CASE NOTES

Right of the European Union to claim compensation before a national court against the member of a cartel: Case C-199/11 *Europese Gemeenschap v. OTIS NV and Others*, Judgment of 6 November 2012, not yet reported

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§1. INTRODUCTION

On 6 November 2012, the Court of Justice of the European Union (CJEU) decided in Case C-199/11 that the European Commission (hereafter 'Commission') is allowed to bring an action before a national court for compensation for loss against the members of a cartel on behalf of the European Union (hereafter 'EU'). Indeed, the main finding of this judgment is that the EU has the ability to claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice that is prohibited under Article 101 TFEU.[1]

Due to the particularity of the party to the procedure – id est, the Commission is one of the parties to the damage procedure, while the damage procedure is based on a decision of the Commission that was previously taken in an administrative procedure – it is essential that the fundamental rights that govern any proceedings are respected. This concerns in particular Article 47 of the Charter of Fundamental Rights of the European Union, on the right to an effective remedy and to a fair trial. In this regard, the CJEU held, in an exhaustive manner, (1) whether the Commission can be seen as judge and party and (2) if the principle of equality of arms between the parties is violated. As to the first point, the CJEU states that it is fundamental that a Court that has full power of jurisdiction can review the administrative decision of the Commission, prohibiting the agreement or practice under Article 101 TFEU. As to the second point, the Court states that the principle of equality of arms has not been violated due to the numerous safeguards provided by European law in order to ensure that this principle is observed. These safeguards will be analysed later.

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1 Formerly Article 81 EC.

§2. FACTUAL BACKGROUND OF CASE C-199/11

Between at least 1995 and 2003, the undertakings Otis, KONE, Schindler and ThyssenKrupp participated in cartels in the markets for the sale, installation, maintenance and renewal of elevators and escalators in Belgium, Germany, Luxembourg and the Netherlands. In February 2007, the Commission imposed fines of over €992 million[2] on these companies for their participation in four separate, but related, single and continuous infringements of Article 101 TFEU.[3] The companies had to pay different amounts, depending on their relative importance in the cartel.[4]

In June 2008, the European Union,[5] represented by the Commission, opened proceedings before the Brussels Commercial Court, claiming damages for €7,061,688 against the concerned companies.[6] Since the EU had entered into several contracts for the installation, maintenance and renewal of elevators and escalators in various buildings of the EU institutions, the Commission argued that the EU had suffered a financial loss caused by the cartels in Belgium and Luxembourg.[7]

The Brussels Commercial Court decided to refer two questions to the Court of Justice for a preliminary ruling. Firstly, it asked whether Article 282 EC[8] must be interpreted to mean that the Commission is empowered to represent the EU before a national court in the specific context of this case.[9] Secondly, the Commercial Court addressed a 'more unusual and comparatively more complex'[10] question; can the Charter of Fundamental

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2 Otis, KONE, Schindler and ThyssenKrupp brought actions before the General Court of the European Union for annulment of the decision. The General Court decided to reduce the fines of ThyssenKrupp. The actions brought by Otis, KONE and Schindler were dismissed. See Case C-199/11 *Europese Gemeenschap v. OTIS NV and Others*, Judgment of 6 November 2012, not yet reported, para. 20–22.

3 Commission Decision of 21 February 2007, *Elevators and Escalators*, [2008] OJ C 75/19, para. 857; V. Soyez, 'Aufzugs- und Fahrtreppenkartell – Schadenersatzansprüche der Öffentlichen Hand', *KommJur* 2 (2010), p. 41–44.

4 Furthermore, in application of the Commission's Leniency programme, some of the concerned companies received full immunity from fines or a reduction of the fine. As a result, Otis was granted full immunity concerning a cartel in the Netherlands and a reduction of the fine for the infringement in Belgium, Luxembourg and Germany. For the evidences submitted by KONE relating to the cartel in Belgium, Luxembourg and Germany, KONE was granted full immunity in Belgium and Luxembourg and a reduction of the fine for the infringement in Germany. ThyssenKrupp was granted a reduction of the fine in the Netherlands and Belgium and Schindler was granted a reduction of the fine in Germany. See Commission Decision of 21 February 2007, *Elevators and Escalators*, para. 856.

5 At that time the 'European Community'.

6 OTIS NV, etc.

7 Case C-199/11 *Europese Gemeenschap v. OTIS NV and Others*, para. 23.

8 Until 1 December 2009, the date on which the FEU Treaty entered into force, Community representation before the courts of the Member States was governed by Article 282 EC (Now: Article 335 TFEU). Since the action before the referring court was brought prior to that date, consideration should be given to whether that article enabled the Commission to represent the Community in such an action.

9 Case C-199/11 *Europese Gemeenschap v. OTIS NV and Others*, para. 27.

10 Opinion of Advocate General Cruz Villalón in Case C-199/11 *Europese Gemeenschap v. OTIS NV and Others*, Judgment of 6 November 2012, not yet reported, para. 3.

Rights of the EU[11] prevent the Commission from bringing an action for damages before a national court, when it has itself previously adopted a decision that is binding for the referring court, and when it has found that an agreement or practice infringes Article 101 TFEU?[12] The Court analyses this issue from two angles. On the one side, the Court examines *the scope of jurisdiction of the referring court with regards to the decision of the Commission on which the civil action is based*. On the other side, the Court investigates the *principle of equality of arms*.[13]

§3. THE REASONING OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

As to the first question, the Court states that because the old Article 282 EC is the applicable rule, it is not necessary for the European Union to fulfil the new conditions for representation laid down in Article 335 TFEU, the last sentence of which states that '[…] the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation'. The Commission is thus allowed to represent the European Union before a national court, hearing a civil action such as the one at issue.[14]

As to the second question referred to the Court of Justice, it relates to the compatibility with the principle of effective judicial protection of the fact that, according to Article 16(1) of Regulation 1/2003,[15] a decision of the Commission relating to proceedings under Article 101 TFEU is binding on the referring court.[16] This question covers two different aspects. First, it seeks to determine whether the right to a fair hearing is infringed by the binding aspect of the Commission's decision. In that sense, it wishes to ascertain that, in the context of an action for damages intended by the Commission, the Commission is not both judge and party in its own cause in breach of the *nemo judex in sua causa* principle. Second, it asks whether the principle of equality of arms was breached when the Commission conducted the investigation relating to the infringement that is at the basis of the subsequent action for damages intended by the Commission.[17]

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11 In particular, Article 47 thereof.

12 Case C-199/11 *Europese Gemeenschap v. OTIS NV and other*, para. 37.

13 Result from the Article 47 of the Charter. This Article gives expression to the general principle of effective judicial protection, stating that 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal […]'.

14 On the transition between Article 228 TEC and 335 TFEU, see Case C-137/10 *Région de Bruxelles-Capitale,* Judgment of 5 May 2011, not yet reported, para. 16–25; Opinion of Advocate General Cruz Villalón in Case C-137/10 *Région de Bruxelles-Capitale*, Judgment of 5 May 2011, not yet reported, para. 41–55. And the conclusions of the AG.

15 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, [2003] OJ L 1/1.

16 See also recital 22 of the Regulation 1/2003.

17 Case C-199/11 *Europese Gemeenschap v. OTIS NV and Others*, para. 38–39.

Before analysing these two aspects, the Court first ascertains that the EU, like any other legal person, can rely on a breach of Article 101 TFEU before a national court in order to claim compensation for a harm suffered.[18] The Court comes to this finding based on its decisions in the cases *Courage and Crehan*[19] and *Manfredi and Others*.[20]

The Court also recalls that when national courts rule on agreements, decisions or practices which are already the subject of a Commission decision, they cannot decide in a way that does not comply with the findings of the Commission.[21] National courts are therefore bound by the decision of the Commission when they are hearing an action for damages for loss sustained as a result of a practice which has been found, by a decision of the Commission, to infringe Article 101 TFEU.[22] The Court recalls that the reason thereof is that 'the full effectiveness of Article [101 TFEU] and, in particular, the practical effect of the prohibition laid down in Article [101(1) TFEU] would be put at risk if it were not open to any person to claim damages for loss caused to him by a contract or conduct liable to restrict or distort competition'.[23] Indeed, the binding nature of the decision of the Commission will also have consequences on subsequent claims. Only the questions of the existence of loss and of a direct causal link between the loss and the agreement or practice in question remain to be assessed by the national court in such a situation.[24]

The Court then analyses the principle of effective judicial protection laid down in Article 47 of the Charter and, more specifically, the right of access to a tribunal, which is an element thereof.[25] According to the Court, the fact that national courts may not take decisions running counter to a Commission's decision in relation to a proceeding under Article 101 TFEU does not necessarily mean that the right of access to a tribunal of defendants in the main proceedings is denied.[26] In fact, the legality of a decision of the Commission can be reviewed by the EU Courts under Article 263 TFEU.[27] This review meets the requirements of the principle of effective judicial protection fixed in Article 47 of the Charter, as it covers both the law and the facts, and is supplemented by an unlimited jurisdiction concerning the amount of the fine.[28] The Court concludes that

18 Ibid., para. 40–44.
19 Ibid., para. 26.
20 Ibid., para. 59–61.
21 Ibid., para. 50; Article 16 of Regulation 1/2003. This rule is a consequence of the obligation of sincere cooperation between, on the one hand, the national courts and, on the other hand, the Commission and the EU Courts. See also Case-344/98 *Masterfoods Ltd v. HB Ice Cream Ltd* [2000] ECR I-11369; A. Johnston, 'Judicial Reform and the Treaty of Nice', 39 *CMLR* 3 (2001), p. 449.
22 Case C-199/11 *Europese Gemeenschap v. OTIS NV and other*, para. 51.
23 Ibid., para. 41.
24 Ibid., para. 65; V. Soyez, *KommJur* 2 (2010), p. 41–44, 42.
25 The right of access to a tribunal was previously referred to as the 'right to be heard' in the decision.
26 Case C-199/11 *Europese Gemeenschap v. OTIS NV and Others*, para. 52–55.
27 Ibid., para. 57.
28 Ibid., para. 59–63 *cum* 49. See also Case C-272/09P *KME Germany and Others v. Commission*, Judgment of 8 December 2011, not yet reported; Case C-386/10P *Chalkor v. Commission*, Judgment of 8 December 2011, not yet reported.

the Commission cannot be seen as judge and party in its own cause, in the context of a dispute such as that taking place in the main proceedings. This result is the consequence of the fact that the decision of the Commission can be reviewed by an independent authority, in addition to the fact that two further parameters remain to be assessed by a national court in an action for damages. These parameters are the existence of a loss and of a direct causal link between the loss and the agreement or practice in question.[29]

The Court then considers the principle of equality of arms.[30] The defendants claim that the Commission would be in a privileged position (compared with their own position) for two reasons. First, the Commission would be enabled to gather and use information – including material protected by business secrecy – which is not available to all the defendants.[31] Second, the balance between the parties would be jeopardized because the Commission conducts the investigation into the infringement of Article 101 TFEU with the aim of subsequently claiming compensation for the loss sustained as a result of the infringement.[32]

The Court rejects the two claims. As to the first claim, it explains that the order for reference indicates that the information which the defendants in the main proceedings refer to has not been provided to the national court by the Commission. Furthermore, the Commission has stated that it relied only on the information available in the non-confidential version of the decision finding an infringement of Article 101 TFEU.[33] As to the second claim, the Court states that the prohibition, set out in Article 28(1) of Regulation 1/2003, prevents the creation of an unequal relationship between the parties. This article prevents the Commission from using information gathered in the course of the investigation for purposes other than those for which it was acquired.[34]

The Court adds that EU law contains a sufficient number of safeguards to ensure that the principle of equality of arms is observed even in a situation like the one at hand, where both the decision of 27 February 2007 and the decision to bring the action for damages in the current case were taken by the College of Commissioners. These safeguards derive notably from Article 339 TFEU, Article 28 of Regulation No. 1/2003 and point 26 of the Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC.[35] The existence

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29 Case C-199/11 *Europese Gemeenschap v. OTIS NV and Others*, para. 63, 65, 67. See also D. Canapa, 'Révision de la Loi sur les cartels: quelle "Autorité de la concurrence" pour la Suisse? Examen et critique du cadre institutionnel proposé', in L.D. Loacker and C. Zellweger-Gutknecht, *Differenzierung als Legitimationsfrage* (Dike, Zürich/St. Gallen 2012), p. 323–325.

30 This principle implies that each party must have the possibility to present his case, including his evidence, and must not be placed at a substantial disadvantage *vis-à-vis* his opponent. See Case C-199/11 *Europese Gemeenschap v. OTIS NV and Others*, para. 71.

31 Ibid., para. 69.

32 Ibid., para. 74.

33 Ibid., para. 70, 73.

34 Ibid., para. 74.

35 Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, [2004] OJ C 101/54.

of a judicial review by the EU Courts of both the law and the facts also supports this conclusion.[36]

The Court concludes that the Commission is not precluded by Article 47 of the Charter 'from bringing an action before a national court, on behalf of the EU, for damages in respect of loss sustained by the EU as a result of an agreement or practice which has been found by a decision of the Commission to infringe […] Article 101 TFEU'.[37]

§4. COMMENTS

This judgment clearly states that the EU has the right to rely on a breach of Article 101 TFEU before a national court, in order to claim compensation for a harm suffered. This case therefore appears to fill a gap that had not been examined in previous leading judgments relating to the right to damages under Article 101 and 102, namely in the cases *Courage v Crehan*[38] and *Manfredi and Others*.[39] There is, furthermore, no reason to consider that this right should be limited to the breaches of Article 101 TFEU and not include breaches of Article 102 TFEU.[40] Moreover, the judgment has a substantial symbolic value as the Commission encourages victims of anti-competitive behaviour to claim for damages, an aim which the EU has been pursuing for many years.[41] Therefore, it is conceivable that this case could give rise to more law suits against undertakings that have violated the competition rules in the future.[42]

That being said, considering the fact that an administrative decision of the Commission relating to proceedings under Article 101 TFEU is binding on the referring court,[43] it appears however particularly essential that the fundamental rights are respected in subsequent civil actions for damages intended by the Commission.

One aspect thereof is that the Commission must in no way be seen as judge and party. In order to guarantee this, the party opposed to the Commission in the civil action must have been given the possibility to challenge the administrative decision of the

36 Case C-199/11 *Europese Gemeenschap v. OTIS NV and Others*, para. 75–76.

37 Ibid., para. 77.

38 Case C-453/99 *Courage v. Crehan* [2001] ECR I-6297.

39 Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619.

40 Soyez shares the same opinion concerning the German public authorities – cities and communes (p.43). In his opinion, an action for damages by the public authorities is not only obvious, but also necessary. This is due to the level of the damage as well as to the predictable risk of litigation. See V. Soyez, *KommJur* 2 (2010), p. 41–44.

41 On this topic, see notably Commission on Anti Trust – Actions for Damages – Key Documents, http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html (last visited 16 February 2013).

42 A. Heinemann, 'The Rise of a Private Competition Law Culture: Experience an Visions', in J. Basedow, J.P. Terhechte and L. Tichy, *Private Enforcement of Competition Law* (Nomos Verlagsgesellschaft, Baden-Baden 2011), p. 228*; Financial Times Deutschland*, 'Die Prozesswelle der Kartellopfer', 15 November 2012, p. 17.

43 See Article 16(1) of Regulation 1/2003.

Commission in law and in facts before an independent judicial authority.[44] In this way, the administrative decision of the Commission is to a certain degree 'disconnected' from its original author. This fact enables the Commission to base its civil action for damages on the administrative decision that it previously pronounced, as this decision has been, at least indirectly, confirmed by the European Courts.

The second aspect is that the principle of equality of arms between the parties to the proceeding must be respected. It is essential that there is no unfair advantage given to one party. Indeed, the Commission is a party in a civil proceeding that follows an administrative decision it previously took. The Commission could therefore find itself in a better position than another party to the civil procedure through access to documents it would have collected as an authority during the administrative procedure, and which it could use as a party to a civil procedure.

Therefore, it is essential that the decision of the Commission on which the civil action is based can be reviewed by a Court that has full power of jurisdiction. It is equally fundamental that, in application of Article 28 Regulation 1/2003, the Commission is precluded to refer to elements other than the ones appearing in its decision. One way to achieve this is to make sure that 'Chinese walls' exist between the different departments of the Commission. Such walls would preclude the department which deals with the civil court action, from access to the files of the administrative competition procedure handled by DG Competition. The Commission cannot use more information for its own procedure than it would allow to be disclosed to a third party. Any other reasoning would be contrary to Article 47 of the Charter.[45]

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44 See above §3.

45 Therefore the condition the Commission must fulfil in order to legally use information that has not been disclosed in the administrative decision – notably information that would have been gathered from the leniency programme – is that this information would have been made available to any other plaintiff that would have requested it. On the parallel question of the information that must be disclosed to a party to the civil procedure by a national competition authority, see Case C-360/09 *Pfleiderer AG v. Bundeskartellamt*, Judgment of 14 June 2011, not yet reported. On the question of the relationship between the private and public enforcement of Articles 101 and 102, see R. Whish and D. Bailey, *Competition Law* (7th edition, Oxford University Press, Oxford 2012), p. 305–306.