OTIS: ANOTHER BRICK IN THE WALL OF EU COMPETITION LAW'S PRIVATE ENFORCEMENT*

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1. INTRODUCTION

Almost in the end of 2019 the European Court of Justice (ECJ) decided *Otis*[1], which, alongside *Skanska*[2] and *Cogeco*[3], represents another great judgment regarding private enforcement of EU competition law during that year. In this case the ECJ recognizes that the Province of Upper Austria may be entitled to damages despite not having a vertical or horizontal connection with the market affected by the escalators and lifts' cartel. One can increasingly argue that a second stage of EU private enforcement is blooming before our eyes.

In *Otis*, the ECJ, agreeing with AG Kokott's Opinion[4] (which, as usual, is mandatory reading for a holistic perception of what is at stake) issued a very important decision that not only reinforced private enforcement, but also protected the effectiveness of articles 101 and 102 TFEU. Among the EU institutions, the ECJ is, by far, private enforcement's greatest supporter and through the preliminary ruling mechanism, the ECJ is given the opportunity

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1 Case C-435/18 *Otis* EU:C:2019:1069.

2 Case C-724/17 *Skanska* EU:C:2019:204.

3 Case C-637/17 *Cogeco* EU:C:2019:263.

4 Opinion of AG Kokott in Case C-435/18 *Otis* EU:C:2019:651.

to protect, develop and foster this type of competition law enforcement. Moreover, one point that *Otis* left clear and deserves a special highlight is the constant, yet partial, Europeanization of the applicable law that ECJ has been doing in this context.

2. THE *OTIS* JUDGMENT

In 2007 the European Commission applied fines to several undertakings in the market for the installation and maintenance of escalators and lifts in Belgium, Germany, Luxembourg and the Netherlands. It was the kick-off of escalators and lifts' cartel series which, even today, still has multiple implications. In 2008, many of those undertakings were also fined in Austria by a similar cartel in its national market. Based on that, several entities – including the Province of Upper Austria, a public entity which granted legally-mandated promotional loans for the financing of building projects, allowing the beneficiary of those loans to obtain funding at better conditions than market rate – lodged follow-on claims in order to be compensated for the loss caused to them by the cartel. The Province of Upper Austria claimed 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. This resulted in that entity being obliged to grant loans in higher amounts. If the cartel at issue had not existed, 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.

The kind of the damages claimed, in addition to the fact that the claimant at hand was not active either on the relevant market or on any upstream or downstream market, led to dissenting opinions in the Austrian national courts (paras. 11-18) and, consequently, the Austrian Supreme Court asked the ECJ whether, under article 101 TFEU, a legal person like the Province of Upper Austria – with both its specificities and (un)ties with the affected market by the cartel – could seek damages from the cartel members (paras. 19-20).

Shortly, the ECJ reasoned that as long as there is a causal link between the damage and the infringement of article 101 TFEU a compensation could be sought, independently of the market on which the injured person is active.

What could be seen as surprise, is actually not. One should recall that the ECJ ruled in *Manfredi*[5] and in subsequent case-law that "*any individual can claim compensation for the harm suffered where there is a causal relationship between the harm and an agreement or practice prohibited under Article* [101 TFEU]". This means that, even before it was issued, *Otis* was already among us (in the shadow of the ECJ's case-law interpretation), meaning that with the ECJ declaring it the path is much clearer. It is now undisputed that the critical criteria to declare if someone is entitled to compensation is the existence of a causal link between the harm and the violation of articles 101 or 102 TFEU.

3. DESCENDING INTO *OTIS*

At first sight, the judgment could lead to the idea that *Otis*' main implication is related to the right to damages, in general and, in particular, to the right to compensation for indirect damage suffered in upstream or downstream markets. Certainly, it is important at such level, especially because it extends *Kone*'s case-law[6], continuing to widen the scope of the right to damages based on infringements of Articles 101 and 102 TFEU, as well as fostering their – and private enforcement's – deterrent effect. However, this is only *Otis* by the door; there is much more in its lift shaft, particularly for the private enforcement system as a whole.

First of all, the right to a compensation based on article 101 (and 102) TFEU springs from EU law, while the detailed rules governing the exercise of that right are a matter of national law, which must guarantee the effectiveness of said right. Although its importance, this is a mere reaffirmation of the settled *Courage* case law[7].

However, what constitutes a novelty is, just like in *Skanska*, the ECJ's clarification of something which is a requisite for the existence of the right to damages, instead of a detailed rule governing the exercise of that right. As highlighted by AG Kokott, in this case the cornerstone was who has legitimacy (*i.e* who has a causal link) to claim compensation and for which damages (para. 60). These are requisites of the right to damages, since its very existence depends on the verification of such conditions. On the contrary,

5 Joined Cases C-295/04 to C-298/04 *Manfredi* EU:C:2006:461.

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

7 Case C-453/99, *Courage* EU:C:2001:465.

detailed rules are those which are important to a right to damages' materialization, but not to assess its existence, meaning that they are not concerned with the right's existence *per se*, but, instead, with its concretization in a determined case. In this regard, it is also worth noting the examples given by AG Kokott of what should be considered detailed rules governing the existence of the causal link (paras. 57-59).

It follows that it is already becoming settled in EU case-law that the "who", "what" and "why" of the right to damages arising from articles 101 and 102 TFEU is determined by EU – rather than national – law. National law determines the "how", considering the principle of procedural autonomy, within the limits of equivalence and effectiveness. This definitely contributes to an increasingly Europeanization of the law that is applicable to right to damages, which, by its turn, could lead to a more uniform and efficient private enforcement throughout the EU.

Furthermore, since the right to damages is determined by EU Law according to its own logic, not all the requisites found in the tort laws of some Member States will be applicable. In this case, the Court specifically ruled out the need for the damage to fall within the scope of protection of article 101 TFEU (para. 31). EU Law is concerned simply with identifying enough causality between the damage and the anticompetitive practice.

Additionally, the ECJ stated that the burden of proof of causality lies on the injured party, which must demonstrate before the national court that the damage was indeed caused by the anticompetitive practice. This could be the case if the claimant had the possibility of making more profitable investments with the capital which was unavailable to him as a result of the infringement (para. 33). *Otis* also provides a clue for quantification: the damage will consist in the remuneration of the capital which could have been obtained, had it been free to be invested otherwise. This is in line with the right to full compensation, laid down in article 3 of the Damages Directive.[8]

Notwithstanding the important conclusions that can be drawn from *Otis*, the brevity and content of the judgment, especially when compared to AG Kokott's Opinion, leaves a little tone of disappointment in the air because the ECJ showed a tendency for vagueness where it could have gone further, without overstepping the limits of the referral procedure. It is true that

8 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349/1, 05/12/2014).

each concrete preliminary ruling should be a clarification meant to assist the national judge in a specific case, but it is also evident that in judgments under article 267 TFEU the ECJ is also providing enlightenments which will be useful in future cases. According to settled case-law the preliminary ruling mechanism aims "to prevent the occurrence within the [EU] of divergences in judicial decisions on questions of [EU] law"[9]. It cannot be forgotten that across the EU several judges are not specialized in competition law and much less in its private enforcement, meaning that the ECJ's reasoning – both the decision and its grounds – in this concrete domain must be clear understandable to those judges.

It is precisely in this absence of clearness that resides *Otis* main pitfall and where it could be arguably better[10]. The ECJ stated that if there is a causal link, there is a right to damages; it also ruled that one does not have to be active on the market affected by the cartel to have a right to damages; however, it did not elaborate whether this situation, showed a sufficient causal link leaving us with no clue regarding what should be consider an enough legal standard to assess if there is a sufficient causal connection in this case. It would be useful if it was stated that if certain criteria are met then an entity is entitled to damages, leaving up to the national court to assess if in the concrete case those criteria are met or not. Even though this assessment must be reserved to the national courts – it is an aspect related with standard of proof (*i.e.* a detailed rule governing the exercise of the right to damages) – they should have a clear legal test to determine the causal connection, since this is a requisite of the right to damages which derives directly from EU law.

It is up to the national courts to assess if in a concrete case the loss was suffered. The same injured party cannot be entitled to damages or not, based on article 101 or 102 TFEU, depending on the Member State in which it files its action (and that Member State's own legal test for causality in tort actions); nonetheless, due to ECJ's lack of clarity and even if the principles of equivalence and effectiveness play their role, this may perfectly occur.

9 Case C-283/81, *CILFIT*, EU:C:1982:335.

10 For a deeper analysis on this regard see – SOUSA FERRO, Miguel & OLIVEIRA E COSTA, Guilherme – "*Otis*: Another Great Judgment on Private Enforcement from the CJEU… But It Could be Better", to be published in Competition Policy International – EU Column.