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Letter from the Editors

Rainy Days Ahead for Cartel Defendants in Europe?

We devote our second issue of the International Civil Redress Bulletin to the January 30, 2014 Opinion of European Court of Justice ("ECJ") Advocate General Juliane Kokott in the matter KONE AG, currently before the European Court of Justice. The KONE case raises the issue of how "umbrella price effects" will be treated under EU law. As Advocate General Kokott explains, "There is said to be umbrella pricing when undertakings that are not themselves party to a cartel, benefiting from the protection of the cartel's practices (operating 'under the cartel's umbrella', so to speak), knowingly or unknowingly set their own prices higher than they would otherwise have been able to under competitive conditions."

In the European court system, AG Kokott's opinion is not binding on the ECJ, but instead is intended to provide an independent and impartial view of the legal issues raised by the parties. However, although advisory, Advocate General opinions have been very influential and are often followed by the court.

(continued)

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***The Committee also thanks the contribution of Scott Wagner, Bilzin Sumberg (Young Lawyers Division Representative).**

Letter from the Editors (continued)

The question put to the ECJ in KONE, and addressed by Advocate General Kokott's opinion, is whether European Union law requires the national courts of the European Member States to recognize a claim for damages against members of a cartel, not only for sales made by those members, but also for sales made by other, innocent suppliers who were not themselves a part of the cartel, but who were able to charge higher prices as a result of the cartel's effects on the overall market.

In the United States, prominent commentators have argued that buyers should be able to recover damages from members of a cartel both for purchases from the cartel members as well as for purchases of the same product from innocent suppliers. U.S. courts, however, have for the most part been hesitant to grant standing to plaintiffs seeking umbrella effect damages, finding their claims to be unacceptably contingent, speculative, and complex. The U.S. Supreme Court has not yet addressed the issue.

The approach taken by AG Kokott, if adopted, could create another contrast between U.S. and EU competition law. As with those jurisdictions' approaches to recovery by indirect purchasers, umbrella effects may become another area where the United States bases its judgment on its decades of experience with the practicalities and realities of litigating antitrust claims, while the EU focuses more on reaching the right theoretical result, paying – at least for now – less attention to how that theory will translate into reality as its system of civil redress for competition law claims continues to evolve.

In the two articles that follow, our expert authors interpret the meaning of Judge Kokott's opinion and its potential ramifications if adopted by the ECJ. We hope you enjoy them and encourage you to bring us your own views on these and the many other challenging issues posed by the development of new civil redress regimes around the world.

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FOCUS ON EUROPE

The Defense View

AG Kokott's Kone Opinion: EU Law on the Verge of an All-European (Cartel) Damage Claim?

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In her Opinion of 30 January 2014 ("Opinion") in Case *Kone AG and Others*[1] of the Court of Justice of the European Union ("ECJ"), Advocate General[2] ("AG") Juliane Kokott found that Art. 101 of the Treaty on the Functioning of the European Union ("TFEU")[3] allows companies to recover damages suffered as a consequence of so-called "umbrella pricing". According to AG Kokott, companies can claim any damage they suffer as a consequence of a cartel, including the effects of umbrella pricing, provided that they show a "sufficiently direct" causal nexus between the harmful conduct and the alleged damages. More remarkable than her elaborations on causation and liability for umbrella pricing, however, are the fundamental statements as to the nature of the damage claim AG Kokott draws upon in order to reach her conclusions. Should the ECJ follow her opinion, Europe may be heading towards a paradigm change in European private antitrust litigation: An all-European claim for cartel (and potentially other) damages.

Background

The companies Kone, Otis, Schindler, and ThyssenKrupp were found by the European Commission to have engaged for decades in a price fixing, bid rigging, and market-sharing cartel on the elevators and escalators markets in Belgium, Germany, the Netherlands, and Luxembourg.[4] ÖBB-Infrastruktur, a subsidiary of the Austrian Federal Railway and an important customer on the Austrian market for elevators and escalators, sued the cartel members before an Austrian court for damages allegedly incurred in Austria in the context of purchases from those found to have participated in the cartel as well as from other companies not party to the cartel. It based its claim on the concept of "umbrella pricing" (also "umbrella effect"), which describes the effect that a cartel can have on the prices charged by competitors who are not themselves party to the cartel. The notion is that, in certain circumstances, even competitors outside of the cartel will set their prices higher during a cartel period than they would have been able to in the absence of the cartel. ÖBB-Infrastruktur argued that it ought to be permitted to recover civil damages from the cartel members because prices in Austria had been set under the protection of their cartel in other, neighboring European markets.[5]

The Austrian Supreme Court (the *Oberster Gerichtshof*) concluded that if the claim were to be adjudicated under Austrian procedural law, it would have to be dismissed from the outset, as companies party to a cartel are not liable for umbrella pricing under Austrian law.[6] The Austrian court, however, expressed concern that such a conclusion could be incompatible with EU law, in particular with the principle of effectiveness.[7] Hence, it sought a preliminary ruling from the ECJ on the following question: "Is Article 101 TFEU … 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?"[8]

AG Kokott's Assessment

The question of whether the civil liability in damages of the members of a cartel also extends to umbrella effects is not yet settled at the EU level. Private antitrust litigation in the EU and its Member States is still in its infancy compared to jurisdictions like the US, in which antitrust enforcement has for decades relied heavily on the initiative of private claimants. In some of its past decisions, however, the ECJ has sent strong signals in support of victims of cartel infringements, which have appreciably spurred private antitrust litigation in recent years. In *Courage*, for example, the ECJ held that "the full effectiveness of Article 85 of the Treaty [now Article 101 TFEU]… would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition".[9] On this basis, the ECJ went on to find that even the parties to an anticompetitive contract must not be barred absolutely from bringing an action for damages against the cartelists[10] and that "in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)".[11] In *Manfredi*, the ECJ confirmed the general principle that "any individual can claim compensation for the harm suffered" as a consequence of an infringement of the EU competition rules.[12]

Presented with the question of the referring Austrian court, AG Kokott develops her opinion from what she identifies to be the general principles set out by the ECJ in these decisions. Her conclusions bear the potential

to mark a turning point for private antitrust litigation in Europe by rendering the influence of national law -- which, until now, has been seen as providing the legal basis for any damage claim -- almost insignificant.

AG Kokott opines that (1) civil liability of cartel members for umbrella pricing is a matter of EU law, and (2) under EU law, damages resulting from "umbrella pricing" could in principle be recoverable.

Civil liability of cartel members for umbrella pricing is a matter of EU law

AG Kokott concludes that the question of whether cartel members are to be held liable for damages resulting from an umbrella effect must be answered by EU law.

Based on the ECJ's judgments in *Manfredi* and *Courage*, the referring court and most of the parties to the proceedings took the view that the civil liability of cartel members for umbrella pricing is governed primarily by national law and that Member States' discretion is limited at most by the principles of equivalence and effectiveness. AG Kokott disagrees. She argues that a closer examination of these judgments reveals that the national law of the Member States does not govern the existence of a damages claim (i.e. the question of *whether* compensation is to be granted), but only the details of application of such claims and the rules for their actual enforcement (i.e. the question of *how* compensation is to be granted – e.g. jurisdiction, procedure, time-limits and the furnishing of proof).[13]

AG Kokott further points out that the ECJ in *Manfredi* had recognised "the right of any individual" to claim damages caused by a cartel infringement "without making the existence of that right in any way dependent on the national laws of the member states"[14], solely based on the considerations of the practical effectiveness of Art. 101 TFEU and the direct effects it has on the relationships between individuals.[15] AG Kokott adds that it is also clear from the ECJ case-law that EU law, in addition to establishing a right to claim damages, also determines the persons who are entitled to claim compensation (any individual) and the types of loss which may be the subject of a civil claim (factual loss and loss of profits).[16]

Based on these considerations AG Kokott concludes that the question of whether the members of a cartel are liable for damages sustained as a result of umbrella pricing does not so much concern the procedural question of "*how*" compensation is to be granted, but instead focusses on the more fundamental question of *"whether"* cartel members can be held liable at all for this kind of loss.[17] In line with the fundamental objective of EU competition law, which is to create uniform conditions for all economic entities active on the internal market, AG Kokott concludes this question cannot be left to the laws of the Member States alone, since, if national courts were to use different criteria to assess the civil liability of cartel participants, there would be a risk of economic operators being treated differently.[18] The issue, therefore, must be answered by EU law.

Damages resulting from umbrella pricing are in principle recoverable

In assessing the preconditions for private liability under EU law, AG Kokott draws the conclusion that damages resulting from an umbrella effect could in principle be recoverable, depending on the circumstances of the individual case.

Having established that whether cartel members may be held liable for umbrella effects is a matter of EU law, AG Kokott turns to assess the preconditions applicable under EU law for such liability. She initially refers to Art. 340 TFEU on the non-contractual liability of the EU institutions to determine that, for the sake of consistency, private liability should – like the liability of EU institutions or EU Member States – require a "sufficiently direct causal nexus" between the harmful conduct and the damage alleged.[19] She admits, though,

that further clarification has to be sought by “a normative examination, as the national systems of civil law, too, usually do in the context of their respective non-contractual liability regimes”.[20]

AG Kokott points out, however, that a *direct* causal link must not be confused with a *single* causal link in the sense that a damage must exclusively or immediately arise from an unlawful act. In AG Kokott’s view, a direct causal link exists as long as the unlawful act was at least a *contributory cause* of a damage suffered.[21] She asserts that the case-law of the EU also supports the conclusion that whether a chain of causality is broken by an intervening, contributory cause will always depend on the circumstances of each individual case.[22]

AG Kokott states that the precondition of a sufficient contributory cause is intended to ensure two things: a) liability is limited to such loss as was reasonably foreseeable; and b) liability is limited to loss the compensation of which is consistent with the objectives of the provision of law that was infringed.[23] In remarkably clear fashion, she explains that damage caused by an umbrella effect of a cartel is not always unforeseeable, since it is common business practice for companies to keep a close eye on market trends and prices and to take those trends duly into consideration when making their own commercial decisions.[24] From this, she reasons that an obligation to grant compensation for loss resulting from umbrella pricing is “part and parcel” of the system in which EU competition rules are enforced.[25] She therefore opines that EU law does not categorically exclude recovery of damages suffered while doing business with competitors of a cartel due to an umbrella effect, but rather requires the court to carry out a comprehensive assessment of all the relevant circumstances in order to determine whether the cartel in the case in question has given rise to foreseeable umbrella pricing effects.[26]

Conclusions

The opinion of AG Kokott is not so much remarkable for the particulars it provides in respect of the liability for damages caused by the umbrella effect of a cartel. Those particulars roughly correspond to what already exists in various EU Member States. It is remarkable, though, for the plain words with which AG Kokott sets out that a legal claim for the recovery of damages caused by an infringement of EU antitrust law is European, *i.e.*, governed by EU law, by nature. Unlike the existing case-law, she does not confine her assessment to the development of certain corner stones to be observed by national law in order to comply with EU law, but develops autonomous preconditions for a liability *under EU law*. If the ECJ follows the opinion of AG Kokott and concludes that it is a “fundamental objective of EU competition law … to create uniform conditions for all economic entities active on the internal market”, and that this objective presupposes harmonization of the details of the civil liability of cartel participants[27], there remains essentially no room for national particularities. The ECJ will have to carve out an all-European action for damages.

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[1] Case C-557/12 *Kone AG and Others*, a procedure for a preliminary ruling requested by an Austrian court in one of the litigations stemming from the “elevators cartel”.

[2] Advocates General are senior law officer who present opinions on the cases brought before the ECJ in order to help the ECJ assess the cases and prepare their judgments. Like ECJ judges, they are appointed for six-year terms and render their opinions on cases before the ECJ publicly before the ECJ rules.

[3] Article 101 TFEU represents the prohibition of anticompetitive agreements under EU law (comparable to Section 1 Sherman Act).

[4] Commission decision of 21 February 2007, Case COMP/E-1/38.823 - PO/Elevators and Escalators.

[5] Opinion, paras. 5-12.

[6] Opinion, para. 4.

[7] Where supranational EU law confers individual rights, it often does not provide procedural rules for their implementation. In such cases, the domestic legal system of each Member State is required to implement and enforce those rights on the basis of their domestic procedural rules. According to the principle of effectiveness, these domestic procedural rules must not be designed or applied in a way that renders practically impossible or excessively difficult the exercise of the substantive rights conferred by EU law.

[8] Opinion, para. 14-15.

[9] Case C-453/99 Courage and Crehan [2001] ECR I-6297, para. 26.

[10] Case C-453/99 Courage and Crehan [2001] ECR I-6297, para. 28.

[11] Case C-453/99 Courage and Crehan [2001] ECR I-6297, para. 29; supported by later cases, e.g. Case C-360/09 Pfleiderer [2011] ECR I-5161, para. 30; Case C-536/11 Donau Chemie [2013] ECR nyr, paras. 25-27.

[12] Joined Cases C-295/04 to C-298/04 Manfredi [2006] ECR I-6619, paras. 60-61.

[13] Opinion, paras. 21-23.

[14] Opinion, para. 26.

[15] Opinion, para. 25 - 26; referring to joined Cases C-295/04 to C-298/04 Manfredi [2006] ECR I-6619, paras. 60-61.

[16] Opinion para. 27; referring to joined Cases C-295/04 to C-298/04 Manfredi [2006] ECR I-6619, paras. 95-96.

[17] Opinion, para. 28.

[18] Opinion, para. 29.

[19] Opinion, para. 34.

[20] Opinion, para. 35.

[21] Opinion, para. 36.

[22] Opinion, para. 36 – 37; citing to Case C‑440/07 P Commission v Schneider Electric [2009] ECR I‑6413, para. 222; Case C‑497/06 P CAS Succhi di Frutta v Commission, nyp, paras. 61 – 62; Case C‑460/09 P Inalca and Cremonini v Commission [2013] ECR, para. 120; Case T‑587/10 Interspeed v Commission, nyp, para. 40; Case T‑320/00 CD Cartondruck v Council and Commission, nyp, para. 177. It should be mentioned, though, that the opinion of AG Kokott is not without opposition in this respect: see opinion of AG Ruiz-Jarabo Colomer in Case C-440/07 P, para. 170, who considers that a recoverable damage must "directly, immediately and exclusively arise from the unlawful act".

[23] Opinion, para. 40.

[24] Opinion, paras. 41 - 52.

[25] Opinion, para. 53 - 70.

[26] Opinion, para. 84.

[27] Opinion, para. 29.

The ECJ's Advocate General Opinion in *In re KONE and Others*: An Uplifting View from a Plaintiff's Perspective

Pierre Bos, advocaat, of counsel, BarentsKrans[1]

The present matter offers the Court of Justice of European Union (commonly referred to as "the ECJ") the opportunity to add to its case law on the private enforcement of European antitrust law. It concerns the question, not yet settled at European Union level, of whether civil liability in damages of the members of a cartel also extends to 'umbrella pricing'. This case-law is increasingly plaintiff-friendly, even though the Advocate General says at the end of her opinion that the solution she advances for civil liability of umbrella pricing is "neither more nor less 'pro business' than its categorical exclusion as favored by Austria's Supreme Court". After all, she believes that the economic operators involved are not only the members of the cartel, but also their customers and the customers of non-cartel members. The Advocate General deems it "eminently unfair" to give preferential treatment to members of a cartel ('the people who did it') by leaving them off the 'umbrella hook', as that would create inappropriate incentives from the viewpoint of effective enforcement of antitrust rules. From a plaintiff lawyer's perspective this is an interesting shift from the age-old and by that token frustratingly one-sided fixation on the rights of defense, limiting the ability of plaintiffs, in particular in administrative proceeding before the European Commission as the EU's prime enforcer of antitrust rules, to participate in pending matters, including having access to the European Commission's files.

The Advocate General's opinion in *Kone* contributes to a welcome rebalancing of the antitrust playing field between defendants and plaintiffs, notwithstanding the Advocate General's cautionary *obiter dictum* that she is impartial to either side. Fortunately, she appears to be very partial to the right theoretical result, i.e. that European Union law (not national law!) determines whether there should be any liability of cartel members for umbrella-pricing damages (which it does in the affirmative because of the level-playing field argument) and determines under what conditions this should occur (which it does provided the right circumstances are prevalent while rejecting typical all-to-clever defenses such as umbrella liability runs counter to an alleged principle of operating on the internal market as cost efficiently as possible; umbrella pricing is unintentional, because unforeseeable (this is very much foreseeable); compensating for umbrella pricing provides a means of absorbing unlawful profits (this is irrelevant as profit absorption is not an essential precondition for bringing compensation claims, even if it is a welcome side-effect); a chilling effect on leniency (i.e. immunity) programs (providing a smooth road back to legality should not be at the expense of other economic operators' legitimate interests); and allowing such compensation equals the introduction of punitive damages (there is no overcompensation of the loss caused by the cartel members)). This opinion is a boon to plaintiffs' rights' advocates, as it so eloquently offers the intellectual framework for solving other issues, whether pressing or not, pertaining to, e.g., governing law in cases where damages have occurred in various countries, statutes of limitation, passing-on or joint and several liability.

Contrary to what may be thought in US legal circles, the approach as suggested by the Advocate General in her opinion is not of mere theoretical import, but allows courts of fact (i.e. trial courts) to translate a *Kone* ruling of the ECJ effectively into reality. Indeed, e.g. the factual judge will have to review, when addressing whether there is "adequate causal link" between the umbrella loss claimed and the cartel's illegal practices, what the cartel's proportion of the relevant market is (the stronger a cartel's position, the more likely the cartel will have a significant impact on pricing levels), the (lack of) homogeneity and transparency of the relevant product market, and whether the results of tendering procedures are concealed or not in order to serve as indications of prevailing price levels when future orders are placed). The usual toing and froing in litigation will

occur here, obviously under the prevailing rules of civil procedure. There, European Union law (normally) wouldn't have much to say, if anything.

Should this opinion (at least in its end result) be adopted by the ECJ, then it will be another one down for cartel members resisting antitrust damage claims upon a finding by an antitrust agency of illegal conduct. As the Advocate General herself pointed out in her opinion, the ECJ (see e.g. *Courage, Manfredi, Pfleiderer, Donau Chemie*) and national courts (*Orwi* in Germany, *Kone* in Austria in the direct purchasers claim, *Air cargo* and *Gas insulated switchgear* in The Netherlands) have been favorable to affording plaintiffs claims on substantive or procedural merits. Indeed, the *Kone* opinion is to be seen in a plaintiff's eye as an elevating event.

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[1] Pierre Bos, *advocaat*, of counsel, BarentsKrans, The Hague Bar, The Netherlands. All views are personal and may not be attributed to the firm or any of its clients.

UPCOMING EVENTS

ABA Antitrust Spring Meeting Program

Global Antitrust Damages Actions: Spreading Light or Gloom?
Presented by the International and Civil Redress Committees
26 March 2014, 10:45 a.m. to 12:00 p.m. (EST)

With the reform of antitrust damages actions spreading across Europe and beyond, the global trend towards more robust private enforcement actions ramps up, at times implicating the confidentiality of leniency applications and settlement documents. Our leading experts will provide guidance on how to successfully navigate the different substantive and procedural standards across jurisdictions.

Moderator

- **Anna Chehtova**, Attorney, Federal Trade Commission, Washington, DC

Panelists

- **Eddy De Smijter**, Acting Head of Unit A6 Private Enforcement, DG Competition, European Commission, DG Competition, Brussels, Belgium
- **Michael D. Hausfeld**, Hausfeld LLP, Washington, DC
- **Maya Lester**, Brick Court Chambers, London, United Kingdom
- **Christopher Rother**, Head of Group Regulatory, Competition and Antitrust, Deutsche Bahn, Berlin, Germany

Teleconference

Private Enforcement: Charting International Waters Between the US and China
1 May 2014, 12:00 p.m. to 1:00 p.m. (EST); 6:00 p.m. to 7:00 p.m. (CET)

After years of litigation and rounds of summary judgment, the In re Vitamin C Antitrust litigation moved forward even after the defendants asserted the foreign compulsion defense where they claimed that they were compelled to fix the prices of vitamin C by the government of China. Never before had plaintiffs in the

face of this defense survived the summary judgment phase of litigation. Yet, overcoming that hurdle was not the only first for the vitamin C litigants. This case also resulted in the first civil price-fixing verdict against Chinese companies in United States, the first known time that the foreign compulsion defense was presented to a jury at trial, and the first time a former Chinese government representative testified at trial in a US court. This panel will explore the unique international issues the litigants faced in this case and will consider the question of whether this case is a sign of things to come for private enforcement of foreign price-fixing conspiracies.

Moderator

- **Heather Tewksbury**, WilmerHale, Palo Alto

Panelists

- **William Isaacson,** Boies Schiller & Flexner LLP, Washington, DC
- **Daniel Mason**, Zelle Hofmann Voelbel & Mason LLP, San Francisco

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