

Respondent: ÖBB-Infrastruktur AG

Question referred

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 of Justice of the European Union requires grant of a claim under national law?

— consequently, interpreted Article 4 of Annex V to those Regulations as implying that the right to carry over annual leave exceeding the limit laid down in that provision may be granted only where the official has been unable to take leave for reasons connected with his activity as an official and the duties he has thus been required to perform.

The persons referred to in Article 23 of the Statute of the Court of Justice of the European Union and the parties to the proceedings before the General Court of the European Union are invited to lodge their written observations on those questions at the Court of Justice of the European Union within one month of the service of the present decision.

Decision of the Court (Reviewing Chamber) of 11 December 2012 to review the judgment of the General Court (Appeal Chamber) delivered on 8 November 2012 in Case T-268/11 P Commission v Strack

(Case C-579/12 RX)

(2013/C 71/10)

Language of the case: German

Parties to the proceedings before the General Court

Appellant: European Commission

Other party to the proceedings: Guido Strack

Questions to be reviewed

The review shall concern the questions whether – having regard to the case-law of the Court of Justice relating to the entitlement to paid annual leave as a principle of European Union social law, which is also expressly affirmed in Article 31(2) of the Charter of Fundamental Rights of the European Union and is covered in particular by Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9) – the judgment of the General Court of the European Union of 8 November 2012 in Case T 268/11 P Commission v Strack affects the unity or consistency of European Union law inasmuch as the General Court, as an appeal court:

— interpreted Article 1e(2) of the Staff Regulations of Officials of the European Union to the effect that it does not include the requirements relating to the organisation of working time contained in Directive 2003/88, in particular, paid annual leave, and

Appeal brought on 13 December 2012 by Koninklijke Wegembouw Stevin BV against the judgment delivered by the General Court (Sixth Chamber) on 27 September 2012 in Case T-357/06 Koninklijke Wegembouw Stevin v Commission

(Case C-586/12 P)

(2013/C 71/11)

Language of the case: Dutch

Parties

Appellant: Koninklijke Wegembouw Stevin BV (represented by: E. Pijnacker Hordijk, advocaat)

Other party to the proceedings: European Commission

Form of order sought

The appellant claims that the Court of Justice should:

— partially set aside the judgment under appeal, in so far as the General Court held therein that the Commission demonstrated to the requisite legal standard that KWS acted as leader in the cartel established by the Commission;

— partially annul Article 1(j) of the contested decision, ⁽¹⁾ in so far as the Commission imposed a fine of EUR 27.36 million on KWS;

— set a new fine for KWS in the amount of EUR 27.36 million – 0.5 × EUR 17.1 million = EUR 18.81 million;

— order the Commission to pay a part of KWS's procedural costs at first instance and in this appeal, to be determined more precisely by the Court of Justice.

Pleas in law and main arguments

The appellant puts forward two pleas in support of its appeal.

First plea

In its first plea, the appellant claims that the General Court infringed the principle of equal treatment and fundamental requirements relating to the consistency of judicial decisions in that, in the judgment under appeal, it used the same evidence, without stating any reasons, let alone any convincing reasons, in a contradictory manner against the different applicants, KWS and Shell Nederland Verkoop Maatschappij B.V. ('SNV', whose action was the subject of the judgment of the General Court of 27 September 2012 in Case T-343/06), whereas, according to the contested decision, KWS and SNV together had the same role in the context of the cartel arrangements.

— The General Court's assessment of the alleged instigating and leadership roles of KWS and of SNV should be seen in conjunction with one another: the Commission found in the decision that KWS and SNV were jointly the driving force behind the cartel.

— The probative value of a number of items of evidence relied upon by the Commission against KWS and SNV was assessed by the Court in a contradictory manner which is legally unacceptable.

— On the basis of the foregoing, the finding that KWS was alone in having a leadership role in the cartel established between bitumen suppliers and road builders is untenable.

Second plea

By its second plea, the appellant claims that the General Court infringed the prohibition on taking arbitrary measures, the principle of equal treatment and the principle of proportionality by considering in the judgment under appeal that the 50 % increase in the fine imposed on KWS on the basis of the existence of an instigating and leadership role could be maintained, even though the General Court had established that there were insufficient grounds for finding that KWS had an instigating role.

— If the finding that KWS alone can be attributed a leadership role cannot be upheld, that also applies in respect of the increase in the fine.

— By maintaining the increase in the fine set by the Commission, even though the Commission did not put forward sufficient evidence in respect of one of the two

circumstances justifying an increase in the fine, the General Court 'rewards' the Commission for its careless assessment in the contested decision.

— The principle of equal treatment and of proportionality preclude the General Court from maintaining the 50 % increase in KWS's fine (in full moreover), whereas it annulled that increase in full in the parallel proceedings in Case T-343/06 as regards SNV and Others.

— On the basis of the foregoing, the increase in fine as determined for KWS cannot be maintained.

(¹) Commission Decision C(2006) 4090 final of 13 September 2006 relating to a proceeding under Article 81 (EC) (Case COMP/F/38.456 — Bitumen (Netherlands)).

Reference for a preliminary ruling from Upper Tribunal (Tax and Chancery Chamber) (United Kingdom) made on 14 December 2012 — The Commissioners for Her Majesty's Revenue & Customs v GMAC UK PLC

(Case C-589/12)

(2013/C 71/12)

Language of the case: English

Referring court

Upper Tribunal (Tax and Chancery Chamber)

Parties to the main proceedings

Applicant: The Commissioners for Her Majesty's Revenue & Customs

Defendant: GMAC UK PLC

Questions referred

1. To what extent is a taxable person, in relation to two transactions concerning the same goods, entitled both (i) to invoke the direct effect of one provision of EC Council Directive 77/388 (¹) ('the Sixth VAT Directive') in respect of one transaction and (ii) to rely on the provisions of national law in relation to the other transaction, when to do so would produce an overall fiscal result in relation to the two transactions which neither national law nor the Sixth VAT Directive applied separately to those two transactions produces or is intended to produce?