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## European Commission's Damages Litigation Illustrates Challenges in Domestic Regimes Pre-Implementation of the Damages Directive

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In January 2015 the European Commission announced its intention to appeal a judgment of the Belgian Commercial Court which dismissed the Commission's claim for €6 million of damages against Otis, KONE, Schindler and ThyssenKrupp. The Court's decision illuminates the importance of changes brought about by the recently implemented Damages Directive.

**Background** On 27 February 2007 the European Commission ("EC") fined four manufacturers of elevators and escalators €992 million.

It found that Otis, Schindler, KONE and ThyssenKrupp were involved in four separate cartels in Germany, Belgium, the Netherlands and Luxembourg. From 1995 to 2005 the companies rigged contracts bids for installation, modernisation, repair and maintenance of elevators and escalators. The cartelists exchanged information regarding the prices of their services and agreed on the allocation of sale and installation contracts for new elevators and escalators.

The cartel had long-term effects, principally regarding the pricing of maintenance contracts. The life-span of elevators and escalators often lasts for decades and the contracts for maintenance and modernisation are likely to extend accordingly. The cartel was particularly notable because the elevators and escalators affected by the anti-competitive agreement were installed (and later serviced) in the buildings belonging to the EC and in the Luxembourg courts.

**EC's damages claim** The EC initially brought a follow-on action for damages against the four companies on behalf of the European Community in Belgium in 2008. The EC argued that it should be entitled to damages for an overcharge on the contracts for maintenance and modernisation of elevators and escalators that it concluded with the cartelists. It also sought a declaration that the contracts were void ab initio due to the cartelists' fraudulent activity. Otis, KONE, Schindler and ThyssenKrupp submitted that the EC's claim was unfounded.

On 24 November 2014, the Belgian Commercial Court decided that the EC's action was admissible in principle but dismissed the claim for damages on the basis that: (i) insufficient evidence was adduced as to the causal link between the anti-competitive behaviour and loss; and (ii) the EC failed to prove an overcharge.

**Admissibility** The proceedings were unusual as the EC sought private damages for losses it had

suffered, off the back of its own confidential investigations and subsequent decision. This led the Belgian court to ask for an opinion of the Court of Justice of the European Union ("CJEU") on the point of admissibility of the EC's claim. The CJEU ruled that despite the EC's role in the investigation of the cartel, the maintenance of effective competition requires that everyone, including the EC, can claim damages for loss caused by such infringements. The Belgian court subsequently confirmed that even though it was bound by the EC's decision, it had the power to autonomously decide on the causal link between the infringement and the loss, and the extent thereof.

**Overcharge** Notwithstanding the EC's decision, the Belgian court was not satisfied that the cartel's existence led to higher prices. Based on the expert reports, it decided that it was not clear that the maintenance contracts concluded with the EU in Belgium resulted in an overcharge.

**Causal link** The EC's damages action was initiated in 2008, and accordingly, the Belgian court applied the civil law in force at that time. This provided that a causal link between an infringing act and the loss could only be presumed if the act usually causes such damage or loss. In its judgment, the court noted from economic studies that the causal link regarding a cartel's effect on price could not be "simply assumed" in bid-rigging cases and that the EC had failed to prove the link in this particular case.

**Implications for potential claimants** The case illustrates the difficulties which claimants can encounter in pursuing damages for infringements dating back many years and without the benefit of historic data records. Due to the fact that its case proceeded under the 2008 Belgian law, the EC was not yet able to rely on the Damages Directive, which was adopted in late 2014 and required to be implemented by 27 December 2016. The Directive will introduce both disclosure requirements in damages actions in all Member States and a presumption of harm in cartel cases which should assist claimants.

**Disclosure** In advance of the directive being implemented, the EC's case suffered from a lack of historic data. For instance, only seven maintenance contracts were available for the court's evaluation. The Damages Directive will help to alleviate such evidentiary obstacles by requiring disclosure by both parties of relevant data records

**Presumption of harm** The directive will also create a rebuttable presumption of harm in cartel cases so that the burden of proof shifts onto the defendants to show that their behaviour did not cause any harm to the claimants.

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