditure, the SC argued that including them would result in undercompensating the claimant that had to forgo such expenditure "to develop its business which did not promptly enhance its profits"[189].

Statutes and case law have mainly confronted the hypothesis of loss reduction due to the passing on of price overcharges[190]. The next Section explores instead the burden of proof of claimants and defendants when the latter pleads mitigation due to either passing on or cost reduction.

2. The burden of proof

As a matter of principle, the defendant has the legal burden to plead and prove that the claimant has mitigated their loss, either by cost reduction or passing-on[191]. Whilst the claimant has to prove causation between the anticompetitive practice and the harm, the defendant is burdened to establish a proximate causative link "as a matter of law between the putative overcharge and the way in which the loss was mitigated"[192]. In the same vein, the German courts have set out that the defendant has to plausibly argue, on the basis of the general market conditions, in particular the elasticity of demand, the price development and the product characteristics, that passing on of the cartel-induced price increase is at least a "serious possibility"[193].

However, defendants may be prevented from adequately proving the causal connection between the anticompetitive conduct and the claimant's mitigation of losses due to the fact that most of the information useful to prove it is in the disposal of the claimant[194]. Thus, the law allows them to prove mitigation using inferences[195]. After the defendant has raised

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in the course of his business [the claimant] has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account …". Here the court clearly sets out the causal requirement for the successful plead in mitigation by requiring that the claimant's action must arise out of the transaction.

[188] *Sainsbury's v Mastercard [2020] UKSC 24* para 217.

[189] Para 210.

[190] Although other recent case law on cost reduction is considered below.

[191] Recital (39) Directive 104/2014. Before, this principle existed in the case law, including *The World Beauty* [1970] P 144; OMV Petrom SA v Glencore International AG [2016] EWCA Civ 778; [2016] 2 Lloyd's Rep 432, para 47.

[192] Para 24.This is a basic principle considering that otherwise a heavy burden would be placed on the claimant, incompatible with Case C-295/04 *Manfredi v Lloyd Adriatico SpA* [2007] at 89-91 and the principle of effectiveness of EU law. See also German Supreme Court judgment of 23.9.2020 KZR-35-19, paras 95 ff.

[193] BGH, WuW 2020, 597, para. 51 – Rails Cartel IV; BGHZ 190, 145 pa ra. 64 – ORWI.

[194] *Royal Mail Group Limited v Daf Trucks Limited & Others BT Group Plc & Others v Daf Trucks Limited & Others* CAT [2021] CAT 10, para 3. See also *Sainsbury's v Mastercard [2020] UKSC 24* (n 225) para 216.

[195] If they fulfil the requirements canvassed by recent case law considered below

successfully the issue of mitigation through inferences the plaintiff has the evidentiary burden to show how they have handled the recovery of their costs in their business[196].

Nonetheless, in order for a defendant to be allowed to raise a plea of mitigation, there must be more than general economic or business theory to support a reasonable inference that the claimant would have sought to mitigate its loss in the particular case, and that the steps taken were triggered by, or at least causally connected to the overcharge[197].
If a defendant can merely point to what may be considered routine financial operations and budgetary control processes, it will usually not be enough to show the necessary link between the overcharge and the relevant measures[198].

The Damages Directive recognises that even when the claimant reduced costs by passing on the whole or part of the overcharge, there may be volume effects that diminish its profits[199]. Higher prices, due to passing on of the overcharge, may lead to lower sales and to loss of profits for the undertaking that uses those products as part of its output.

In *Score Draw*, for example, the plaintiff claimed damages for loss of net profit in respect of direct sales and licensed sales to retailers[200]. While reduced expenditures may bring about a loss of profits because the firm cuts back on the scope of production, cutting costs may cause damages to third parties connected to the firm. These damaged parties may bring a claim for compensation of damages, provided that they can substantiate a causal relationship between the harm suffered and the prohibited arrangement. However, it seems that they will not be able to rely on the special provisions regulating the passing-on of the overcharge.[201]

3. Quantification and the 'broad axe' principle

The previous sections have shown that whilst the claimant has the burden to prove causation between the action and the harm claimed, the defendant must prove the alleviation of such damage due to mitigation.[202] Both claims imply quantification of the harm which can rarely be calculated with precision, due to information asymmetries.

This principle is line with the previous case law on the assessment of legal causation. As an example, after a thorough probabilistically-based analysis, the Court in *Arkin* v *Borchard Lines Limited* considered that the assessment of causation between

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[196] *Sainsbury's v Mastercard [2020] UKSC 24* (n 225) para 216. The SC argues that most of the relevant information about what the claimant has done to mititgate its expenditures is held by the claimant itself. For a general analysis of the allocation of the burden of proof and the evidentiary burden on the parties, see Lombardi (n 6) Chapter 6.

[197] *Royal Mail Group Limited v Daf Trucks Limited & Others BT Group Plc & Others v Daf Trucks Limited & Others* CAT [2021] CAT 10, paras 33, 36, and 43.

[198] *Stellantis NV v NTN Corp* (n 220) para 20.

[199] Recital (40) and Article 12(3).

[200] Score Draw Limited v PNH International Limited [2021] EWHC 756 (Ch).

[201] Ibid.

[202] Or, certainly, that the absence of any harm.

damages and the antitrust infringement was a matter of 'common sense'[203] – that is, a way to solve with the use of a 'broad axe'[204] and ample discretionary power, a complex situation that class-based probabilities and economic reasoning have brought to a dead end. This principle finds also some correspondence in Article 17 of the Damages Directives establishing that neither the burden nor the standard of proof required for the quantification of harm may render the exercise of the right to damages "practically impossible or excessively difficult". Thus, "Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available".

Causal uncertainty creates incentives to alleviate the burden of proof, through presumptions or by relaxing the standard of proof, that though are inherently based on a specific evaluation of the specific case and on the judge's common sense. As such, it is not always possible to conceptualize such decisions and distil rules from judgments that are very fact specific[205].

5. Conclusions

Causation is a complex, fact-based part of the finding of liability for damages[206]. Causal redundancy is common, if not the standard rule, in competition damages actions but it is not the only impediment in the path to proving causation. Harm caused to indirect victims, employing economic evidence to establish causation, passing on, and mitigation of the harm also complicate the proof of causation. In this regard it is important to clarify a contended issue in the most recent case law of the EU Courts, that causation is governed by EU law. There is a fundamental confusion about responsibility, causation as a general concept, 'causal methodologies', and proof of causation. Whilst causation is part of the process for attributing responsibility, it should not be conflated with it[207].

Causation, as a link between two known facts, necessitates the use of specific techniques and methods to be established. Frequently, we call these methods causation. Thus, if one needs to answer the question whether the CJEU has provided a sufficient methodological background to establish causation, which can also be combined with the proof rules provided in each Member State, then the answer must be that no, it did not. If we are instead referring to a general principle mandating that causation is an essential

[203] *Arkin* v *Borchard Lines Ltd. & Ors* [2003] EWHC 687 (Comm).

[204] Concept effectively explained by Lord Shaw in *Watson Laidlaw & Co Ltd* v *Pott, Cassells and Williamson* (1914) 31 RPC 104 at 117–118: *'[t]he restoration by way of compensation is therefore accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe'*.

[205] Lombardi (n 6) 116.

[206] For discussion, see . Lianos, P. Davis & P. Nebbia, (n6).

[207] See also our comments below, Section 3.3, on the decision C-724/17, Vantaan kaupunki v Skanska Industrial Solutions Oy and Others (hereinafter Skanska), ECLI:EU:C:2019:204.

element of a claim for damages and thus of responsibility for antitrust damages, then the EU courts have progressively established this rule.

National laws have developed different causal accounts that can be used to determine either the causation in fact or the causation in law. The finding of causation thus begins with the designation of the tools and concepts providing the rules for the causal enquiry and that better explain causation in the specific case. The CJEU has adopted a rather broad definition of causation in fact, which can in theory accommodate most of the accounts surveyed in this paper. However, the late jurisprudence of the court also seems to indicate that the approaches accommodating for the inclusion of different causal conditions (i.e. contributing factors) will more likely conform with the principle of effectiveness.

The caselaw considered in this chapter demonstrates the inherent complexity of the counterfactual test, as well as the diverse approaches courts may take even when examining the same fact pattern[208].

Causal uncertainty offers incentives to alleviate the burden of proof through presumptions or by lowering the standard of proof. Rules on disclosure allowing access to evidentiary materials also contribute to rebalance the informational asymmetry existing between the parties for the proof of causation. Hence, the relaxation of the proof rules may be permissible when it is excessively difficult for the claimant prove causation of the harm[209]. However, the use of presumptions, inferences, and inversions of the evidential burden, should be subordinated to the existence of specific conditions. These include the high probability of general causation (as for instance in the case of overcharge damages caused by cartels), and asymmetric information. In the latter case, the use of inferences or rebuttable presumptions may indeed help a more efficient and speedier resolution of the case. However, such inferences tend to be very fact specific. As a result, it is rarely possible to conceptualize the judicial decisions that use these inferences and distil general rules from judgment[210].

Even when the proof of causation is successfully discharged on the balance of probability, parties may struggle to determine the exact amount of the harm. For this reason, national courts have the power to estimate damages[211] Whilst the different approaches to estimation of damages may endanger the harmonious application of EU law, the relatively small number of cases where the 'broad axe' is used and its inherent case-based nature, do not necessarily warrant for full-fledged harmonization.

Finally, private enforcement of competition law is an expression of the principle of corrective justice and has a deterrent function that seems associated with the effectiveness of corrective justice. For this reason, limiting the classes of claimants through a narrow interpretation of the causal requirements would fail to achieve both policy objectives.

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[208] See, in particular the Visa/Mastercard cases.
[209] Lombardi (n 6) 142 ff.
[210] ibid 116.
[211] *Sainsbury's v Mastercard [2020] UKSC 24*.

However, as seen in this chapter, the burden of proof for causation is heavy on plaintiffs, especially those that are claiming indirect damages, thus creating enough friction for indiscriminate damages actions. Here, the challenge is to balance the relaxation of the proof rules and the shifting of the evidentiary burden without creating presumptions that are *de facto* impossible to rebut. But, also, ensure that a high evidential burden does not raise litigation costs to an extent that hinders the right to redress.