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European Court of Justice Provides Guidance Regarding Potential Liability of Cartel Members in EU Member States for Sales by Non-Cartel Participants

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Last week, the EU's highest court, the European Court of Justice (ECJ), held that Member State laws may not categorically prohibit consumers from recovering from cartel members damages attributable to purchases from *non-cartel participants* that—acting independently—were able to charge inflated prices as a result of market-wide price effects from cartel behavior. Much remains to be determined in the national courts, and plaintiffs will continue to face significant barriers to recovery based on this theory. In certain circumstances, however, companies alleged to have engaged in cartels could face increased potential civil exposure in Europe. Particularly in light of the EU's upcoming directive on competition damages actions (expected this fall at the latest), which will provide substantial guidance regarding private actions for alleged competition violations, the decision is another sign that Europe may become a hotbed for antitrust litigation.

Umbrella Theory of Liability: The U.S. Experience

Although the issue is relatively new in Europe, in the United States private plaintiffs purchasing from non-cartel members have on occasion sought to hold cartelists liable on theories that by raising market-wide prices, the collusion created a pricing "umbrella," enabling non-cartel members to independently price higher than they would have but for the cartel. These theories have found little success in U.S. courts.

In *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 584 (3d Cir. 1979), for example, the plaintiff claimed to have been injured by purchasing paper bags from rivals of participants in an industry cartel that were allegedly able to charge artificially inflated prices as a result of the cartel's umbrella effect. In rejecting this damage theory, the court relied heavily on *Illinois Brick v. Illinois*, 431 US 720 (1977), in which the U.S. Supreme Court held that federal antitrust law does not provide a damages cause of action for indirect purchaser claims based on overcharges imposed on direct purchasers that were "passed on" to them. Among several concerns about allowing indirect purchaser claims, the Supreme Court cited the "massive evidence and complicated theories" inherent in "attempt[ing] to trace the effect of the overcharge through each

step in the distribution chain from the direct purchaser to the ultimate consumer." *Id*. at 741.

The Third Circuit analogized the umbrella theory to indirect purchaser claims because "in both situations the plaintiff seeks to recover for higher prices set by, and paid by it to, parties other than the defendants." *Mid-West Paper*, 596 F.2d at 584. Moreover, the Third Circuit observed that because independent pricing decisions are determined by many factors, umbrella claims are inherently speculative and trying to determine why a non-cartel member charged a certain price would necessarily lead to the sort of complex economic proceedings that *Illinois Brick* cautioned against. *Id*. at 585; *see also, e.g., FTC v. Mylan Laboratories, Inc*., 62 F. Supp. 2d 25, 39 (D.D.C. 1999) ("The main difficulty with the umbrella theory is that, even in the context of a single level of distribution, ascertaining the appropriate measure of damages is a highly speculative endeavor. There are numerous pricing variables which this Court would be bound to consider to approximate the correct measure of damages.").

The *Kone* Decision

The Kone decision arose from litigation in Austria brought by a builder subsidiary of Austrian Federal Railways against several participants in a market allocation scheme involving installation and maintenance of elevators and escalators in Austria and several other EU Member States, resulting in a EUR 992 million fine by the European Commission. Case C-557/12, *Kone AG, et al. v. ÖBB-Infrastruktur AG*, (ECJ 2014). Relying on an umbrella theory, the plaintiff sought to recover for alleged overcharges incurred when it purchased elevators and escalators from non-cartel members, arguing that market-wide price effects from the cartel allowed the non-member to charge prices higher than it would have been able to but for the cartel. *Id*. at ¶10. The case eventually made its way to the Federal Supreme Court of Austria. That court found that, as a matter of Austrian national law, the plaintiff's umbrella theory was too attenuated to support a claim. *Id*. at ¶ 15. But it stayed the proceedings to seek a determination from the ECJ whether EU law, which here has primacy over Member State law, prohibits Member States from categorically rejecting umbrella liability claims. *Id*. at ¶ 17. The court referred the following question to the ECJ:

> "Is Article 101 TFEU [the EC Provision prohibiting agreements in restraint of trade] to be interpreted as meaning that any person may claim from members of a cartel damages also for the loss which he has been caused by a person not party to the cartel who, benefiting from the protection of the increased market prices, raises his own prices for his products more than he would have done without the cartel (umbrella pricing), so that the principle of effectiveness laid down by the Court . . . requires the grant of a claim under national law?"

Id. Answering the referred question in the affirmative, the ECJ found that "the full effectiveness of Article 101 . . . would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition," so long as "there is a causal relationship between that harm and an agreement or practice prohibited under Article 101." *Id*. at ¶¶ 20-21. Although it is generally the province of each Member State to "lay down the detailed

rules governing" claims for compensation based on violations of Article 101," national rules "must not jeopardise the effective application of Articles [101 and 102]." *Id*. at ¶¶ 24, 26. The ECJ went on to observe that depending on various factors such as "the nature of the goods or the size of the market covered by [a] cartel," a "competing undertaking, outside the cartel in question," might choose to set prices higher than "it would have chosen . . . in the absence of that cartel." *Id*. at ¶ 29.

The ECJ concluded that "the victim of umbrella pricing" may obtain compensation from cartel members "where it is established that the cartel at issue was, in the circumstances of the case and, in particular the specific aspects of the relevant market, liable for the effect of umbrella pricing by third parties acting independently, and those aspects could not be ignored by the members of the cartel." Id. at ¶ 34. In other words, the possibility of umbrella liability recovery must be available in Member State private litigation where (i) the plaintiff proves a sufficient causal connection between the cartel activity and inflated prices paid to a non-cartel member and (ii) the cartel participants had a sufficient basis to recognize that would be the case. *Id*. Importantly, however, the ECJ found that "[i]t is for the referring court to determine whether those conditions are satisfied." *Id*.

Implications

The *Kone* decision could have substantial implications for companies accused of participating in cartels that are alleged to have injured consumers in EU Member States. Depending on the circumstances, the decision could increase total potential exposure for cartelists selling in Europe, or at least open the door to claims by plaintiffs that previously may not have considered bringing a claim.

Importantly, however, the decision leaves much for national courts to determine. Member States may no longer categorically deny umbrella liability claims. But, as the ECJ made clear, it will be up to the national courts to determine the critical questions of whether (i) on the particular facts, inflated prices paid to non-cartel members were sufficiently linked to market-wide effects from the cartel and (ii) cartel members had a sufficient basis to recognize their conduct would lead to inflated prices, even for those buying from non-cartel members. Outcomes in future cases will undoubtedly turn on the specifics of each case—e.*g*., the particular type of cartel conduct at issue, the nature of the cartelized product, the proportion of market supply accounted for by cartel members, and the methodology non-cartel members use to set prices. Outcomes will also turn on particulars of national law governing proof of causation and the like for private competition claims. In practice, it will continue to be challenging for plaintiffs to prove the requisite causal connection between cartel activity and inflated prices for purchases from non-cartel members. As the European national courts proceed to adjudicate umbrella theories, it may be the case that—like many courts in the United States—many national courts will find umbrella theories are too speculative to permit recovery.

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