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Compensation of the loss suffered by indirect victims of a cartel

The Court of Justice of the European Union has recently issued a decision that could significantly increase the financial consequences that the members of a cartel are likely to bear.

The Court held that the members of a cartel may, in certain circumstances, be ordered to provide compensation for the loss suffered by the client of a company not party to the cartel wherever that company has, because of the existence of the cartel, applied prices higher than that which would have been applied if the cartel had not existed.

In a decision dated June 5, 2014,^[1] the Court of Justice of the European Union ("CJEU") ensured the full effectiveness of EU antitrust laws, in particular Article 101 of the Treaty on the Functioning of the European Union ("TFEU") that prohibits cartels^[2].

In 2007, the European Commission imposed on Kone, Otis, Thyssenkrupp and several companies of the Schindler group heavy fines for their participation in a cartel involving the installation and maintenance of elevators and escalators in several Member States^[3].

Some of these companies, as well as a number of their competitors, were also sanctioned in 2008 by the competent Austrian authorities.

That cartel sought to guarantee for its members a price higher than that which they could have expected under normal competitive conditions.

At least one third of the market volume was affected by the cartel and, as a result, market prices hardly changed and the cartel members' market shares remained essentially the same since 2004.

An Austrian company, ÖBB-Infrastruktur, sought from the cartel members compensation for the loss it claimed to have suffered as a result of its suppliers setting higher price than it would have paid for if the cartel had not existed.

Indeed, ÖBB-Infrastruktur had bought from companies not party to the cartel elevators and escalators. It considered that the cartel led third-party companies to apply higher prices than those that would have been applied in normal market conditions. It assessed its loss at 1,839,239.74 Euros.

The Austrian Court of First Instance, to which the case had been brought, dismissed ÖBB-Infrastruktur's claim but such claim was later granted by the Austrian Court of Appeals.

The Austrian Supreme Court held that, according to Austrian case-law, a person who brings a claim for damages based on non-contractual liability must establish the existence of an "*adequate causal link*" and a "*link of unlawfulness*" between the contentious event and the loss suffered.

According to the "*adequate causal link*" criterion, a person responsible for a damage must provide compensation for all the consequences that he/she could foresee *in abstracto*, including accidental ones, but not for atypical consequences. As such, when a company that is not a party to a cartel takes advantage of the effect of umbrella pricing, there is no adequate causal link between the cartel and the loss potentially suffered by a buyer; that loss is indirect and stems from an "*independent decision that a person not party to a cartel has taken on the basis of his own business considerations*".

Regarding the "*unlawfulness*" issue, the Austrian Supreme Court held that there is an obligation to provide compensation only if the "*unlawfulness of the loss stems from a breach of contractual obligations, a breach of absolute rights or a breach of protective provisions*".

Under Austrian law, compensation was thus not possible since (i) the loss was caused by a decision of the supplier, which was not a party to the cartel, and (ii) there was no contractual link between the members of the cartel and the victim.

In this context, the Austrian Supreme Court asked the CJEU whether Austrian law was contrary to Article 101 of the TFUE.

The CJEU first noted that the practical effect of the prohibition of cartels would be put at risk if it were not open to any individual to claim damages for loss caused to him/her by a breach of antitrust legislation.

The CJEU then acknowledged that the market price is one of the main factors taken into consideration by a

company when determining its pricing policy. As such, even if the determination of a price is regarded as a purely autonomous decision taken by a company not party to a cartel with which the victim has contracted, such a decision may have been taken by reference to a market price distorted by that cartel.

Hence, the pricing policy and the determination of an umbrella pricing are the result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets.

As such, Austrian law – that subjects the right to claim compensation for a damage suffered to the existence of a direct causal link while excluding that right when the concerned person had no contractual link with a member of the cartel but only with a company not party thereto – could be seen as challenging the full effectiveness of Article 101 TFUE.

On the contrary, the CJEU held that where it is established that in the circumstances of the case and, in particular, the specific aspects of the relevant market, the cartel was likely to have the effect of umbrella pricing being applied by independent companies not party to the cartel, and that those circumstances and specific aspects could not be ignored by the members of that cartel, compensation may be sought from such members.

This decision could significantly increase the amount of damages that members of a cartel can be ordered to pay by courts of law.

This was the point made by two members of the cartel that tried to convince the CJEU that such damages would be likely to dissuade cartel members from assisting the competition authorities to investigate cases, which would run contrary to the principle of effectiveness.

The CJEU rejected this argument and explained that the leniency program, which is aimed at reducing the fines imposed by the European Commission in cartel cases, was not binding on Member States and that it could in no event deprive individuals of the right to obtain compensation before national courts for a loss sustained as a result of a cartel.

[1] CJEU, June 5, 2014, Kone and others vs. ÖBB Infrastruktur, C-557/12

[2] Article 101 of the TFUE prohibits cartels. It stipulates as follows:

The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

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- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

[3] Commission Decision C(2007) 512 final of February 21, 2007. The Commission imposed a fine totaling 992 million Euros.

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