Distribution Law Center
DRIVEN BY CONTRAST

CASE CARD | 27 October 2021

Pressegrosso I (Case 16 Ok 6/09)

1. CASE SUMMARY

A. Summary of facts

These decisions concerned the wholesale distribution of print products (e.g. newspapers, magazines and journals) (so-called 'Pressegrosso'). The Pressegrosso essentially consists of the collection of the press products from the printers, the commissioning of the consignments to the points of sale, the organization of the actual transport, the collection and counting of the unsold copies (returns) and the carrying out of the collection from the retailers. For this purpose, the distributors (so-called 'Grossists') were in a contractual relationship with the publishers and were imposed fixed prices by the latter.

B. Legal analysis

The Austrian Supreme Court decided that the price fixing implemented by the publishers vis-à-vis the Grossists is subject to European (and Austrian) competition law. One key element of this analysis was the scope of the agency privilege in competition law.

Ultimately, the Austrian Supreme Court further specified its guidelines from the Lufthansa I judgement (see the respective case summary) and found that this privilege does not apply in the present case, because the Grossists bore a degree of commercial risks clearly exceeding the commission risk usually borne by agents (e.g. delcredere and storage risk). In this respect, the Grossists therefore approximated to independent dealers. This led the Austrian Supreme Court to the conclusion that the agency privilege cannot be applicable in the present case.

Moreover, it further developed the distinction between risks functionally necessary (e.g. the commission risks) and risks functionally non-necessary for agency relationships (e.g. delcredere risks).

It is noteworthy that this is one of the rare cases where an agreement containing a clear restriction of competition nonetheless was qualified as compliant with Competition law (see Article 101(3) TFEU). This is now reflected in the new Section 2 para 2 no 2 Austrian Cartel Act.

2. QUOTES

"[…] Commercial agents are sales intermediaries who are legally independent and are to promote the sale of a product for a certain period of time with contractual ties to a company. They are sales agents in the narrower

sense. On the other hand, commercial brokers or commission agents are sales agents in the broader sense; they are only occasionally active for the supplier. The commercial agent also bears the entrepreneurial risk of his commercial agency. He is personally independent, works on his own organization and is basically independent of instructions. […]"

"[…] When assessing restrictive clauses in agency agreements under antitrust law, it is expedient to distinguish between restrictions on the content of and contractual partners to the contracts to be brokered by the commercial agent, on the one hand, and restrictions relating to the provision of his agency services, on the other. The principal's specifications regarding the business transactions with third parties brokered by a commercial agent are functionally necessary and inherent in the legal transaction if the commercial agent actually acts only as an intermediary with regard to these contracts. The justification for the immunization under antitrust law of all those specifications which concern prices and business conditions of the brokered transactions as well as the selection of the contracting parties lies in the fact that it is also the principal who has to bear the economic consequences of the design of the content of the contract and the selection of the customers. In assessing whether Art 81 (1) EC applies to agency agreements, it therefore depends on whether the commercial agent has to bear financial or business risks in connection with his agency activity over and above the risk of earning lower commission income in the event of poor negotiability of the offer in question […]"

"[…] In this sense, the ECJ already considered in the joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 [1975] ECR 1663, Suiker unie, whether the sales intermediary has or retains tasks which, from an economic point of view, are similar to those of a proprietary trader in that the sales intermediary has to bear the financial risks of the sale or the handling of the contracts concluded with third parties. In this case, the intermediary is not to be regarded as an auxiliary body integrated into the principal's business. Also in the decision C-217/05, CEPSA, the ECJ considers it decisive whether the sales intermediary bears own risks from the transactions brokered for the principal or is integrated into the principal's company as an auxiliary organ, whereby the financial and commercial risks are borne by the principal (RN 43). For the applicability of Art 81 (1) EC, the actual distribution of the financial and commercial risks is decisive (RN 46). If the intermediary bears only a small part of the risks, Art 81(1) EC is not applicable (RN 61). […]"

"[…] Like the ECJ, the ECJ also focuses on the tasks accruing to or remaining with the agent as well as the bearing of the financial risk of the sale and the execution of the contracts concluded with the third party (T-325/01, DaimlerChrysler). Whether the agent is also integrated into the principal's company is not considered an independent criterion. […]"

"[…] Point 14 of the Guidelines distinguishes between two types of financial or commercial risks that are considered essential for classification as a genuine agency contract. These are, on the one hand, the risks directly related to the contracts that the agent is supposed to conclude or negotiate for the principal and, on the

other hand, the risks related to market-specific investments, i.e. investments that are necessary for the type of activity to be performed by the agent and that the agent needs in order to be able to negotiate or conclude the contracts in question. If the agent does not bear any of these risks, then the contract does not fall under Art 81 EC as a genuine agency contract. Risks whose assumption plays a role include the risk for costs, including transport costs, the obligation to invest in sales promotion measures, the storage risk, the investment in business-specific equipment, premises or employee training, and the delcredere risk (para. 16) […]"

"[…] According to the case law of the ECJ, commercial agents who comply with the legal model, i.e. who act as intermediaries in the name and for the account of the principal and are subject to the principal's instructions with regard to the prices and conditions of the transactions to be intermediated, are presumed to be integrated into the principal's business. This presumption is rebutted if the commercial agent has to bear economic risks in relation to the brokerage activities transferred, and not just general commercial risks, as entailed by any independent business activity. […]"

"[…] The third party respondent has itself argued that distribution incurs high costs, which exceed the costs incurred in Germany. It also claimed that the remission rate in Austria was higher than in Germany. The distribution of ultimately unsold copies therefore by no means causes only minor costs, so that the associated risk cannot be considered insignificant or minor […]"

"[…] The contract also transfers the delcredere risk to the third-party defendant. The extent of this risk has not been determined, but in any case it cannot be considered as a merely insignificant and minor risk […]"

"[…] According to the established facts, there is no economic unity between the Second Respondent and the Third Respondent which would prevent an assessment of the agreements between them under Article 81 EC. On the question whether single or multiple representations within the meaning of point 13 of the Guidelines do not preclude privileged treatment, as well as Eilmansberger's raised with weighty arguments, whether the outsourcing of essential distribution services to an agent who - as in this case - belongs to a significant group of companies, does not prevent its integration into the manufacturer's company, need therefore no longer be addressed […]"

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Austrian Cartel Act

4. RELEVANT LITERATURE

See *Vertriebsverträge im Kartellrecht* (2019) Part I Chapter I paragraph 2.14 and Part III Chapter 4 paragraph 4.64

5. OTHER COMMENTS

The Pressegrosso-judgements of the Austrian Supreme Court further develop the scope of the agency privilege. This privilege exempts agreements between a principal and an agent from the prohibition of Article 101 TFEU (and Section 1 Austrian Cartel Act).

6. PRACTICAL SIGNIFICANCE

As the Pressegrosso-judgements follow up the Lufthansa I judgement (i.e. first important judgement concerning the agency privilege), its substantial comments regarding the risk distribution serve as valuable guideline when implementing a distribution system and complement the Lufthansa I judgement.