

Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

12 December 2019 (\*)

(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,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 16 May 2019,

after considering the observations submitted on behalf of:

- Otis GmbH, by A. Ablasser–Neuhuber and F. Neumayr, Rechtsanwälte,
- Schindler Liegenschaftsverwaltung GmbH and Schindler Aufzüge und Fahrtreppen GmbH, by A. Traugott and A. Lukaschek, Rechtsanwälte,
- Kone AG, by H. Wollmann, Rechtsanwalt,
- ThyssenKrupp Aufzüge GmbH, by T. Kustor and A. Reidlinger, Rechtsanwälte,

- the *Land* Oberösterreich, by I. Innerhofer, R. Hoffer and S. Hinterdorfer, Rechtsanwälte,
  - the Austrian Government, by F. Koppensteiner and V. Strasser, acting as Agents,
  - the Italian Government, by G. Palmieri, acting as Agent, and by C. Colelli, avvocato dello Stato,
  - the European Commission, by B. Ernst and G. Meessen, acting as Agents,
- after hearing the Opinion of the Advocate General at the sitting on 29 July 2019,  
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 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.**

[Signatures]

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— Language of the case: German.