Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 30 January 2014[1]

Case C-557/12

KONE AG and Others

(Request for a preliminary ruling from the Oberster Gerichtshof (Austria))

(Competition — Antitrust law — Private enforcement — Action for damages — Claim for compensation brought by the customer of a person not party to the cartel against the undertakings belonging to the cartel on the ground that a person not party to the cartel, benefiting from the protection of the cartel, charges inflated prices — Umbrella pricing — Direct causal link — Principle of effectiveness)

I – Introduction

1. The present preliminary ruling proceedings offer the Court of Justice the opportunity to add to its case-law on the private enforcement of European competition law. They concern the question, not yet settled at European Union level, of whether the civil liability in damages of the members of a cartel also extends to 'umbrella effects' or 'umbrella pricing'.

2. 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. Does European Union law require that customers of undertakings not party to the cartel should be able to claim compensation for the inflated prices charged by those undertakings from the members of the cartel before the national courts? Or, conversely, may such an obligation to award compensation be excluded in national civil law on the ground that the loss suffered is indirect and too remote?

3. These questions arise against the background of the elevator cartel, with which the Court has already had to deal, in other circumstances, on a number of occasions.[2] ÖBB-Infrastruktur AG had purchased from a manufacturer that was *not* involved in the cartel elevators the price of which had in its opinion been set under the protection of the elevator cartel and was as such higher than would otherwise have been expected under competitive conditions. For the loss it suffered as a result, ÖBB-Infrastruktur is now suing the four undertakings involved in the elevator cartel for damages before the Austrian civil courts.

1 — Original language: German.

2 — See, for example, Case C-199/11 *Otis* [2012] ECR and Case C-501/11 P *Schindler Holding and Others* v *Commission* [2013] ECR, as well as, additionally, my Opinion in the latter case.

4. According to information supplied by the referring court, if that claim for compensation were to be adjudicated upon in accordance with Austrian national civil law alone, it would have to be dismissed from the outset, since, under the principles applicable in national law, undertakings party to a cartel cannot be held responsible for umbrella pricing. The Court of Justice must now give a ruling on whether European Union law precludes such a categorical exclusion of the liability of members of a cartel for umbrella pricing. The Court's judgment in this case will without doubt be groundbreaking in the context of the further development of European competition law and, in particular, its private enforcement.

II – Facts and main proceedings

A – *The elevator cartel*

5. The 'elevator cartel', which involved the conclusion of anti-competitive agreements between major European manufacturers of elevators and escalators, more specifically, Kone, Otis, Schindler and ThyssenKrupp, operated in several Member States of the European Union over a period of many years. The European Commission uncovered that cartel in 2003 and, in 2007, imposed fines for the elevator cartel's practices on the Belgian, German, Netherlands and Luxembourg markets. [3]

6. In Austria, the Bundeswettbewerbsbehörde (Federal Competition Authority) and the Kartellgericht (Antitrust Court) took action against the elevator cartel. The fines imposed by the Kartellgericht in 2007 [4] were confirmed by the Oberster Gerichtshof (Supreme Court), sitting as higher antitrust court, in 2008. [5] ThyssenKrupp was the leniency applicant.

7. According to the findings made in the Austrian national antitrust proceedings, there had existed between the parties to the cartel, from the 1980s to early 2004, an agreement, repeatedly confirmed, to divide up the market for elevators and escalators which those parties largely, albeit not uninterruptedly, implemented. The cartel was intended to secure for the favoured undertaking in question a higher price than would have been achievable under competitive conditions. The cartel distorted competition and the evolution of prices to be expected under conditions of competition.

8. The members of the cartel sought to coordinate their activities in respect of well over half the volume of new machinery on the market in Austria. In addition, more than half of the projects concerned were allocated to one of them by mutual consent. In all, at least one third of the market volume became the subject of specific agreements between the cartel members in this way. Approximately two thirds of the projects forming the subject of such concerted practices went ahead as planned. In the remaining third of cases, the project was awarded either to undertakings that were not party to the cartel or to a cartel member that did not adhere to the agreement but made a more favourable offer.

9. In short, the result of the cartel members' conduct was that market prices hardly changed and their market shares remained roughly the same.

3 — See also in this regard *Otis and Others* (paragraph 18 et seq.) and *Schindler Holding and Others* v *Commission* (paragraph 10 et seq.), cited in footnote 2.

4 — Order of the Oberlandesgericht Wien (Higher Regional Court, Vienna), sitting as antitrust court, of 14 December 2007 (ref. 25 Kt 12/07).

5 — Order of the Oberster Gerichtshof, sitting as higher antitrust court, of 8 October 2008 (ref. 16 Ok 5/08).

B – *The action for damages brought by ÖBB-Infrastruktur*

10. ÖBB-Infrastruktur is a subsidiary of Österreichische Bundesbahnen (Austrian Federal Railways) and as such is responsible for the construction and maintenance of railway stations throughout Austria. ÖBB-Infrastruktur is an important customer on the Austrian market for elevators and escalators.

11. Before the Austrian civil courts, ÖBB-Infrastruktur brought an action for damages amounting to more than EUR 8 million against cartel members Kone, Otis, Schindler and ThyssenKrupp. In support of its action, ÖBB-Infrastruktur claims in essence that, as a result of the elevator cartel's practices, it paid inflated prices for the elevators which it purchased. Of those elevators, ÖBB-Infrastruktur acquired some as a direct customer of the cartel members, some as an indirect customer of theirs and some as a customer of undertakings not party to the cartel.

12. These preliminary ruling proceedings are concerned only with that part of the action for damages by which ÖBB-Infrastruktur claims that an undertaking not party to the cartel, benefiting from the protection of the cartel's practices, charged it significantly higher prices than would have been possible under normal competitive conditions. ÖBB-Infrastruktur estimates the loss sustained to be at least EUR 1.8 million.

13. The judgment at first instance, by which that part of the action for damages had been dismissed as unfounded,[6] was set aside on the decisive points by the Oberlandesgericht Wien (Higher Regional Court, Vienna) sitting in its appellate jurisdiction.[7] The dispute is now pending before the Austrian Oberster Gerichtshof sitting as court of appeal on points of law.

14. The Oberster Gerichtshof takes the view that the loss on account of which ÖBB-Infrastruktur has brought its action cannot be attributed to the parties to the cartel on legal grounds. On the one hand, it considers that the adequate causal link required under Austrian law is not present; on the other hand, it considers that the loss alleged is not covered by the protective purpose of the competition rules. However, in view of the conflicting views among legal commentators as regards the correct treatment in law of umbrella pricing, the Oberster Gerichtshof has doubts as to whether such an outcome, based on domestic civil law alone, is compatible with European Union law, in particular the principle of effectiveness.

III – Request for a preliminary ruling and procedure before the Court of Justice

15. By order of 17 October 2012, the Oberster Gerichtshof,[8] the referring court, referred the following question to the Court of Justice for a preliminary ruling:

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?

6 — Part judgment of the Handelsgericht Wien (Commercial Court, Vienna) of 19 September 2011 (Ref. 19 Cg 21/10z-57).

7 — Order of the Oberlandesgericht Wien, sitting in its appellate jurisdiction, of 21 December 2011 (Ref. 1 R 272/11v-65).

8 — Ref. 7 Ob 48/12b.

16. In the written procedure in the preliminary ruling proceedings, observations have been submitted, on the one hand, by ÖBB-Infrastruktur, as claimant in the main proceedings, and, on the other hand, by Kone, Otis, Schindler and ThyssenKrupp, as defendants in the main proceedings, as well as by the Austrian Government, the Italian Government and the European Commission. With the exception of the two governments, those parties also presented argument at the hearing on 12 December 2013.

IV – Assessment

17. By its question, the referring court seeks an interpretation primarily of Article 101 TFEU, whereas it appears to refer to Article 81 EC and Article 85 of the EC Treaty only in the alternative. However, since the elevator cartel's practices took place before the Treaty of Lisbon came into force, some of them falling within the scope *ratione temporis* of Article 81 EC and others arising even when Article 85 of the E(E)C Treaty was still in force, only the latter two provisions are relevant for the purposes of answering the request for a preliminary ruling. What I have to say is none the less also directly applicable to Article 101 TFEU, the content of which is essentially identical.

18. It is settled case-law that parties suffering loss as a result of a cartel falling within the purview of Article 81 EC or Article 85 of the E(E)C Treaty can claim compensation from the undertakings belonging to the cartel.[9] What is not yet clear, however, is whether such compensation claims also include loss resulting from the fact that undertakings not party to the cartel increase prices by more than the amount that would be expected under competitive conditions, that is to say loss attributable to umbrella pricing. This is a subject on which there is conflicting opinion among legal commentators.[10] It is not particularly surprising, therefore, that the parties to the present dispute, too, hold widely differing views in this regard, especially since the financial implications are considerable.

19. From a legal point of view, the issue of whether members of cartels can also be held civilly liable for umbrella pricing hangs on the existence or otherwise of a *causal link*. The question is whether there is a sufficiently close connection between the cartel and the losses resulting from umbrella pricing caused by a cartel, or whether these are excessively remote losses for which damages cannot reasonably be awarded against the members of the cartel.

20. In what follows, I shall first of all show that the issue of the civil liability of cartel members for umbrella pricing is a matter of European Union law, not national law (see Section A immediately below). I shall then turn to the specific legal conditions that may, under European Union law, be attached to a finding as to the existence of a causal link between a cartel and any umbrella pricing (see in this regard Section B below).

9 — 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; *Otis* (cited in footnote 2, paragraphs 41 and 43; and Case C-536/11 *Donau Chemie* [2013] ECR, paragraph 21.

10 — For the state of opinion on both sides of the Atlantic see, inter alia, R.D. Blair and V.G. Maurer: 'Umbrella Pricing and Antitrust Standing: An Economic Analysis', in: *Utah Law Review* 1982, p. 763; J.M. Lave, 'Umbrella Standing: the tradeoff between plaintiff suit and speculative claims', in: *Antitrust Bulletin* 48(2003), p. 223; F.W. Bulst, 'Schadensersatzansprüche der Marktgegenseite im Kartellrecht', Baden-Baden 2006, p. 255; F.W. Bulst, in: W. Möschel and F. Bien (ed.), Kartellrechtsdurchsetzung durch private Schadensersatzklagen, Baden-Baden 2010, p. 225 (242 et seq.); G. Meeßen, 'Der Anspruch auf Schadensersatz bei Verstößen gegen EU-Kartellrecht – Konturen eines europäischen Kartelldeliktsrechts', Tübingen 2011, p. 256 et seq.; I. Hartung, 'Umbrella Claims: Schadenersatz bei Kartellverstößen auf Um- oder Abwegen?', in: *ecolex* 2012, p. 497; H. Beth and C.-M. Pinter, 'Preisschirmeffekte: Wettbewerbsökonomische Implikationen für kartellrechtliche Bußgeld- und Schadensersatzverfahren', in: *Wirtschaft und Wettbewerb* (WuW) 2013, p. 228; R. Inderst, F. Maier-Rigaud and U. Schwalbe, 'Umbrella Effects', in: *IESEG Working Paper Series* 2013-ECO-17.

A – *Civil liability of cartel members for umbrella pricing: a matter of European Union law*

21. The referring court and many parties to the proceedings take the view that the civil liability of cartel members for umbrella pricing is governed primarily by national law and that, from the point of view of European Union law, the discretion available to the Member States in this regard is limited at most by the principles of equivalence and effectiveness.

22. At first sight, that view does appear to find support in the judgment in *Manfredi*, where the Court of Justice describes 'the detailed rules governing the exercise' of the right to compensation, including those on the application of the concept of 'causal relationship' as being 'for the domestic legal system of each Member State to prescribe', reiterating in this regard the requirement to observe the principles of equivalence and effectiveness. [11]

23. A closer examination of the judgment in *Manfredi* and also of a number of other more recent judgments of the Court of Justice shows, however, that, as things currently stand, it is not so much the *existence* of claims to compensation (i.e. the question of *whether* compensation is to be granted) that is dictated by national law as, rather, 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), that is to say, in particular, jurisdiction, procedure, time-limits and the furnishing of proof. [12]

24. However, 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 81 EC or Article 85 of the E(E)C Treaty (now Article 101 TFEU). [13] That direct anchoring in European Union law is common to the civil liability of undertakings for their infringements of the prohibition on agreements, decisions and concerted practices and the liability of the Member States for their infringements of European Union law, [14] notwithstanding all the conceptual differences which may otherwise exist between those instruments. [15]

25. As the Italian Government has rightly pointed out, the fact that the specific obligation to provide compensation incumbent on cartel members is a genuine principle of European Union law follows not least from the legal nature and the meaning of the aforementioned prohibition on agreements, decisions and concerted practices. That prohibition has direct effect as between individuals. By virtue of primary law, it creates obligations incumbent on all undertakings active on the internal market and it can be relied on by anyone. [16] The full practical effectiveness – *effet utile* – of the prohibition on agreements, decisions and concerted practices 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 by undertakings of Article 81 EC or Article 85 of the E(E)C Treaty (now Article 101 TFEU). [17]

11 — *Manfredi* (cited in footnote 9), paragraphs 64 and 92.

12 — *Courage and Crehan*, paragraph 29, *Manfredi*, paragraphs 62, 64 and 77, *Pfleiderer*, paragraph 30, and *Donau Chemie*, paragraph 25, all cited in footnote 9.

13 — See in this regard *Courage and Crehan*, paragraphs 25 and 26, and *Manfredi*, paragraphs 60 and 61, cited in footnote 9. The Commission, too, recognises this in its proposal of 11 June 2013 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 final ('the proposal for a directive'), where it speaks of 'the Union right to compensation for harm caused by infringements of Union competition law' (see recital 11 in the preamble to the proposal for a directive).

14 — On the liability of the Member States see, fundamentally, Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraphs 35 to 37, and Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 31.

15 — So also Advocate General Van Gerven in his Opinion of 27 October 1993 in Case C-128/92 *Banks* [1994] ECR I-1209, points 36 to 45.

16 — See *Courage and Crehan*, paragraphs 19 and 23, and *Manfredi*, paragraphs 39 and 57, cited in footnote 9, each with further references.

17 — *Courage and Crehan*, paragraph 26, and *Manfredi*, paragraphs 60, 89 and 90, both cited in footnote 9.

26. The Court of Justice therefore recognises in the judgment in *Manfredi* 'the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition', without making the existence of that right in any way dependent on the national law of the Member States. [18]

27. That is not all, however. It is clear from the judgment in *Manfredi* that both the persons entitled to claim compensation from the members of a cartel for infringement of the aforementioned prohibition on agreements, decisions and concerted practices ('any individual') and also the types of loss which the cartel members may have to make good are predetermined by European Union law. The Court has already held that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest. [19]

28. When applied to the present case, all of the foregoing supports the conclusion that the civil liability of cartel members for umbrella pricing is also a matter of European Union law. After all, if there is a need to assess whether the members of a cartel have to make good loss sustained as a result of umbrella pricing, that assessment will not only be concerned with the rules for enforcing and calculating compensation claims and the furnishing of evidence before national courts (in other words, the 'how' of the compensation). The focus of interest of such an assessment will, rather, be the much more fundamental question of whether cartel members can be held civilly liable at all for this kind of loss and whether they can be sued by persons who are not their direct or indirect customers (that is to say, the 'whether' of compensation). That question cannot be left to the legal orders of the Member States alone.

29. If the legal criteria by which national courts assess the civil liability which those participating in an agreement, decision or concerted practice within the meaning of Article 81 EC or Article 85 of the E(E)C Treaty owe to certain persons for certain kinds of loss were to differ fundamentally from one Member State to another, there would be a risk of economic operators being treated differently. This would not only run counter to the fundamental objective of European competition law, which is to create framework conditions that are as uniform as possible for all undertakings active on the internal market ('*level playing field*' [20]), it would also be an invitation to '*forum shopping*'.

30. All in all, the objective of the uniform and effective enforcement of the competition rules of the European internal market therefore requires an answer to the question of principle as to whether or not cartel members must provide compensation for loss resulting from umbrella pricing that is uniform throughout the European Union.

B – *The European Union law conditions applicable to the establishment of a causal link*

31. It remains to be considered what specific conditions may be attached under European Union law to the establishment of a causal link between a cartel and umbrella pricing.

32. As the formulation 'any individual' used by the Court of Justice itself shows, the obligation to provide compensation incumbent on the members of a cartel must not be interpreted narrowly. Cartels are capable of causing considerable economic damage not only in the narrower sphere of the cartel's members, but far beyond. It would therefore be unreasonable to restrict the group of persons entitled to bring a claim to such an extent that eligibility to seek compensation extends from the

18 — *Manfredi* (cited in footnote 9), paragraph 95.

19 — *Manfredi* (cited in footnote 9), paragraphs 95 and 96.

20 — On the concept of 'level playing field', see, for example, my Opinions in Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals* v *Commission* [2010] ECR I-8301, point 169, Case C-17/10 *Toshiba Corporation and Others* [2012] ECR, point 118, Case C-226/11 *Expedia* [2012] ECR, point 37, and Case C-681/11 *Schenker and Others* [2013] ECR, point 48.

outset only to certain economic operators, such as those who have entered into a contract with the members of the cartel or the direct or indirect purchasers of their goods or services. Any other position would fail to ensure the full effectiveness of the prohibition in European Union law on agreements, decisions and concerted practices.

33. On the other hand, it is perfectly legitimate, for the purposes of examining the existence of a causal link, to lay down criteria which ensure that cartel members are not subject to unlimited liability to provide compensation for any losses, however remote, for which their anti-competitive behaviour may have been the cause in the sense of a '*conditio sine qua non*' (also known as an *equivalent causal link* or a *but-for* causal link).

34. Thus, in the context of the non-contractual liability of European Union institutions provided for in the second paragraph of Article 340 TFEU, it is settled case-law that there must be a *sufficiently direct causal nexus* between the harmful conduct and the damage alleged.[21] For the sake of consistency, that very same criterion should also be applied to all other cases involving claims to compensation for infringement of European Union law, irrespective of whether such claims are brought by individuals against Member States[22] or – as here – between private parties for the purpose of asserting the civil liability of cartel members for loss caused by them on the market.[23]

35. It is true that the aforementioned criterion of directness also requires further clarification. In order to define more precisely the actual meaning to be ascribed to the phrase 'sufficiently direct causal link', recourse must be had ultimately to a normative examination, as the national systems of civil law, too, usually do in the context of their respective non-contractual liability regimes.[24] The terminology used in this regard ('*legal causation*', '*adäquate Kausalität*' and the like) may differ from one legal order to another. In substance, however, the considerations are the same, and it is these which also inform the concept of a sufficiently direct causal link.

36. It is important to emphasise in this regard, first of all, that a direct causal link must not be regarded as being the same as a single causal link. The fact, underlined by the referring court and a number of parties to the proceedings, that, when determining his prices, a person not party to the cartel is exercising his freedom to make his own corporate decisions cannot therefore of itself be considered such as to support the conclusion that any loss resulting from umbrella pricing may not be attributed to the members of the cartel. On the contrary, there is sufficient support for the assumption of a direct causal link if the cartel was at least a *contributory cause* of the umbrella pricing.[25]

21 — In this regard, see, fundamentally, Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier and others* v *Council* [1979] ECR 3091, paragraph 21: 'a sufficiently direct consequence'; see also the judgment of 30 April 2009 in Case C-497/06 P *CAS Succhi di Frutta* v *Commission*, paragraph 67, and Case C-419/08 P *Trubowest Handel and Makarov* v *Council and Commission* [2010] ECR I-2259, paragraph 53.

22 — *Brasserie du pêcheur and Factortame* (cited in footnote 14), paragraph 51, and Case C-420/11 *Leth* [2013] ECR, paragraph 41.

23 — Since Advocate General Van Gerven spoke in favour of it in his Opinion in *Banks* (cited in footnote 15), points 49 to 54, the criterion of a direct causal link recently made its express appearance in the case-law on the obligation of cartel members to provide compensation in the judgment in *Otis* (cited in footnote 2), paragraph 65.

24 — The study group on a European civil code is thinking along the same lines when it states that damage compensable by way of non-contractual liability must be 'legally relevant damage': … 'loss or injury constitutes legally relevant damage only if it would be fair and reasonable for there to be a right to reparation or prevention …'; see C. von Bar and E. Clive, 'Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference', Munich 2009, Volume 4, Book VI, Chapter 2, VI.-2:101.

25 — A view almost certainly not shared by Advocate General Ruiz-Jarabo Colomer, who, in his Opinion in Case C-440/07 P *Commission* v *Schneider Electric* [2009] ECR I-6413, point 140, required that the damage to be compensated must 'directly, immediately and *exclusively* arise from the unlawful act' (emphasis added). As far as can be seen, however, this particularly strict formulation never found its way into the case-law of the European Union courts.

37. The case-law of the European Union courts does not by any means always assume as a matter of course that the chain of causality is broken where the action of a third party was a contributory cause of the loss sustained. Rather, it is always the specific circumstances of the individual case in question which are decisive.[26] In cases such as this one, it seems to me that 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[27] – follows the price initiative taken by the cartel.

38. Furthermore, the irrelevance in this regard of the freedom to make corporate decisions enjoyed by the person not party to the cartel is also shown by a brief look at a related issue: the civil liability of cartel members for loss sustained by their indirect customers (that is to say, the customers of their customers). In that context, too, the incurrence of loss on the part of the indirect customer is ultimately dictated by the freely-made corporate decision of a third party (the intermediate trader). After all, the customers of the intermediate trader will sustain a loss only if he passes on to them the anti-competitively inflated prices charged by the cartel members. The cartel members' practices are not therefore the only cause of the loss suffered by their indirect customers. None the less, the view that such losses on the part of indirect customers are eligible for compensation has been gaining ground in more recent times.[28]

39. In relation to the loss resulting from umbrella pricing at issue here, too, it would be unreasonable to make the civil liability of cartel members subject to the condition of their being the single cause. Prices rarely have only one cause. This does not mean, however, that cartel members whose anticompetitive practices have – as here – contributed towards a distortion of the price formation mechanisms that normally apply on the market in question, cannot be held liable for the resulting loss.

40. That said, the criterion of a sufficiently direct causal link is in substance intended, on the one hand, to ensure that a person who has acted unlawfully is liable only for such loss as he could reasonably have foreseen (see in this regard Section 1 immediately below). On the other hand, a person is liable only for loss the compensation of which is consistent with the objectives of the provision of law which he has infringed (see Section 2 below).

1. Foreseeability of loss resulting from umbrella pricing

41. It is important first of all to clarify the circumstances under which the members of a cartel are able to foresee the loss resulting from umbrella pricing. In other words, the question is whether there can be an *adequate causal link* between the aforementioned loss and the cartel's illegal practices.

42. Any loss the incurrence of which the cartel members ought reasonably to take into consideration on the basis of practical experience is foreseeable (or ensues via an adequate causal link), unlike loss which results from an entirely extraordinary train of events and, therefore, ensues via an atypical causal chain.

26 — See, on the one hand, Case C-440/07 P *Commission* v *Schneider Electric* [2009] ECR I-6413, paragraph 222, *CAS Succhi di Frutta* v *Commission* (cited in footnote 21), paragraphs 61 and 62, Case C-460/09 P *Inalca and Cremonini* v *Commission* [2013] ECR, paragraph 120, and the judgment of 10 July 2012 in Case T-587/10 *Interspeed* v *Commission*, paragraph 40, in each of which it is assumed that the causal chain had been broken, and, on the other, the judgment of the General Court of 14 December 2005 in Case T-320/00 *CD Cartondruck* v *Council and Commission*, in particular paragraph 177, where it is held that the chain of causality was not broken.

27 — For more detail on the foreseeable nature of the conduct of the person not party to the cartel, see points 41 to 52 of this Opinion, below.

28 — See in particular in this regard, at national level, the judgment of the German Bundesgerichtshof (Federal Court of Justice) of 28 June 2011, 'ORWI' (KZR 75/10, *BGHZ* 190, 145. The Austrian Oberster Gerichtshof (Supreme Court), too, has adopted position to the same effect in the present case (order of 17 October 2012, Ref. 7 Ob 48/12b). The same is true of the Commission's proposal for a directive (see in particular recitals 11 and 33 in the preamble to, and Articles 12 and 13 of, the proposal for a directive).

43. The referring court takes the view – like Kone, Otis, Schindler, ThyssenKrupp and the Austrian Government – that loss resulting from umbrella pricing is not sufficiently foreseeable by cartel members and cannot therefore be said to ensue via an adequate causal link between it and the cartel members. Umbrella pricing is only a 'side effect' of the cartel.

44. That argument must be rejected.

45. It is true that persons not party to a cartel may take into account a large number of factors when exercising their freedom to make their own corporate decisions in order to determine their prices. [29] That fact alone, however, does not mean that loss resulting from umbrella pricing is not foreseeable by the members of the cartel.

46. After all, in a market economy, it is common business practice for undertakings to keep a close eye on market trends and to take those trends duly into consideration when making their own commercial decisions. Accordingly, 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, whether they are aware of the anti-competitive practices of the latter or not. Indeed, it is very much in the normal way of things.

47. This is particularly true where – as here – the cartel members cover a significant proportion of the relevant market, as evidenced by the large market share they jointly hold, [30] and their anti-competitive practices, too, affect a significant proportion of that market, [31] which in no way presupposes that they manipulate the lion's share of the market. The stronger the cartel's position is on the market concerned, the more likely it is that the cartel will have a significant impact on pricing levels on that market as a whole and the less scope there is for an operator not party to the cartel to have any meaningful influence of his own over the market price.

48. It is true that the more homogenous and transparent the relevant product market is, the easier it is for an operator not party to the cartel to be guided by the business practices of the cartel members when determining his own prices. This does not, however, support the converse inference that a cartel is unlikely ever to give rise to umbrella pricing on markets that are not homogeneous, that exhibit little transparency and where the products – such as some of the elevators and escalators in question here – are customised. [32] After all, even on markets such as these, operators tend to be acutely aware of the prevailing price level and of how the individual suppliers on the market are behaving.

49. Even the fact that elevators and escalators are often purchased via a tendering procedure, especially in the case of large public-sector orders, does nothing to change the foregoing finding. As ÖBB-Infrastruktur submitted without being contradicted, the results of such procurement procedures are not in any way concealed from other market operators [33] and may therefore serve as an indication of the prevailing price level when future orders are placed.

29 — These may, for example, include business strategy (emphasis on brand image, premium pricing strategy, etc.) and entrepreneurial personality, but also the purchasing power of customers.

30 — According to uncontradicted information supplied by ÖBB-Infrastruktur, the elevator cartel in Austria involved the largest manufacturers in the industry, whose combined market share was in the region of 80%.

31 — According to the findings made in the main proceedings, at least a third of the market volume was the subject of specific agreements between the cartel members, who even attempted to coordinate their activities in respect of well over half the volume of new machinery on the market in Austria (see point 8 of this Opinion, above).

32 — See to the same effect H. Beth and C.-M. Pinter, WuW 2013, p. 228 (232): 'Even where there are differences between the products, umbrella pricing is not unlikely, although it will be less marked than on a highly homogenised market'.

33 — In this connection, ÖBB-Infrastruktur has drawn attention to the rules applicable in Austria to the opening of bids in a tendering procedure.

50. An operator not party to a cartel who has some spare capacity may well be tempted to set his own prices below those charged by the cartel in order in this way to gain market share at the cartel members' expense. Even then, however, there is still a considerable incentive for the operator not party to the cartel to charge his customers a higher price than would otherwise be possible under competitive conditions. Assuming, for example, that the cartel price is 120 and the price achievable under competitive conditions would otherwise be 100, the operator not party to the cartel could set his price at 110, for example. Such behaviour would be far from unusual. It would be economically rational and anything but unforeseeable by the members of the cartel.

51. Conversely, it is very important for the success of anti-competitive agreements between the members of a cartel that the prices of non-members should also rise and come close to those of the cartel members. After all, 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. For this reason, too, the obvious conclusion is that cartel members acting rationally and thinking their anti-competitive practices through to their logical conclusion will not be surprised by umbrella pricing. On the contrary, they must actually expect it. ÖBB-Infrastruktur was right to make this point.

52. In the light of the foregoing, it must be assumed, in short, that loss resulting from umbrella pricing is not loss the occurrence of which is always atypical or unforeseeable by the members of the cartel. It would be incompatible with the practical effectiveness of Article 81 EC or Article 85 of the E(E)C Treaty (now Article 101 TFEU) to preclude compensation for such loss from the outset by reference to a comparatively strict understanding of the criterion of an adequate causal link.

2. Compatibility of compensation for loss resulting from umbrella pricing with the objectives of the competition rules which have been infringed

53. It remains to be considered, secondly, whether compensation for loss resulting from umbrella pricing is consistent with the objectives of Article 81 EC or Article 85 of the E(E)C Treaty (now Article 101 TFEU).

54. The referring court takes the view – like Kone, Otis, Schindler, ThyssenKrupp and the Austrian Government – that loss resulting from umbrella pricing falls outside the protective scope of the European Union competition rules. In their opinion, cartel members cannot be held civilly liable for such loss because there is no 'context of unlawfulness'.

55. That argument, too, is unsound.

56. The objective of the competition rules contained in Articles 81 and 82 EC and Articles 85 and 86 of the E(E)C Treaty (now Articles 101 and 102 TFEU) is to create and maintain a system of undistorted competition on the European internal market. That fundamental concern of European Union[34] is served by both the private and the public machinery for the enforcement of competition law.

34 — *Courage and Crehan* (cited in footnote 9), paragraphs 20 and 21. On the importance of the competition rules to the functioning of the internal market, see also Case C-126/97 *Eco Swiss* [1999] ECR I-3055, paragraph 36, and – in relation to the legal position following the entry into force of the Treaty of Lisbon – Case C-52/09 *TeliaSonera* [2011] ECR I-527, paragraph 20, and Case C-469/09 *Commission* v *Italy* [2011] ECR I-11483, paragraph 60.

57. It can hardly be maintained that, of all things, the recognition of the civil liability of cartel members for loss resulting from umbrella pricing is incompatible with that objective. As I shall show below, such an obligation to afford compensation is part and parcel of the system in which the European competition rules are enforced (see in this regard Section (a) immediately below) and, moreover, is capable of correcting the negative consequences which infringements of competition law committed by cartel members have on other market participants, in particular consumers (see in this regard Section (b) below).

a) Part and parcel of the system of enforcement of the competition rules

58. We must begin by looking at the question of whether a civil-law obligation on cartel members to provide compensation for loss resulting from umbrella pricing is generally compatible with the system in which the competition rules of the Treaties are enforced in the European Union.

59. It is recognised that the enforcement of the European competition rules rests on two pillars. These are, on the one hand, the duty of public enforcement by punitive means incumbent on the competition authorities ('public enforcement') and, on the other hand, private enforcement undertaken on the initiative of individuals by recourse to the means available in civil law ('private enforcement'). [35]

60. In order to ensure the practical effectiveness of the competition rules, it is essential that both the system of public enforcement and the system of private enforcement should evolve as effectively as possible. [36] The clout of the competition rules would be greatly weakened if, in the case of certain phenomena such as umbrella pricing, private enforcement were to be dispensed with from the outset and public enforcement were the only available remedy, as some members of the elevator cartel seem to imagine.

61. Of course, the instruments of private enforcement – just like those of public enforcement – must be formulated and applied in such a way as to ensure that their use is not counterproductive in relation to the effectiveness of the competition rules. Unlike ThyssenKrupp, however, I do not have the impression that including umbrella pricing within the ambit of the civil liability of cartel members could create fundamentally inappropriate incentives which would ultimately do more harm than good to the enforcement of the competition rules.

62. The written and oral exchanges of argument and evidence in the procedure before the Court of Justice were concerned in particular with the possible interrelationship between civil liability, on the one hand, and the leniency programmes of the European Commission and the national competition authorities, on the other.

63. It may well be that the prospect of market participants who have suffered loss pursuing a civil liability claim against them may deter some cartel members from laying their cards on the table and cooperating with the competition authorities. However, is this a good reason to disregard completely the justified interests of injured parties in obtaining financial restitution? Surely it makes sense to provide cartel members with a smooth road back to legality in the form of leniency programmes and to help uncover infringements, provided that this is not at the expense of other economic operators' legitimate interests.

35 — *Courage and Crehan* (cited in footnote 9), paragraph 27, *Pfleiderer* (cited in footnote 9), paragraph 29, *Otis* (cited in footnote 2), paragraph 42, and *Donau Chemie* (cited in footnote 9), paragraph 23.

36 — See to this effect *Courage and Crehan* (cited in footnote 9), paragraph 26, *Manfredi* (cited in footnote 9), paragraphs 60, 89 and 90, and *Otis* (cited in footnote 2), paragraph 41. On the importance of private enforcement, see also the White Paper on 'Damages actions for breach of the EC antitrust rules' (COM[2008] 165 final). In its White Paper, the Commission proposes measures which are designed 'to create an effective system of private enforcement [of competition law] by means of damages actions that complements, but does not replace or jeopardise, public enforcement' (p. 4, Section 1.2). The EFTA Court, too, recently had occasion to highlight the importance of the private enforcement of competition law and to emphasise that this is in the public interest (judgment of 21 December 2012, *DB Schenker* v *EFTA Surveillance Authority*, E-14/11, paragraph 132).

64. There may be some justification for taking due account of an undertaking's position as applicant for immunity in any action for damages and for calling primarily on other members of the cartel to satisfy compensation claims, as the Commission, too, proposes.[37] In my opinion, however, it would not be appropriate to regard the 'chilling effect' which compensation is purported to have on leniency programmes – 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.

65. This is particularly true given that a restrictive practice in the award of compensation would very much play into the hands of those who are engaged or are contemplating becoming engaged in anti-competitive practices. After all, it will be much easier for them to calculate the financial risks connected with joining a cartel if their exposure to compensation claims in the event of discovery is reduced. The certainty that they would never be liable for umbrella pricing would give the members of a cartel an additional incentive to continue with their anti-competitive practices. The deterrent effect which private enforcement mechanisms have, and were expressly intended to have, on undertakings[38] that are contemplating infringing the ground rules of the European internal market would be turned on its head.

66. Contrary to the view that Kone appears to take, the objectives of European competition law cannot be reduced to allowing undertakings active on the internal market to operate as cost-efficiently as possible. In a European Union based on the rule of law which has set itself the objective of achieving a highly competitive social market economy (Article 3(3) TEU), functioning markets characterised by undistorted competition are in themselves an asset beyond all cost-benefit considerations.

67. Furthermore, it is difficult to lend much credibility to warnings of inflated costs for economic operators and alerts as to the risk to the efficiency of the markets that would arise if members of cartels were not exempted from certain compensation claims when they come from the very undertakings that have manipulated the market and kept prices artificially high. The most effective way for cartel members to shield themselves from the costs connected with potential compensation claims is for them to provide their own protection, in particular by not infringing the competition rules in the first place. Sheltering cartel members from compensation claims, on the other hand, would serve only to compel other economic operators, especially customers who have suffered loss, to carry the financial burden of the cartel's practices.

68. The argument put forward by ThyssenKrupp to the effect that making cartel members civilly liable for umbrella pricing could 'have the effect of reducing competition on the market' because the risks of liability hanging over them might deter undertakings from investing in the market in question[39] also seems very strange in this connection. It is sufficient to point out in this regard that the model for trading on the internal market should come in the form of undertakings that comply with the competition rules, not those that seek to engage in illegal practices there at the expense of others. Should the recognition of an obligation on cartel members to pay compensation for umbrella pricing have the effect of keeping black sheep away from the market, this would hardly be detrimental to competition.

37 — In Article 11 of, and recital 28 in the preamble to, its proposal for a directive, the Commission proposes that an undertaking to which a competition authority has granted immunity from fines as part of a leniency programme should to some extent benefit from favourable treatment in the context of civil liability, too.

38 — Even though the Commission tried to play down the relevance of the deterrent effect at the hearing, the Court of Justice none the less attaches considerable importance to it in settled case-law; see *Courage and Crehan*, paragraph 27, *Manfredi*, paragraph 91, *Pfleiderer*, paragraph 28, and *Donau Chemie*, paragraph 23, all cited in footnote 9.

39 — In response to my enquiry, ThyssenKrupp's counsel played down this submission at the hearing as 'rhetorical exaggeration'.

69. Finally, the warning voiced by some that the Member States' civil courts would be overloaded if the Court of Justice were to find that cartel members have an obligation to provide compensation for loss resulting from umbrella pricing is unconvincing. After all, given the relatively high hurdles in terms of the burden of proof that await him in the civil courts,[40] any potential 'umbrella plaintiff' would probably be well advised to weigh up carefully the pros and cons of taking out a civil action against cartel members.

70. If, however, the customer of an undertaking that is not party to a cartel does decide to take legal action against the members of the cartel for loss resulting from umbrella pricing, he should not be denied the possibility of instituting such judicial proceedings on the ground that the costs are alleged to be too high. On the contrary, the second subparagraph of Article 19(1) of the EU Treaty and Article 47(1) of the Charter of Fundamental Rights require the Member States to provide, within the field of application of EU competition law, remedies sufficient to ensure adequate legal protection.[41]

b) Suitability for correcting the negative consequences resulting from the commission of infringements of competition law

71. Last but not least is the question whether including umbrella pricing within the ambit of the civil liability of the members of a cartel is compatible with the function of compensation. In general terms, that function is to correct the negative consequences resulting from the commission of infringements of the law, and that very purpose is also served by the obligation on cartel members to compensate any individual for the harm caused by their anti-competitive practices.[42] At the same time, the possibility of obtaining damages strengthens confidence in the competition rules of the European Union and is a substantial contribution to their enforcement.[43]

i) The objection that the loss resulting from umbrella pricing is unintentional

72. A number of parties to the proceedings argue that, while the undertakings belonging to the elevator cartel did intend to increase their own prices to their own customers, they did not intend to inflate the prices charged by undertakings outside the cartel to their customers under the protection of umbrella effects. In their contention, it is unfair to require cartel members to provide compensation for such effects.

73. That objection does not hold water.

74. The finding as to the existence of a causal link between a cartel and certain types of loss that may have been sustained by economic operators is based on purely objective criteria. It is true that, from a subjective point of view, civil liability may depend on whether the cartel members deliberately or negligently infringed the competition rules laid down in the Treaties. It does not, however, depend on whether the members of the cartel also deliberately or negligently caused the loss actually sustained. Such a requirement of fault would be incompatible with the general principles of civil law and would make it excessively difficult to enforce the competition rules.

40 — The Commission's proposal for a directive does, however, provide for some easing of the burden of proof.

41 — See to the same effect, not least, *Courage and Crehan*, paragraph 25, *Manfredi*, paragraph 89, and *Donau Chemie*, paragraph 22, all cited in footnote 9; see also, in particular on the relevance of Article 47 of the Charter of Fundamental Rights in the context of a civil dispute between private individuals, Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213, in particular paragraph 61.

42 — *Donau Chemie* (cited in footnote 9), paragraph 24.

43 — *Donau Chemie*, paragraph 23; similarly, see *Courage and Crehan*, paragraphs 26 and 27, *Manfredi*, paragraph 91, and *Pfleiderer*, paragraph 28, all cited in footnote 9.

75. That said, in a case such as this, the occurrence of umbrella pricing is most certainly not unforeseeable by the undertakings belonging to a cartel, as I have already mentioned.[44] It follows therefore that, in engaging in anti-competitive practices, cartel members condone any resultant umbrella pricing, with the result that, in relation to the loss sustained, they would be open to the charge at least of negligence, and perhaps even of recklessness (*dolus eventualis*).

ii) The objection that compensation for umbrella pricing does not provide a means of absorbing unlawful profits

76. Moreover, contrary to the view taken by some of the parties to the proceedings, it is irrelevant whether compensation for loss resulting from umbrella pricing provides a means of absorbing the unlawful profits of cartel members.

77. The fact that profits can be absorbed in this way may in many cases be a welcome side-effect of compensation for antitrust offences. The absorption of profits is not, however, an essential precondition for bringing compensation claims against cartel members.

78. Herein lies the fundamental difference between a claim for compensation and a claim for the restitution of unjustified enrichment. A claim for compensation is primarily concerned not with recovering from the injuring party the excess that has accrued to him but with awarding to the injured party reparation for the loss he has suffered as a result of the injuring party's unlawful conduct.[45] It is entirely of a piece with that function to extend the civil liability of cartel members to loss resulting from umbrella pricing.

iii) The objection as to the introduction of punitive damages

79. Finally, the objection raised by several parties to the proceedings to the effect that the recognition of civil liability for umbrella pricing would cause the compensation owed by cartel members to degenerate into punitive damages is also irrelevant.

80. Aside from the fact that European Union law does not in principle prohibit the award of exemplary or punitive damages,[46] there is nothing to indicate that the civil liability of cartel members for umbrella pricing could produce such an effect.

81. Contrary to what is usually the case with punitive damages, the inclusion of umbrella pricing in the obligation to provide compensation incumbent on cartel members, the issue in this instance, requires cartel members only to make good the loss which they have caused (or to which they have contributed) on the market in question by their anti-competitive practices. There is no overcompensation for such loss.

82. In short, it can therefore be assumed that compensation for loss resulting from umbrella pricing is consistent with the objectives of Article 81 EC or Article 85 of the E(E)C Treaty (now Article 101 TFEU).

44 — See points 41 to 52 of this Opinion, above.

45 — In response to my enquiry at the hearing before the Court, even Otis's counsel conceded the validity of this distinction.

46 — *Manfredi* (cited in footnote 9) paragraphs 92 and 93.

3. Summary

83. To sum up, 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 81 EC or Article 85 of the E(E)C Treaty (now 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.

C – *Concluding remarks*

84. The solution which I have proposed 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, but it does not rule out such an obligation to provide compensation from the outset either. Rather, it will always be necessary 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 umbrella pricing.

85. Shifting the umbrella pricing issue from the level of pure theory to that of the production of evidence seems to me to be the best way of contributing to the effective enforcement of the European competition rules, while taking due account of the interests of all economic operators.

86. No doubt there will not always be meaningful studies or other evidence that reasonably support the conclusion that umbrella pricing caused by a cartel has taken place on the market in question. On the other hand, however, such an effect is also anything but excluded and the losses connected with it are by no means as 'speculative' and 'uncertain'[47] as is sometimes argued. In the present case, for example, the Austrian Oberster Gerichtshof stated in its order for reference that the elevator cartel had distorted the expected development of prices,[48] and ÖBB-Infrastruktur refers to a study said to prove the emergence of umbrella pricing.[49]

87. It should be noted in passing that, contrary to what many critics allege, the affirmation of the civil liability of cartel members for umbrella pricing is neither more nor less 'pro-business' than the categorical exclusion of any obligation to provide compensation, which the referring court seems to favour. After all, the economic operators involved include not only the members of the cartel but also the customers who were charged inflated prices irrespective of whether their contracts were with the cartel members themselves or with undertakings not party to the cartel. It would be eminently unfair to extend unilateral preferential treatment to the cartel members, the very persons who are guilty of serious infringements of the competition rules, in the form of a categorical exclusion of umbrella pricing from the ambit of their civil liability, particularly since this would, as already mentioned,[50] create inappropriate incentives from the point of view of the effective enforcement of the competition rules.

47 — See to this effect in particular – from the case-law of the courts of the United States of America – the decisions of the United States Court of Appeals (Third Circuit), *Mid-West Paper Products Co. v. Continental Group Inc.*, 596 F.2d 573, 597 (1979) and of the United States District Court (District of Columbia), *Federal Trade Commission v Mylan Laboratories*, 62 F.Supp.2d 25, 39 (1999).

48 — See point 7 of this Opinion, above.

49 — It is for the national courts to examine this submission and to assess the evidential value of the study.

50 — See points 65 and 68 of this Opinion, above.

88. Nor is my proposed solution incompatible with the legislative proposal for the partial harmonisation of actions for damages under national law recently put forward by the European Commission. As discussed with the parties to the proceedings at the hearing, the Commission's proposal for a directive does not preclude the award of compensation for loss resulting from umbrella pricing. [51]

89. The fact that the US case-law on 'umbrella claims' is inconsistent [52] and that the United States Supreme Court has not as yet provided any clarification in this regard should not prevent the Court of Justice from addressing the issue of umbrella pricing.

V – Conclusion

90. In the light of the foregoing considerations, I propose that the Court's answer to the request for a preliminary ruling from the Austrian Oberster Gerichtshof should be as follows:

Article 85 of the E(E)C Treaty and Article 81 EC preclude the interpretation and application of domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, benefiting from the protection of the cartel's practices, set its prices higher than would otherwise have been expected under competitive conditions.

51 — That proposal for a directive (cited in footnote 13) does not seek to harmonise this area in full, but, as is clear not least from its title, is concerned only with the adoption of 'certain rules governing actions for damages' and expressly recognises that there are other 'aspects not dealt with in this Directive' (see recital 10 in the preamble to the proposal for a directive). Moreover, the provisions contained in the proposal for a directive are formulated in a way that is sufficiently broad as also to include compensation for loss resulting from umbrella pricing or, in any event, not to exclude it (see in particular Article 11(2) and (4) of the proposal for a directive, which refer to 'injured parties other than the direct or indirect purchasers or providers' of the infringing undertakings).

52 — Judgments finding in favour of liability: United States Court of Appeals (Seventh Circuit), *United States Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 627 (2003); United States Court of Appeals (Fifth Circuit), *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1166 (1979). Judgements finding against such liability, on the other hand, include: United States Court of Appeals (Third Circuit), *Mid-West Paper Products Co. v. Continental Group Inc.*, 596 F.2d 573, 597 (1979); United States District Court (District of Columbia), *Federal Trade Commission v. Mylan Laboratories*, 62 F.Supp.2d 25, 39 (1999).