Ledit montant tient compte du dépôt de garantie de 72.000 € versé en cours de contrat à l'intimée pour la bonne exécution de B obligations. En première instance, la société A avait formulé une demande reconventionnelle en remboursement de ladite somme, demande rejetée par le tribunal.
Etant donné que l'appel de la société A est fondé en ce qu'il a été retenu qu'elle avait été empêchée d'exécuter B obligations contractuelles, le dépôt de garantie est devenu sans objet. L'appelante a donc droit au remboursement de cette somme.
Le jugement est à réformer en ce sens.
Il est encore à réformer en ce que la société défenderesse a été condamnée à payer à la demanderesse une indemnité de procédure de 2.000 €.
Il est cependant à confirmer en ce que le tribunal a débouté la société A de sa demande basée sur l'article 240 NCPC.
Les demandes des parties en appel en allocation d'une indemnité de procédure sont à rejeter.
L'intimée n'y a pas droit au vu du sort réservé à l'appel et aux dépens. L'appelante n'y a pas droit non plus vu qu'elle n'établit pas en quoi il serait inéquitable de laisser à sa charge les frais non compris dans les dépens qu'elle a dû supporter pour faire valoir B droits.

PAR CES MOTIFS
la Cour d'appel, quatrième chambre, siégeant en matière commerciale, statuant contradictoirement, le magistrat de la mise en état entendu en son rapport,
reçoit l'appel,
le dit fondé,
réformant :
déboute la société anonyme B de sa demande en condamnation dirigée contre la société par actions simplifiée de droit français A,
la condamne à payer à la société par actions simplifiée de droit français A le montant de 72.000 € avec les intérêts légaux à courir à partir du 25 novembre 2015, date de la demande reconventionnelle en justice jusqu'à solde,
décharge la société par actions simplifiée de droit français A de la condamnation à payer une indemnité de procédure,
confirme le jugement en ce que le tribunal a rejeté la demande de cette société basée sur l'article 240 NCPC,
dit non fondées les demandes en allocation d'une indemnité de procédure,
fait masse des frais et dépens des deux instances et les impose dans leur intégralité à la société anonyme B avec distraction au profit de Maître Muriel Piquard, avocat constitué, qui en fait la demande.
(...)

Note

L'arrêt commenté été cassé par la Cour de cassation par un arrêt du 23 avril 2020 (n° 59/2020), car la Cour d'appel a omis de répondre à un moyen essentiel repris dans les conclusions de la partie intimée mais cela ne retire rien à l'intérêt de la décision tant pour les juristes belges que français et bien sûr luxembourgeois.
Cet arrêt illustre parfaitement les conditions d'application de la force majeure et ses relations avec la théorie de la caducité. Il s'agit d'une belle application de la théorie du fait du prince puisque l'arrêt traite d'un changement législatif. La cour montre aussi que le caractère imprévisible du changement de circonstances doit faire l'objet d'une appréciation raisonnable (voir notre article paru dans le numéro précédent).
La cour souligne que la cause du contrat doit s'apprécier à la formation de celui-ci, ce qui est correct mais est discutable *de lege ferenda*. Mais même si le caractère licite de l'objet est généralement traité à l'occasion de la formation du contrat, l'on peut se demander si le contrat n'est pas devenu caduc du fait de la disparition d'un des éléments essentiels du contrat, qui est la diffusion du programme. En effet, la caducité porte sur un changement de circonstances postérieur à la conclusion du contrat et qui fait disparaître un élément essentiel de celui-ci (voir sur cette question, P. WERY, *Chronique de jurisprudence sur les causes d'extinction des obligations, 2000-2013*, Larcier, 2014).

Denis PHILIPPE

VII. Concurrence et pratiques du marché – VII. Mededinging en marktpraktijken

Cour de justice européenne, 12 décembre 2019

C-435/18

Siège : E. Regan, I. Jarukaitis, E. Juhász, M. Ilešič, C. Lycourgos
Avocat général : J. Kokott

Renvoi préjudiciel – Article 101 TFUE - Réparation des dommages causés par une entente – Droit à indemnisation des personnes n'opérant pas comme fournisseur ou comme acheteur sur le marché concerné par l'entente – Dommages subis par un organisme public ayant octroyé des prêts à des conditions avantageuses en vue de l'acquisition des biens faisant l'objet de l'entente

Le 12 décembre 2019, la Cour de justice de l'UE a, dans l'affaire Otis e.a./Land Oberösterreich, jugé qu'une partie qui n'était pas un client ou un fournisseur direct des membres d'un cartel peut, elle aussi, intenter une action en dommages et intérêts contre

les auteurs de ces infractions au droit de la concurrence si elle a été lésée par le cartel en question. Cela peut être le cas, par exemple, si des organisations ont prêté plus d'argent à des conditions défavorables aux victimes du cartel par le biais de prêts incitatifs et ont donc également souffert (indirectement) du cartel. Les organisations qui sont indirectement désavantagées financièrement par un cartel peuvent donc également être en mesure à l'avenir de récupérer, sous certaines conditions, les dommages qu'elles ont subis auprès des victimes du cartel.

.....

Prejudiciële verwijzing – Artikel 101 VWEU - Vergoeding van door een kartel veroorzaakte schade – Recht op vergoeding voor personen die niet als leverancier of afnemer actief zijn op de door het kartel beïnvloede markt – Schade geleden door een overheidsinstantie die leningen heeft verstrekt tegen gunstige voorwaarden met het oog op de aanschaf van goederen waarop het kartel betrekking heeft

Op 12 december 2019 heeft het EU Hof van Justitie in de Otis e.a./ Land Oberösterreich-zaak geoordeeld dat ook een partij die niet een directe afnemer of leverancier was van kartellisten, toch een schadevergoedingsactie kan starten tegen deze inbreukmakers op het mededingingsrecht wanneer zij schade heeft ondervonden van het betreffende kartel. Dit kan bijvoorbeeld het geval zijn indien organisaties via stimuleringsleningen meer geld tegen ongunstige voorwaarden hebben geleend aan kartelslachtoffers, en zo ook (indirect) te lijden hebben gehad van het kartel. Ook organisaties die indirect financieel nadeel ondervinden van een kartel, kunnen dus in de toekomst onder voorwaarden door hen geleden schade op kartellisten verhalen.

.....

(...)

(Reference for a preliminary ruling – Article 101 TFEU – Damages for the loss caused by a cartel – Right to compensation of persons not acting as supplier or purchaser on the market affected by the cartel – Damage suffered by a public body which granted loans on favourable terms in order to acquire assets subject to the cartel)
In Case C-435/18,
REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 17 May 2018, received at the Court on 29 June 2018, in the proceedings
Otis GmbH,
Schindler Liegenschaftsverwaltung GmbH,
Schindler Aufzüge und Fahrtreppen GmbH,
Kone AG,
ThyssenKrupp Aufzüge GmbH
v
Land Oberösterreich and Others,
THE COURT (Fifth Chamber),
composed of E. Regan, President of the Chamber, I. Jarukaitis (Rapporteur), E. Juhász, M. Ilešič and C. Lycourgos, Judges,
Advocate General: J. Kokott,
(...)

Judgment

1. This request for a preliminary ruling concerns the interpretation of Article 101 TFEU.

2. The request has been made in proceedings between Otis GmbH, Schindler Liegenschaftsverwaltung GmbH and Schindler Aufzüge und Fahrtreppen GmbH (those two companies together 'Schindler'), Kone AG and ThyssenKrupp Aufzüge GmbH ('ThyssenKrupp'), on the one hand, and the *Land* Oberösterreich (Province of Upper Austria) as well as 14 other entities, on the other hand, concerning the application made by the latter seeking to have those 5 companies ordered to compensate them for loss they suffered as the result of a cartel between those companies, in breach in particular of Article 101 TFEU.

Austrian law

3. Paragraph 1295(1) of the Allgemeines Bürgerliches Gesetzbuch (General Civil Code; 'the ABGB') provides:
'Any person shall be entitled to seek compensation for injury caused by another person who caused that injury through his fault, whether the injury was caused by breach of a contractual obligation or was unrelated to a contract.'

4. Pursuant to the second sentence of Paragraph 1311 of the ABGB, the person responsible for injury caused is the person who has 'infringed a provision aimed at preventing accidental injuries'.

The dispute in the main proceedings and the question referred for a preliminary ruling

5. On 21 February 2007 the European Commission imposed fines totalling EUR 992 million on various undertakings as a result of their participation, at least since the 1980s, in cartels for the installation and maintenance of lifts and escalators in Belgium, Germany, Luxembourg and the Netherlands. Several entities within the groups of companies to which Otis, Schindler, Kone and ThyssenKrupp belong constituted those undertakings.

6. By judgment of 8 October 2008, the Oberster Gerichtshof (Supreme Court, Austria), acting as appellate court in matters involving the law on cartels, upheld the order of the Kartellgericht (Antitrust Court, Austria) 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. Although it participated together with all of those undertakings in that cartel on the Austrian market ('the cartel at issue'), ThyssenKrupp had however chosen to give evidence and had benefited, for that reason, from the leniency programme provided for by Austrian law.

7. The cartel at issue was aimed at securing for the favoured undertaking a higher price than would have been achievable under competitive conditions. Free competition was thereby distorted, as well as the price development that would have taken place in the absence of a cartel.

8. By an action brought on 2 February 2010 before the Handelsgericht Wien (Commercial Court, Vienna, Austria), the Province of Upper Austria and 14 other entities applied for Otis, Schindler, Kone and ThyssenKrupp to be ordered to compensate them for loss caused to them by the cartel at issue. Unlike the 14 other entities, the Province of Upper Austria did not however claim to have suffered loss as a direct

or indirect customer of the products covered by the cartel at issue, but in its capacity as a body granting subsidies.

9. In support of its application, the Province of Upper Austria claimed that, in the context of its budget allocations dedicated to promote the building of homes, during the period concerned by the cartel at issue, it in particular granted, on the basis of statutory housing subsidy provisions, promotional loans for the financing of building projects, in the amount of a certain percentage of the total construction costs to numerous persons. 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. 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 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.

10. It is on the basis of those considerations 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.

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

12. By order of 27 April 2017, the appellate court, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) annulled that decision and referred the case back to the court of first instance for a new ruling. The appellate court considered that the prohibition of cartels serves also to protect the financial interests of those who must incur additional costs resulting from the distortion of market conditions. That category covers public bodies, such as the Province of Upper Austria, which significantly contribute to making possible the implementation of construction projects, by offering subsidies in an institutionalised setting. Such bodies are 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.

13. Otis, Schindler, Kone and ThyssenKrupp brought an action before the referring court, the Oberster Gerichtshof (Supreme Court) against that order of the Oberlandesgericht Wien (Higher Regional Court, Vienna).

14. The referring court states that, according to criteria of Austrian law, the loss suffered by the Province of Upper Austria does not present a sufficient connection with the purpose of the prohibition of cartel agreements, which is to maintain competition on the market affected by the cartel at issue.

15. That court states in that regard 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. Such material losses are capable of being compensated only if the unlawfulness of the harmful conduct can be derived from the legislation, in particular in the case of infringements of protective provisions, since such provisions are abstract risk prohibitions, which are intended to protect the members of a group of people against the infringement of legal interests. In such a case, the incurring of liability requires the occurrence of a loss that the transgressed standard precisely intended to prevent. The person responsible for the loss is only liable for losses manifested as a realisation of the risk on account of which certain conduct is required or forbidden. 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.

16. The referring court notes also that, according to the Court's case-law, Article 101 TFEU seeks to ensure the maintenance of effective undistorted competition in the internal market and, consequently, prices set on the basis of free competition. Therefore, it is of the opinion that 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. By contrast, according to it, public law bodies which, as a result of subsidies, 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.

17. However, the referring court notes that, although the Court's case-law provides, in particular, that any individual can claim compensation for loss caused by a contract or conduct liable to restrict or distort competition, a causal relationship between the loss and the anti-competitive behaviour is necessary. Moreover, it is for the Member States 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. The national law may therefore not render practically impossible or excessively difficult the exercise of rights conferred by EU law.

18. Moreover, that court states that, in the light of the factual circumstances of the case in the main proceedings, the question raised by the latter is 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.

19. In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer

the following question to the Court of Justice for a preliminary ruling:
'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?'

Consideration of the question referred

20. By its question, the referring court asks, in essence, whether Article 101 TFEU must be interpreted as meaning that persons who are not active as suppliers or customers on the market affected by a cartel, but who provide subsidies, in the form of promotional loans, to buyers of the products offered on that market, may seek an order that the undertakings which participated in that cartel pay compensation for the losses they suffered as a result of the fact that, since the amount of those subsidies was higher than what it would have been without that cartel, those persons were unable to use that difference more profitably.

21. In that regard, it should be noted that Article 101(1) TFEU produces direct legal effects in relations between individuals and directly creates rights for individuals which national courts must protect (judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 23, and of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 24 and the case-law cited).

22. The full effectiveness of Article 101 TFEU and, in particular, the practical effect of the prohibition laid down in paragraph 1 of that provision would be put at risk if it were not open to any individual to claim damages for loss caused to him or her by a contract or by conduct liable to restrict or distort competition (judgments of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465, paragraph 26, and of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 25 and the case-law cited).

23. Therefore, any person is thus entitled to claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101 TFEU (judgments of 13 July 2006, *Manfredi and Others*, C-295/04 to C-298/04, EU:C:2006:461, paragraph 61, and of 14 March 2019, *Skanska Industrial Solutions and Others*, C-724/17, EU:C:2019:204, paragraph 26 and the case-law cited).

24. The right of any individual to claim compensation for such a loss actually strengthens the working of the European Union 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 (judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 23 and the case-law cited).

25. In that regard, and specifically in the context of competition law, national rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU must not jeopardise the effective application of that provision (see, to that effect, judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 26 and the case-law cited).

26. Therefore, the law of Member States must, in particular, take into account the objective pursued by Article 101 TFEU, which strives to guarantee effective and undistorted competition in the internal market, and, accordingly, prices set on the basis of free competition. It is for the purposes of guaranteeing that effectiveness of EU law that the Court has held, as was noted in paragraph 23 of the present judgment, that national legislation must recognise the right of any individual to claim compensation for loss sustained (see, to that effect, judgment of 5 June 2014, *Kone and Others*, C-557/12, EU:C:2014:1317, paragraph 32 and the case-law cited).

27. It should be noted that, as was also stated, in essence, by the Advocate General in point 78 of her Opinion, both the guarantee of the full effectiveness of Article 101 TFEU and effective protection against the adverse effects of an infringement of competition law would be seriously undermined if the possibility of requesting compensation for loss caused by a cartel were limited to suppliers and customers of the market affected by the cartel. That would, from the outset, systematically deprive potential victims of the possibility of requesting compensation.

28. In the main proceedings, the Province of Upper Austria claims to have suffered loss not as the customer of the products covered by the cartel at issue, but in its capacity as a public body granting subsidies. It grants to third parties promotional loans with a rate of interest which is lower than the market interest rate. Given that the amount of the loans is connected with the construction costs, the Province of Upper Austria considers that it suffered loss, since the amount of the loans – and, consequently, the amount of the financial aid granted by it at a privileged interest rate – was higher than that which would have been granted in the absence of a cartel.

29. However, the applicants in the main proceedings contest, in essence, the right of the Province of Upper Austria to request compensation for loss it considers to have suffered, on the ground that the latter does not present a sufficient connection with the objective pursued by Article 101 TFEU and is thus not capable of giving rise to compensation.

30. Nevertheless, as is apparent from paragraphs 22 to 25, 26 and 27 of the present judgment, 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.

31. Subject to the possibility of the participants to a cartel not being held liable to compensate for all the loss that they could have caused, it is not necessary, in that regard, as the Advocate General noted, in essence, in point 84 of her Opinion, that the loss suffered by the person concerned present, in addition, a specific connection with the 'objective of protection' pursued by Article 101 TFEU.

32. Consequently, 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.

33. It is therefore for the referring court to determine whether, in the present case, 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.

34. In the light of all the foregoing, the answer to the question referred is that Article 101 TFEU must be interpreted as meaning that persons who are not active as suppliers or customers on the market affected by a cartel, but who provide subsidies, in the form of promotional loans, to buyers of the products offered on that market, may seek an order that the undertakings which participated in that cartel pay compensation for the losses they suffered as a result of the fact that, since the amount of those subsidies was higher than what it would have been without that cartel agreement, those persons were unable to use that difference more profitably.

Costs

35. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.
On those grounds, the Court (Fifth Chamber) hereby rules:
Article 101 TFEU must be interpreted as meaning that persons who are not active as suppliers or customers on the market affected by a cartel, but who provide subsidies, in the form of promotional loans, to buyers of the products offered on that market, may seek an order that the undertakings which participated in that cartel pay compensation for the losses they suffered as a result of the fact that, since the amount of those subsidies was higher than what it would have been without that cartel, those persons were unable to use that difference more profitably.
(...)

Annotation – The puzzle of private enforcement of European competition law: what is the extent of cartelists' liability?

Introduction

On the brink of a new decade, the European Union Court of Justice ("**ECJ**") delivered a landmark judgment regarding the private enforcement of EU competition law. On 12 December 2019, the ECJ ruled that a party not acting as a supplier or buyer on the market affected by a cartel can claim compensation for loss due to that cartel. This is an interesting ruling as up until recently, only direct suppliers or buyers of cartels brought actions for damages before national courts. The case at hand concerned a public body that did not have a prior direct (contractual) relationship with the cartels, but that started a private damages action against those participants regardless, because it claimed to have suffered losses due to the cartel.

The structure of this annotation is as follows. We start with an explanation of the development of the system of private enforcement of EU competition law, after which we will outline the key elements of the Land Oberösterreich case and provide an explanation of the significance of this ECJ ruling for legal practice. We will complete this contribution with a concise conclusion.

The development of private enforcement of competition law in Europe

Let's rewind first. Competition law prohibits companies (*inter alia*) from entering into price agreements, allocating markets or customers, and limiting production. These acts are considered to constitute hardcore restrictions of competition because they remove competition between companies on fundamental elements such as price setting. Traditionally, EU competition law has been enforced by the European Commission ("**Commission**") and national competition authorities, both of whom can impose very serious fines. Next to this administrative (and in some countries also criminal) enforcement of competition law, there is a second path to ensure that competition principles are respected in economic relations: that is the so-called private enforcement of competition law. Private parties are the drivers behind this and not public authorities.

In private enforcement cases, injured parties seek to recover damages (from the cartellists) which they suffered as a result of the cartel. They bring cases before the national court of an EU member state for this purpose. National civil law (primarily) applies in the absence of a uniform European civil law code. The vast majority of these civil proceedings are brought on a follow-on basis (meaning that these cases rely on a prior decision of a competition authority to establish liability), although this is not a prerequisite.

Private enforcement of competition law is more and more common in Europe, but this has not always been the case. In the early 2000s, actions for damages of EU competition law infringements were virtually non-existent (which is in stark contrast to other jurisdictions such as the USA). It thus remained a largely undeveloped field of law in Europe. As cross-border

European competition law violations are associated with immense welfare losses[1], the European Union (mainly the Commission) tried to push for more private enforcement. Even though the ECJ delivered landmark rulings[2] and the Commission published numerous papers, it was not until the entering into force of the so-called Damages Directive in 2014 and the subsequent implementation into national legal orders that private enforcement cases have really taken off.[3]

Competition law claims bring about a large number of legal questions, for instance on standing, jurisdiction, limitation, and evidence. These questions of civil law and private international law arise in the various ongoing proceedings before national courts. This is not to say that these national proceedings are free of EU law – far from it. EU law does intertwine, for instance, through the effect of directives or the application of regulations that touch upon or regulate certain aspects of private law. This means that the EU judiciary can also have a role in the interpretation of (certain) relevant civil law through the preliminary reference procedure. Moreover, in some instances, even primary EU law (such as the cartel prohibition of Article 101 Treaty on the Functioning of the European Union ("**TFEU**")) can have an impact in national proceedings as it applies directly in national law.

The year 2019 proved to be fruitful in terms of the further development of private enforcement of competition law. Four important judgments of the ECJ further paved the way: *Skanska Industrial Solutions* (regarding parental liability)[4], *Cogeco* (regarding limitation rules)[5], *Tibor-Trans* (on jurisdiction)[6], and finally the *Land Oberösterreich* case (the subject of this annotation).

Facts of the case

What were the facts of the ECJ's *Land Oberösterreich* case? In February 2007, the European Commission imposed fines totaling € 992 million on various undertakings active in the elevator industry for their participation in a cartel concerning the installation and maintenance of elevators and escalators in Belgium, Germany, Luxembourg and the Netherlands. Entities belonging to the groups of companies of Otis, KONE, Schindler and ThyssenKrupp were involved in this cartel. Subsequently, in December 2007, the Austrian Competition Court fined, inter alia, Otis, Schindler and Kone for forming a cartel on the Austrian market.

Land Oberösterreich (an Austrian public law body, but acting as a private party in the case at hand) grants loans to third parties to finance construction projects. These loans are calculated on the basis of a certain percentage of the total construction costs. The construction costs included the installation costs of the elevators. The interest rate on these loans is lower than the prevailing (federal) market rate.

Land Oberösterreich (and fourteen other entities) alleged they had suffered loss as a result of the cartel. Land Oberösterreich argued that the loans it granted were higher because of the cartel. Had the cartel not existed, the total construction costs of the projects would have been lower and Land Oberösterreich would have granted lower loans. With the money saved, Land Oberösterreich might have been able to make more profitable investments than it actually did. Consequently, in February 2010, Land Oberösterreich started an action for damages before the District Court in Vienna and claimed a sum corresponding specifically to the loss of interest (plus interest on missed interest) from the elevator manufacturers. The Supreme Court of Austria eventually submitted preliminary questions to the ECJ regarding the circle of claimants that can bring an action for damages against cartels.

Main elements of the ECJ's ruling and its importance for legal practice

In response to the preliminary questions of the Austrian Supreme Court, the ECJ ruled that *any* individual can claim compensation for a competition law infringement. This also includes parties that have suffered indirect damages as a result of a cartel. Should this right only be reserved for direct suppliers or buyers of cartels, this would undermine the full effectiveness of the cartel prohibition (as laid down in Article 101 TFEU), and would *"[...] from the outset systematically deprive potential victims of the possibility of requesting compensation."*

The ECJ based its approach on an effectiveness-oriented interpretation of Article 101 TFEU, which applies directly to the national orders of the EU member states. It is the full effectiveness of this provision as well as the effective protection against the adverse effects of a competition law infringement that, according to the ECJ, requires (such) a broad interpretation of the circle of potential claimants. It is now up to the Austrian court to determine whether the Land Oberösterreich actually suffered damages (and how much) that were a direct result of the cartel, which

1. It is estimated that consumers suffer roughly between € 13 billion to over € 37 billion for cross-border EU competition law breaches. See also: BEUC, 'EU collective redress: old myths and recent realities' (2012), https://www.beuc.eu/publications/x2013_008_ama_collective_redress-myths_facts_en.pdf.
2. See for example: ECJ, 20 September 2001, C-453/99, ECLI:EU:C:2001:465 (*Courage Ltd v Crehan*) and ECJ, 13 July 2006, C-295/04, ECLI:EU:C:2006:461 (*Vincenzo Manfredi/Lloyd Adriatico Assicurazioni SpA*).
3. 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 (5 December 2014), OJ L 349.
4. ECJ, 14 March 2019, C-724/17, ECLI:EU:C:2019:204 (*Skanska Industrial Solutions*).
5. ECJ, 29 March 2019, C-637/17, ECLI:EU:C:2019:263 (*Cogeco*).
6. ECJ, 29 July 2019, C-451/18, ECLI:EU:C:2019:635 (*Tibor-Trans Fuvarozó és Kereskedelmi*).

will not be an easy task. In that regard, national judiciaries are not be envied.

Conclusion

With this judgment, the ECJ underlined that *anyone*, even those who were not directly active themselves on the relevant market where the cartel infringement took place, can claim damages when there is a direct causal link between the alleged damage and the cartel. The basis for this assumption is the full effectiveness of Article 101 TFEU, which has direct application in the legal orders of the EU member states and therefore cannot be ignored in national civil proceedings.

The ECJ has solved yet another piece of the private enforcement puzzle. The following age-old quote of Hugo de Groot still rings true: "*the right to punish belongs to the rulers of the state but the right to claim redress belongs to those who suffered wrong.*"[7]

Joost HOUDIJK
Advocaat bij AKD

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.....

Antwerpen 25 april 2019

AR: 2018/AR/2013

Zetel: E. Hulpiau, B. Ponet, I. Renap

Stakingsvordering – Verwarringstichting – Slechtmaking

Het hof van beroep oordeelt dat de eerste rechter terecht besliste dat er sprake is van een inbreuk op art. VI.104 en art. VI.105, 1 °, c) WER door appellante. Appellante bezondigt zich zowel aan het stichten van verwarring tussen de eigen en andermans onderneming (zij doet zich voor als de firma die de contracten kan beheren), als aan het pogen klanten te winnen via misleiding (door de lopende overeenkomst met geïntimeerde te laten opzeggen en een nieuwe overeenkomst te laten tekenen met appellante).

Geïntimeerde vorderde terecht in het beschikkend gedeelte van haar conclusie niet dat elke vorm van concurrentie of prospectie van de markt door appellante zou worden lamgelegd, enkel vroeg zij dat de staking zou bevolen worden van het feit dat deze op onrechtmatige wijze plaatsvindt. De twee stakingsbevelen zoals herleid opgelegd door de eerste rechter (betrekking hebbende op contact opnemen met de contractpartijen van geïntimeerde op de wijze zoals aangegeven en versturen van opzegbrieven zonder dat het duidelijk is dat met een andere contractpartij in zee wordt gegaan) worden bevestigd.

Slechtmaking is een vorm van onrechtmatige mededinging die als zodanig onder het verbod van art. VI.104 WER valt. Of een boodschap al dan niet denigrerend is, hangt af van de beoordeling in het concrete geval. Slechtmaking veronderstelt dat er sprake is van een bijzonder schadelijke aanval op een onderneming, waardoor afbreuk wordt gedaan aan haar reputatie of aan de reputatie van haar producten, diensten of activiteiten, door een lasterlijke of eer rovende daad, of zelfs door een eenvoudige kritiek die toelaat haar te identificeren. Bij de beoordeling of er sprake is van ongeoorloofde slechtmaking, is het irrelevant of het beweerde al dan niet juist is en of er hiermee een concurrentievoordeel wordt beoogd. De slechtmaking kan uitdrukkelijk zijn, maar ook impliciet. In dit laatste geval volstaat het dat er bij het publiek geen twijfel over kan bestaan wie geviseerd wordt en wat wordt bedoeld. Enige zwartmaking/slechtmaking is *in casu* onbewezen.

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Action en cessation – Confusion – Dénigrement

La Cour d'appel a jugé que le premier juge avait correctement décidé qu'il y avait une violation de l'article VI.104 et de l'article VI.105, 1°, c), du CDE dans le chef de l'appelant. L'appelant est coupable à la fois d'avoir créé une confusion entre sa propre société et celle d'autres (il se fait passer pour la société qui peut gérer les contrats), et d'avoir tenté de gagner des clients par la tromperie (en faisant résilier l'accord actuel avec l'intimé et en signant un nouvel accord avec l'appelant).
Dans le dispositif de ses conclusions, l'intimée n'a pas prétendu que toute forme de concurrence ou de prospection du marché serait paralysée par l'appelante, mais a simplement demandé que la cessation soit ordonnée du fait que celle-ci se déroule de façon illicite.
Les deux ordres de cessation tels que réduits par le premier juge (relatifs à la prise de contact avec les cocontractants de l'intimé de la manière indiquée et à l'envoi de lettres de résiliation sans qu'il soit clair qu'un autre contractant serait impliqué) sont confirmés.

Le dénigrement est une forme de concurrence illégale qui, en tant que telle, tombe sous le coup de l'interdiction de l'article VI.104 du CDE. Le caractère dénigrant ou non d'un message doit être évalué dans chaque cas spécifique. Le dénigrement présuppose une attaque particulièrement préjudiciable à une entreprise qui porte atteinte à sa réputation ou à la réputation de ses produits, services ou activités, par un acte diffamatoire ou calomnieux, ou même par une simple critique permettant de l'identifier. Pour évaluer s'il y a eu dénigrement illicite, il importe peu de savoir si les allégations sont correctes ou non et si elles visent ou non à obtenir un avantage concurrentiel. Le dénigrement peut être explicite, mais aussi implicite. Dans ce dernier cas, il suffit qu'il n'y ait aucun doute dans l'opinion publique quant à la personne visée et à l'objet des allégations. Dans le cas d'espèce, il n'y a aucune preuve d'une quelconque diffamation/dénigrement.

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(...)

7. Hugo de Groot, 'Jurisprudence of Holland' (1631).