

EU High Court Opens The Door To Umbrella Liability

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Law360, New York (June 10, 2014, 10:18 AM ET) -- The Court of Justice of the European Union has ruled^[1] that, under EU law, victims of cartels should be allowed to seek damages from cartel members for higher prices paid to noncartel members that were able to raise their prices under the pricing “umbrella” created by the cartel. The CJEU’s formal endorsement of such umbrella liability diverges from the approach evolving in U.S. courts, which have been reluctant to embrace umbrella liability.

Background of the Case

The reference to the CJEU for a preliminary ruling arises in the context of a damages claim against the elevator cartel in Austria. This case stems from a leniency application by elevator manufacturer [ThyssenKrupp](#), which led the Austrian competition authorities in 2007 to fine elevator manufacturers Kone, Otis, and Shindler for joining in anti-competitive agreements to divide the market for elevators and escalators in Austria. In 2010, Austria’s rail network, OBB, brought an action seeking damages amounting to more than €8 million. OBB claims that, as a result of the cartel, it paid inflated prices for the elevators it purchased from both the cartel members and from manufacturers not party to the cartel.

The case went up to the Austrian Supreme Court, which took the view that liability for umbrella damages cannot be imposed on the parties to the cartel because the “adequate causal link” required under Austrian law is not present and because the court considered that the loss alleged is not covered by the protective purpose of the competition rules. However, having doubts as to whether its interpretation of national law was compatible with EU law, the Austrian court decided to send a reference to the CJEU asking the following question:

Is Article 101 [of the 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?

The Economics of Umbrella Pricing

Economic literature^[2] has recognized the possibility of umbrella effects resulting from

cartel behavior. Certain authors[3] have focused on producing empirical evidence of the ubiquity of damages resulting from competition law violations. They consider that umbrella pricing is just one instance of quantifiable damage of potentially substantial magnitude occurring outside the vertical chain typically considered the relevant locus of damage resulting from competition law infringements. Another example is that of economic harm suffered by producers of complementary products as a result of a cartelized principal product.

According to these economic models, certain umbrella effects as a result of a cartel are theoretically unavoidable. The reasoning is quite simple: a cartel artificially increases the prices of a given product; as a result, noncartelised producers of the same (or substitutable) product face an increase in demand; as a result of an increase in demand, a typical profit-maximizing reaction is to increase the price, although by a lower figure than the cartelists. These umbrella effects may, however, be mitigated, or even completely eliminated, depending on factors such as, among others, the number of competitors outside the cartel, the homogeneity of the products, the existence of capacity limitations, etc.

EU Case Law on Damages Claims

Article 101.1 of the Treaty on the Functioning of the European Union (“TFEU”)[4] prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

According to well-settled EU case law[5], parties suffering loss as a result of a cartel falling within the purview of Article 101.1 TFEU can claim compensation from the undertakings belonging to the cartel. The landmark judgment of *Courage and Crehan* summarises the relevant EU law principle:

The full effectiveness of Article 101 of the Treaty and, in particular, the practical effect of the prohibition laid down in Article 101.1 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.[6]

Furthermore, this principle was confirmed and expanded by the court in *Manfredi*, where it clarified that:

any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC. [...]

In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State 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.[7]

Member state's procedural autonomy is therefore only restricted by the principle of equivalence, which ensures that such procedural rules are not less favorable than those governing similar domestic actions, and the principle of effectiveness, which provides that national procedural rules must not render practically impossible or excessively difficult the exercise of rights conferred by EU law, such as the right to claim compensation.

Advocate General's Opinion on the Referred Case[8]

On Jan. 30 2014, Advocate General Juliane Kokott delivered her opinion on the case.[9]

Liability of Cartel Members for Umbrella Pricing Is a Matter of EU Law

In the first section of her assessment, Advocate General Kokott made it clear that, in the case of umbrella claims, the "how" of the compensation, i.e., the relevant rules on enforcing and calculating compensation claims and furnishing of evidence before the national courts, is for the national legal systems to determine. However, in order to avoid discrimination between economic operators and forum shopping within the Union and to ensure a level playing field in the internal market, the 'whether' of the compensation, i.e., the fundamental question of whether cartel members can be held civilly liable for umbrella pricing and whether they can be sued by persons who are not their direct or indirect customers, is a matter of EU law. This question requires a uniform EU-wide answer and, therefore, "cannot be left to the legal orders of the Member States alone." [10]

EU Law Conditions to Establish a Causal Link

In the second section of her assessment, the advocate general gave her opinion on the EU law conditions applicable to the establishment of a causal link. Building on EU law principles in relation to noncontractual liability of the EU institutions, Kokott concluded that, for there to be a successful claim, it is necessary to establish a "sufficiently direct causal link" between the conduct and the harm. However, this does not mean that there needs to be a single causal link. A direct causal link can be assumed if the cartel was at least a contributory cause of the umbrella pricing.[11] According to the advocate general, a sufficiently direct causal link requires that (1) the harm must be a reasonably foreseeable result of the conduct and (2) compensation for that harm must be consistent with the objectives of the provision infringed.

Foreseeability of the Loss Resulting From Umbrella Pricing

In the opinion of Advocate General Kokott, in a market economy, “the fact that persons not party to a cartel set their prices with an eye to the market behaviour of the undertakings belonging to the cartel is anything but unforeseeable or surprising.”[12] According to Kokott, this is particularly true in the present case due to the strong position of the cartel, which covered a significant proportion of the market. Moreover, cartel members will implicitly seek umbrella effects because “the more prices rise as a whole, the easier it is for cartel members to impose the prices they charge themselves on the market in the long run.” [13]

Consistency With the Objectives of EU Competition Law

The advocate general rejected the argument that damages caused by umbrella effects fall outside the scope of EU competition rules. On the contrary, “the full practical effectiveness ... of [EU competition rules] would be adversely affected if it were not open to any individual to claim damages for loss caused to him as a result of infringements . . . of [such rules].” Even if this possibility could reduce the incentives of cartel members to apply for the competition authorities’ leniency programs, “sheltering cartel members from compensation claims ... would serve only to compel other economic operators, especially customers who have suffered loss, to carry the financial burden of the cartel’s practices.” That would be “eminently unfair” and “create inappropriate incentives from the point of view of the effective enforcement of competition rules.”

Advocate General’s Conclusion

Advocate General Kokott concluded that competition law enforcement rests on two pillars, namely, public and private enforcement, and the effectiveness of competition rules would be greatly weakened if, in the case of certain phenomena such as umbrella pricing, private enforcement were to be excluded from the outset and public enforcement were the only available remedy.

The Judgment of the Court of Justice

In its judgment on June 5, 2014, the CJEU, although using slightly different, less prescriptive language[14], has not only agreed with Kokott on how to answer the reference question but has effectively endorsed the whole of the substance of the advocate general’s opinion.

First, the CJEU agrees with the advocate general not only on the possibility of umbrella

effects but also on their foreseeability. Indeed, the court notes that “market price is one of the main factors taken into consideration by an undertaking when it determines the price at which it will offer its goods or services. Where a cartel manages to maintain artificially high prices [...] and certain conditions are met, relating, in particular, to the nature of the goods or to the size of the market covered by that cartel,”[15] umbrella effects cannot be ruled out. Accordingly, loss suffered by an umbrella customer “is one of the possible effects of the cartel that the members thereof cannot disregard.”[16]

Second and more importantly, the court indirectly endorses Kokott’s opinion on causality. The CJEU holds (in a rather complicated formulation) that, with regard to the compensation of loss resulting from a cartel, national law cannot establish (categorically and regardless of the particular circumstances of the case) that a direct causal link does not exist when there is no contractual link with the cartel but it only contributed to cause the harm.[17] Otherwise, the full effectiveness of EU competition rules, which aim at guaranteeing effective and undistorted competition in the internal market, would be put at risk.

Consequently, where it has been established that the cartel is, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to result in prices being raised by competitors not party to the cartel, the victims of this price increase must be able to claim compensation for harm suffered from the members of the cartel.[18]

The Draft EU Directive on Damages Actions

The Kone case comes at a time when a legislative proposal for the partial harmonization of actions for damages under national law is being debated by the European Parliament and the Council. The proposed directive, both in its original form proposed by the [European Commission](#)[19] and in its current form as provisionally agreed by the European Parliament and the Council[20], does not explicitly address umbrella liability. There are, however, several references in the draft legislation that could theoretically support the bringing of umbrella claims under EU law.

First, the draft directive, embracing the relevant case-law, provides that any natural or legal person who has suffered harm, without further qualification, must be able to claim and to obtain full compensation for that harm[21].

Second, in a provision designed to preserve incentives for potential leniency applicants, the proposed directive implicitly acknowledges the possibility of harm caused outside of the cartel’s supply chain:

Member States shall ensure that, to the extent the infringement of competition law caused harm to injured parties other than the direct or indirect purchasers or providers

of the infringing undertakings, the amount of contribution of the immunity recipient shall be determined in the light of its relative responsibility for that harm.[22]

Finally, by recognizing that indirect purchasers not only may have standing in a damages claim against the cartel members but, more importantly, are presumed to have standing under certain conditions[23], the legislators are acknowledging two facts relevant for the case of umbrella claimants, i.e., first, the importance of economic evidence to prove the existence and scope of the loss and the causal link between the loss and the infringement (the proposed text expressly mandates member states to take into account “the commercial practice that price increases are passed on down the supply chain”, and requires the cartel member to rebut this — presumably, by providing relevant economic evidence)[24]; and second, the fact that the interruption of the causal link by third-party action (in this case, the pricing decision of the direct purchaser to pass-on the overcharge to its customers) does not necessarily break the causal chain.

Advocate General Kokott expressly noted[25] the consistency of her conclusions with the approach of the draft directive, avoiding any possibility that the directive might be thought to override the judgment once it comes into force.

The Position in the U.S.

On the other side of the Atlantic, however, recent federal precedents[26] have taken the opposite view under U.S. antitrust law, and have held that antitrust plaintiffs suing a cartel for damages may not recover for purchases made from entities outside the cartel because the intervening pricing decisions of noncartel members render the chain of causation too indirect and attenuated, and therefore the damages too speculative.

These cases have grounded their rejection of umbrella liability in the reasoning of *Associated General Contractors of California Inc. v. California State Council of Carpenters*,[27] which establishes a multifactor test for determining whether an antitrust plaintiff has “antitrust standing” to sue: whether the plaintiff’s injury is of the type the antitrust laws were intended to redress; the directness of the injury; whether damages are speculative; and the risk of duplicative recovery and concomitant complexity in apportioning damages among multiple injured entities.

However, there are some other federal precedents that leave open the possibility of establishing umbrella liability where there is a strong chain of causation akin to a mathematical relationship.[28] Also, the issue has received little attention from the U.S. Courts of Appeals and no attention from the [U.S. Supreme Court](#). The approach to umbrella liability is therefore by no means settled under U.S. law and the Kone judgment may well have an impact in future cases in the U.S.

Implications of the Kone Judgment

Defendants will no doubt emphasize that the Kone judgment goes no further, explicitly at least, than clarifying that national law cannot categorically exclude umbrella claims from the outset. It does not require umbrella damages to be awarded in any particular case. As the advocate general explained, such a solution “does not mean that cartel members will automatically and in every individual case be required to provide compensation to customers of undertakings not party to a cartel”[29]; they cannot be “subject to unlimited liability for any losses, however remote, for which their anti-competitive behaviour may have been the cause.”[30]

It is certainly true that a comprehensive assessment of all the relevant circumstances of the case will be necessary to determine whether umbrella pricing has occurred, but Kone shifts “the umbrella pricing issue from the level of pure theory to that of the production of evidence.”[31]

One should not put too much weight on the fact that the judgment only prohibits a categorical exclusion of umbrella claims as that arguably just reflects normal CJEU practice. Courage and Crehan only explicitly precluded an absolute bar to actions being brought by a party to the agreement that infringed competition law.[32] The reality is that the CJEU is wary of appearing to trespass on matters that are the responsibility of member states but it is nonetheless sending a very clear message inviting claimants to pursue umbrella damages in appropriate cases. For this reason, one would have to agree with the assessment of Advocate General Kokott that “[t]he Court’s judgment in this case will without doubt be ground breaking in the context of the further development of European competition law and, in particular, its private enforcement.”

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[1] Judgment of the Court (Fifth Chamber) of 5 June 2014 in the Case C-557/12, Kone AG and others, [2014] ECR I-0000.

[2] See, e.g., Laitenberger, Ulrich and Smuda, Florian, “Estimating Consumer Damages in Cartel Cases” (September 16, 2013) in ZEW - Centre for European Economic Research Discussion Paper No. 13-069; Inderst, Roman and Maier-Rigaud, Frank P. and Schwalbe, Ulrich, “Umbrella Effects” (July 23, 2013). Forthcoming, Journal of Competition Law and Economics 2014 [Nominated for the 2014 Concurrences Antitrust

Awards]. See also the Commission Staff Working Document SWD(2013) 205, "Practical Guide quantifying harm in actions for damages based on breaches of Art 101 or 102 TFEU", published on 11 June 2013, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf

[3] See F. Maier-Rigaud, "Umbrella Effects and the Ubiquity of Damage Resulting from Competition Law Violations", 25 February 2014, in *The Journal of European Competition Law and Practice*, 2014, Forthcoming.

[4] A consolidated version of the Treaty can be found at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012E/TXT>

[5] Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraphs 25 and 26; Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619, paragraphs 60 and 61; Case C-360/09 *Pfleiderer* [2011] ECR I-5161, paragraph 28; Case C-199/11 *Otis* [2012] ECR, paragraphs 41 and 43; and Case C-536/11 *Donau Chemie* [2013] ECR I-0000, paragraph 21.

[6] See Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 26, (emphasis added).

[7] Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619, paragraphs 61 and 64, (emphasis added).

[8] Opinion of Advocate General Kokott delivered in Case C-557/12, *Kone AG and others*, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=147064&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=185155>

[9] The Court of Justice's advocates general assist the judges of that court by giving their opinions on legal solutions to cases before the judges deliberate. While opinions of the advocates general are merely advisory, they are very often followed by the judges.

[10] Advocate General's opinion (note 8 above), paragraph 28.

[11] Advocate General's opinion (note 8 above), paragraph 28.

[12] Advocate General's opinion (note 8 above), paragraph 46.

[13] Advocate General's opinion (note 8 above), paragraph 51.

[14] In other cases, however, the Court has not refrained itself from dictating rules on procedural matters. See, e.g., Case C-8/08 [T-Mobile Netherlands](#) [2009] ECR I-4529, where the ECJ determined that national courts were bound by a rebuttable presumption of a causal connection between exchanges of information between competitors and their subsequent use of that information, even though different procedural rules relating to evidence would apply under national law

[15] Case C-557/12, *Kone AG and others*, [2014] ECR I-0000, paragraph 29.

[16] Case C-557/12, *Kone AG and others*, [2014] ECR I-0000, paragraph 30.

[17] Case C-557/12, *Kone AG and others*, [2014] ECR I-0000, paragraph 33.

[18] Case C-557/12, *Kone AG and others*, [2014] ECR I-0000, paragraph 34.

[19] Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, June 11, 2013. The text originally proposed by the Commission is available

at: [http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2013/0404/COM_COM\(2013\)0404_EN.pdf](http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/com/2013/0404/COM_COM(2013)0404_EN.pdf)

[20] The text of the proposal as it stands now is the result of a provisional agreement between Parliament and Council, so it is unlikely that significant changes are included before its formal approval and publication expected in autumn this year. The last version of the text as adopted by the European Parliament on 17 April 2014 in first reading can be found

at: <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2014-0451>

[21] See Article 2.1 of the text adopted by the European Parliament on 17 April 2014 (note 14 above).

[22] See Article 11.5 of the text adopted by the European Parliament on 17 April 2014 (note 14 above).

[23] See Article 14.2 of the text adopted by the European Parliament on 17 April 2014 (note 14 above). In particular, where the indirect purchaser has shown that:

- a) the defendant has committed an infringement of competition law;
- b) the infringement of competition law resulted in an overcharge for the direct purchaser

of the defendant; and

c) he purchased the goods or services subject of the infringement , or purchased goods or services derived from or containing the goods or services subject of the infringement.

[24] See Article 14.1 of the text adopted by the European Parliament on 17 April 2014 (note 14 above).

[25] Advocate General’s opinion (note 8 above), paragraph 88.

[26] See, e. g., *Antoine Garabet, M.D., Inc. v. Autonomous Techs. Corp.*, 116 F. Supp. 2d 1159, 1167-68 (C.D. Cal. 2000).

[27] *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

[28] See, e.g., *In re Online DVD Rental Antitrust Litigation*, 2011 WL 1629663, at *9 (N.D. Cal. 2011), where the court held that plaintiffs had failed to establish umbrella liability because they “fail[ed] to demonstrate that [Netflix](#) pricing truly ‘set’ or determined Blockbuster pricing, as a function of any interdependent market interaction, as opposed to simply a likely function of the competitive dynamics of the marketplace.”

[29] See Advocate General’s opinion (note 8 above), paragraph 84.

[30] See Advocate General’s opinion (note 8 above), paragraph 4.

[31] See Advocate General’s opinion (note 8 above), paragraph 85.

[32] See Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 28.

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