

**The ECJ's judgment in *Kone* and private enforcement's "negative harmonization framework":  
Another Brick in the Wall (Part 6)**

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*Abstract*

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## **The ECJ's judgment in *Kone* and private enforcement's "negative harmonization framework": Another Brick in the Wall (Part 6)**

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**Keywords:** Antitrust Law Private Enforcement; Court of Justice legality test; National courts weighing-up power; Power of the Commission to reject requests for access to leniency documents

### **Abstract**

The *Kone* judgment, the sixth judgment of the ECJ on antitrust law private enforcement claims brought under national legislation, develops two aspects of the case law. In first place it clarifies the issue of causal link in actions for damages for breach of Articles 101 and 102 TFEU. In second place it slightly changes the *Courage* legality test. Some criticisms can be raised as to the reasoning of the Court since it could lead to the erroneous conclusion that the Commission has no power to deny requests from third parties seeking access to leniency documents in its possession.

### **1. Introduction**

The Court of Justice (ECJ) has played a key role in defining the "bricks" for the construction of the "edifice" of the private enforcement of European competition law. The Court has in fact replaced the latency of the European legislator in this area by building with its case law a form of "negative harmonization framework" for private enforcement<sup>1</sup>. This latency was recently transformed to legislative action, more than ten years after the publication of Reg. 1/03<sup>2</sup>, with the publication of the 2014 Antitrust Damages Directive<sup>3</sup>. Apart from its other features, this

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<sup>1</sup> See the opinion of Advocate general Kokott in *Kone* of 30 January 2014, para. 1.

<sup>2</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) OJ L 1, 4 January 2003, p. 1.

<sup>3</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance OJ L 349, 5 December 2014, p. 1.

Directive incorporates, in essence, the principles of the case-law of the Court with regard to the private enforcement of the EU antitrust rules<sup>4</sup>.

With reference to ECJ's case law, less attention has been given to the way in which the Court has developed the legality test as concerns national legislation in this area.

The *Kone* judgment<sup>5</sup>, the sixth judgment of the ECJ on antitrust law private enforcement claims brought under national legislation<sup>6</sup>, develops both these aspects in an interesting way. Regarding the first aspect, the judgment develops the issue of the causal link in an action for damages for breach of Article 101 and 102 TFEU. As for the second aspect, the judgment modifies and develops the structure of the legality test in relation to national legislation concerning private enforcement.

## 2. Facts

The request for a preliminary ruling in *Kone* was made by the Supreme Court of Austria (*Oberster Gerichtshof*). The appeal to the *Oberster Gerichtshof* was submitted by *Kone* and four other companies against *ÖBB Infrastruktur AG* for the review of the decision of the Court of Appeal. The appellants in the main proceedings were in fact ordered to pay 1,839,235.74 euros in damages caused to the defendant company by an anticompetitive cartel they had maintained, "since the 1980s at least", in markets for the installation and maintenance of elevators in several Member States<sup>7</sup>. The anticompetitive violation had been established by a European Commission decision of 21 February 2007<sup>8</sup>. The peculiarity of the case stemmed from the fact that *ÖBB* had purchased goods and services *not from the members of the cartel* but from a company that had not taken part in the anticompetitive behaviour. In spite of this, *ÖBB* claimed to have been damaged by the behaviour of the cartelists because the cost of goods and services purchased from a non-cartelist by *ÖBB* was found to be higher than the price that would have been charged on the market (and offered to *ÖBB*) without the cartel. This was a consequence of so-called "umbrella pricing". As already mentioned, the *ÖBB* request for compensation, rejected by the Austrian court of first instance, was accepted by the Court of Appeal.

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<sup>4</sup> For an introduction to the Directive, see Francesca Squillante, *A Brief Overview of the Directive on Antitrust Damages Actions*, in *IAR*, Vol. 1, Issue 2 (2014).

<sup>5</sup> Judgment of the Court of Justice of 5 June 2014 "*Kone*".

<sup>6</sup> Regarding the case law relating to antitrust law private enforcement, see: Judgment of the Court of Justice of 27 March 1974 "*BRT SABAM*"; Judgment of the Court of Justice of 1 June 1999 "*Eco Swiss*"; Judgment of the Court of Justice of 13 July 2006 "*Manfredi*"; Judgment of the Court of Justice of 14 June 2011 "*Pfleiderer*"; Judgment of the Court of Justice of 6 June 2013 "*Donau Chemie*".

<sup>7</sup> *Kone*, para. 5.

<sup>8</sup> *Ibid.* para. 6.

In its reference to the Court of Justice, the *Oberster Gerichtshof* considered the requirements needed pursuant to EU law in order to establish liability in damages for members of a cartel in the circumstances at issue<sup>9</sup>. In particular, the Austrian Court pointed out that, pursuant to the prevailing interpretation of Article 1311 of the Austrian civil code (ABGB), a person claiming compensation for damages for non-contractual liability is required to show, *inter alia*, the existence of a sufficient causal link. The existence of a sufficient causal link under Austrian case law would not be present in the case of umbrella pricing<sup>10</sup>. The *Oberster Gerichtshof* also underlined that “*the question whether, under EU law, the loss resulting from the effect of umbrella pricing must give rise to compensation is highly controversial in both German and Austrian academic writings*”<sup>11</sup>.

The Austrian Court thus sought a ruling from the Court of Justice as to whether Article 101 TFEU recognizes the right to claim compensation for damages even in the case of umbrella pricing, i.e. where a direct causal link is absent; and thus whether, in those circumstances, “*the principle of effectiveness laid down by the Court (...) requires the grant of a claim under national law*”<sup>12</sup>.

### **3. The Judgment of the Court of Justice**

In the first part of the judgment the Court recalls the principles of its jurisprudence regarding the conditions that govern a claim for damages in the event of a violation of Article 101(1) TFEU, namely: the violation of art. 101 TFEU, the damage suffered by a third party and the existence of a causal link between the two<sup>13</sup>. In the absence of Union legislation, the Court underlines that “*it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to claim compensation [...] including those on the application of the concept of ‘causal relationship’, provided that the principles of equivalence and effectiveness are observed*”<sup>14</sup>. In particular, referring to the principle of effectiveness, the Court notes that, “*specifically in the context of competition law, those rules must not jeopardise the effective application of Articles 101 TFEU and 102 TFEU*”<sup>15</sup>.

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<sup>9</sup> Ibid. para. 12.

<sup>10</sup> Ibid. para. 14.

<sup>11</sup> Ibid. para. 16.

<sup>12</sup> Ibid. para. 17.

<sup>13</sup> Ibid. paras. 18-26.

<sup>14</sup> Ibid. para. 24.

<sup>15</sup> Ibid. para. 26.

Moving on to apply these principles to the case in question<sup>16</sup>, the Court decided that Article 101 TFEU precludes application of the contested Austrian law because it did not ensure the full effectiveness of competition law<sup>17</sup>. In particular, the interpretation of Article 1311 ABGB, with particular reference to the concept of a causal link as understood by the Austrian courts, would undermine the full effectiveness of Article 101 TFEU because it required “*categorically and regardless of the particular circumstances of the case [...] the existence of a direct causal link*”<sup>18</sup>. Under the Austrian approach, therefore, no recovery of damages was possible where “*the individual concerned had no contractual links with a member of the cartel, but with an undertaking not party thereto, whose pricing policy, however, is a result of the cartel that contributed to the distortion of price formation mechanisms governing competitive markets*”<sup>19</sup>. Kone and the other applicants in the main proceedings argued that recognizing a claim for compensation where losses result from umbrella pricing would constitute punitive damages “*since the loss sustained by ÖBB–Infrastruktur does not involve, in exchange, enrichment for the appellants in the main proceedings*”<sup>20</sup>. However, the Court succinctly rejected this characterization and explained that “*the rules on non–contractual liability do not make the amount of loss that may be compensated by way of damages dependent on the profit achieved by the person whose misconduct caused that loss*”<sup>21</sup>.

Second, the applicants in the main proceedings asserted that allowing recovery of damages under the circumstances would be contrary to the principle of effectiveness, as exposure to damages would be likely to dissuade undertakings from assisting the competition authorities in an investigation of the case. The Court, in an equally terse answer and quoting the *Pfleiderer* judgment, claims (in a way that is partially open to criticism – see *infra* § 4.c) that “*the leniency programme is a programme developed by the Commission, through its Notice (...) which has no legislative force and is not binding on Member States (...). Consequently, that leniency programme cannot deprive individuals of the right to obtain compensation (...)*”<sup>22</sup>.

#### **4. Comment**

The judgment described above raises several points of interest.

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<sup>16</sup> Ibid. paras 27-34.

<sup>17</sup> Ibid. para. 32.

<sup>18</sup> Ibid. para. 33.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid. para. 35.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid. para. 36.

**a. The legality test of the Court of Justice with reference to national legislation on antitrust law private enforcement** - A first element of interest in the *Kone* judgment is the confirmation, once again, of the legality test chosen by the Court of Justice in its antitrust law private enforcement case-law rather than defining "positive" praetorian rules in this field (as proposed by Advocate General Mazák in the *Pfleiderer* case<sup>23</sup>; an interpretation I do not share<sup>24</sup>). This interpretation was, *inter alia*, the consequence of the need to "bridge the gap" left open by the European legislator due to the absence of legislation in the private enforcement area (a gap now bridged, more than ten years after Reg. 1/03, with the above-mentioned 2014 *Antitrust Damages Directive*). Instead, in an approach I agree with<sup>25</sup>, the Court defined through its case-law a "negative harmonization framework", identifying the limits of legality of the national legislations related to antitrust law private enforcement. To this end, the Court assessed the legitimacy of national legislation in the light of the limits to the principle of Member States' procedural autonomy (and its constituent principles of equivalence and effectiveness). This legality test has been subject to important developments and changes, as exemplified by the judgment under review here. For instance, the Court in its case-law has set out and applied, *inter alia*, a special application of the principle of effectiveness in the specific field of competition law, i.e., the principle of "effective application of Articles 101 and 102 TFEU"<sup>26</sup>. Moreover, always with the aim of safeguarding the principle of "effective application" of European competition law, the Court has envisaged for the national courts a power to weigh-up the interests of private and public enforcement<sup>27</sup>.

**b. The Court of Justice legality test with specific reference to national legislation that has the aim or effect of categorically excluding a right to compensation for breach of Article 101(1) TFEU** - A second point of interest of the *Kone* judgment is the structure of the legality test with reference to national legislation that has the aim or effect of "categorically exclud[ing] a right to compensation" for breach of Article 101(1) TFEU<sup>28</sup>.

In this respect, the Court in its previous case-law had stated that national legislation preventing "any individual to claim damages for loss caused [...] by conduct liable to restrict or

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<sup>23</sup> Conclusion of Advocate General Mazák of 16 December 2010 "*Pfleiderer*".

<sup>24</sup> See my *The Court of Justice 'Antitrust Enforcement Negative Harmonisation Framework' and the CDC and Pfleiderer Judgments: 'Another Brick in the Wall'*, in B. Cortese (ed.), *EU Competition Law Between Public and Private Enforcement*, Kluwer Law International, 2014, p. 253. See the positive view on this position by Paolo Cassinis, Giuseppe Galasso, *Il ruolo dell'Autorità garante della concorrenza e del mercato tra il public e private enforcement*, in *Private Enforcement of Competition Law*, Gian Antonio Benacchio – Michele Carpagno (eds.), Cedam, 2012, p. 23.

<sup>25</sup> *Ibid.* p. 249.

<sup>26</sup> *Pfleiderer* para. 24 referring to judgment of the Court of Justice of 7 December 2010 "*VEBIC*", para. 57.

<sup>27</sup> *Ibid.* para. 25 et seq.

<sup>28</sup> *Kone* para. 31.

*distort competition*” was regarded as unlawful because it violated the principle of the *effet utile* (i.e. the practical effect of the prohibition)<sup>29</sup>. In other words, the Court’s legality test for national legislation that impedes damages actions was not based on the principle of procedural autonomy of the Member States in order to find them unlawful, even though it takes that principle into consideration for other aspects<sup>30</sup>. The Court’s conclusion was based exclusively on the nature of Article 101(1) TFEU as “*a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market*”<sup>31</sup>. By contrast, in *Kone* the Court modifies its legality test, even though the legislation under review in the circumstances at issue has the same effect as the rule of English law in *Courage*, i.e. it “*categorically excludes a right to compensation*”<sup>32</sup>. In *Kone*, unlike in *Courage*, the Court assesses the *effet utile* principle (i.e. the practical effect of the prohibition<sup>33</sup>) entirely as *part of* the principle of autonomy<sup>34</sup>.

The innovation in the legality test, set out in paragraph 21, finds its practical application in paragraph 32 of the judgment. To this end, the Court for the first time in its case-law creates with an interesting solution a link between the protection of “*full effectiveness*” of European Union competition law<sup>35</sup> and the need for national legislation to take into account the “*objective pursued by Article 101 TFEU*”<sup>36</sup>, thus giving substance to the otherwise vague principle, in the circumstances at issue, of “*full effectiveness*”. In this respect the Court points out that the “*national legislation must ensure that European Union competition law is fully effective (...). Those rules must therefore specifically take into account the objective pursued by Article 101 TFEU, which aims to guarantee effective and undistorted competition in the internal market (...)*”<sup>37</sup>. In other words, and as already argued in *Courage* - albeit with different reasoning and with the application of a different legitimacy test but reaching the same conclusions - in *Kone* the Court claims again that national legislation must ensure the *effet*

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<sup>29</sup> *Courage* para. 26.

<sup>30</sup> *Ibid.* para. 29 et seq.

<sup>31</sup> *Ibid.* para. 20 referring to *Eco Swiss* para. 36.

<sup>32</sup> *Kone* para. 31. That is differently from the cases in *Pfleiderer* and *Courage*. In the *Pfleiderer* case, the issue was the relationship between the right of “*a person who has been adversely affected by an infringement of European Union competition law and is seeking to obtain damages from being granted access to documents relating to a leniency procedure involving the perpetrator of that infringement*”, on the one hand (*Pfleiderer* para. 32), and the ability to refuse such access with a view to protecting leniency programs, which help to “*uncover and bring to an end infringements of competition rules*” (*ibid.* para. 25), on the other. In *Donau Chemie*, doubts as to the legality of the national legislation (in contrast to *Kone*) concerned the fact that, in the words of the Court, the national law “*must not be developed in such a way as to preclude any possibility for the national courts to conduct that weighing-up on a case by case basis*” as regards access to the documents of antitrust procedure (*Donau Chemie* para. 35).

<sup>33</sup> *Ibid.* para. 21.

<sup>34</sup> *Ibid.* paras. 21-33.

<sup>35</sup> *Ibid.* para. 33.

<sup>36</sup> *Ibid.* para. 32.

<sup>37</sup> *Ibid.* para. 32.

*utile* of Articles 101 and 102 TFEU. A different interpretation of national legislation leading to different results would lead to its illegality and consequently its non-applicability.

Keeping in mind the different structure of the legislation in the *Courage* and *Kone* cases<sup>38</sup>, the change of the *Courage* legality test in *Kone* would seem to fit into a sort of further refinement of the test already started in the *Donau Chemie* case<sup>39</sup>. This refinement appears to be aimed at defining the structure of the test so that the legality of the national laws regarding antitrust law private enforcement will be assessed only in the context of the limits of the principle of procedural autonomy. This does not exclude that the Court in future blatant cases, as in the case of the legislation in *Courage*, could revert back as a matter of reasoning to the *Courage* test (judgment of the legality of the national law before applying the principle of procedural autonomy) more as a way to emphasise its conclusion being based, in both cases, on the *effet utile* principle.

*c. The national courts weighing-up exercise of antitrust law private and public interests, the questionable reasoning of the Court in rejecting the arguments of the appellants in the main proceedings on this point, and the Commission's power to deny access to leniency documents -* The third element of interest of the judgment in question concerns the reasoning by which the Court rejects the arguments submitted by the cartelists regarding the weighing-up of the respective interests of the private and the public enforcement of antitrust law. More specifically, in *Kone* the cartelists argued that allowing the recovery of damages under in instances of umbrella pricing would dissuade companies that have violated the rules of competition law from cooperating with the Commission and coming forward to request leniency. From their point of view, such a disincentive would be contrary to the effectiveness of public enforcement.

In this regard, it has to be remembered, as already mentioned above, that the Court in *Pfleiderer* had recognised (more clearly than in *Kone*) that national courts had a weighing-up power enabling them to ensure the effective application of Articles 101 and 102 TFEU<sup>40</sup>. In particular, the national courts have the power to weigh-up the interests, *inter alia*, of antitrust law private enforcement, on the one hand (i.e. the "*right to claim damages for loss caused (...)*")

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<sup>38</sup> In *Courage*, the English provision at stake had the effect of always limiting the claim for redress. By contrast, in *Kone* the relevant provision limited the claim for redress only in some cases (i.e. in the case of umbrella pricing).

<sup>39</sup> In *Donau Chemie* the Court changes the test of legitimacy of national regulations. In particular, the Court exercised the "weighing-up" power referred to in *Pfleiderer* within the more general assessment of the principle of effectiveness. It thus changed the test used in *Pfleiderer*, where the Court had exercised that power outside of the application of the principle of procedural autonomy of the Member States and, in particular, outside the application of the principle of effectiveness (*Donau Chemie* para. 27).

<sup>40</sup> *Pfleiderer* para. 32.



*by conduct which is liable to restrict or distort competition*" in violation of Articles 101 and 102 TFEU<sup>41</sup>), and those of public enforcement on the other (i.e. the interest in "*uncover[ing] and bring[ing] to an end infringements of competition rules*"<sup>42</sup>).

In *Kone*, the issue of the national courts' weighing-up power is not raised as part of the reference to the Court of Justice, whereas the issue had been raised by the courts of reference in the cases of *Pfleiderer* and *Donau Chemie*. In *Kone*, the issue was raised instead by the cartelists in connection with their submission that the Court should reject an interpretation of EU law that was contrary to their interests. Their argument was radical and somehow independent from the solution of the concrete matter before the Court, which was the issue of the causation link. The cartelists argued that "*such damages are likely to dissuade the undertakings concerned from assisting the competition authorities to investigate cases*" and, as a consequence, the possibility of recovering such damages would run contrary to the principle of effectiveness<sup>43</sup>. In other words, the cartelists sought to persuade the Court that in such a case the interests of public and private enforcement have to be weighed-up and, in order to protect the principle of effectiveness, the interests of public enforcement should prevail. This interpretation in turn would not have permitted claims for damages based on the existence of umbrella pricing<sup>44</sup>; that is, the Court was being called on to accept under the circumstances the outright exclusion of claims for damages related to the protection of the rights under Article 101(1) TFEU. However, the Court correctly rejects the plea because it would have deprived "*individuals of the right to obtain compensation before the national courts for loss sustained as a result of an infringement of Article 101 TFEU*"<sup>45</sup>.

However, the Court does not justify this conclusion by recalling what it stated in its judgment at paragraph 22, that is, that "*any person is (...) entitled to claim compensation for the harm suffered*" for breach of competition rules, nor does the Court make reference to *Courage*, as properly done *mutatis mutandis* in a similar case by the General Court in *CDC*<sup>46</sup>. Rather, in the present case the Court's reasoning relates to the fact that the Commission's rules on leniency<sup>47</sup> have "*no legislative force and [are] not binding on Member States*"<sup>48</sup>. Consequently,

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<sup>41</sup> Ibid. para. 28.

<sup>42</sup> Ibid. para. 25.

<sup>43</sup> The companies make reference to the fact that, during the proceedings before the Commission, they had requested the application of the Leniency Notice (Decision 21 February 2007, C(2007) 512 final "*Kone*" para. 36).

<sup>44</sup> *Kone*, *per relationem* para. 28.

<sup>45</sup> Ibid, para. 36.

<sup>46</sup> L.F. Pace, *The Court of Justice 'Antitrust Enforcement Negative Harmonisation Framework'*, cit., p. 249 (discussing Judgment of the General Court of 15 December 2011 "*CDC*", para. 77).

<sup>47</sup> Commission Notice on Immunity from fines and reduction of fines in cartel cases of 8 December 2006.

<sup>48</sup> *Kone* referring to *Pfleiderer* para. 21.

*that leniency programme cannot deprive individuals of the right to obtain compensation before the national courts for loss sustained as a result of an infringement of Article 101 TFEU*<sup>49</sup>.

To criticise this reasoning, one could say that even if the Leniency Notice had been binding, this would not have excluded claims for damages in cases of umbrella pricing. By the same token, the Court certainly did not want to suggest that, for an interest to be worth weighing-up (in this case, the protection of the effectiveness of the leniency program), it must be of a legally binding nature. Indeed, the ECJ's case law does not establish any such requirement.

In this respect, the Court would have done better to clarify that the submissions of the cartelists had to be rejected on the basis of the nature of Article 101 TFEU as "*a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market*"<sup>50</sup>. Moreover, paraphrasing the words of *Kone*, the Court should have declared that, in such a case, no measure of EU secondary law – even one endowed with "*legislative force and (...) binding on Member States*" could have had the effect of excluding the "*right to obtain compensation before the national courts for loss sustained as a result of an infringement of Article 101 TFEU*"<sup>51</sup>.

Furthermore, from the reasoning of the Court one could draw mistaken conclusions. In particular, it might be inferred that the Commission could not oppose a request for access to documents provided to it by a leniency applicant either because the rules on leniency have "*no legislative force and are not binding on Member States*" or in view of the inapplicability for this purpose of Reg. 1049/01<sup>52</sup>. The idea that the Commission could not reject such requests would be wrong because, as I have already argued elsewhere<sup>53</sup>, this possibility was introduced by *Pfleiderer*. Indeed, that judgment, which introduced the national courts' weighing-up power discussed above, allows the Commission, *mutatis mutandis*, to legitimately reject such requests. The Commission could therefore carry out a weighing-up of the interests of private and public enforcement with a view to protecting the effective application of Articles 101 and 102 TFEU and could indeed accord preference to public enforcement, rejecting third-party access to such documents even in the absence of an express prohibition to that effect.

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<sup>49</sup> *Kone* para. 36.

<sup>50</sup> *Eco Swiss* para. 36.

<sup>51</sup> *Kone* para. 36.

<sup>52</sup> See judgment of the General Court of 15 December 2011 "*CDC*".

<sup>53</sup> L.F. Pace, *The Court of Justice 'Antitrust Enforcement Negative Harmonisation Framework'*, cit., p. 251.

## 5. Conclusions

The *Kone* judgment develops the two aspects of the ECJ's case-law relating to the private enforcement of antitrust law discussed above: it establishes new principles and it modifies the Court's legality test.

With regard to principles, *Kone* clarifies an interesting issue, already dealt with in *Manfredi*<sup>54</sup>, namely that of a causal link in actions for damages for breach of Articles 101 and 102 TFEU. The issue of causation is particularly relevant to the Austrian and German legal systems, and less relevant with regard to other systems, such as that of Italy<sup>55</sup>. Nevertheless, recital 13 of the Antitrust Damages Directive (Dir. 2014/104/EU), which must be transposed into national law by 27 December 2016, expressly refers to the issue of causation that arose in *Kone*. That recital provides, *inter alia*, that “*the right to compensation is recognised for any natural or legal person (...) irrespective of the existence of a direct contractual relationship with the infringing undertaking (...)*”.

As for the legality test, *Kone* changes the structure of the test established in *Courage*. In contrast to *Courage*, the Court of Justice in *Kone* assesses the legitimacy of national laws regarding antitrust law private enforcement only in the context of the principle of procedural autonomy by establishing an interesting link between the otherwise vague principle, in the circumstances at issue, of “fully effectiveness” and the “*objective pursued by Article 101 TFEU*”<sup>56</sup>.

Finally, and as seen above, some criticisms can be raised as to the reasoning of the Court regarding the national courts' weighing-up exercise; reasoning that could lead to the erroneous conclusion that the Commission has no power to deny requests from third parties seeking access to leniency documents in its possession.

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<sup>54</sup> Judgment of the Court of Justice of 13 July 2006 “*Manfredi*”, paras 64 and 92.

<sup>55</sup> Indeed, the Italian case-law (see for all Judgment of the Corte di cassazione 11 June 11 2003, n. 9384, *Soc. V. Liquigas. Girelli*) and the legal literature (see E. Camilleri, *Contratti a valle, rimedi civilistici e disciplina della concorrenza*, Jovene, 2008, p. 214 ss.; E. Camilleri, *Le conseguenze civilistiche dell'illecito antitrust*, in L.F. Pace (eds), *Dizionario sistematico del diritto della concorrenza*, Jovene, 2013, p. 290 available at [www.competition-law.eu](http://www.competition-law.eu)) both take the view that the necessary causation element between anti-competitive behaviour and damage can be ascertained even in the absence of a direct causal link.

<sup>56</sup> *Kone* paras. 32 and 33.

(ed.), *EU Competition Law Between Public and Private Enforcement*, Kluwer Law International, 2014, p. 253

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