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Advocate General J. Kokott suggests to uphold the Commission's fines calculation methods for companies with accounts in non-Euro currencies

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In her recent opinion, Advocate General J. Kokott went over one of the most important elements for companies facing cartel sanction: the fines calculation method. If this specific point is often challenged by the parties, the Court of Justice of the European Union's (ECJ) upcoming judgement *Pilkington Group Ltd and Others v European Commission* may provide some clarifications on the exchange rate to be used when calculating the 10% upper limit on fines for companies whose account are not in Euro.

Background

Pilkington Group Ltd (Pilkington) is one of the world's largest manufacturers of glass and glazing products particularly active in the automobile sector.

In 2008, the Commission found Pilkington and other glass manufacturers liable for having participated in a set of agreements and concerted practices in the automotive glass sector in the EEA.[1] More precisely, the companies have been fined € 1 354 896 000 for illegal market sharing and exchange of commercially sensitive information regarding deliveries of car glass in the EEA. The overall aim of these exchanges was to maintain stability of the parties' position on the relevant market through contracts regarding (i) the supply of automotive glass and (ii) price agreements. This stabilisation effect was ensured by the implementation of correcting measures in case the predicted results were not performed.

Pilkington lodged an appeal before the General Court (GC). In line with the Commission's decision, the GC held that Pilkington had infringed Article 81(1) EC (now, Article 101(1) TFEU) and Article 53 of the EEA Agreement through its participation in the cartel from 10 March 1998 to 3 September 2002, and thus dismissed the action.[2]

Pilkington appealed the judgement before the ECJ, relying on three pleas in law concerning the calculation of the fines as well as other general legal principles.

Which turnover shall be taken into account for the calculation of the fine?

In its appeal, Pilkington challenged the fact that, in calculating the fine, the Commission took into account some contracts concluded before the starting point of the infringement but re-negotiated during the period of the cartel. According to Pilkington, point 13 of the 2006 Guidelines which the Commission relied upon cannot be extended in order to cover sales which are outside the scope of the market concerned.

However in the present case, as pointed out by the AG, the contested sales took place in the relevant market. In consequence, they are an indication of the economic importance of the cartel. In addition, the infringement has benefited to the whole activity on this relevant market. Therefore, the contested sales should be taken into account for the calculation of the fine according to the AG.

Which year of reference should be taken into account when using the exchange rate for calculating the 10% ceiling on the fine?

Pilkington challenges the Commission's choice of exchange rate for converting Pilkington's turnover from pounds sterling into euros. The company claims that in doing so, the Commission did not respect the 10% ceiling provided by Article 23(2) of Regulation No 1/2003.

The exchange rate represents a decisive factor for companies located outside the EEA. Indeed, the fluctuation of the exchange rate could considerably influence the final amount of the fine imposed. It is of particular interest in the present case since depending of which reference is used, the fine could be limited by the 10% ceiling, saving Pilkington almost 40 million EUR.

More precisely, Pilkington claimed that the Commission's practice to take into account the average exchange rate of the European Central Bank (ECB) applicable during the last full business year of the company preceding the decision did not respect the principles of equal treatment and legal certainty. According to Pilkington, the Commission should take into account the average exchange rate of a later period, "*namely the up-to-date exchange rate at the time the decision imposing the fine is adopted.*"[3]

If the AG agreed with the parties on the fact that companies based outside the EEA are not in the same situation than the ones which are, and thus should not be treated in the same way according to the equal treatment principle, she does not agree with their analysis in this respect.

Indeed, as pointed out by her, the mere fact that a company is established outside the EEA does not suffice to establish that they should be entitled to a new up-to-date assessment of their capacity to pay at the time the Commission adopted the decision. The exchange rate risk of unfavourable currency movements is one that the company knowingly assumes, in the same manner that it assumes a favourable currency movement. Then, according to the AG, the company could not transfer to the public only the potential disadvantage resulting from being located outside the EEA on the basis of the equal treatment principle.

In addition, the AG took the view that the application of the ECB's average exchange rate for the last full business year of the company ensures more legal certainty for companies than taking into account the exchange rate at a future period, i.e. the day on which the Commission adopts the decision imposing the fine, as pleaded for by Pilkington. Indeed, the last full business year is a fixed period and hence more predictable, whereas the up-to-date rate depends on arbitrary events and is as such much more difficult to foresee. Moreover, the only uncertainty resulting from the exchange rate is a risk that companies located outside the EEA always bear and which can produce either advantages or disadvantages. Thus, the existence of such currency fluctuations does not render the fine imposed by the Commission contrary to the principle of legal certainty.

Did the GC respect the principles of equal treatment and proportionality?

In addition to the fines' calculation method used by the Commission, Pilkington challenged other legal principles, namely the principles of equal treatment and proportionality on the one hand, and the GC's unlimited jurisdiction on the other.

Specifically, it claimed that the fine imposed on it was on a much larger proportion of its total turnover than for the other participants. However, as the AG asserted, the mere fact that the fine imposed on one undertaking amounts to roughly 10% of its total turnover whereas it is lower for the other participants does not constitute in itself an infringement of the principle of equal treatment, especially when a large part of the total turnover of such undertaking derives mostly from the products encompassed by the cartel.

The AG also quickly dismissed the second argument of Pilkington regarding the alleged violation of the principle of proportionality. Indeed, as explained above, the AG took the view that the fine imposed by the Commission respects the 10% ceiling provided by Article 23 (2) of Regulation No 1/2003. As this limit's aim is rightly to ensure that the fines imposed by the Commission are not disproportionate, there is, in principle, no infringement of the principle of proportionality if this limit is respected. Moreover, the deterrent effect of the fine has to be maintained, and the mere fact the fine may cause temporary weakness in the financial strength of the undertaking concerned does not mean that the fine is disproportionate provided that the 10% limit is respected.

Did the GC fail to exercise its power of unlimited jurisdiction?

Finally, the parties complained that the GC did not exercise its power of unlimited jurisdiction. The GC stated that it would review the amount of a fine imposed by the Commission on the ground of the negative financial consequences faced by the undertaking only in "exceptional circumstances, where justified by an overriding interest".[4] According to Pilkington, by doing so, the GC did not take into account the extent of its power under Article 261 TFEU. Nonetheless, the AG underlined the fact that the GC correctly applied this principle, and decided not to reduce the fine imposed on Pilkington after analysing its submission. The AG thus confirmed the GC's view that such a reduction of the fine based on the potential financial negative consequences for the undertaking is appropriate only in exceptional circumstances, which was not the case here.

Conclusion

The issue here mostly concerns the exchange rate for calculating the 10% ceiling on the fine and is of particular interest for companies with accounts in currencies other than the Euro. As pointed out by the AG, using an exchange rate applicable on the date when the Commission adopts the decision imposing the fine on the undertaking would not lead to greater legal certainty than using the average exchange rate for the last full business year prior to the adoption of such decision. It would on the contrary give more power to the Commission since it has a decisive influence on when it adopts decision imposing fines. Finally, as companies with non-Euro accounts knowingly bear the risk of uncertainty resulting from the exchange rate, then they should be able to take precautions in the currency in which their liabilities could be paid. It remains to be seen whether the ECJ will follow the AG's recommendations in its judgment.

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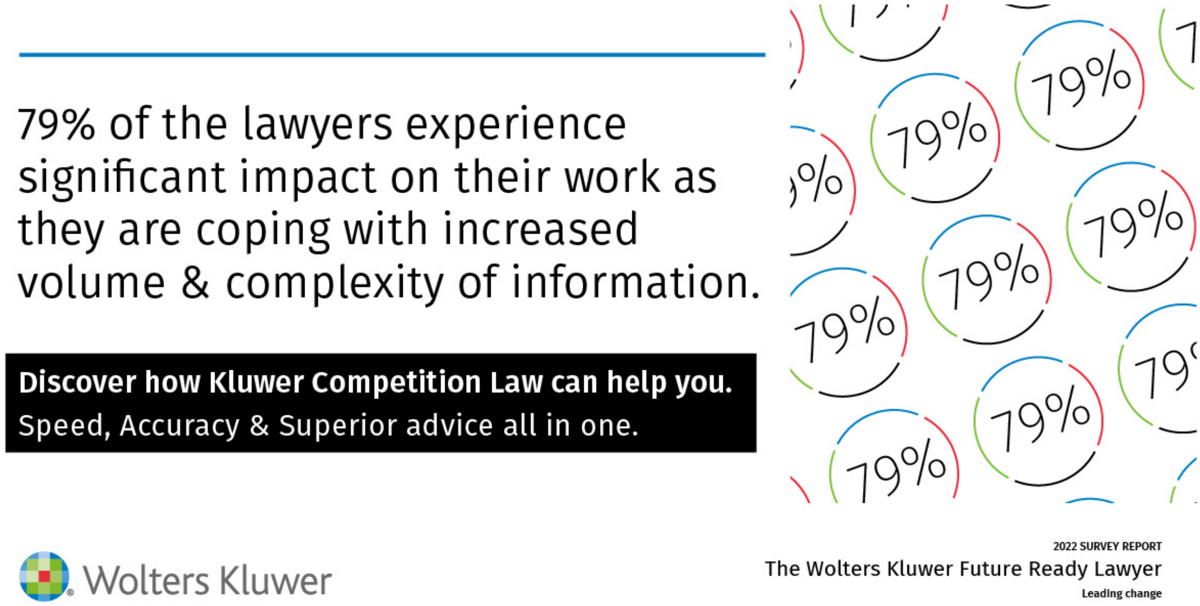

References[+]

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