



## EU's Highest Court Rules Cartel Victims can Claim Damages for Purchases from Non-Participants in the Cartel

On June 5<sup>th</sup>, the highest European court – the Court of Justice (ECJ) – issued a watershed ruling in *Kone and Others*, C-557/12 (*Kone*), holding that members of a cartel potentially can be held responsible for higher prices independently charged by companies competing with cartel members, upon proof that the price increases were adopted in response to the cartel's price increases—so-called umbrella pricing. Significantly, this ruling follows closely after the European Commission's (Commission) Damages Directive of April 17, 2014 (yet to be formally adopted) (Damages Directive), which will facilitate private antitrust damages actions in the European Union (EU).

The ECJ's *Kone* decision represents an additional move to further empower private damages claimants against cartel members by dramatically increasing cartelists' potential damages exposure. This may spur an increase in private antitrust damages actions brought in the EU. Whether umbrella pricing claims will be successful in the EU may be another story, however, in view of the causation and proof requirements announced by the ECJ, which may be difficult to establish.

### Legal Backdrop

In 2007, the Commission fined several elevator manufacturing firms more than €992 thousand (\$1.3 million USD). The Commission ruled that from at least 1995 through 2004, the firms were involved in cartel activity in Belgium, Germany, Luxembourg and the Netherlands. The Commission specifically found that the infringing cartel activity included the conspiratorial allocation of sales contracts and sharing of commercially sensitive information relating to installing, modernizing, and maintaining elevators and escalators.

Subsequently, in 2008, the Austrian antitrust authorities fined a number of companies for implementing a similar cartel within Austria. Thereafter, ÖBB-Infrastruktur AG (ÖBB), a subsidiary of Austrian Federal Railways, filed damages claims exceeding €8 million (\$12 million USD) against the cartel members. Additionally, it sought to hold the cartelists responsible for an additional €1.8 (\$2.7 million USD) with respect to purchases from third-party companies that were not involved in the cartel, but from whom ÖBB had purchased elevators and escalators during the relevant time period. ÖBB claimed that its losses were due, in part, to price increases charged by the third-party suppliers under the umbrella of the cartel, *i.e.*, that they used the cartel prices to set their own prices higher than they would have been under competitive conditions.

In considering the ÖBB case, the Supreme Court of Austria made a preliminary reference to the ECJ, asking whether cartel members could be found liable for such claimed losses. The relevant Austrian law (as well as the law in some other member states) categorically excluded umbrella pricing claims on the ground that the causal link to the cartelists' pricing is broken by the independent decision of a third-party supplier.

### **ECJ Judgment on Umbrella Pricing**

The ECJ declared in its *Kone* decision that an umbrella pricing claim against cartelists should not be prohibited if it can be shown that: (i) the market price was inflated as a result of the cartel member's collusion; (ii) a non-cartelist's price increase was demonstrably a result of the inflated prices caused by the cartel; and (iii) the claimant can establish that it was harmed as a result. The ECJ did not define the criteria to be applied in such instances, leaving the issues of causation and proof to the national courts.

### **Forecast**

In the EU, private damages actions are becoming more frequent. Following the Damages Directive's implementation, they are expected to become all the more frequent. Obviously, the ECJ's *Kone* decision potentially increases even further the damages exposure that cartelists may face. Moreover, such a claim may lead to requests for documents from non-cartelist suppliers needed by the claimant in order to establish the requirements announced by the ECJ—particularly, that the third-party supplier increased its prices to its customers under the pricing umbrella caused by the cartel rather than for other reasons. Of even more significance, the ECJ's ruling may result in varying criteria being adopted among member state courts as they try to sort out the causation and evidentiary requirements announced by the ECJ.

Finally, the ECJ's refusal to prohibit umbrella pricing claims may lead to another divergence between U.S. and EU law regarding private antitrust damages actions. While umbrella pricing claims have been made in the United States, the U.S. Supreme Court has not addressed the issue, and to date such claims have not been successful.

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