Cartel victims may take shelter under a cartel’s umbrella
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According to Advocate General Kokott, cartel members may be liable for damages resulting from umbrella pricing. Umbrella pricing occurs when non-cartel members take advantage of the cartel by charging higher prices than they would have done under normal competitive conditions. If the European Court of Justice follows the Advocate General’s opinion, cartel members may have to worry about not only potential fines by competition authorities and damages claims by cartel victims, but also providing compensation to customers of non-cartel members.

The Advocate General’s opinion relates to a request for a preliminary ruling by the Austrian Supreme Court in a case where a customer of a non-cartel member is suing four companies involved in the elevator cartel for damages before the Austrian civil courts. Austrian national law categorically excludes the liability of cartel members for umbrella pricing.

The Advocate General (AG) is of the opinion that the issue of civil liability of cartel members for umbrella pricing is a matter of EU law and not national law. The principle that any individual is entitled to claim compensation for loss sustained where there is a causal relationship between that loss and an infringement of the competition rules stems from EU law itself. In regard of umbrella pricing, the AG considers that a direct causal link can be assumed if the cartel was at least a contributory cause of the umbrella pricing and two conditions are fulfilled:

- the loss resulting from umbrella pricing is reasonably foreseeable for the cartel members
- the compensation for loss resulting from umbrella pricing is compatible with the objectives of the competition rules which have been infringed

Concerning the first criterion, the AG states that it is common business practice in a market economy for companies to keep a close eye on market trends and to take those trends duly into consideration when making their own commercial decisions. It is therefore not unforeseeable for cartel members that companies not party to their cartel will set their prices keeping the cartel members’ market behaviour in mind. As for the second criterion, the AG argues that it can hardly be maintained that recognition of civil liability of cartel members for losses resulting from umbrella pricing is incompatible with the objectives of the competition rules: to create a system of undistorted competition in the European internal market. The practical effectiveness of the competition rules is safeguarded only if both the system of public as well as private enforcement evolves as effectively as possible. Outright exclusion of umbrella pricing from the private enforcement system would not serve this purpose.

The AG closes with the comment that allowing damages claims for umbrella pricing does not result in the automatic obligation of cartel members to compensate customers of non-cartel members. It will always be necessary to carry out a comprehensive assessment of all relevant circumstances and evidence to determine whether a cartel, in any given case, has given rise to umbrella pricing. Thus, as far as the AG is concerned, cartel members should beware of even more lurking damages claims.