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Umbrella pricing victims may seek damages from cartelists

European Court of Justice rules that members of a cartel may be liable for damages based on price increases implemented by independent third parties following the cartel

Even though follow-on damage claims are today almost automatically borne in mind by potential claimants after a fining decision of a competition authority, many legal aspects of those claims are still controversially disputed. The judgment of the European Court of Justice ("the Court") provides further guidance with regard to one of those legal aspects, the so-called "umbrella pricing". Umbrella pricing means that companies that are not member to a cartel use the cartel as an umbrella to set their own prices, intentionally or unintentionally, higher than they would have been able to under competitive conditions. In its judgment of 5 June 2014 the Court held that a victim of umbrella pricing may obtain compensation from the members of a cartel even if it did not have a contractual relationship with them.¹ Cartelists must thus be prepared that claimants in follow-on damage claims proceedings will not only seek compensation for the damages suffered from the cartelists but also for such loss suffered due to price settings of third parties which might have followed the price initiative taken by the cartel.

Facts of the Case

The request for a preliminary ruling of the Court has been made in damage claims initiated by ÖBB-Infrastruktur AG ("ÖBB"), a subsidiary of Österreichische Bundesbahnen (Austrian Federal Railways). ÖBB is responsible for the construction and maintenance of railway stations and as such an important customer on the Austrian market for elevators and escalators. In the past, ÖBB had purchased elevators as direct and indirect customer from Kone, Otis, Schindler and ThyssenKrupp, all members of a cartel fined in 2007 by the Austrian competition authorities and others from companies not party to the cartel.

The four European manufacturers of elevators and escalators had agreed between the 1980s and early 2004 to divide up the market in Austria in order to secure a higher price than they could have achieved under competitive conditions. The fines imposed by the Austrian competition authorities were confirmed by the Oberster Gerichtshof (Supreme Court) in 2008.²

Before the Austrian civil courts, ÖBB brought an action for damages amounting to more than EUR 8 million against the cartel members and estimated the loss suffered from higher prices charged by companies not party to the cartel to be at least EUR 1.8 million.

Whereas the first civil court rejected any compensation of ÖBB for losses as a result of purchasing from third companies at a higher price (umbrella pricing) the appellate court upheld ÖBB's claim. The Oberste Gerichtshof, as final instance court in Austria, stayed the proceedings and referred the following question to the Court for a preliminary ruling:

"Is Article 101 TFEU to be interpreted as meaning that any person may claim from members of a cartel damages also for the loss which he has been caused by a person not party to the cartel who, benefitting from the protection of the increased market price, raises his own prices for his products more than he would have done without the cartel (umbrella pricing), so that the principle of effectiveness laid down by the Court ... requires the grant of a claim under national law?"

Reasoning of the Court

The Court decided that the categorical exclusion under national law of any civil liability of members of a cartel for loss resulting from umbrella pricing is incompatible with Art. 101 of

¹ European Court of Justice ("ECJ"), case C-557/12 - Kone AG *et al.* v ÖBB-Infrastruktur AG, 5 June 2014.

² Order of the Higher Regional Court Vienna, ref: 25 Kt 12/07, 14 December 2007; Order of the Oberster Gerichtshof, ref. 16 Ok 5/08, 8 October 2008.

the Treaty on the Functioning of the European Union ("TFEU"). ÖBB had argued that part of the loss it suffered was caused by the cartel which made it possible to maintain a market price at such a high level that even competitors not party to the cartel were able to benefit from a market price that was higher than it would have been under competitive conditions.

The Court stressed that the market price is one of the main factors taken into consideration by an undertaking when it determines the price at which it will offer its goods or services. Where a cartel manages to maintain artificially high prices for particular goods it can therefore not be ruled out that a competitor outside the cartel might choose to set the price of its offer at an amount higher than in absence of the cartel.³ The Austrian law categorically excludes a right to compensation in case of umbrella pricing since the causal link between the loss sustained and the cartel in question is considered to have been broken by the autonomous decision of the third party to set its umbrella prices. Despite the fact that it is, in principle, for the domestic legal system of each Member State to lay down the detailed rules governing the application of the concept of the causal link, the Court held that the full effectiveness of Art. 101 TFEU would be put at risk if national law would categorically exclude the right to claim the loss suffered through umbrella pricing from the members of the cartel compensation.⁴

As a consequence, the victim of umbrella pricing may obtain compensation for the loss caused by the members of the cartel

- where it is established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently and
- that those circumstances and specific aspects could not be ignored by the members of that cartel.⁵

However, it is for the referring court to determine whether those conditions are satisfied.

Comment

On the one hand, the question as to whether and under what conditions loss suffered from

³ ECJ, case C-557/12 - Kone AG *et al.* v ÖBB-Infrastruktur AG, 5 June 2014, para 29.

⁴ ECJ, case C-557/12 - Kone AG *et al.* v ÖBB-Infrastruktur AG, 5 June 2014, para 33.

⁵ ECJ, case C-557/12 - Kone AG *et al.* v ÖBB-Infrastruktur AG, 5 June 2014, para 34.

umbrella pricing has to be compensated by the cartelists has now been answered.

According to the Court, the victim of umbrella pricing may obtain compensation under the conditions that (i) the market price was inflated due to the cartel, (ii) he suffered harm due to the higher market price and (iii) the cartel member was able to foresee the loss resulting from umbrella pricing.

On the other hand, the Court did not define the criteria for considering whether these conditions have been met. This particularly concerns the questions of causation and of proof that is required by the courts. It is thus for the national courts to establish such rules and standards.

As a consequence, the umbrella price issue has not disappeared, but rather has shifted to the production of evidence. Therefore, Advocate General Kokott is right when she states that, due to the burden of proof, an umbrella plaintiff still has to weigh up the pros and cons of taking out a civil action against cartel members.⁶

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⁶ Advocate General Kokott, opinion of 30 January 2014, Case C-557/12, para 69.