CATÓLICA LAW REVIEW

The Otis II judgement and the extensive reading of Article 101 TFEU: closing 2019 with a gold key?

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SUMMARY

1. The elevators and escalators cartel

On 21 February 2007 the European Commission imposed fines over €900 million on Otis, KONE, Schindler and ThyssenKrupp[1] for having operated cartels for the installation and maintenance of elevators and escalators in Belgium, Germany, Luxembourg and the Netherlands.

In Article 1 of the Decision, the European Commission concluded that:

> • In Belgium the undertakings have infringed Article 101 TFEU, between May 1996 and January 2004, "by regularly agreeing collectively, (…) in the context of related national agreements and concerted practices concerning elevators and escalators to share markets, allocate public and private tenders and other contracts in accordance with the pre-agreed shares for sale and installation and to refrain from competing with each other for maintenance and modernization contracts";
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> • In Germany, the undertakings have disregarded Article 101 TFEU, between August 1995 and December 2003, "by regularly agreeing collectively (…), in the context of related national agreements and concerted practices concerning elevators and escalators to share markets, allocate public and private tenders and other contracts in accordance with the pre-agreed shares for sale and installation";
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> • In Luxembourg, the undertakings have infringed Article 101 TFEU "by regularly agreeing collectively (…) in the context of related national agreements and concerted practices concerning elevators and escalators to share markets, allocate public and private tenders and other contracts in accordance with the pre-agreed shares for sale and installation and to refrain from competing with each other for maintenance and modernization contracts";
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> • In the Netherlands, the undertakings have breached Article 101 TFEU, between April 1998 and March 2004, "by regularly agreeing collectively, (…) in the context of related national agreements and concerted practices concerning elevators and escala-

1 Commission Decision of 21 February 2007 relating to a proceeding under Article 81 of the EC Treaty Case COMP/E-1/38.823 – PO/Elevators and Escalators, available here: https://ec.europa.eu/competition/antitrust/cases/dec_docs/38823/38823_1340_4.pdf (16.10.2020).

> tors to share markets, allocate public and private tenders and other contracts in accordance with the pre-agreed shares for the sale and installation and to refrain from competing with each other for maintenance and modernization contracts".

The Commission also pointed out in it's press release[2] that the effects of this cartel could continue for twenty to fifty years as the cartelised installation resulted in a market distortion on the maintenance market as well, also operated by the cartelist.

2. Looking closer at the Otis II ruling

Looking back in time

In the Courage ruling[3] the Court of Justice acknowledges, for the first time, the right of every natural or legal person to seek compensation for the harm caused to them by an infringement of Articles 101 and 102 TFEU. The ECJ clarified that Articles 101 (1) and 102 TFEU "produce direct effects in relations between individuals and create rights for the individuals concerned which the national courts must safeguard".[4] In addition, the ECJ underlines that in the absence of European Union ("EU") Law rules "governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)".[5] And the Court of Justice concludes, in a rather clear way, that EU Law "precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of

2 "Competition: Commission fines members of lifts and escalators cartels over €990 million", Press release of 21 February 2007, available here: https://ec.europa.eu/commission/presscorner/detail/en/IP_07_209 (17.10.2020).

3 Judgment of 20 September 2001, Case C-453/99, *Courage and Crehan* (2001) ECR I-6297, ECLI:EU:C:2001:465.

4 *See* § 23.

5 *See* § 29.

that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract".[6]

Later, in the Manfredi ruling the ECJ states that when there aren't EU rules governing the right to compensation "it is for the domestic legal system of each Member State to prescribe the detailed rules governing the exercise of that right, including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed".[7]

The truth is, and both Courage and Manfredi rulings give us the confirmation, the right to compensation for harm resulting from infringements of EU and national competition law compels each Member State to adopt procedural rules that ensure the effective exercise of that right.

The need for effective procedural remedies follows from the fundamental right to effective judicial protection as provided in the second subparagraph of Article 19 (1) of the Treaty on European Union ("TEU") and in the first paragraph of Article 47 of the Charter of Fundamental Rights of the European Union.

Finally, in 26 November 2014 the European Parliament and the Council of the EU adopted a EU Directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.[8] This Directive "reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as stated in the case-law of the Court of Justice, and does not pre-empt any further development thereof".[9]

The main objective of the Directive is to set out the "rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that harm from that undertaking or association".[10]

Before going through the Otis II ruling we should look at other relevant private enforcement rulings adopted in the same year.

In the Skanska ruling the Finish Supreme Court raises, briefly, the question whether the principle of effectiveness of EU law "requires that liability for an infringement of EU competition law is to be attributed to the company which has

6 *See* § 36.

7 Judgment of 13 July 2006, Joined cases C-295/04 to C-298/04, *Manfredi* (2006) ECR 461, §64, ECLI:EU:C:2006:461, §64.

8 Directive 2014/104/EU of the European Parliament and of the Council, Official Journal of the European Union, L349, 05.12.2014, pp.1-19.

9 *See* recital 12.

10 *See* Article 1.

acquired the share capital and business of a company which has been wound up and which participated in the cartel".[11] According to the Finnish rules on civil liability only the legal entity that causes the damage is liable. However, it is possible to derogate this basic rule if the operators concerned "use the group structure, the relationship between the companies or the shareholder's control in a reprehensible or artificial manner, resulting in the avoidance of legal liability".[12]

The national Court wonders, also, whether the company that continued the business of the company participating in the cartel is to be held liable only if the former company knew or should have known when it acquired the share capital of the latter company that the latter had committed such an infringement.

The ECJ argued that the right to claim compensation for damages caused by a conduct prohibited by Article 101 TFEU ensures the full effectiveness of this disposition as well as the effectiveness of the prohibition laid down in paragraph 1 of this Article. Furthermore, the Court of Justice underlined, recalling the Kone judgement,[13] that this right "strengthens the working of the EU competition rules, since it discourages agreements or practices, frequently covert, which are liable to restrict or distort competition, thereby making a significant contribution to the maintenance of effective competition in the European Union".[14]

The Court of Justice moves a step forward in a more effective protection of the right to claim compensation deciding that "Article 101 TFEU must be interpreted as meaning that, in a case such as that in the main proceedings, in which all the shares in the companies which participated in a cartel prohibited by that article were acquired by other companies which have dissolved the former companies and continued their commercial activities, the acquiring companies may be held liable for the damage caused by the cartel in question".[15]

It's also interesting to look at the preliminary ruling of the *Tribunal Judicial da Comarca de Lisboa* in the Cogeco Judgement[16] concerning the interpretation of some Articles of the Directive 2014/104/EU.[17] The ECJ answered the questions

11 Judgment of 14 March 2019, Case C-724/17, *Skanska Industrial Solutions and others* (2019) ECR 204, §21, ECLI:EU:C:2019:204.

12 *See* § 15.

13 Judgment of 5 June 2014, Case C-557/12, *Kone and others* (2014) ECR 1317, §23, ECLI:EU:C:2014:1317; in this decision the Court confirmed that victims of cartels may claim compensation from cartelists for inflated prices paid to non-cartel members, the so-called "umbrella damages". The Court decided that even companies that have not bought products directly or indirectly from suppliers involved in the cartel, but which have paid higher prices to the cartelists' competitors than would have been the case if there were no cartel, may be able to claim damages from the cartelists.

14 *See* §§ 43 and 44.

15 *See* § 60.

16 Judgment of 28 March 2019, Case C-637/17, *Cogeco Communications* (2019) ECR 263, ECLI:EU:C:2019:263.

17 *See* Vieira Peres, Catarina (2019).

regarding the compatibility of national legislation, such as Article 498 (1) of the Portuguese Civil Code with EU law, concluding that "Article 102 TFEU and the principle of effectiveness must be interpreted as precluding national legislation which, first, provides that the limitation period in respect of actions for damages is three years and starts to run from the date on which the injured party was aware of its right to compensation, even if unaware of the identity of the person liable and, secondly, does not include any possibility of suspending or interrupting that period during proceedings before the national competition authority."

Also, the ECJ interpreted Article 22 of Directive 2014/104/EU as meaning that it was not applicable to the dispute in the main proceedings. In fact, the Court decided that the provisions of the domestic legal system transposing the procedural provisions of Directive 2014/104/EU are not applicable to actions for damages brought before the date of entry into force of those national provisions; thus, actions brought after 26 December 2014 but before the date of expiry of the period prescribed for the transposition of that directive remain governed solely by the national procedural rules that were already in force before the transposition of the Directive.

Last but not least, in the Tibor-Trans Judgement[18] the Court had the opportunity, in the context of a request for a preliminary ruling from the Hungarian Győr Regional Court of Appeal, to interpret Article 7(2) of Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, in the sense that, in an action for compensation for damage caused by an infringement of Article 101 TFEU, "'the place where the harmful event occurred' covers the place where the market which is affected by that infringement is located, that is to say, the place where the market prices were distorted and in which the victim claims to have suffered that damage, even where the action is directed against a participant in the cartel at issue with whom that victim had not established contractual relations".[19]

Looking at the dispute in the main proceedings

The case pending before the Supreme Court of Austria (*Oberster Gerichtshof*) followed an action for compensation brought inter alia by the *Land Oberösterreich* ("applicant") against five companies active on the market for the

18 Judgment of 29 July 2019, Case C-451/18, *Tibor-Trans* (2019) ECR 635, ECLI:EU:C:2019:635.

19 *See* § 37.

installation and maintenance of lifts and escalators, whose participation in a cartel had already been established.

In fact, the applicant had not suffered loss as a purchaser of the products covered by the cartel. However, the increase of construction costs caused by the cartel led the applicant to grant subsidies in the form of promotional loans, for the purpose of financing construction projects, in a higher amount than would have been the case in the absence of that cartel, depriving the applicant of the possibility to use that difference in a more profitable way.

According to the Supreme Court of Austria, under national law the principles governing compensation for purely material losses restrict compensation to losses which the rule infringed was intended to prevent; that excludes compensation for losses suffered by individuals who do not operate as suppliers or as customers on the market affected by the cartel.

By judgment of 8 October 2008, the Supreme Court of Austria, acting as appellate court, upheld the order of the Austrian Antitrust Court (*Kartellgericht*) of 14 December 2007 by which that court had imposed fines on Otis, Schindler and Kone, as well as on two other companies, as a result of their anti-competitive behaviour in Austria. The ThyssenKrupp also participated in the cartel at issue but had chosen to give evidence and had benefited from the leniency programme.

By an action brought on 2 February 2010 before the Vienna Commercial Court (*Handelsgericht Wien*), the Province of Upper Austria, as well as fourteen other entities, applied for the companies involved in the cartel to compensate them for the loss caused. Differently from the fourteen other entities, the Province of Upper Austria did not claim to have suffered loss as a direct or indirect customer of the products covered by the cartel at stake, but in its capacity as a body granting subsidies.

In order to promote the building of homes, the Province of Upper Austria granted to numerous persons promotional loans for the financing of building projects in the amount of a certain percentage of the total construction costs. The beneficiaries of those loans had therefore the opportunity to obtain external funding at a good price through the application of a lower percentage than the market rate. In this context, the Province of Upper Austria claimed, in essence, that the costs connected with the installation of lifts, included in the overall building costs paid by those beneficiaries, were increased as a result of the cartel at issue. That resulted in granting higher amounts than the amounts that would be granted if the cartel at issue had not existed. Thus, if the cartel didn't exist the Province of Upper Austria would have granted smaller loans and it could have invested the difference at the average interest rate of federal loans. It is in this context that the Province of Upper Austria requested that Otis, Schindler, Kone

and ThyssenKrupp be ordered to pay a sum corresponding specifically to that loss of interest, plus interest.

By judgment of 21 September 2016, the Vienna Commercial Court rejected the request of the Province of Upper Austria considering that the latter is not an operator active on the market for lifts and escalators and had suffered merely indirect loss which is not capable of giving rise, as such, to compensation.

By order of 27 April 2017, the appellate court, the Vienna Higher Regional Court, annulled that decision and referred the case back to the Vienna Commercial Court for a new ruling. The appellate court considered that the objective of the cartels prohibition consists also in protecting the financial interests of those who must incur in additional costs resulting from the distortion of market conditions. And that category covered public bodies, which expressively contributed to making possible the implementation of construction projects by offering subsidies in an institutionalised setting. Such bodies were thus the source of a substantial part of the demand in the market for lifts and escalators, on which the five companies concerned were able to sell their services at higher prices as a result of the cartel at issue.

Otis, Schindler, Kone and ThyssenKrupp brought an action before the Austrian Supreme Court against this order.

The Supreme Court started by sustaining that the loss suffered by the Province of Upper Austria did not present a sufficient connection with the purpose of the prohibition of cartel agreements, that consisted in maintaining competition on the market affected by the cartel at issue. According to the Supreme Court "a loss does not give rise to compensation if it occurs because of a side effect in a sphere of interests which is not protected by the prohibition set out in the protective provision which was infringed", adding that the ECJ's case law shows that "Article 101 TFEU seeks to ensure the maintenance of effective undistorted competition in the internal market" and "the personal scope of protection of the cartel ban covers all those suppliers and customers active on the relevant product and geographic markets affected by a cartel".[20] By contrast, the Supreme Court underlines that entities "that allow certain groups of customers to acquire more easily the product covered by the cartel are not direct market participants, even though a significant part of the market activity is made possible only thanks to those subsidies. Such loss is not sufficiently connected with the purpose of the prohibition of cartel agreements, which seeks to maintain competition on the market affected by the cartel".[21]

20 Case C-453/18, *Otis and others* (2019) ECR 1069, §§ 15 and 16.

21 *See* § 16.

In the Supreme Court perspective it results from the ECJ's case law that "any individual can claim compensation for loss caused by a contract or conduct liable to restrict or distort competition"[22] and it is necessary to have a causal relationship between the loss and the anti-competitive behaviour.

And if it is true that according with the ECJ's case law Member States have the duty to propose the rules governing the exercise of that right to claim compensation, including those rules on the application of the concept of 'causal relationship', it is also true that Member States should guarantee that the principles of equivalence and effectiveness are observed. It comes as a very important rule that the national law cannot render practically impossible or excessively difficult the exercise of rights conferred by the European Union law. It is in this circumstances that the Supreme Court wonders "whether the principle according to which everyone may take action against a member of a cartel for compensation for loss applies also to persons, firstly, who, even if they are essential to the functioning of the market concerned, are not active on that market as suppliers or customers and, secondly, whose loss is only the result of the loss suffered by a third party who is directly affected".[23]

Thus, the Supreme Court decided to suspend the proceedings and to question the ECJ whether or not persons operating in a different market, and not as suppliers or customers in the cartelised market, can obtain compensation for their indirect losses.[24]

Looking at the Advocate General Opinion

After assessing the scope of compensation and the persons eligible in cartel cases, Advocate General ("AG") Kokott considered, in her opinion of 29 July 2019, that the full effectiveness and efficiency of Article 101 TFEU would be harshly damaged if the right to claim for damages caused by a cartel was limited to operators active on the affected market.

22 *See* § 17.

23 *See* § 18.

24 *See* § 19: "Are Article 85 TEC, Article 81 EC and Article 101 TFEU to be interpreted as meaning that, in order to maintain the full effectiveness of those provisions and the practical effectiveness of the prohibition resulting from those provisions, it is necessary that compensation for losses may also be claimed from members of a cartel by persons who are not active as suppliers or customers on the relevant product and geographic market affected by a cartel, but who grant loans to buyers of the products offered on the market affected by the cartel under preferential terms as funding bodies within the scope of statutory provisions, and whose loss lies in the fact that the loan amount granted as a percentage of the product costs was higher than what it would have been without the cartel agreement, which means that they were unable profitably to invest those amounts?".

Following the ECJ judgments in Kone[25] and Skanska,[26] the opinion of AG Kokott confirms that any substantive legal question, including aspects of causality, related to the enforcement of rights established directly in Article 101 TFEU shall be governed by EU law, not national law. This approach is very positive towards the achievement of a more equal treatment and a level playing field for claimants and defendants through the EU being independent of the Member State where the damages action is pending, and of the national law governing the claim. Additionally, it is clear that the requirement that EU law should be equally and uniformly applied to all substantive questions related to the enforcement of rights provides a greater legal certainty to all parties involved in private antitrust enforcement.

AG Kokott endorses the practice of national courts, including supreme courts, who refer to EU principles enshrined in the Damages Directive, for the effective enforcement of antitrust damages claims not covered by its temporal scope. Importantly, AG Kokott confirmed that as an essential component of compensation, interest is due from the time when the harm occurred. Moreover, it implies that claimants may substantiate a financial loss in excess of legal interest if they can demonstrate that they would have been able to invest the amounts paid in excess as a result of the cartel.

AG Kokott started her analysis by reminding "the right of any person to claim damages caused by a cartel is rooted directly in Article 101 TFEU";[27] subsequently, AG Kokott underlined that Article 101 TFEU "does not contain any restriction of the right to claim damages caused by a cartel".[28] In this context, the AG stated that any type of exclusion "'for legal reasons, of the compensation for certain types of loss, regardless of the specific circumstances of this case' is not compatible with Article 101 TFEU'".[29] In the opinion of AG Kokott, players that are not active on the affected market cannot be excluded from getting compensation for damages that are predictable for the tortfeasors and sufficiently linked to their behaviour.[30]

And although national law governs the conditions of application and procedural rules that govern the exercise of the right to compensation, namely the rules on judicial competence, rules of procedure, limitation periods and administration of proof,[31] AG Kokott defends that the normative elements of this right,

25 Judgment of 5 June 2014, Case C-557/12, *Kone and others* (2014) ECR 1317, ECLI:EU:C:2014:1317.

26 Judgment of 14 March 2019, Case C-724/17, *Skanska Industrial Solutions and others* (2019) ECR 204, ECLI:EU:C:2019:204.

27 *See* § 40.

28 *See* § 81.

29 *See* § 87.

30 *See* §§ 63, 78 and 151.

31 *See* § 41.

including its nature and scope, "have to be subject to uniform and autonomous interpretation across the European Union".[32]

According to AG Kokott, the objective of Article 101 TFEU "would be compromised if the legal requirements applied by national courts assessing the civil liability for breaches of Article 101 TFEU for specific types of losses suffered by specific persons differ fundamentally from one Member State to another".[33]

AG Kokott expressed a very interesting approach to the Damages Directive sustaining that it can provide guidance, notwithstanding the limits of its temporal application, regarding the effective exercise of the right established in Article 101 TFEU, if it reflects the principles established by the Court's case law.[34] Therefore, the AG admits that even for damage claims prior to the entry into force of the Directive, "the disadvantage caused by the absence of a specific amount during a specific period, as well as the advantage resulting from the availability of a specific amount during a specific period are generally compensated by the fact that the amounts to be repaid have to be increased by the amount of interest accruing from the date on which the repayment is due, applying the market interest rate".[35]

AG Kokott has also a very interesting approach regarding interest saying that "all amounts of the compensation for damages caused by a cartel, regardless of their nature – for instance the losses of interest, damages resulting from overcharge or any other damage –, have to be compensated together with interest accruing on the amounts from the date on which these amounts became due".[36]

The AG sustains that "it is sufficient to 'explain to the national judge which amount was missing and during which period and, where appropriate, the interest rates applicable during that period".[37] But it's particular disruptive the understanding of AG Kokott that the existence of a right to compensation is a matter of EU law and not national law and that this right includes the categories of affected persons that have standing to claim for compensation, the types of damages, and also the scope of the damages. Therefore, the substantive features of the right established in Article 101 TFEU, namely the rights related to connection, should be applied in uniform manner ensuring a required equal treatment throughout the European Union.

Briefly, AG Kokott concludes that despite the temporal limits for the application of the Damages Directive, the EU law that is part of the designated *acquis*

32 *See* § 54.

33 *See* § 55.

34 *See* § 8.

35 *See* § 114.

36 *See* § 119.

37 *See* § 124.

can be raised immediately before the national courts. In fact, according to the AG, both principles of effectiveness and equivalence apply to the procedural rules governing the exercise of the right to compensation, whilst the material conditions entail an autonomous EU interpretation. In the AG Kokott perspective the objective chased by Article 101 TFEU does not anticipate any restriction of the right to compensation, and though the patrimonial damage has to be demonstrated, interest is in order from the date of harm until compensation is paid.

Looking at the ECJ ruling

On 12 December 2019, the Court of Justice confirmed the opinion of AG Kokott, which favoured an extensive reading of the scope of Article 101 TFEU. The Court clarifies that Article 101 TFEU must be interpreted in order to comprehend requests for compensation by undertakings not active as suppliers or customers on the market affected by a cartel but who suffer loss due to that cartel by providing inflated subsidies to buyers of products offered on the affected market.

The Court of Justice provides a clarification concerning the relation between provisions of EU law and those of national law regulating actions for compensation for loss caused by a cartel. In this circumstance, the ECJ recalls that Article 101(1) TFEU produces direct effects in relations between individuals and confers the right to request compensation, particularly on any person who has suffered loss caused by a contract or conduct which is likely to restrict or distort competition, where there exists a causal connection between the loss and the infringement of the competition rules. In addition, national rules relating to procedures for exercising that right to compensation must not weaken the effective application of Article 101 TFEU.

The Court expresses the understanding that effective protection against the negative consequences of an infringement of EU competition rules would be seriously undermined if the right to compensation for losses caused by a cartel were to be restricted to suppliers and customers on the market affected by the cartel. But in the case brought before the ECJ, the restriction specified in the national law ends up excluding compensation for the loss claimed by the applicant since the applicant is not a supplier or customer on the market affected by the cartel.

Thus, the Court underlines that Article 101 TFEU implies allowing any person who does not operate as a supplier or as a customer on the market affected by a cartel, but who granted subsidies in the form of promotional loans to purchasers of products offered on that market, to request compensation for loss it suffered.

In fact, the ECJ argues that the amount of those subsidies was higher than it would have been in the absence of that cartel, and it was not possible to use that difference more profitably as well.

According to the Court, in order to ensure the effective application of Article 101 TFEU any loss having a causal connection with an infringement of the EU competition law must be capable of giving rise to compensation, even if such loss arose in a market other than the market affected by the cartel.

As Brian Cullen very well points out, the ECJ's uses the *effet utile* doctrine in two ways: "first, the effectiveness of EU law requires extending compensation to any person suffering loss due to a cartel, without which 'the full effectiveness of Article 101 TFEU would be put at risk'. Consequently, 'any person is thus entitled to claim compensation for the harm suffered' provided there is a causal relationship between the loss suffered and the anticompetitive conduct. Second, the effectiveness of EU law requires removing national rules, which undermine the objective of undistorted competition, enshrined in Article 101 TFEU."[38]

The Court rebutted Otis' argument that the Province of Upper Austria's loss was too remote to warrant damages saying that "any loss which has a causal connection[39] 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".[40]

The Court argues that "persons not acting as suppliers or customers on the market affected by the cartel must be able to request compensation for loss resulting from the fact that, as a result of that cartel, they were obliged to grant subsidies which were higher than if that cartel had not existed and, consequently, were unable to use that difference more profitably".[41]

Lastly, the Court underlines that it is for the national court to determine whether the Province of Upper Austria "actually suffered such loss, by verifying, in particular, whether that authority had the possibility of making more profitable investments and, if that is the case, whether that authority adduces the evidence necessary of the existence of a causal connection between that loss and the cartel at issue".[42]

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38 Cullen, Brian (2020). "Otis: Effet Utile and the Endless Expansion of Article 101 TFEU", *Journal of European Competition Law & Practice*, Vol. 10, number 10, pp. 618-620, p. 619.

39 The ECJ insistence on a causal link is describe by Brian Cullen as "a welcome filter preventing non-market participants with tenuous links to the affected market from recovering damages—even though the loss does not require 'a specific connection with the 'objective of protection' pursued by Article 101 TFEU'" – Cullen, Brian (2020). "Otis: Effet Utile and the Endless Expansion of Article 101 TFEU", *Journal of European Competition Law & Practice*, Vol. 10, number 10, pp. 618-620, p. 619.

40 *See* § 30.

41 *See* § 32.

42 *See* § 33.

3. Closing 2019 with a gold key?

It is undeniable that AG Kokott adopted a breakthrough opinion, followed by the Court of Justice, in relation to the scope of damages claims that can be brought by claimants. After an extensive debate of both case law and legal principles, AG Kokott decided to follow the view that the full effectiveness and efficiency of Article 101 TFEU would be undermined if damages were just limited to operators active on the market affected by the cartel.

If the designated 'mantra' of EU competition law has been that 'any person' can claim full compensation for all the loss caused to him (or her) through a competition law infringement, with the Otis II judgment the Court of Justice had the opportunity to clarify that 'any person' is not limited to market participants such as buyers or suppliers, including all persons who suffered a loss while operating in a separate market when granting subsidies to purchasers of products offered on the affected market, since the amount of those subsidies was higher than it would have been in the absence of that cartel, and it was unable to use that difference in a more profitably way.

The Otis II judgement follows closely the Courage[43] and Manfredi[44] rulings that we should always have in mind. In Courage the Court of Justice made it clear that the full effectiveness of Article 101 TFEU "would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition".[45] Also in Manfredi the Court of Justice confirmed that Article 101 TFEU "must be interpreted as meaning that any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm".[46]

It is also true that the Otis II judgment confirms and goes even further than the ECJ ruling in the Kone case, in which it was held that national rules which limit the type of persons that can claim cartel damages are contrary to EU law. Indeed, a right to full compensation exists for all loss suffered by any person, as long as there is a causal connection between the loss and the competition law infringement. The recognition of umbrella damages in the Kone judgement was seen, at the time, as opening the door to indirect cartel damages claims but the practical effect has been shy to this day.

43 Judgment of 20 September 2001, Case C-453/99, *Courage and Crehan* (2001) ECR I-6297, ECLI:EU:C:2001:465.

44 Judgment of 13 July 2006, Joined cases C-295/04 to C-298/04, *Manfredi* (2006) ECR I-6619, ECLI:EU:C:2006:461.

45 *See* § 26.

46 *See* § 63.

When we look at the reality, direct or indirect customers of cartelists have initiated the majority of the competition damages claims and we may predict that in light of the Otis II judgment more claims will follow in connected markets.

The consequences in terms of the incentives for public entities to pursue antitrust damages claims are likely to be significant but the cruel reality is that the major public procurement contracts are repeatedly hounded by price-fixing and bid-rigging cases. Now, not only the contracting public authority as the 'operator', but also a public finance agency, are entitled to damages, so cartelists will face a challenging new group of potential claimants.

The Court of Justice findings are a first step towards a more effective compensation for antitrust damages, particularly indirect damages. National courts are clearly the doorkeepers, setting out the required thresholds to assess the existence, extent, and causal link of cartel losses. In fact, the Court of Justice reiterates that the requisites of the right to compensation based on Article 101 TFEU are established by EU law but the rules governing the exercise of that right are still a matter of national law, and the national courts have the responsibility to guarantee the effectiveness of the referred right. The ECJ draws the fundamental requisite that "any loss which has a causal connection with an infringement of Article 101 TFEU must be capable of giving rise to compensation[47] in order to ensure the effective application of Article 101 TFEU and to guarantee the effectiveness of that provision".[48] The Court also clarifies that the responsibility to prove the causal connection relies on the injured party that has to demonstrate before the national court that the damage was caused by the anticompetitive practice.[49] And we can also read between the lines that the quantification of the damage will be found considering whether the injured party had or not "the possibility of making more profitable investments".[50]

We can't deny the importance of this judgement for the private enforcement of competition law, being clearly not just one but a few steps forward in the recognition of the right to compensation for indirect losses. However, we must agree with Miguel Sousa Ferro and Guilherme Oliveira e Costa when they say that "the relative vagueness with which the Court set out the criteria for Member

47 *See* Article 3 of the Directive that provides as follows: "1. Member States shall 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. 2. 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. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest. 3. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages."

48 *See* § 30.

49 *See* §§ 32 and 33.

50 *See* § 33.

States' liability left much room for legal uncertainty and for heterogeneous solutions throughout the European Union". [51]

Miguel Sousa Ferro and Guilherme Oliveira e Costa fear that the imprecision of some parts of this judgement as well as the incompleteness of the explanations provided to the national courts not only may cause more uncertainty, but also leave space for national courts to fill in the blanks with their own views as to the legal solutions.

It's incontestable that the Court established in the Otis II judgment very relevant rules regarding antitrust private enforcement, reinforcing the fundamental right to judicial effective protection, but also missed the occasion to provide legal standards and give more clear guidelines.

We should note that the ECJ specifies that the claim for damages is part of Member States' law despite the conditions of the claim being defined by EU primary law.[52] But differently from AG Kokott, the ECJ didn't provide a desirable clear statement and a necessary clarification of the elements that have to be achieved in order to establish a "causal relationship" in the concrete case.[53]

Finally, we believe that this was an opportunity lost to contribute more firmly not only to a further uniform and effective application of Article 101 TFEU, but also to a closer and more productive cooperation with the national courts. In this context, the ECJ chose to close 2019 with a silver key instead of a gold one.

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52 This conclusion follows the previous ECJ judgements of 20 September 2001, Case C-453/99, *Courage and Crehan* (2001) ECR I-6297, ECLI:EU:C:2001:465, of 13 July 2006, Joined cases C-295/04 to C-298/04, *Manfredi* (2006) ECR I-6619, ECLI:EU:C:2006:461, of 5 June 2014, Case C-557/12, *Kone and others* (2014) ECR 1317, ECLI:EU:C:2014:1317, of 14 March 2019, Case C-724/17, *Skanska Industrial Solutions and others* (2019) ECR 204, ECLI:EU:C:2019:204.

53 *See* Bessa Venda, Sílvia (2020). "Ottis II: light at the end of the tunnel for damages indirectly caused by competition law infringements", *ULP Law Review*, Vol.13, number 1, pp.155-161.

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