

# Kluwer Competition Law Blog

## Greater scope for cartel damages recovery following the Court of Justice's ruling that cartelists are liable for "umbrella" damages resulting from the higher prices paid to non-cartelists

Nicola Boyle (Hausfeld) · Monday, June 23rd, 2014

*Co-authored by Nicola Boyle, Tom Bolster and Boris Bronfentrinker, Hausfeld*

On 5 June 2014, the Court of Justice of the European Union (ECJ) clarified the full extent of cartel damages that can be recovered in Europe. The ECJ ruled that the civil liability of cartelists also extends to so-called "umbrella pricing". This term describes pricing by non-cartelist companies, who set their own prices higher than they would otherwise have been able to do in a truly competitive market by relying on the cartelized overall higher market prices. This ruling confirms that any person may claim damages from cartelists for all the loss caused by that cartel, even if the loss arises from inflated prices that were charged by and paid to a non-cartelist.

### ***Kone AG & Others v. ÖBB-Infrastruktur AG (Case C-557/12)***

- The ECJ's ruling followed a preliminary reference filed in December 2012 by Austria's Supreme Court which was hearing a follow-on damages claim brought by ÖBB-Infrastruktur AG against the companies involved in the elevator cartel. The claimant had purchased elevators directly from the members of the cartel (Kone, Otis, Schindler and ThyssenKrupp) as well as from companies that were not part of the cartel.
- Following the European Commission's decision of 21 February 2007, in which the elevators cartelists were fined a total of €992 million, ÖBB-Infrastruktur claimed damages before the Austrian civil courts for the losses it had incurred as a result of the cartel. This included €1.8 million relating to elevators purchased from companies that were not part of the cartel but who charged significantly higher prices than would have been possible under normal market conditions.
- The Austrian civil courts noted that the members of a cartel cannot be held liable for umbrella damages under Austrian law. Austria's Supreme Court however referred a question to the ECJ on whether such a provision of national law was compatible with European law or whether victims of umbrella pricing should be entitled to claim damages from cartelists under national law.

Resolving the issue of whether umbrella damages are available under European law is a significant

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development given the diverging stance that has been taken by different Member State courts. As the ECJ's judgment is binding on national courts in all Member States, this ruling ensures that umbrella damages are available to claimants not only in Austria (the country of the Court making the reference) but throughout the European Union.

The ruling will be welcomed by all consumers and businesses that have suffered losses as a result of cartels. The confirmation that umbrella damages claims are receivable across the European Union reinforces the European Commission's policy objective of encouraging private enforcement. Whilst claimants have often sought to recover "umbrella claims" as part of their cartel damages claims, uncertainty about the availability of this type of damages in certain Member States has meant that cartelists have often sought to force their customers to discount the value of their umbrella damages claim in the course of settlement negotiations. Any uncertainty about the availability of umbrella damages claims is now removed. Claimants can now pursue claims with confidence that the cartelists are liable for the losses caused by the cartel conduct irrespective of who has sold the cartelized goods or services.

Should you want further information about the ECJ's ruling on umbrella damages or how it may enable you to recover losses caused by a cartel, please contact:

Boris Bronfentrinker, Partner – bbronfentrinker@hausfeldllp.com  
Nicola Boyle, Partner – nboyle@hausfeldllp.com  
Tom Bolster, Associate – tbolster@hausfeldllp.com

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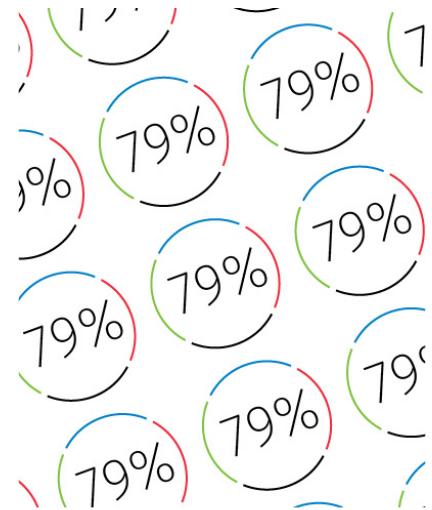
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