requirements for recognition which are "unlawfully discriminatory" (at para. [13]). Relying on *Hämäläinen*, the Court of Appeal concluded that the previous marriage dissolution requirements under s. 4 of the 2004 Act had not been unlawfully discriminatory.

The decision in *Hämäläinen* is a significant blow for transgender rights in Europe. It creates an impossible choice between vindicating one's sense of self-identity and protecting the integrity of loving families. It is hoped that the Strasbourg Court is presented with an opportunity to reconsider its decision in the near future, and will then develop a jurisprudence which more appropriately ensures the rights of transgender persons and their families.

PETER DUNNE

"UMBRELLA EFFECTS" AND PRIVATE ANTITRUST ENFORCEMENT

UMBRELLA effects arise where anti-competitive conduct by one or more market actors results in general price rises across the sector concerned. The Court of Justice of the European Union has, with its preliminary ruling in Case C-557/12, *Kone and others v OBB-Infrastruktur AG*, Judgment of 5 June 2014, EU:C:2014:1317, now addressed the potential legal implications of such umbrella effects. In confirming that the right to compensation stemming from breach of EU competition law extends to umbrella claims as a matter of principle, the Court of Justice has offered its most expansive, and arguably most emphatic, interpretation of the scope and importance of private antitrust enforcement to date.

The right of "any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition" has been established since Case C-453/99, *Courage v Crehan* EU:C:2001:465 (at para. [26]). Three criteria must be satisfied: breach of an antitrust rule, quantifiable loss, and causation. Although the right to claim damages under *Courage* appears to derive directly from EU law, its application is conditioned by the principle of national procedural autonomy and, in particular, domestic rules governing the concepts of causation and loss. Yet EU law continues to shape the interpretation and application of these concepts. In Case C-295/04, *Manfredi* EU:C:2006:461, for instance, the Court of Justice clarified that, for the purposes of EU competition law, actionable loss encompasses both actual loss and loss of profit, plus interest (at para. [95]). Moreover, the forthcoming Directive on antitrust damages actions makes express provision for indirect purchaser standing, alongside a concomitant passing-on defence. With its decision in *Kone*, the Court of Justice has extended the reach of EU law even further into the ostensible domain of domestic rules and procedures.

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The judgment had its roots in a private damages action brought in Austria. ÖBB-Infrastruktur (ÖBB) is an Austrian State-owned company that manages the national rail network, including railway stations, and as such is a significant purchaser of elevators and escalators. In February 2007, the European Commission imposed fines totalling almost €1 billion on escalator and elevator companies for participation in a cartel covering Belgium, Germany, Luxembourg, and the Netherlands (Commission Decision of 21 February 2007, COMP/E-1/38.823 (O.J. 2008, C 75/19)). Later that year, the Austrian Antitrust Court (Kartellgericht) fined undertakings for involvement in that cartel as it pertained to Austria. ÖBB subsequently initiated a private damages action against the four principal undertakings concerned, seeking compensation in line with the principle in *Courage*.

The bulk of ÖBB's claimed losses resulted from direct or indirect purchases from the cartelists, and thus was relatively uncontroversial. It also sought about €1.9 million in damages arising from umbrella effects, having made purchases from third parties which, it alleged, benefited from the existence of the cartel in adapting their prices upwards. Yet Austrian procedural rules on causation did not permit umbrella claims, on the basis that such claimants could not demonstrate an adequate causal link between their putative losses and the infringement of competition law. Doubts regarding the compatibility of this restriction with EU law, however, moved the Austrian Supreme Court (Oberster Gerichtshof) to refer the issue to Luxembourg, seeking clarification as to the extent to which EU law requires national courts to vindicate umbrella claims.

In developing a right to private enforcement, both in the context of the earlier cases of *Courage* and *Manfredi* and in its more recent strand of cases on access to evidence (see Cases C-360/09, *Pfleiderer* EU:C:2011:389 and C-536/11, *Donau Chemie* EU:C:2013:366), the Court of Justice has placed particular emphasis on the principle of effectiveness in the context of EU competition law. Its decision in *Kone* is no different in this regard. The Court thus began by recalling the settled nature of the right to claim damages, and the contribution that private enforcement makes to the maintenance of effective competition in the EU (at paras. [21]–[26]).

The Court then turned more directly to the issues referred. The question as to whether recognition of umbrella claims is a matter for EU law or should instead be subsumed within the scope of national procedural autonomy received considerable attention from Advocate General Kokott in her impressive Opinion (EU:C:2014:45, at para. [21]–[30]). The Court, however, treated the EU law nature of this issue, implicitly, as a given to the extent that the principle of effectiveness might be engaged. It observed that market price is one of the main factors taken into account by undertakings when they set the prices they will charge. Where market forces are distorted by the existence of a cartel, it could not be ruled out that the prices

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charged by competing undertakings not party to the cartel might be set at higher levels than otherwise would be the case (at para. [29]). Rejecting arguments that this merely reflects independent economic decision-making by rival undertakings, the Court held that umbrella pricing thus constitutes "one of the possible effects of the cartel that the members thereof cannot disregard" (at para. [30]).

That being the case, the Court turned to consider the domestic rule at issue. Noting that EU law requires that national legislation must ensure that EU competition law is "fully effective", and must recognise the right of any individual to claim compensation (at para. [32]), the Court held that a categorical prohibition on umbrella claims would "put at risk" the effectiveness of Article 101 TFEU (at para. [34]). Accordingly, the Court in its formal response to the referring court held that EU law does not permit the automatic exclusion of umbrella claims at national level, such as that contained in Austrian law. In this regard, the Court's approach is not dissimilar to that in *Donau Chemie*, where it found that an Austrian blanket ban on access to evidence for the purpose of follow-on litigation was contrary to EU law.

There is, of course, a considerable distinction between having a theoretical possibility of recovering compensation for umbrella claims, and successfully bringing such a claim on the facts at national level. Indeed, Advocate General Kokott pointed expressly to the difficulty of such claims in practice in rejecting a "floodgates" objection to recognising umbrella claims under EU law (Opinion, at para. [69]). Put simply, umbrella claims are particularly problematic to establish, so that prudent claimants are unlikely to rush to litigate speculative claims even after the ruling in *Kone*. Yet the Court, in an interesting passage that goes beyond the negative formulation of its somewhat restrictive response to the referring court, provides assistance for would-be litigants by setting out a two-pronged test to establish causation. Thus, the Court held, an umbrella claim should succeed where a claimant can show, first, that the cartel at issue, having regard to all circumstances including the specific market dynamics, was liable to result in umbrella pricing by third parties and, second, that those factors which made umbrella pricing foreseeable "could not be ignored" by cartelists (at para. [34]).

Recognising that EU law allows recovery of umbrella claims in appropriate circumstances – or, in the more roundabout logic of the Court's formal response, at least precludes any categorical exclusion – is, in one sense, merely a logical application of the ostensibly open-ended right, following from *Courage*, to claim compensation where breach of EU competition law causes loss to *any* individual. The judgment is in tune with the Court's ringing endorsement of the centrality of private enforcement in its case law on access to evidence in competition cases. It is also largely compatible, in a way that the cases on access to evidence are not, with the provisions of the forthcoming Directive. The latter legislative

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development might be viewed as an important means by which the theoretically generous right to antitrust damages, articulated in *Kone*, might be realised in practice. In particular, the Directive requires a minimum level of procedural harmonisation – addressing, inter alia, disclosure, limitation periods, and quantification of harm – in order to counter the perceived under-enforcement of antitrust before national courts to date.

As the EU institutions move to encourage and facilitate greater levels of private enforcement in Europe, however, one might have concerns regarding the apparent expansiveness of the rights granted by EU law. A frequent criticism levelled at the European Commission in respect of its preparatory work for the antitrust Directive is that existing levels of enforcement are underestimated due to the preponderance of (often unreported) settlements. While it is undisputed that umbrella claims will remain challenging to litigate to final judgment, certainly the decision in *Kone* is a boon for any claimants that might hope to settle less convincing umbrella claims. In the US, antitrust courts have, generally, been reluctant to grant standing for umbrella claims in private enforcement actions.

The principle of national procedural autonomy necessitates a delicate balance between EU and national systems in terms of the protection, and thus obliquely the content, of rights derived from EU law. *Kone* represents a further tipping in favour of EU control in respect of private competition enforcement. As antitrust damages actions increase in Europe, the challenge will be to ensure that the expansive pronouncements of the Court of Justice find a nuanced application at national level in the context of what is, most frequently, big business litigation.

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