

## Court Rules That Cartel Members Are Liable for ‘Umbrella Claims’

*If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.*

**James S. Venit**  
Brussels  
+32.2.639.4501  
james.venit@skadden.com

**Ingrid Vandendorre**  
Brussels  
+32.2.639.0336  
ingrid.vandendorre@skadden.com

**Frederic Depoortere**  
Brussels  
+32.2.639.0334  
frederic.depoortere@skadden.com

\* \* \*

*This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.*

Four Times Square, New York, NY 10036  
Telephone: +1.212.735.3000

[WWW.SKADDEN.COM](http://www.skadden.com)

In a judgment that may expand civil damage liability for cartel participants significantly (Case C-557/12, *Kone AG and Others*, judgment of June 5, 2014), the European Court of Justice (the ECJ) has ruled that a cartel’s members are liable for “umbrella damages,” which are caused by price increases implemented by parties that did not participate in the cartel but were able to free-ride on its price effects.

The ECJ ruling responds to a reference from the Austrian Supreme Court, which asked the EU’s top court to determine whether the Austrian railway operator ÖBB Infrastruktur AG could claim damages from EU elevator manufacturers that had participated in a cartel condemned by the Austrian Competition Authority because it had been charged inflated prices by elevator manufacturers not part of the cartel. The Austrian Supreme Court held that Australian law does not permit claims for umbrella damages, but referred the matter the ECJ to determine the compatibility of the Austrian legal position with EU law.

In its ruling, the ECJ concluded that member states cannot “categorically and regardless of the particular circumstances” exclude civil liability for losses from umbrella pricing. The facts that cartel outsiders freely determine their own prices and may not have knowledge of the cartel do not shield cartel members from liability for damages as a result of overcharges made possible by the cartel. According to the ECJ, the victim of umbrella pricing may obtain compensation where it is established that the cartel was “in the circumstances of the case and, in particular, the specific aspects of the relevant market, liable to have the effect of umbrella pricing being applied by third parties acting independently.”

*Kone AG and Others* significantly enhances the exposure of cartel participants, which may now face civil damage claims for sales by firms not party to the cartel. The availability of such claims is independent of the proposed Directive on Actions for Damages, which is awaiting final legislative approval,<sup>1</sup> and significantly broadens the exposure of cartel members to civil damages by creating an additional category of potential plaintiffs.

1 See “European Parliament Approves Proposed Directive on Private Antitrust Damages Actions” (April 18, 2014), available at <http://www.skadden.com/insights/european-parliament-approves-proposed-directive-private-antitrust-damages-actions>.

## Additional Contacts in the Antitrust and Competition Group

Clifford H. Aronson	New York	212.735.2644	clifford.aronson@skadden.com
Simon Baxter	Brussels	32.2.639.0310	simon.baxter@skadden.com
Jess Biggio	New York	212.735.2060	jessica.biggio@skadden.com
Alec Y. Chang	New York	212.735.4142	alec.chang@skadden.com
C. Benjamin Crisman, Jr.	Washington, D.C.	202.371.7330	benjamin.crisman@skadden.com
Paul M. Eckles	New York	212.735.2578	paul.eckles@skadden.com
Shepard Goldfein	New York	212.735.3610	shepard.goldfein@skadden.com
Peter E. Greene	New York	212.735.3620	peter.greene@skadden.com
Matthew P. Hendrickson	New York	212.735.2066	matthew.hendrickson@skadden.com
Ian G. John	New York	212.735.3495	ian.john@skadden.com
James A. Keyte	New York	212.735.2583	james.keyte@skadden.com
Karen Hoffman Lent	New York	212.735.3276	karen.lent@skadden.com
John H. Lyons	Washington, D.C.	202.371.7333	john.h.lyons@skadden.com
Gary A. MacDonald	Washington, D.C.	202.371.7260	gary.macdonald@skadden.com
Jeffrey A. Mishkin	New York	212.735.3230	jeffrey.mishkin@skadden.com
John M. Nannes	Washington, D.C.	202.371.7500	john.nannes@skadden.com
Sharis Pozen	Washington, D.C.	202.371.7555	sharis.pozen@skadden.com
Neal R. Stoll	New York	212.735.3660	neal.stoll@skadden.com
Steven C. Sunshine	Washington, D.C.	202.371.7860	steve.sunshine@skadden.com