The Escalators' Series. Season: Private Enforcement. Episode: About the One that was not an Undertaking on the Relevant Market.

Case Comment to Judgment of the Court of Justice of 12 December 2019, Case C-435/18*

by

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* Judgment of the Court of Justice of 12.12.2019, Case C-435/18, *Otis Gesellschaft m.b.H. and Others v Land Oberösterreich and Others*, ECLIEU:C:2019:1069.

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Abstract

This case-note offers comments to the judgement of the Court of Justice in another escalators' case and its potential implications. Given that the preliminary questions rather entail obvious response, the ruling goes beyond expectations. Its reasoning is not based on the necessity to cope with specific national obstacles that was predominantly utilized in face of private enforcement cases. Instead the Court of Justice held that genuinely Article 101 TFEU implies that, probably, any injured party will be entitled to act as a claimant in damages litigation. No room for national legal specificities was left then. Furthermore, the case comment argues that its side back is *more economic approach* return to the mainstream debate. Aside these and other insights, some misgivings are presented in a context of a certain noticeable tendency in terms of the fashion in which the Court of Justice *in genere* handles with the cases.

Résumé

Ce commentaire analyse l'arrêt de la Cour de justice dans la « Escalators' Series » et ses implications potentielles. Comme les questions préjudicielles comportent plutôt des réponses claires, l'arrêt va au-delà des attentes. Son raisonnement n'est pas basé sur la nécessité de faire face à des obstacles nationaux spécifiques qui ont été principalement utilisés dans des affaires privée. Au contraire, la Cour de justice a estimé que l'article 101 du TFUE implique véritablement que toute partie endommagée sera en droit d'agir en tant que demandeur dans un litige de dommages et intérêts. Il n'y avait pas de place pour les spécificités juridiques nationales. En outre, le commentaire de l'affaire fait valoir que cette décision implique un retour à une approche plus économique dans le débat général. ertaines réserves sont présentées dans le contexte d'une certaine tendance perceptible en ce qui concerne la manière dont la Cour de justice traite généralement les affaires. En outre, le commentaire de l'affaire fait valoir qu'il implique un retour au débat général avec une approche plus économique. Par ailleurs, certaines réserves sont présentées dans le cadre d'une certaine tendance perceptible en ce qui concerne la manière dont la Cour de justice traite en général les affaires.

Key words: damages; private enforcement; Article 101 TFEU; preliminary ruling; competition law; national civil law; principle of effectiveness; *more economic approach*.

JEL: K15, K21, K29, K33, K37

I. Introduction

So far EU competition law encountered not that many bunches of cases tied with a subject of the same infringer(s) and hence coined as "sagas" or "series". Some time ago the Microsoft Saga reached a peak interest from antitrust lawyers and economists (see e.g. Montagnani, 2007). Contemporarily it is feasible to discern new sagas, tailored to the current state of competition regime development, including how law and economics are mingled, and what competition authorities have appetite for. Undoubtedly two may be readily posed – so-called Interchange Fee cases (see e.g. Lista, 2013, p, 145 *et seq.*) and so-called Escalators cases (compare Sousa Ferro and Oliveira e Costa, 2020). These both sagas have one in common; their pedigree is public as competition authorities (and courts) rendered multiple decisions (and judgements) which just preceded even more rulings in civil proceedings. Unlike the first ones that will apparently still give rise to a range of civil suits across Europe[1], Escalators saga has seemed to steadily stall. Nothing could be more wrong as case C-435/18 evidences.

II. National proceedings

The case at issue pertains to the legal dispute that emerged in Austria between companies operating in escalators[2] industry, namely Otis GmbH, Schindler Liegenschaftsverwaltung GmbH, Schindler Aufzüge und Fahrtreppen GmbH, Kone AG, ThyssenKrupp Aufzüge GmbH and Land Oberösterreich (i.e. the Province of Upper Austria) and Others. A concise explanatory introduction exceeding a mere domestic perspective is needed here though.

In 2007 the European Commission found various undertakings complicit of anticompetitive delict and imposed relatively severe pecuniary sanctions thereon. The decision embraces (merely) the territory of the Benelux countries together with Germany. What is more, intra group entities associated to Kone, Otis, Schindler and ThyssenKrupp were among those undertakings. Slightly later, in 2008, the Oberster Gerichtshof, i.e. the Austrian Supreme Court, upheld the order of the Kartellgericht, i.e. the Austrian Competition Court, stating existence of the escalators cartel. Thereby fines were imposed on – inter alia – Kone, Otis

[1] Such as in Poland, see: https://www.rp.pl/W-kancelariach/302039944-Prawnicy-kancelarii-Maruta-Wachta-Sp-J-zlozyli-pozwy-w-imieniu-firm-przeciwko-MasterCard-i-VISA.html; https://www.cashless.pl/4583-Interchange-pozew-o-150-mln-zl (available at 20.05.2020).

[2] The collateral issue of potential differences of escalators, lifts and elevators will not elaborated.

and Schindler. Nevertheless the order's ambit was limited to their misconduct perpetrated exclusively in Austria. As concerns ThyssenKrupp, it benefitted fully from the domestic leniency program. Within this public enforcement case, it was ascertained that the distortion of competition was caused by higher prices and the price development was affected thereof.

In a follow-on civil case, the Province of Upper Austria (i.e. Land Oberösterreich) and 14 other entities, demanded in 2010 to be awarded an indemnity for their loss from Kone, ThyssenKrupp, Otis and Schindler. It should be accentuated that the Province of Upper Austria's right for damages was not based on a link between a (direct or indirect) customer of the affected products and a cartelist. The public entity explained instead that it has granted subsidies to promote the building of homes and proceeded promotional loans for the financing of building projects. Alike, it claimed that the expenses for the installation of lifts were lower, but for the cartel at issue. Consequently the loans would have been lower and Land Oberösterreich could have invested the difference at the average interest rate of federal loans. The claim at hand was rejected in 2016 by the Handelsgericht Wien, i.e. the Commercial Court in Vienna, since the public entity is not an operator active on the market for escalators. Taking it into account and a mere indirect claimant's loss, the Handelsgericht Wien denied to award compensation. This judgement was in turn annulled nearly a year later by the Oberlandesgericht Wien, i.e. the Higher Regional Court in Vienna. In addition to referring the case back to the court of first instance for a new ruling, the Oberlandesgericht Wien maintained that the competition law is also aimed at protecting the financial interests of those, inclusive of public bodies, who bore additional costs caused by the distortion of competition. Furthermore the court noticed their role as "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" (paragraph 12 *in fine*). The proceedings before the Oberster Gerichtshof were initiated as result of an action brought by the cartelists against that judgement.

III. The referring courts' considerations

The Austrian Supreme court admitted that the suffered loss does not satisfy the conditions laid down in the domestic civil law. In this vein, it was stated that "under Austrian law, pure material losses, which consist in damage to the assets of the injured party without infringement of an absolutely protected legal interest, do not enjoy, outside of a contractual relationship, absolute protection" (paragraph 15). The court added that it can be considered otherwise providing

that, in particular, there is an abstract prohibition constructed in the law in order to prevent violations against the seminal legal interests.[3] Relatedly, a perpetrator may be obliged to compensate the loss, only if it occurred in consequence of the risk presence against which the law envisages a requirement or a proscription.[4] As per paragraph 16, the court was, on the other hand, aware of the EU case-law according to which the protection against cartels enshrined in 101 TFEU[5] covers all suppliers and customers active on the relevant product and geographic markets that were affected by the anticompetitive agreement. Nonetheless, in the Oberster Gerichtshof's view, public bodies merely grant loans and thus are not market's participants, despite their vital role in fostering thereof, what cannot remain unnoted. Thereby the referring court raised the very issue concerning a causal connection between the loss and the anti-competitive behaviour that is a subject of rules prescribed by the Member States on their own discretion. The principles of equivalence and effectiveness have to be fulfilled though.

Taking it all as a whole, the Austrian Supreme Court, through preliminary question, inquired whether the full effectiveness of Article 101 TFEU[6] requires conferring on entities, that are not active as suppliers or customers on the relevant market, rights to seek compensation from cartelists, if they role is limited to grant preferential loans to purchasers of the products affected by the illicit agreement as funding bodies within the scope of statutory provisions, and if their loss consists in an inability to invest amounts that would have been saved, but for the cartel did not come into existence so that the purchasers' expenses were lower then.

IV. The assessment of the Court of Justice

The Court of Justice recalled (paragraph 21) its well-known, classical, judgment from *Courage* case[7], so as the very recent seminal *Skanska* case[8]. In light of the case-law, the specificity of Article 101(1) TFEU was stressed, namely

[3] In this regard, discrepancies in translations between certain language versions of the judgement have been noticed.

[4] In the Opinion, it is even more clearly explained – the causal link occurs in light of the domestic law only if the infringed provision is also aimed at protecting the injured party (point 51 of the Opinion).

[5] Treaty on the Functioning of the European Union. Consolidated version [2010] OJ C 83/47.

[6] And counter-parts from the former Treaties.

[7] Judgment of the Court of Justice of 20.09.2001, Case C-453/99, *Courage and Crehan*, ECLIEU:C:2001:465.

[8] Judgment of the Court of Justice of 14.03.19, C-724/17, *Skanska Industrial Solutions and Others*, ECLIEU:C:2019:204.

its direct applicability in horizontal relationships and mandatory protection of the harmed parties that national courts are to ensure. While clarifying the concept of the full effectiveness of Article 101 TFEU, the Court noted that, either by a contract or by conduct, any individual may suffer and lodge an action for damages for that reason. To this end, a well-established, since *Manfredi* case[9], causal relationship between that harm and an anticompetitive conduct has to be proved. Invoking chiefly *Kone* case[10], the Court observed that this wide scope of the right to claim damages as it "strengthens the working of the European Union competition rules" (paragraph 24) and serves as a deterring factor. Therefore, under no condition, shall pertinent national rules jeopardise objectives that Article 101 TFEU sets out. Stating so, the Court agilely and convincingly moved to an explanation by means of which effective and undistorted competition in the internal market was put to the forefront in an implied opposition to a mere relevant market perspective, which, in turn, was emphasised in the stance presented by Oberster Gerichtshof in the discernible fashion. Having held that, the duty rested on the Member States to ensure the right to claim compensation for any party what did not require further arguments.

Besides, the Court of Justice cogently observed[11] that the effective protection against the adverse effects of a breach of competition rules cannot be limited to suppliers and customers of the relevant market since it would be, otherwise, seriously undermined. Consequently a range of suffered entities would be from the outset and unconditionally doomed to be devoid of redress. Accordingly the Province of Upper Austria did not claim to be a customer but a public body granting subsidies instead (paragraph 28). In spite of that, the applicants questioned that Land Oberösterreich has a right for compensation in the first place (paragraph 29). Their position was basically justified on the remoteness between objective pursued by Article 101 TFEU and produced loss. The Court of Justice took an opposite view reminding that any loss which has a causal connection with a violation of Article 101 TFEU "must be capable of giving rise to compensation" (paragraph 30) lest pursing a scenario in which the effectiveness thereof was put at stake.

Heeding all these issues, the Court of Justice ruled that entities not acting as suppliers or customers on the relevant market must be vested with the right to claim damages also if their loss had a form of inability to use more profitably the difference between the higher granted subsidies and lower subsidies granted

[9] Judgment of the Court of Justice of 13.06.2006, Cases C-295/04 to C-298/04, *Manfredi and Others*, ECLIEU:C:2006:461.

[10] Judgment of the Court of Justice of 5.06.14, Case C-557/12, *Kone AG and Others v. ÖBB-Infrastruktur AG*, ECLIEU:C:2014:1317.

[11] Invoking also the Opinion of the Advocate General in this regard.

under circumstance of undistorted competition. In compliance with the rules governing judgements delivered in preliminary proceedings, the Court of Justice passed to the national court a duty to adjudicate *in concreto*, verifying whether the Austrian public authority actually suffered such loss, had the possibility of making more profitable investments and, lastly, the evidence supported the existence of a causal link between that loss and the cartel at issue.

V. Opinion of Advocate General

Before the judgement has been passed, Advocate General, Juliane Kokott, prepared her opinion[12]. Essentially, the Court of Justice invoked it merely twice – in relation to her rejection for any limits regarding Article 101 TFEU to suppliers and customers of the market affected by the cartel (paragraph 27 of the judgement and point 78 of the Opinion), as well as to her denial in respect of a thesis that the loss has to be necessarily linked with the objective of protection pursued by Article 101 TFEU (paragraph 27 of the judgement and point 78 of the Opinion). Aside these two remarks, the AG pointed out other worth mentioning observations among which are some that should be encapsulated at least in a few sentences below.

In general, the Opinion is complex and released from vagueness that could be instead alleged to the commented ruling (Sousa Ferro and Oliveira e Costa, 2020). It lies in line with former opinions from Juliane Kokot who almost "monopolised" private enforcement of the EU competition law from the position of Advocate General, just to mention the following cases: Kone, Cogeco[13] and Gasorba[14], although in Skanska[15] it was Nils Wahl whose opinion was presented.

Turning to details, AG Kokott rightly noticed that the case referred to the Court of Justice regarded infringements that were present before and after Austria acceded to the European Union (point 22 *et seq.*). The Court of Justice seamlessly shifted its attention on the interpretation of Article 101 TFEU. Hence the possible interpretation of a domestic equivalent before 1994 was not taken into account. As the conditions, under which the Court of

[12] Opinion of Advocate General J. Kokott presented on 29.07.2019, Case C-435/18, *Otis Gesellschaft m.b.H. and Others v Land Oberösterreich and Others*, ECLIEU:C:2019:651.

[13] Judgment of the Court of Justice of 28.03.14, Case C-637/17, *Cogeco Communications Inc v Sport TV Portugal SA and Others*, ECLIEU:C:2019:263.

[14] Judgment of the Court of Justice of 23.11.17, Case C-547/16, *Gasorba SL and Others v Repsol Comercial de Productos Petrolíferos SA*, ECLIEU:C:2017:891.

[15] Judgment of the Court of Justice of 14.03.19, Case C-724/17, *Vantaan kaupunki v Skanska Industrial Solutions Oy and Others*, ECLIEU:C:2019:204.

Justice is authorised to rule with regard to purely domestic cases, spur doubts (see Dobosz, 2017), the maneuver, to take a chance to skip it, is entirely understood. Since misconduct took place also after 31/12/1993, it comprised a convenient opportunity to adjudicate without prejudice to merits regarding the earlier period.

Another facet of the case, that is not readily noticeable whilst reading through the judgement, concerns the uniform application of the EU competition law. AG marked it in points 54 and 55 of her Opinion holding that the level playing field constitutes the goal which would be put in danger if legal criteria differed in respect of cartelists' civil liability for certain losses and with regard to certain entities. I have already comprehensively discussed the paramount role that uniformity plays elsewhere (see Dobosz, 2018). This ruling solely affirmed that an adjudication process through the lens of uniformity is unavoidable, so as enhances delineating of what can be left to national regimes and what has to be dealt on the EU level. Alike goals can be visible in Directive 2019/1/EU[16].

In terms of establishing whether the loss in question was capable to be a foreseeable effect of the cartel, AG Kokott went further than the Court of Justice (points 145–150 of the Opinion). Unlike applicants and the Commission, Advocate General determined that the loss caused by higher prices would be passed on entities which provide funding for the investors. Moreover, infringers were aware of the preferential loans used to finance building projects. Doubtlessly, the lost opportunity to gain from interests on the financial market is thus a solid and unnecessarily atypical reason for which redress can be claimed.

VI. Observations

1. Comment on usefulness of the case for the EU (competition) law

Having encountered the content of the preliminary question, the following objections may be in the first blush born in mind – did this question have to be necessarily dealt via preliminary ruling in the first place or was it actually intended to obtain a prior *quasi* "approval" from the Court of Justice? Given a current stage of knowledge and development when it comes to the EU competition law, nothing intricate can be found in the preliminary question

[16] Directive 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L 11, 14.1.2019, p. 3–33.

so that pushing it to Luxembourg might not have been deemed indispensable. Needless to say that objectively none of the preliminary questions can be *ex ante* assessed to deserve the attention of the Court of Justice, but for some, responses come up virtually at a glance. Some doubt may emerge due to still quite a new wave from Directive 2014/104/UE[17]. It is not a case here because of its inapplicability (see points 7 and 8 of the Opinion). Since it is never so simple as it appears to be, also this time some reading through the judgement brings discoveries. It is why even *prima facie* uninteresting preliminary questions (and rulings) ought to be commented. The response – particularly from the Court of Justice – may surpass the expectations. It may work *vice versa* as well. Potentially ground-breaking questions could have prompted demotivating rulings – just to mention the Polish case[18] *PZU* and hopes that case spurred (Szmigielski, 2018; Dobosz, 2018a).

Time will show whether the commented case will join other milestones for developing the EU competition law. Just after vast efforts have been undertaken for the implementation of Directive 2014/104/UE (in this respect see Rodger, Sousa Ferro, Marcos, 2018), as well as innumerous publications[19] devoted to private enforcement, the state of knowledge was not supposed to be extended in course of judgement passed in this another escalators' case. The request from the Austrian court looked rather like a "backup" for the national court's ruling given some conflicting touchpoints with the domestic incumbent civil rules.[20] This critical insight may be espoused by previous judgements – in the aforementioned *Kone* case as well as in *Tibor-Trans* case[21]. They are legitimate sources to guide national courts in terms of the ambit of loss to be compensated and non-contractual grounds for redress actions.

Hardly could no one have foreseen that, technically speaking, the Court of Justice may take chance to enact the broad scope of Article 101 TFUE along with a concurrent denial for another interplay between the EU and Member States' legal orders. No objections inasmuch as a reasoning behind it stems from *more economic approach* but it is arguably a side effect instead. There is a thin distinction between the perception of the Court of Justice as a *spiritus movens*

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[17] 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, 05.12.2014, p. 1–19.

[18] Judgment of the Court of Justice of 3.04.19, Case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A. v Prezes Urzędu Ochrony Konkurencji i Konsumentów*, ECLIEU:C:2019:283.

[19] It would be a vain and pointless effort to list them here.

[20] However, as it is a truism, from the mere observer's position it may not be entirely feasible to ascertain whether the preliminary question is genuinely well-founded.

[21] Judgment of the Court of Justice of 29.07.2019, Case C-451/18, *Tibor-Trans Fuvarozó és Kereskedelmi Kft. v DAF TRUCKS N.V.*, ECLIEU:C:2019:635.

for changes and an impression of unpredictability (or inconsistency at least) in terms of its adjudications. This is important not only through the lens of the EU competition law but generally European Union law. As concerns solely the former one – just to juxtapose the judgement at hand with above mentioned *PZU* case which has been identified as "a lost opportunity" (Libertini, 2019). As regards the latter one – just to recall a very latest judgement[22] of the Federal Constitutional Court which adopted essentially different stance than the Court of Justice[23], thereby triggering a certain tension in dialogue between those two courts, or – *sensu largo* – between the EU court and Member States courts. Even the competition law is not released from the rule of law issues (see Bernatt, 2019), hence either way compromised position of the Court of Justice may not be inconsequential in face of adjudication challenges whilst utmost values are at stake. For that reason, the Court of Justice should, at once, be extremely cautious and capable to forsake its comfort zone.

2. Nifty more economic approach embodiment

What can be found truly outstanding in the commented ruling is the pass-through from presenting the objectives of the EU competition law to manifesting the priority that effective and undistorted competition takes, what prevails over "the technicalities" regarding the relevant market. Although the Court of Justice did not state it literally, the point has been well delivered.

Similarly, the Court of Justice put forward an argument aptly that the effectiveness of the EU competition law system would be questioned if it would have been limited – in terms of the guaranteed protection for harmed ones – to suppliers and customers of the relevant market. In other words, the European Union competition rules were not designed to protect only the chosen ones – competition law is not simply about end users (Foer, Durst, 2018, p. 499). It is indeed contrary – the subjects' catalogue in this context is possibly non-exhaustive as it ought to be congruent with *more economic approach*. Seemingly *more economic approach* has become *passé*, just after it figured as a *cliché* for many years. Notwithstanding its current recognition, *more economic approach* is embedded in the competition law veins and no matter it is explicitly expressed or not, it still plays a vital role. Therefore it

[22] BVerfG, Judgement of the Second Senate of 05 May 2020 – 2 BvR 859/15, paras. (1–237) available in English at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html;jsessionid=133C175B562B23E5FE926C576713CC51.2_cid383 (22.05.20).

[23] Judgement of the Court of Justice of 11.12.2018, Case C-493/17, *Weiss and Others*, ECLIEU:C:2018:1000.

has to be recalled that not only effectiveness of Article 101 TFEU is pertinent here but this very approach alike. Besides, as this approach is an invitation for complicated econometric magic, which many lawyers are afraid of, *a contrario* it requires to embrace economically suffered victims in deliveries of antitrust redress measures. Not to mention, *more economic approach* and effectiveness are, cumulatively, mutually harmonious and adequate to narrate future cases, especially as issues with damages cases in Europe have not been averted (see e.g. Ritz, Marx, Bogenreuther, 2019).

Unlike the Court of Justice, the Austrian Supreme Court underscored the essential role of the claimant for the functioning of the relevant market as if it were a crucial factor in considerations about admissibility of the right for indemnity. However, as in line with *more economic approach*, more sophisticated analysis techniques may be necessary to capture the impact that a conduct may have on the structure of competition in a given market (Cruz Vilaca, 2018, p. 176), it is not applicable to the commented case, so as it should be yet borne in mind that the impact exerted on the relevant market cannot be ever deemed necessary to award compensation. If an entity is able to prove that the infringement affected its economic situation, its particular standing on the market does not matter. It can be readily apprehended from paragraph 20 of the judgement that the Court of Justice rephrased the referring question to capture the sheer legal problem of the case. In consequence, no trace concerning the essential impact on the functioning of the relevant market can be found onwards.[24]

In addition, two features in respect of the commented case should be observed. Firstly, it was the public entity that sued the cartelists – but *nota bene* not the Member States' first public entity in the EU (see Walle, 2018, p. 7). Secondly, it could be only a public entity to sue on such grounds. It appears to be a never-ending drawback that many SMEs (and consumers) may not manage, in particular financially, to engage in a several years long suitcase. Likewise beneficiaries of the Austrian programme fostering the housing may not be in a sound position to execute their rights. It should be recalled then that they had to incur higher costs for their financial participation in overall building expenses, including the lifts' installation. Not to mention, they might have had larger loans, mortgages, to pay back owing to higher prices for the lifts. The final judgement of the national court may thereby pave the way for them to claim for indemnity. But take note of the Oberster Gerichtshof observation from paragraph 18 in which the Austrian Supreme Court seemed to have clearly stated that the loss of Land Oberösterreich is only the result of the loss suffered by third parties who were directly affected, namely the beneficiaries of

[24] This example perfectly shows how it is important in the Court's judgement to put in order the question's aspects at this stage of adjudication.

the programme. It ironically shows that although the anticompetitive practices have been profoundly examined in course of public and private enforcement, some harmed entities might have been compensated, nonetheless the weakest ones may remain at the end of the day without fair share.

3. The sins of the European Commission and the Austrian Supreme Court

Adjudicating in favour of "the economic side" appears to be the ultimate goal expected from the competition law. Therefore, prisms adopted by the Austrian Supreme Court and the European Commission may be found perplexing. As regards the former one, it might have, to some degree erroneously, paid too much attention to the domestic and civil layers of the case.[25] Likewise, the national court apparently strived to stress that the claimant had a massive impact on the relevant market by means of loans proceeding, as if it were a point at all. As concerns the latter one, its standpoint may be understood in one of, at least, two ways. First, the EC attempted to pretend that the private pillar of the EU competition law has artificial boundaries and they can be as remote as the EU competition authority allows, if it does. Second, the EC endeavoured to shift a burden of the issue to national courts for the sake of principles of effectiveness and equivalence (point 37 of the Opinion). No matter which one is closer to the truth, it can be acknowledged that a provisional impression that the Commission is in charge of competition law boundaries, can be no longer retained. More importantly, the civil paradigm was from the very beginning doomed to be equally undiscovered and limitless. How otherwise awarding compensation to certain harmed parties and leaving the others with no redress could be reconciled in practice? It's a big ask. An unconditional acceptance for any damages cannot be respected though – it has been already recognised that liability ought to be individual in lieu of general one and possible to be calculated (Jurkowska-Gomułka, 2015, p. 74–75).

4. Damages actions (not) under control

Notwithstanding the harsh reception above of the European Commission's view, a question pertaining to an extent to which the compensation stemming from anticompetitive delict can be awarded is not that rejectible. Hypothetically, could a harmed party sue employees of the infringer if the latter were bankrupt and if their salaries were higher due to the employer's unfairly high income

[25] This remark is built upon a content of paragraph 15 of the judgement.

resulting from anticompetitive practice?[26] I hope it could not. Passing-on scenarios appeared to be altogether captured (see how in: Moisejevas, 2017, see p. 137–138) but frankly speaking no one is able to envision directions in which damage claims may go.

Yet it is Article 1 of Directive 2014/104/UE that straightforwardly provides that "anyone who has suffered harm caused by an infringement of competition law" is covered by the EU compensation rules. Similarly, another provision therein defines "injured party" as a person that has suffered harm caused by an infringement of competition law – without any additional prerequisites expressed. The Polish law[27] that implemented Directive has not incorporated the EU definition of a harmed party in its own glossary. However Article 3 of the Polish law states that an injured party can be anyone. Nevertheless it is intriguing that the Polish lawmaker introduced a culpability premise therein. It corresponds to a culpability concept existing in the national tort law. Given the recent EU case-law, this domestic condition may be of relative significance from now on, at least when interstate trade criterion has been fulfilled. In pure domestic cases it may be theoretically taken into account as so far – despite differing both categories of cases is not preferable any more.

What is more, it can be even boldly presumed that the EU autonomous comprehension of injured parties left no space for diverse specific Member States rules that could hamper the pace in which private enforcement is flourishing. The approach taken in the case at issue is a step forward overreaching limitations characteristic for Article 4 of Directive. There is a huge difference when the essence of the Treaty's norm dictates interpretation in comparison to a mere principle of effectiveness indirect impact which then rests mainly on national courts. Thus, in future, national courts will need to think twice before they proceed upon such issues as imputability, adequacy and culpability since they have been apparently reduced to minimal factor affecting damages actions. Instead economic side seemingly takes priority in such litigations.

5. The European Commission undermines amicus curiae option?

It can be argued that there are other available options whilst seeking support in interpretation's conundrums with regard to Article 101 TFEU (and 102 TFEU). Aside the preliminary reference, the European Commission may serve as *amicus curiae* yet during the national proceedings (Vallindas,

[26] Regardless of probable evidence multiple related issues.

[27] Ustawa z dnia 21 kwietnia 2017 r. o roszczeniach o naprawienie szkody wyrządzonej przez naruszenie prawa konkurencji, Dz.U. 2017, poz. 1132.

2018). For various reasons this legal institution is more abstract and ideal than concrete and expedient given solely handful of cases in which the Commission stepped in to the proceeding, no matter on its own motion (Article 15(3) of Regulation 1/2003)[28] or invited (Article 15(1) of Regulation 1/2003). Regardless of pros and cons for both concepts, the Commission, acting as the agent in the proceedings before the Court of Justice either way has to employ its resources, both in terms of people and time. Hence if the Commission does not engage before a national court, its involvement may be shifted in time to the ECJ's proceedings at any rate.

As per information provided in the judgment (and the opinion), the Commission was reluctant to follow the path that the Court of Justice has trodden. Paradoxically, if the EC had acted as *amicus curia* in the case at issue before a national court, it would have produced more harm than good. National courts are not restrained and can ask the Court of Justice even if the EC has delivered its opinion. However potential conflicting assessments from the most important antitrust institutions is not a desirable course of events. Irrespective of which of them is called upon to assist, their involvement brings the case on the European forum whilst for instance majority of dismissed actions is not widely known.[29] In light of uniform application of the EU competition law, this is the pivotal window through which the Member States' authorities and courts may learn how the Treaties' provisions should be construed.

VII. Conclusions

The commented case can be called a spin-off in the European series of lifts. It opens the avenue for broader scope of instances that may give rise to civil suits in line with the less and less heard concept these days – *more economic approach*. Direct and indirect customers together with parties suffered by umbrella pricing were already deemed legitimate to claim damages in respect of breach of Article 101 TFEU, but they brought attention from the national procedural side. The judgement at issue had to align with this consistent course what ensued by a clear assertion that the lost opportunity to gain from interests on the financial market shall be compensated to a public entity granting subsidies in compliance with Article 101 TFEU. Nevertheless the purport of the ruling is much broader and should be applied universally.

[28] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 04.01.2003, p. 1–25.

[29] As recent research demonstrated there has been a number of dismissals across Europe – see Laborde, 2019, p. 5 *et seq.*

The judgement elucidates rather substantial premises in interpreting Article 101 TFUE than the requirements for the legal system of the Member States which were occasionally pondered so far (compare Caro De Sousa, 2018, *passim*). Despite that, the European Commission suggested leaving this issue for national legal regimes (compare: point 53 of the Opinion). The ruling is not flawless though. The preliminary question could have entailed obvious response. Instead the Court of Justice decided to come up with highly surprising motifs laying behind anticipated general findings. Contemporarily, this *modus operandi* raise doubts that fall outside a sole antitrust regime.

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