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Indirect right to compensation for losses from infringement of competition law outside the distribution chain of cartel products

CJEU Judgment of 12 December 2019 in Case C-435/18, *Schindler and others*

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For the first time, the Court of Justice of the European Union (CJEU) is faced with a case of (claimed) cartel harm in which the claimant and affected party is not an operator in the purchase and supply chain of the input affected by the cartel, but a third party financing the companies that allegedly increased the prices.

1. The judgment

The case that gives rise to the question referred for a preliminary ruling by the Austrian Supreme Court concerns an action for damages brought by the *Land Oberösterreich* (state of Upper Austria) against five companies active on the market for the installation and maintenance of lifts and escalators, whose participation in anti-competitive behaviour in the context of a cartel had previously been established. The *Land Oberösterreich* and others applied for Otis, Schindler, Kone and Thyssenkrupp to be ordered to compensate them for loss caused to them by the cartel at issue. However, the *Land* did not 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 providing subsidies. According to said land, the increase in construction costs as a result of the cartel led to the granting of subsidies - in the form of loans under preferential terms intended to finance construction projects affected by the cartel - for a higher amount than would have been the case without a cartel, unable to use that difference more profitably.

According to the referring court, the principles governing compensation for pure material losses under national law limit compensation exclusively to losses that the infringed rule was intended to prevent, which may exclude compensation for losses suffered by persons who are not active on that market as suppliers or customers on the market affected by the cartel. In that regard, the court notes 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.

The legal doctrine of the CJEU can be summarised as follows. Art. 101(1) of the Treaty on the Functioning of the European Union (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). The full effectiveness of Art. 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). 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 Art. 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). Consequently, any loss which has a causal connection with an infringement of Art. 101 TFEU must be capable of giving rise to compensation in order to ensure the effective application of Art. 101 TFEU and to guarantee the effectiveness of that provision. 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 Art. 101 TFEU. Finally, the CJEU states that it is for the *Oberster Gerichtshof* (Austrian Supreme Court) to determine whether or not the applicant had the possibility of making more profitable investments and, if that is the case, whether it adduces the evidence necessary of the existence of a causal connection between that loss and the cartel at issue.

2. Commentary

2.1. *Following Kone.*

Although the above-mentioned judgment cites the judgment of 5 June 2014, *Kone,* in the context of general considerations on the scope of protection afforded by Art. 101 TFEU, it does not refer to it in the specific point that Kone is the immediate precedent of the present resolution, in that it recognised, albeit for theoretical purposes (as here, incidentally), that a market operator who had not acquired directly or indirectly from any member of the cartel might nevertheless be entitled to compensation for the loss caused by the cartel, if the former had been harmed by the umbrella effect that the existence of the cartel causes on the general price level of the products concerned, even if they are sold by operators outside the cartel.

2.2. *Too much noise.*

It does not seem that the CJEU's *Schindler* judgment will be, despite its apparent impact, long-lived. In fact, the CJEU acknowledges that, as from *Courage* and *Kone,* any person, acting in the economic field, who has sustained material losses as a consequence of cartel conduct, is prima facie entitled to obtain the compensation in question, because Art. 101 of the TFEU is a rule of *universal protection against the effects of anti-competitive practices.* However, it is for the national court to determine, on the basis of *the facts and the law*, whether the harm suffered by the subsidising entity is real and whether there is a "causal relationship". It is true that the Schindler judgment does not use a nomenclature such as the one I have just outlined, but this is irrelevant, because, at least as far as causation is concerned, and although the problem of causation in fact (*condictio sine qua non*) appertains to the proof of the facts, causation in law ("foreseeability", duty of care, scope of liability, Schutzgebiet der Norm) constitutes a legal characterisation that lies with the judge a quo by virtue of the *iura novit curia* principle. However, this reasoning is already made in advance by the referring judge, regardless of what the CJEU decides on the scope of Art. 101 TFEU! Basically, the Austrian Supreme Court is already stating that in any event such losses are not *legally attachable* (*zurechenbar*) to the cartel and/or that the cartel members were not subject to a duty of care (*Verkehrepflichten*) vis-à-vis the subsidising entity and/or that the cover of such losses exceeds the scope of liability of Art. 101 TFEU. I do not know how the Austrian judge will operate after having received the answer from the EU court, but, if I were in his place, I would still maintain my starting position, *because this technical legal position on the scope of the principle of compensation has not really been called into question by the Schindler judgment,* even though the CJEU, following the Attorney General's opinion, has foolishly stated that it is irrelevant whether the Directive is a *Schutzgesetz* within the meaning of § 823.2 BGB, which was the precise sense in which the Austrian judge (who takes the doctrine from German law) wanted to apply it, although the Luxembourg court seems to be lost in such technicalities.

2.3. *Paradox of the two levels.*

The CJEU's position is legally inconsistent, as it was in the *Kone* ruling. It is superfluous to uphold in law that a certain person or conduct falls within *the prima facie scope of protection of a rule* (Art. 101 TFEU) and to add endlessly that it is then up to the national court to determine whether the person or conduct *actually falls within the scope of protection of the rule*. The inconsistency stems from the fact that both statements are postulates of law that are not mutually or unidirectionally restrictive of each other. The statement would make sense if the second proposition were limited to the determination of the facts of the case. But, as said, causality between the competitive activities and the losses is not (only) a question of fact. Nor, put it this way, is the question of the existence of *losses*. It seems clear that the subsidising entity has borne an 'overcharge' of the subsidy, as the price of the cartelised product increased. This does not require new proceedings. What matters is whether the losses can be attached to the cartel.

2.4. *Illustrations.*

The debate I am stirring up is not a fictional game of concepts. To understand the inconsistency of the structure of the trial in *Schindler* I propose to advance other cases of indirect connection between cartel and losses:

— One, as a result of the cartel's overcharge, a tenant has suffered a rent increase because the landlord intends to pass on the higher cost of installing and maintaining the lift.

— Two, other, small, non-cartelised industries have seen their sales to companies that had their turnover reduced (use of cartelised lifts) as a result of the price increase; some of those small, of accessories and components, have had to carry out a collective redundancy.

— Three, as a result of the collective redundancy, the wife of a worker who was made redundant has had to make extra efforts to work on the black market to supplement the family income.

— Four, of the reduction in attention devoted by the mother mentioned above, one of the family's children has developed emotional *stress* with sequelae.

— Five, a commonhold association decided not to install a new lift because of its high prices, prolonging the use of an unsafe old lift, which eventually fell due to an accident that killed an elderly resident of the building.

— Six, in the previous case, it was not the old lady next door who was a victim, but a prowler who went up in the lift to see if there were any abandoned flats that he could later ransack.

— Seven, faced with the increased cost of lifts, a commonhold association decides not to install, putting on the knees of the weakest people the cost of progressive degradation of the patellar cartilage.

— Eight, the national competition authority has to invest extra resources in staffing for the lift cartel contingency review.

— Nine, a mortgage creditor that finances the purchase of lifts with a cartel overcharge has his claim defaulted in the purchaser's insolvency proceedings, and complains that, if he had lent less, he would have obtained a lower discount in the insolvency proceedings.

— Ten, the same creditor, regardless of the existence of a default, complains that, if it had not been for the overcharge, it would have had alternative resources to devote to other more profitable use.

— *And so, no shortage of examples.*

2.5. *Rationality of the floodgate.*

If the criteria of the CJEU were applied, *all these persons* and many others would be included prima facie in the protective cover of Art. 3(1) ("any natural or legal person who has suffered") and Art. 12(1) ("compensation of harm can be claimed by anyone who suffered it") of Directive 104/2014 . But this is unacceptable to any legal scholar with any sensitivity and technical expertise, and to any operator who knows that the law of damages does not aim to *compensate everyone affected prima facie* but to delimit with legal criteria territories subject to compensation that prevent an explosive inflation of tort law. Surely the CJEU is also aware of this. And although the technical background of the Chamber is not (has never been) very strong in matters of private law, this is what it must mean when it refers the determination of the existence of losses and causality to the national judge. And then it is clear that the Austrian judge will resort to the discourse that preluded the incidental issue, namely, that *in pure material losses* (as are in essence those from infringement of competition law), which *do not harm personal rights,* no legal system can compensate without having introduced reducing criteria, such as the existence of a *predictability* criterion, the personal limitation to those affected who the infringed rule was intended to protect, the *causal adjustment* between infringement and losses, the limitation of the scope of *the duty of care* that is enforceable against the members of a cartel, the inclusion or exclusion of such plural compensation in the *risk* created by cartel malice, the simple *policy of* reducing the tertiary costs of infinite proceedings, the irrelevance here and there of *alternative lawful behaviour* of the members of the cartel, the extent to which the cartel in question did not increase the *overall risk* within which the losses appeared; etc.

2.6. *The CJEU needs to know more about the civil law of States.*

The view here set out is supported by the Directive itself (or by Art. 101 TFEU), as borne out by an analysis of the same in *search of reasonable answers,* which up to now the CJEU has never done, in my opinion, since the day when with the *Courage* ruling it chose to follow what in my opinion is an incorrect emphasis. In *Courage*, the court showed that it was not aware of the subtleties and requirements of English law in respect of contracts that are unlawful *ab utraque parte,* and in *Schindler it* showed the same lack of reliability with regard to the rudiments of liability in tort that are common to the generality of Member States.

2.7. *To whom does the Directive refer?*

The Directive isolates from the universe of possible diffuse rights to compensation the much more limited set of direct or indirect purchasers (or suppliers), which are likely to suffer from the imposition of overcharges (or undercharges). In fact, Art. 12(1) can and should be read as meaning that "anyone" comprises only the direct or indirect purchaser; that is to say, that it is the status of direct or indirect purchaser which does *not matter,* and not that it does *not matter* whether the "anyone" is a (direct *or* indirect) purchaser or another type of operator. The scope of protection chosen under Art. 12 is reduced to *purchasers and suppliers,* and this applies both to the determination of the overcharge harm (Art. 12(2)) and to the inclusion of other loss of profits (Art. 12(3)). In my opinion, it is not simply a question of the Directive *not dealing with other potential harmed parties,* but that the Directive is clearly delimiting the persons that the European piece of legislation seeks to protect and the interests that are part of the duty of care of cartel members.

2.8. *The flatus vocis of the presumption of harm.*

Art. 17(2) ("It shall be presumed that cartel infringements cause harm") cannot be used as an argument a contrario. Elsewhere I have already tried to prove that this presumption is no more than a description of a typical cartel effect that does not predetermine the existence of harm in every single litigation in this respect (*El cártel de los camiones: presunción y prueba del daño,* Revista de Derecho de la Competencia y de la Distribución, 25, pp. 2019ff.). It is the same as presuming that all frozen floors typically producing harmful falls, which does not exempt Tom from proving that his fall caused him harm, or as asserting that the breach of contract of carriage is a typical contingency producing losses in 98% of the cases, which does not exempt Dick from having to prove that in her case those losses have been produced as a consequence of Harry's breach of contract. It is quite surprising that in a case, such as that of cartels, where a *personal right is not infringed, statistical* damages are awarded, whereas in the case of infringements of genuine personal rights, such as trademarks, it is the law that must *expressly* recognise that, due to the particular nature of the case, a market standard may be relied on that does not require proof because, unlike the Damages Directive or its 2017 national transposition, the *legal rule recognises the appropriateness of abstract damages*.