

# *Advocate General Opens Door to Umbrella Claims in Cartel Damages Cases*

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## Introduction

On 30 January 2014, Advocate General (“AG”) Juliane Kokott of the European Court of Justice (“ECJ”) adopted an opinion addressing the as yet unsettled question under EU law whether the civil liability of members of a cartel also extends to so-called “umbrella pricing.”<sup>1</sup>

The term umbrella pricing is used to describe pricing by companies, which are not themselves part of a cartel but – benefiting from the knock-on effect that the cartel has on prices throughout the market – set their own prices higher than they would otherwise have been able to on a competitive market.

The question before AG Kokott was whether EU law requires that customers of companies not part of the cartel should be able to claim compensation before the national courts from the members of the cartel for the inflated umbrella prices? Or, conversely, can national laws exclude any umbrella claims as a matter of principle on the ground that the loss suffered is indirect and too remote?

## Background

AG Kokott’s opinion was adopted in the context of a preliminary reference from an Austrian court dealing with follow-on damages claims by a company called ÖBBInfrastruktur in relation to the Austrian elevator cartel.

ÖBBInfrastruktur had purchased elevators directly from the members of the cartel (Kone, Otis, Schindler and ThyssenKrupp) as well as from companies that were not part of the cartel. After fines were imposed on the cartel members by the Austrian Cartel Court, ÖBBInfrastruktur claimed damages before the Austrian courts for the losses incurred as a result of the cartel. This included € 1.8 million in claimed damages relating to elevators purchased from companies that were not part of the cartel but which, benefiting from the cartel’s “umbrella”, charged significantly higher prices than would have been possible under normal market conditions.

The Austrian court dealing with this claim noted that, under Austrian civil law, members of the cartel cannot be held liable for this kind of umbrella pricing. However, the court made a preliminary reference to the ECJ, essentially asking whether EU competition law and the EU principle of effectiveness require that such umbrella claims should be possible under national laws.

## Liability of cartel members for umbrella pricing is a matter of EU law

Before analyzing umbrella claims under EU law, AG Kokott made it clear that the issue of liability for umbrella pricing is indeed primarily a matter of EU law, rather than national

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<sup>1</sup> Opinion of Advocate General Kokott delivered on 30 January 2014 in Case C-557/12 *KONE AG and Others*, available on the ECJ website (<http://curia.europa.eu>) (referred to in the footnotes as “Opinion of AG Kokott”).

law. According to AG Kokott, “*the principle that any individual is entitled to claim compensation for loss sustained by him where there is a causal relationship between that loss and an infringement of the competition rules follows from European Union law itself, more specifically from the prohibition on agreements, decisions and concerted practices laid down in [...] Article 101 TFEU.*”<sup>2</sup> The AG, referring to the ECJ’s *Manfredi* judgment, added that EU law also determines the types of loss for which the cartel members can be held liable.<sup>3</sup>

Building on the same principles, AG Kokott concluded that civil liability of cartel members for umbrella pricing is indeed a matter for EU law. Any other conclusion would, in the AG’s view, lead to differences of treatment between economic operators across the EU, which would run counter to the objective of the EU to create a level playing field and would be an invitation to forum shopping.<sup>4</sup>

### **Causal link between a cartel and umbrella damages**

Having concluded that the issue of umbrella pricing is governed by EU law, AG Kokott tackled the crux of the preliminary reference: is there a sufficiently direct causal link between a cartel and the losses resulting from umbrella pricing caused by a cartel, or are these excessively remote losses for which damages cannot reasonably be awarded against the members of the cartel?

AG Kokott’s assessment focused on the underlying purpose of the requirement of a causal link, which in the AG’s view is intended to ensure that a person is liable only for loss that, first, “*he could reasonably have foreseen*” and, second, “*the reparation of which is consistent with the objectives of the provision of law*” that was infringed, in this case competition law.<sup>5</sup>

#### *Foreseeability of loss resulting from umbrella pricing*

The Austrian court, along with the cartel members, expressed the view before the ECJ that losses resulting from umbrella pricing are not sufficiently foreseeable by cartel members and cannot therefore create a sufficiently direct causal link between the losses and the cartel members. Simply put, the umbrella pricing is only a “side effect” of the cartel.

The AG started by recognizing that companies not part of a cartel may take into account a large number of factors when setting their prices, but concluded that this does not in itself mean that losses resulting from umbrella pricing are not foreseeable by the cartel members. In the AG’s own words: “*the causal chain traceable back to the cartel is not broken by the intervention of the person not party to the cartel, but is in fact continued if, when determining his prices, that person is (also) guided by the relevant trading conditions and accordingly – and in an entirely foreseeable manner – follows the price initiative taken by the*

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<sup>2</sup> Opinion of AG Kokott, para. 24.

<sup>3</sup> Opinion of AG Kokott, para. 27.

<sup>4</sup> Opinion of AG Kokott, para. 29.

<sup>5</sup> Opinion of AG Kokott, para. 40.

*cartel.*<sup>6</sup> AG Kokott seems to base this conclusion on the fact that it is “*very much the normal way of things*” for companies not part of a cartel to set their prices with an eye to market behavior of the cartel.<sup>7</sup> The AG added that this is particularly true where the cartel members cover a significant proportion of the market, and where the markets are homogenous and transparent.

### *Consistency of umbrella claims with the objectives of competition law*

AG Kokott started her assessment of this criterion by noting that the objective of EU competition law is to create and maintain a system of undistorted competition on the European internal market, which is served by both public and private enforcement mechanisms. The AG went on to conclude that umbrella claims are not incompatible with that objective; in fact they are “*part and parcel of the system in which the European competition rules are enforced.*”<sup>8</sup>

Several parties raised concerns on this point, noting that unchecked private enforcement (including umbrella claims) would upset the balance between, on the one hand, civil liability of cartel members and, on the other hand, the effectiveness of leniency programs of the European Commission and the Member States. Indeed, there is a justified concern that unchecked private enforcement may deter some cartel members from laying their cards on the table in leniency applications and cooperating with the competition authorities. AG Kokott summarily dismissed this concern, stating that “*it would not be appropriate to regard the ‘chilling effect’ which compensation is purported to have on leniency programs – in so far as this is measurable in the first place – as a reason for the categorical exclusion of all civil liability on the part of cartel members for umbrella pricing.*”<sup>9</sup>

### **AG Kokott’s conclusion**

AG Kokott concluded her assessment by stating that “*loss resulting from umbrella pricing cannot therefore be regarded as being unforeseeable by the members of a cartel, and the reparation of that loss is consistent with the objectives of [...] Article 101 TFEU. It would run counter to the practical effectiveness of those competition rules for the national civil law categorically to exclude compensation for such loss from the outset.*”<sup>10</sup>

### **Observations**

AG Kokott’s opinion is noteworthy in that it opens the door to umbrella claims in national cartel damages proceedings where any such claims are precluded as a matter of principle by national law. It is now up to the ECJ, which is not bound by the AG’s opinion, to give its own ruling on whether EU law precludes such a categorical exclusion of the liability of

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<sup>6</sup> Opinion of AG Kokott, para. 37.

<sup>7</sup> Opinion of AG Kokott, para. 46.

<sup>8</sup> Opinion of AG Kokott, para. 57.

<sup>9</sup> Opinion of AG Kokott, para. 64.

<sup>10</sup> Opinion of AG Kokott, para. 83.

cartel members for umbrella pricing. As noted by AG Kokott, the ECJ's judgment "*will without doubt be groundbreaking in the context of the further development of European competition law and, in particular, its private enforcement.*"<sup>11</sup>

Having said that, one should be careful not to read too much into this opinion: the AG's response to the preliminary question does not specify when umbrella claims should be granted; it merely states that national laws cannot categorically exclude any such claims as a matter of principle.

Even if the ECJ were to take a similar view as the AG, plaintiffs seeking to obtain umbrella damages in national courts will continue to face significant hurdles in terms of burden of proof, and rightly so. Indeed, while there may in some cases be a link between the cartel and the umbrella prices, as argued by AG Kokott, this link will often be very remote. Think, for instance, of a cartel that only accounts for a small proportion of a market, which is not particularly transparent or homogenous. In such cases, in particular, it will be difficult – if not impossible – for plaintiffs to meet their burden of proving the existence of a sufficiently direct causal link by showing that the cartel prices had any appreciable umbrella effect on the prices set by companies outside the cartel. Or to use the AG's own words, cartel members cannot be "*subject to unlimited liability to provide compensation for any losses, however remote, for which their anti-competitive behavior may have been the cause.*"<sup>12</sup>

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<sup>11</sup> Opinion of AG Kokott, para. 4.

<sup>12</sup> Opinion of AG Kokott, para. 33.