Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

5 June 2014*

(Article 101 TFEU — Damages for the loss caused by a cartel prohibited by that article — Loss resulting from the higher price charged by an undertaking as a result of a prohibited cartel to which it is not a party ('Umbrella pricing') — Causal link)

In Case C-557/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 17 October 2012, received at the Court on 3 December 2012, in the proceedings

Kone AG,

Otis GmbH,

Schindler Aufzüge und Fahrtreppen GmbH,

Schindler Liegenschaftsverwaltung GmbH,

ThyssenKrupp Aufzüge GmbH

v

ÖBB-Infrastruktur AG,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, A. Rosas (Rapporteur), D. Šváby and C. Vajda, Judges,

Advocate General: J. Kokott,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 12 December 2013,

after considering the observations submitted on behalf of:

— Kone AG, by H. Wollmann, Rechtsanwalt,

— Otis GmbH, by D. Hauck and E. Hold, Rechtsanwälte,

* Language of the case: German.

— Schindler Aufzüge und Fahrtreppen GmbH and Schindler Liegenschaftsverwaltung GmbH, by A. Traugott and S. Riegler, Rechtsanwälte,

— ThyssenKrupp Aufzüge GmbH, by A. Reidlinger, T. Kustor and E. Rittenauer, Rechtsanwälte,

— ÖBB-Infrastruktur AG, by A. Egger, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Italian Government, by G. Palmieri, acting as Agent, and by P. Gentili, avvocato dello Stato,

— the European Commission, by G. Meessen and P. Van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 January 2014,

gives the following

Judgment

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

2 The request has been made in proceedings between Kone AG ('Kone'), Otis GmbH ('Otis'), Schindler Aufzüge und Fahrtreppen GmbH ('Schindler Aufzüge und Fahrtrappen'), Schindler Liegenschaftsverwaltung GmbH ('Schindler Liegenschaftsverwaltung') and ThyssenKrupp Aufzüge GmbH ('ThyssenKrupp Aufzüge'), undertakings that were parties to cartels relating to the installation and maintenance of elevators and escalators in numerous Member States, and ÖBB-Infrastruktur AG ('ÖBB-Infrastruktur'), a subsidiary of Österreichische Bundesbahnen (Austrian Federal Railways), regarding the possibility of claiming compensation for damage suffered owing to the charging of higher prices while contracts with undertakings not party to those cartels were being concluded.

Legal context

3 Article 1295 of the Austrian General Civil Code (Allgemeines Bürgerliches Gesetzbuch; 'the ABGB') is worded as follows:

'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 Article 1311 of the ABGB, the person responsible for injury caused is the person who has 'infringed a provision aimed at preventing accidental injuries' ('protective provision').

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

5 Since the 1980s at least, Kone, Otis, Schindler Aufzüge und Fahrtrappen, Schindler Liegenschaftsverwaltung and ThyssenKrupp Aufzüge have implemented, in numerous Member States, a large scale agreement purporting to divide up the elevator and escalator market.

6 On 21 February 2007, the European Commission imposed on Kone, Otis, Schindler Aufzüge und Fahrtrappen and Schindler Liegenschaftsverwaltung a fine totalling EUR 992 million for their participation in cartels involving the installation and maintenance of elevators and escalators in Belgium, Germany, Luxembourg and the Netherlands.

7 By judgment of 8 October 2008, the Oberster Gerichtshof, acting as appellate court in matters involving the law on cartels, upheld the order of 14 December 2007, by which the Kartellgericht (Antitrust Court) had imposed fines on Kone, Otis and Schindler Aufzüge und Fahrtrappen, as well as on two other companies. As ThyssenKrupp Aufzüge had chosen to give evidence in order to qualify for leniency, that undertaking did not participate in the proceedings concerning the law on cartels.

8 The object of the cartel at issue in the main proceedings ('the cartel at issue') was to ensure for the preferred undertaking a higher price than that which would have been achievable under normal competitive conditions. It distorted the market and, in particular, the price development that would otherwise have occurred under such conditions.

9 According to the referring court, the members of that cartel sought to coordinate their activities in respect of well over half the commercial volume of new machinery in the whole of Austria. More than half of the projects concerned were allocated by mutual understanding, so that at least one third of the market volume was the subject of agreement concerted practice. Approximately two thirds of the projects subject to such concerted practices went ahead as planned. In the remaining one third of cases, the project was awarded either to third undertakings (not party to the cartel) or to a cartel member that did not adhere to the agreed method of allocation but made an offer at a lower price. Allocations effected by a common understanding at a bilateral level had also been established. The result of the conduct of the members of the cartel at issue was that market prices hardly changed, even in the final years before 2004, and their market shares remained essentially the same.

10 Relying on the 'umbrella effect', ÖBB-Infrastruktur claims from the appellants in the main proceedings compensation for loss assessed at EUR 1 839 239.74, as a result of buying from third undertakings not party to the cartel at issue elevators and escalators at a higher price than it would have paid but for the existence of that cartel, on the ground that those third undertakings benefited from the existence of the cartel in adapting their prices to the higher level.

11 The court of first instance rejected ÖBB-Infrastruktur's claim, but it was upheld by the appellate court.

12 Proceedings having been brought before it by the appellants in the main proceedings, the Oberster Gerichtshof is considering the conditions for bringing the liability of participants in a cartel into play, in the light of Article 101 TFEU and the case-law of the Court of Justice, in particular the judgments in Case C-453/99 *Courage and Crehan* EU:C:2001:465; Joined Cases C-295/04 to C-298/04 *Manfredi and Others* EU:C:2006:461; and Case C-360/09 *Pfleiderer* EU:C:2011:389.

13 According to the case-law of the Austrian courts, a person who makes a claim for damages based on non-contractual liability must establish an adequate causal link and a link of unlawfulness, that is the infringement of a protective provision for the purposes of Article 1311 of the ABGB.

14 The referring court submits that, according to the adequate causal link criterion, the person responsible for damage must provide compensation for all consequences that he could foresee *in abstracto*, including accidental ones, but not for atypical consequences. According to Austrian case-law, when an undertaking not 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, since it consists of an indirect loss: a side effect of an independent decision that a person not party to a cartel has taken on the basis of his own business considerations. The view would be taken that the effect on a competitor of market conditions, as are influenced by the cartel, the economic conclusions

he draws from those conditions as regards his undertaking and as regards his goods as well as the business decisions he then takes, particularly as regards pricing, are largely determined by a great number of factors completely unrelated to that cartel.

15 With regard to the question of unlawfulness, the Oberster Gerichtshof has held that, in accordance with the academic writings relating to the protective purpose of the provision, the act of causing pecuniary loss entails 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. According to the referring court, the decisive factor is therefore whether the provision infringed by the person responsible for the loss had as its object the protection of the injured person's interests. Such is not the case in the practice of umbrella pricing, which involves no relationship of unlawfulness. The unlawful conduct of the cartel members seeks to injure those who buy their goods at the artificially high prices they charge. The loss caused by the umbrella pricing is merely a side-effect of an independent decision that a person not involved in that cartel has taken based on his own business considerations.

16 The referring court notes that the question whether, under EU law, the loss resulting from the effect of umbrella pricing must give rise to compensation is highly controversial in both German and Austrian academic writings. By virtue of the primacy of EU law, the question referred is of decisive importance, owing to the existing uncertainty as to whether denial of the right to compensation is compatible with the principle of effectiveness developed by the Court.

17 Accordingly, the Oberster Gerichtshof decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is Article 101 TFEU (Article 81 EC, Article 85 of the EC Treaty) 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, benefiting from the protection of the increased market prices, 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?'

The question referred for a preliminary ruling

18 Articles 85 of the EC Treaty, 81 EC and 101 TFEU having essentially the same content, reference will only be made to Article 101 TFEU, currently in force.

19 By its question, the referring court is essentially asking whether Article 101 TFEU precludes the interpretation and application of domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected in the absence of the cartel.

20 It should be recalled that Articles 101(1) TFEU and 102 TFEU produce direct effects in relations between individuals and create rights for the individuals concerned, which the national courts must safeguard (see Case C-127/73 *BRT and SABAM* EU:C:1974:25, paragraph 16; *Courage and Crehan* EU:C:2001:465, paragraph 23; and *Manfredi and Others* EU:C:2006:461, paragraph 39).

21 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 by a contract or by conduct liable to restrict or distort

competition (*Courage and Crehan* EU:C:2001:465, paragraph 26; *Manfredi and Others* EU:C:2006:461, paragraph 60; Case C-199/11 *Otis and Others* EU:C:2012:684, paragraph 41; and Case C-536/11 *Donau Chemie and Others* EU:C:2013:366, paragraph 21).

22 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 (*Manfredi and Others* EU:C:2006:461 paragraph 61, and *Otis and Others* EU:C:2012:684, paragraph 43).

23 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 (*Courage and Crehan* EU:C:2001:465, paragraph 27; *Manfredi and Others* EU:C:2006:461, paragraph 91; *Pfleiderer* EU:C:2011:389, paragraph 29; *Otis and Others* EU:C:2012:684, paragraph 42; and *Donau Chemie and Others* EU:C:2013:366, paragraph 23).

24 In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation for the harm resulting from an agreement or practice prohibited under Article 101 TFEU, including those on the application of the concept of 'causal relationship', provided that the principles of equivalence and effectiveness are observed (*Manfredi and Others* EU:C:2006:461, paragraph 64).

25 Accordingly, the rules applicable to actions for safeguarding rights which individuals derive from the direct effect of EU law must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (*Courage and Crehan* EU:C:2001:465, paragraph 29; *Manfredi and Others* EU:C:2006:461, paragraph 62; *Pfleiderer* EU:C:2011:389, paragraph 24; and *Donau Chemie and Others* EU:C:2013:366, paragraph 27).

26 In that regard, and specifically in the context of competition law, those rules must not jeopardise the effective application of Articles 101 TFEU and 102 TFEU (see Case C-439/08 *VEBIC* EU:C:2010:739, paragraph 57; *Pfleiderer* EU:C:2011:389, paragraph 24; and *Donau Chemie and Others* EU:C:2013:366, paragraph 27).

27 In the main proceedings, ÖBB-Infrastruktur claims that part of the loss it suffered was caused by the cartel at issue, 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 otherwise have been but for the existence of that cartel, whether in terms of profit margin, or simply of survival, if their cost structure was such that normal conditions of competition resulted in their removal from the market.

28 It is not disputed by the interested parties that have presented observations to the Court that a phenomenon such as umbrella pricing is recognised as one of the possible consequences of a cartel, in certain circumstances. By contrast, the appellants in the main proceedings are essentially arguing that it would be inappropriate to interpret EU law as meaning that it would permit claims for damages based on the existence of umbrella pricing ('umbrella claims').

29 In that regard, it should be noted that 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 and certain conditions are met, relating, in particular, to the nature of the goods or to the size of the market covered by that cartel, it cannot be ruled out that a competing undertaking, outside the cartel in question, might choose to set the price of its offer at an amount higher than it would have chosen under normal conditions of

competition, that is, in the absence of that cartel. In such a situation, even if the determination of an offer price is regarded as a purely autonomous decision, taken by the undertaking not party to a cartel, it must none the less be stated that such a decision has been able to be taken by reference to a market price distorted by that cartel and, as a result, contrary to the competition rules.

30 It follows that, contrary to the assertions of Schindler Aufzüge und Fahrtrappen and Schindler Liegenschaftsverwaltung, a loss being suffered by the customer of an undertaking not party to a cartel, but benefiting from the economic conditions of umbrella pricing, because of an offer price higher than it would have been but for the existence of that cartel is one of the possible effects of the cartel, that the members thereof cannot disregard.

31 As regards the national legislation at issue in the main proceedings, it appears from the order for reference that Austrian law categorically excludes a right to compensation in a situation such as that at issue in the main proceedings, owing to the fact that the causal link between the loss sustained and the cartel in question is considered, in the absence of a contractual link with a member of that cartel, to have been broken by the autonomous decision of the undertaking not party to the cartel, but which applied, owing to the existence of the cartel, umbrella pricing.

32 It is true, as pointed out in paragraph 24 of the present judgment, 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'. However, it is clear from the case-law of the Court, referred to in paragraph 26 of the present judgment, that that national legislation must ensure that European Union competition law is fully effective (see, to that effect, *VEBIC* EU:C:2010:739, paragraph 63). Those rules must therefore specifically take into account the objective pursued by Article 101 TFEU, which aims to guarantee effective and undistorted competition in the internal market, and, accordingly, prices set on the basis of free competition. In those circumstances, the Court has held, as noted in paragraph 22 of the present judgment, that national legislation must recognise the right of any individual to claim compensation for loss sustained.

33 The full effectiveness of Article 101 TFEU would be put at risk if the right of any individual to claim compensation for harm suffered were subjected by national law, categorically and regardless of the particular circumstances of the case, to the existence of a direct causal link while excluding that right because the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets.

34 Consequently, the victim of umbrella pricing may obtain compensation for the loss caused by the members of a cartel, even if it did not have contractual links with them, 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. It is for the referring court to determine whether those conditions are satisfied.

35 Kone and Otis argue that claims for compensation for loss owing to high prices, which are the result of umbrella pricing, constitute claims for punitive damages, since the loss sustained by ÖBB-Infrastruktur does not involve, in exchange, enrichment for the appellants in the main proceedings. It must be noted, however, that the rules on non-contractual liability do not make the amount of loss that may be compensated by way of damages dependent on the profit achieved by the person whose misconduct caused that loss.

36 The appellants maintain, moreover, that such damages are likely to dissuade the undertakings concerned from assisting the competition authorities to investigate cases, which runs contrary to the principle of effectiveness. However, it must be noted that the leniency programme is a programme

developed by the Commission, through its Notice on Immunity from fines and reduction of fines in cartel cases (OJ 2006 C 298, p. 17), which has no legislative force and is not binding on Member States (*Pfleiderer* EU:C:2011:389, paragraph 21). Consequently, that leniency programme cannot deprive individuals of the right to obtain compensation before the national courts for loss sustained as a result of an infringement of Article 101 TFEU.

37 In the light of all the foregoing considerations, the answer to the question referred is that Article 101 TFEU must be interpreted as meaning that it precludes the interpretation and application of domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions.

Costs

38 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 it precludes the interpretation and application of domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions.

[Signatures]