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Case Comment – Case C-557/12 *Kone AG and Others v ÖBB Infrastruktur AG**Marc Veenbrink & Catalin S Rusu**

I. INTRODUCTION

In 2007 the Commission fined several undertakings of the so-called elevator cartel. This Commission decision proved to be a goldmine for competition law scholars and lawyers: from the equality of arms and the effectiveness of private enforcement in *Otis*,¹ to the *Schindler*² case in which the respective undertaking put forward 13 pleas alleging the infringement of its fundamental rights. Now a third case emerges which could have a major influence on the development of the enforcement of EU competition law, namely the *Kone* case.³ The *Kone* case deals with the so-called concept of “umbrella pricing”. Umbrella pricing is a concept that refers to the behaviour of non-cartel members who raise prices to align themselves with a cartel. This price increase occurs without any collusion between cartel members and non-cartel members.

In the *Kone* case, ÖBB-Infrastruktur AG, a subsidiary of Austrian Federal Railways, claimed damages from the cartel members of the elevator cartel. Part of these damages resulted from the behaviour of the cartel members, whilst another substantial part, namely a part of €1.8 million, resulted from umbrella pricing. Austrian law requires an adequate causal link between an infringement and losses in order for a claim for damages to be successful. Umbrella pricing is, according to Austrian law, a mere indirect loss, which is not sufficient to provide for an adequate causal link. The national court was unsure about the lawfulness of exclusion of a causal link between umbrella pricing and damages and thus decided to refer a question to the Court of Justice.

In the discussion below we will touch upon certain aspects of the Court’s ruling (often in conjunction with the Advocate General’s Opinion), that we consider important for the development of the law in the area of enforcing competition law rules. By no means is this analysis meant to be an exhaustive one. What can be read below pertains, in our opinion, to a set of questions in need of concrete answers; both as far as enforcers and market players (cartelists or not) are concerned.

II. PROCEDURAL AUTONOMY

The Judgment of the Court is for the first part not that innovative. Reference is made to the direct effect of Articles 101(1) and 102 TFEU and, in extension to that, the

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¹ Case C-199/11 *Europese Gemeenschap v Otis NV and Others*, ECLI:EU:C:2012:684.

² Case C-501/11P *Schindler Holding Ltd and Others v European Commission*, ECLI:EU:C:2013:522.

³ Case C-557/12 *Kone AG and Others v ÖBB Infrastruktur AG*, ECLI:EU:C:2014:1317.

possibility for every individual to claim damages for loss caused by an infringement those articles. The underlying reason, as recalled by the Court, is to ensure the effectiveness of EU competition law. In previous case law⁴ the Court has made clear that every individual should have the right to claim damages when three conditions are met; there should be a loss, occurred due to an infringement of the EU competition rules and there should be a causal link between the two. These concepts, however, are not further elaborated upon by the Court. Several authors have pointed out the lack of clarity created by not interpreting these constituent elements of the right to claim damages for EU competition law infringements.⁵ In the case at hand the Court decided to fill in some of these blanks. According to the Court, two conditions should be met in order to establish the causal link between the infringement of the EU competition rules and losses by umbrella pricing. First of all, it should be:

“established that the cartel at issue was, in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently”.⁶

Secondly, “those circumstances and specific aspects could not be ignored by the members of that cartel”.⁷ A categorical exclusion of liability of cartel members for umbrella pricing, as was the case in Austria, is thus prohibited.⁸ As will be explained below, we believe that the first condition is met quite easily. All cartels do have a certain degree of market power, otherwise it would not be sensible to create a cartel. It is therefore not just merely a possibility, but probably likely, that the market circumstances are as such that umbrella pricing could occur. The second condition provides that cartel members could not have ignored the specific market circumstances which increase the likelihood of umbrella pricing to occur. In our opinion, as will be explained below, this should be interpreted as such that cartel members should have been aware of the likelihood of umbrella pricing. This can be regarded as a rebuttable presumption of causality between an infringement of Article 101(1) TFEU and losses suffered by umbrella pricing. The Court has thus conceptualized the requirement of a causal link specifically for umbrella pricing. One could wonder whether by doing so the Court overstepped its boundaries set in the *Courage/Crehan*⁹ and *Manfredi*¹⁰ cases. In those cases the Court ruled that, in the absence of harmonization, Member States are

⁴ Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, [2001] ECLI:EU:C:2001:465; see also Joined cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA*, [2006] ECLI:EU:C:2006:461.

⁵ A. Jones and B. Sufrin, *EU Competition Law. Text, Cases and Materials*, 5th ed, Oxford, Oxford University Press, 2014, p.1105. Van Gerven, ‘*Crehan* and the way ahead’ (2006) 17(2) EBLR 273; Stuyck ‘Case note to case C-453/99 *Courage v Crehan*’ (2005) 1(2) ERCL 234.

⁶ At para 34.

⁷ *Ibid*.

⁸ *Ibid*, para 33.

⁹ Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, [2001] ECLI:EU:C:2001:465.

¹⁰ Joined cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA*, [2006] ECLI:EU:C:2006:461.

free to create rules governing the exercise of the right to claim damages¹¹ which includes rules “on the application of the concept of ‘causal relationship’”.¹²

Member States are, on one hand, obliged to arrange the possibility to claim damages for an infringement of the EU competition rules, whilst, on the other hand, the exercise of the right to claim such damages can be arranged by the Member States themselves. Van Gerven refers to this distinction as the distinction between rights and remedies on one hand, and procedures on the other.¹³ The exercise of the right to claim damages¹⁴ is part of the procedural autonomy of Member States and therefore bound by the limits provided for by the principles of equivalence and effectiveness. Whilst the Court does not deal explicitly with the distinction between the existence of a right or the exercise of that right, AG Kokott does refer to this distinction. She argues that:

“the civil liability of cartel members for umbrella pricing is [...] 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”.¹⁵

It appears that the Court, while reaching the same result as the AG on this matter, takes a different path. The rules governing the causality requirement form apparently part of the procedural autonomy of the Member States.¹⁶ However, the Court continues by stating that Member States are bound by the principle of effectiveness. To ensure the

¹¹ Case C-453/99, *Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others*, [2001] ECLI:EU:C:2001:465, par. 29; Joined cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA*, [2006] ECLI:EU:C:2006:461, par. 64.

¹² Joined cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA*, [2006] ECLI:EU:C:2006:461, par. 64.

¹³ Van Gerven, ‘Of rights, remedies and procedures’ (2000) 37(3) CMLRev 503: “The concept of *right* refers, [according to Van Gerven,] to a legal position which a person recognized as such by the law [...] may have and which in its normal state can be enforced by that person against (some or all) others before a court of law by means of one or more *remedies*, those are classes of action, intended to make good infringements of the rights concerned, in accordance with *procedures* governing the exercise of such classes of action and intended to make the remedy concerned operational.”

¹⁴ Or in the wording of Van Gerven: procedures fall under the procedural autonomy of Member States, whilst the creation of rights and remedies is for the Union to determine.

¹⁵ AG Kokott’s Opinion, ECLI:EU:C:2014:45, par. 28.

¹⁶ This is in line with the reasoning in the *Manfredi* case: Joined cases C-295/04 to C-298/04, *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA, Antonio Cannito v Fondiaria Sai SpA and Nicolò Tricarico and Pasqualina Murgolo v Assitalia SpA*, [2006] ECLI:EU:C:2006:461, par. 64.

full effectiveness of Article 101 TFEU the Court found it necessary to fill in the concept of the causal link.

The reasoning of the Court could, in our opinion, lead to confusion. The question whether a person has the right to claim damages resulting from umbrella pricing is at the core of the *right* to claim damages¹⁷ and thus deals with the *existence* of such a right. Filling in the concept of causality is therefore not part of the procedural autonomy and should thus be governed by EU law.¹⁸ The Court has, unfortunately, missed an opportunity to provide more guidance on the interpretation of the conditions of liability for EU competition law infringements.

III. EXPECTATIONS OF UMBRELLA EFFECTS

Economic theory suggests that certain markets may be particularly prone to the occurrence of umbrella effects. In this respect, transparency, a limited number of market players and product homogeneity are circumstances that may be conducive to such effects. Umbrella pricing is an example of effects occurring outside the vertical chain of product distribution. The impact of cartelisation can also be felt by producers of complementary products to the cartelised products. AG Kokott also points out in para 32 of the Opinion that cartels are capable of causing considerable economic damage not only in the narrower sphere of the cartel's members, but far beyond. What is more, certain opinions point to the fact that, especially in highly concentrated markets, umbrella effects as a result of a cartel are theoretically unavoidable.¹⁹ This is because the cartel itself increases demand for non-cartelised products, which in turn creates an incentive for the non-cartelists to raise prices close to the level of the cartel price. Of course, the seriousness of these umbrella effects depends on various circumstances, such as the strength of existing competitive constraints, the concentration levels in the market, the type of product market dealt with, the amount of market output that the cartelists and non-cartelists can produce, etc. What is interesting to investigate is how to translate this economic evidence in legal terms, especially when talking about causality and the expectations of cartelists of umbrella effects being created.

The matter at hand has to be discussed in the context of a market power analysis. Undertakings will only engage in a cartel if they can attach sufficient market power to it. In other words, by engaging in a cartel the cartelists will alter the existing competitive constraints in their favour. With this comes the expected consequence that, "the stronger the cartel's position is on the market concerned, the more likely it is that the

¹⁷ Cf. P. Craig and G. De Búrca, *EU Law. Text, Cases and Materials*, 5th ed, Oxford, Oxford University Press, 2011, p. 251, mention, with regard to state liability: "while the core conditions of the principle of (state) liability for breach of EU law are determined by EU law, the action for compensation is provided within the framework of domestic legal systems, with varying procedural and substantive rules on matters such as time limits, causation, mitigation of loss, and assessment of damages."

¹⁸ Cf. Van Gerven, 'Of rights, remedies and procedures' (2000) 37(3) CMLRev 526-527.

¹⁹ R. Inderst, F. Maier-Rigaud and U. Schwalbe, 'Umbrella Effects', Forthcoming - Journal of Competition Law and Economics, 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2297399 (accessed on 14 July 2014).

cartel will have a significant impact on the pricing levels on that market as a whole”.²⁰ In such a setting, one may think that it is of little concern to the cartelists if the non-cartelists free ride on the market circumstances created in the cartelised market, and increase prices under the protection of the umbrella effect. This is because, due to the absence of market power in the hands of the non-cartelists, the cartel’s objectives are unlikely to be jeopardized. However, there are strong reasons for the cartelists to appreciate the fact that non-cartelists are raising their prices too; as the more prices rise as a whole, the easier it will be for the cartelists to set their price as the ‘market price’ in the long-run, thus becoming, as Vedder correctly points out, barometric price leaders.²¹

Additionally the non-cartelists do have an incentive to take profit from the umbrella effect that is created. Also, if sufficient market power is attached to the cartel, there is less scope for a non-cartelist to have any meaningful influence of its own over the market price. Therefore, it is not surprising that non-cartelists will act upon the market opportunities created, with a view to their profit-maximizing strategy.²² This line of reasoning echoed in the AG’s Opinion leads to the conclusion that umbrella pricing is not a “side-effect” of the cartel,²³ and that, “any loss the incurrence of which the cartel members ought reasonably to take into consideration on the basis of practical experience is foreseeable”.²⁴ To our mind, this seems to be (almost) bordering a non-rebuttable presumption of umbrella effects occurring and consequently loss resulting out of such a setting. Economic theory points to this conclusion too.

The Court however, prefers a more cautious line of reasoning, by stating in par. 34 of the ruling that the market circumstances “could not be ignored” by the cartelists. When talking about the plausibility of umbrella effects occurring, the Court notes that: such effects are one of the possible consequences of a cartel,²⁵ it cannot be ruled out that non-cartelists will raise prices at a level higher than in the absence of the cartel,²⁶ and the resulting loss cannot be disregarded by the cartelists.²⁷ In our opinion the Court, while endorsing the AG’s rationale to a certain extent, does not fully embark on the same analysis and conclusions reached by the AG. We state this having in mind the difference in assertiveness between the AG’s Opinion and the Court’s ruling. While the AG seems to advocate for a strong presumption of umbrella effects occurring in a cartelized market of the type at issue in the present case, the Court chooses not to seal the discussion that easily. We believe that this is so because the Court opted for a formulation that seems less powerful. What may be drawn from the Court’s line of reasoning and language is that we should not frame the discussion in terms of a non-

²⁰ AG Opinion, n 15, par. 47.

²¹ H. Vedder, ‘The Kone Case and the Lifts Cartel – An Upward Effect on Prices and Effectiveness?’, European Law Blog, <http://europeanlawblog.eu/?p=2397> (accessed on 12 July 2014).

²² See AG Opinion, n 15, par. 46, 47, 50.

²³ Ibid, par. 43, 44.

²⁴ Ibid, Par. 42.

²⁵ *Kone*, n 3, par. 28.

²⁶ Ibid, par. 29.

²⁷ Ibid, par. 30.

rebuttable presumption of umbrella effects occurring and loss resulting in such market circumstances. The wording “could not be ignored” seems to point to much less than that. Perhaps a more appropriate middle ground could be found. We argue that it may have been more suitable for the Court to frame the matter as somewhat of a stronger statement than just “could not be ignored”: cartelists *should have been aware* of such consequences occurring in the market. This may potentially be viewed as a rebuttable presumption, with the emphasis being shifted towards the cartelists having to prove that umbrella effects were unforeseeable. This line of reasoning and formulation would be more consistent with the evidence stemming from economic theory, and in keeping with the discussion on the non-cartelists’ incentives, provided above. It may be that the Court deliberately avoided such an approach, in order not pass too conclusive a judgment on the balance between the private enforcement and the public enforcement tools of competition law; having in mind the burden of proof placed on the cartelists’ shoulders. According to par. 34 of the Judgment the core of the analysis is deferred to the domestic ambit. One should expect further questions to be raised in connection with how strong of a presumption the umbrella effects theory entails.

IV. PRIVATE ENFORCEMENT V LENIENCY PROGRAMMES

One of the arguments discussed by the undertakings concerned deals with the interaction between damage claims and leniency programmes *in general* within the EU.²⁸ The possibility for umbrella pricing to form a causal link might dissuade undertakings from participating in leniency programmes. A broadening of the group of persons who can claim damages, might thus produce a chilling effect on the public enforcement of EU competition law.

The Court only refers to the leniency programme of the Commission and rules, with reference to the *Pfleiderer* case:²⁹ that the “leniency programme [of the Commission] cannot deprive individuals of the right to obtain compensation before the national courts for loss sustained as a result of an infringement of Article 101 TFEU”.³⁰ This short phrase only refers to the leniency programme of the Commission, but not to leniency programmes in general. AG Kokott, on the other hand, does refer to leniency programmes in general. In her opinion “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”.³¹ It appears thus that AG Kokott favours private enforcement over the leniency programmes. The Court has used more subtle phrasing, although stimulating private enforcement is high on the Court’s agenda and the possibility of the chilling effect on leniency applicants cannot preclude private action damages.

In our opinion it is striking that the Court only dealt shortly with the chilling effect on the public enforcement of EU competition law by allowing umbrella pricing to form a

²⁸ AG Opinion, n 15, par. 62.

²⁹ Case C-360/09, *Pfleiderer AG v BundesKartellamt*, [2011] ECLI:EU:C:2011:389.

³⁰ *Kone*, n 3, par. 36.

³¹ AG Opinion, n 15, par. 63.

sufficient causal link for private damage claims. In the past the Court has strongly emphasized the importance of leniency programmes. In the *Donau Chemie* case, for example, the Court ruled that:

“generalised access [to leniency documents] is also liable to adversely affect public interests, such as the effectiveness of anti-infringement policies in the area of competition law, because it could deter parties involved in infringements of Articles 101 TFEU and 102 TFEU from cooperating with the competition authorities”.³²

The Court has also made clear that leniency programmes are “useful tools” to ensure compliance with the EU competition rules.³³ Setting aside leniency, as the Court does in the current Judgment, in favour of the right to claim damages might therefore be detrimental to the public enforcement of EU competition law. The approach of the Court might even lead to a conflict with the current approach of the Commission; which regards leniency programmes as of utmost importance for the public enforcement of the EU competition rules. Access to leniency documents should for example always be declined according to the Commission in order to protect the public enforcement of competition law.³⁴ Furthermore, immunity recipients should be protected against “undue exposure to damages claims”³⁵ and thus liability for immunity recipients is mainly excluded in private damage actions.³⁶ The short response of the Court on the argument of the undertakings may thus not conform the approach which the Commission is currently taking. It will be up to the two Union institutions to find some common ground in the clash between private and public enforcement of EU competition law in order to provide legal certainty for undertakings, national competition authorities and domestic courts.

V. CONSEQUENCES FOR CARTELISTS AND NON-CARTELISTS

The ruling in *Kone* seems to have changed the recipe of the ‘prisoner’s dilemma’ formula. Now, cartelists have to balance the profitability of their anticompetitive behaviour not only with the chances of being caught, the benefits and incentives to confess, and the potentially large amounts they will have to pay to their clients (via damages claims), but also with potentially covering the damages claims arising as a result of accepting the umbrella pricing theory. As shown above, and as correctly pointed out by Vedder,³⁷ one can imagine that the benefits of leniency (immunity) and the threat of potentially more costly damage claims will be perceived differently by

³² Case C-536/11, *Bundeswettbewerbshilfe v Donau Chemie AG and Others*, [2013] ECLI:EU:C:2013:366, par. 33.

³³ Case C-360/09, *Pfleiderer AG v BundesKartellamt*, [2011] ECLI:EU:C:2011:389, par. 25; Case C-536/11, *Bundeswettbewerbshilfe v Donau Chemie AG and Others*, [2013] ECLI:EU:C:2013:366, par. 42.

³⁴ 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 of 9 April 2014, COM(2013)0404, preamble 24 and Article 6(6)(a).

³⁵ *Ibid*, preamble 32.

³⁶ *Ibid*, Article 11(3).

³⁷ H. Vedder, ‘The Kone Case and the Lifts Cartel – An Upward Effect on Prices and Effectiveness?’, European Law Blog, <http://europeanlawblog.eu/?p=2397> (accessed on 12 July 2014).

cartelists. But what are the cartelists to do in such a setting? How should they react to the *Kone* ruling placing an even more costly burden on their shoulders?

It is imaginable that it is not pleasant to pay for somebody else's profit, and in this respect cartelists may want to involve those competitors not party to the cartel in the anti-competitive behaviour. By doing this, the cartelists will rebalance the prisoner's dilemma mix. The expected damages claims that now fall under the umbrella effect (and have to be satisfied by the cartelists) will be redirected to the non-cartelists drawn into anti-competitiveness. The clients of these (previous) non-cartelists will have a claim for damages directly to their sellers, who are now also engaged in the anti-competitive behaviour. Thus, reliance on the umbrella effects theory is not necessary anymore for the injured parties. Causality will also be easier to prove, and overall the claimant will face a less severe uphill battle. To depict how cartelists may draw non-cartelists into anti-competitiveness in practice, one may imagine a cartel between A, B and C, whereas D and E are those competitors protected by the umbrella effect. Should A inform D and E, via an email for example, about A's pricing tactics, this will place D and E in a rather difficult position; if they choose to adjust their prices accordingly (thus benefiting from the umbrella effect), this may amount to a concerted practice. D and E will not then be able to claim they were not aware of the existence of anti-competitiveness in the market. The market conduct that will follow will bring them in the realm of anti-competitiveness too.³⁸ Thus, the choice that D and E will have is either to maintain their prices, or to leave the market.

The above setting will also seal the matter of the rather odd formulation in AG Kokott's Opinion, relating to the non-cartelists raising their prices "knowingly or unknowingly".³⁹ In this respect, Sánchez Graells⁴⁰ has also pointed out some of the problems of the framework of analysis in the AG's Opinion. If the non-cartelist is not aware of the cartel's existence, it will adjust its prices according to the existing market conditions (albeit they are distorted). Accordingly, there should be little scope of intervention for competition law. However, if the non-cartelist is not "innocent", then the increase in price will amount to a concerted practice, thus making it liable for the resulting damages. Whether this "guilt" of the (previous) non-cartelists is triggered by the cartelists (see the email example above), or not, this may definitely warrant further discussion on how independent the non-cartelists' market decisions are.

To complete the puzzle above, and also to relate it to the AG's colourful arguments on the so-called "black sheep undertakings",⁴¹ the non-cartelists do have a third choice besides increasing prices and leaving the market; namely, signalling to the competent

³⁸ Case C-199/92, *Hüls AG v Commission*, [1999] ECLI:EU:C:1999:358 and case C-8/08, *T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit*, [2009] ECLI:EU:C:2009:343.

³⁹ AG Opinion, n 15, par. 2.

⁴⁰ A. Sánchez Graells, 'A first reaction to AG Kokott's KONE Opinion (C-557/12)', How to Crack a Nut, <http://howtocrackanut.blogspot.co.uk/2014/02/a-first-reaction-to-ag-kokotts-kone.html> (accessed on 12 July 2014).

⁴¹ AG Opinion, n 15, par. 68.

competition authorities the existence of anti-competitiveness in the market they are active in. Would this be a rational approach on behalf of the non-cartelists?

On one hand, if the non-cartelists are “innocent” there is little incentive to step forward. This is because should the cartel raise prices, the umbrella effect that is created allows the non-cartelists to follow suit, with no consequences as far as the likelihood of the non-cartelists having to pay damages. Any rational, profit-maximising firm will not pass on an opportunity to increase its price, granted its costs remain the same. The *Kone* ruling does not address the issue of such incentives. What is more, by accepting the umbrella effect theory, nothing has changed as far as the incentives afforded to the non-cartelists are concerned. This may be regarded as a missed opportunity on behalf of the Court: not only that non-cartelists will not be encouraged to unveil the wrong doings of the cartelists, but further protection regarding their liability is conferred.

On the other hand, if cartelist like A, above, sends the above mentioned email, if D and E continue to stay in that market, and if their prices are increased, they will be held liable just like A, B and C. This may be easily viewed as a textbook concerted practice. Consequently, one may draw the conclusion that the *Kone* ruling provides more incentives to cartelists to attract others into anti-competitiveness, than confessing and thus breaking up the cartel. Additionally, this ruling places non-cartelists in a position they most certainly did not demand to be in, should the cartelists act deviously with a view to expand their anti-competitive conduct.

VI. CONCLUDING REMARKS

We do not claim to have discussed all issues which this Judgment raises, nor shall we summarize our preceding arguments. It should, however, be mentioned that the Court has left us with more questions than answers in this Judgment. The Court could have used this opportunity to explain the conditions for liability of anti-competitive behaviour. It appears that the Court favours the importance of private enforcement of EU competition law over public enforcement, although it has carefully phrased its ruling. The cautious approach of the Court in this sensitive area is admirable, but it does lead to more questions; questions which will hopefully be raised by national courts in the near future.