Court of Justice of the European Union
PRESS RELEASE No 88/12
Luxembourg, 26 June 2012

Press and Information

Advocate General's Opinion in Case C-199/11
European Union v Otis NV and Others

According to Advocate General Cruz Villalón, the Charter of Fundamental Rights does not prevent the Commission, when it has found there to be a cartel, from claiming compensation before the national courts for loss sustained by the EU in its capacity as a customer

Although the national court may not call into question the validity of the Commission's decision concerning the cartel, effective judicial protection of the undertakings that took part in the cartel is ensured by the Court of Justice of the European Union

When the European Commission adopts a decision finding there to be a cartel, that decision is binding on all public authorities, including the national courts.

In February 2007[1], the Commission imposed fines totalling more than €992 million on Otis, Kone, Schindler and Thyssenkrupp for having participated in cartels on the market for the sale, installation, maintenance and modernisation of elevators and escalators in Belgium, Germany, Luxembourg and the Netherlands.

The companies concerned brought actions for annulment before the General Court of the EU. By its judgment of 13 July 2011[2], the General Court dismissed the actions brought by Otis, Kone and Schindler. As regards the companies in the Thyssenkrupp group, the General Court decided to reduce their fines.

The companies within those four groups have all appealed to the Court of Justice seeking to have the judgments of the General Court set aside: their appeals are pending.

In parallel, in June 2008, the Commission – representing the EU (at that time the European Community) – brought proceedings before the Brussels Commercial Court against Otis, Kone, Schindler and Thyssenkrupp seeking €7 061,688 in damages. Specifically, the Commission maintained that the EU had sustained financial loss in Belgium and Luxembourg as a result of the cartel in which the undertakings concerned had taken part. The EU had entered into a number of contracts for the installation, maintenance and renewal of elevators and escalators in various buildings of the European institutions with offices in both countries, the price of which was allegedly higher than the market price as a consequence of the cartel declared unlawful by the Commission.

Against that background, the Brussels Commercial Court decided to refer a number of questions to the Court of Justice for a preliminary ruling. In particular, it has asked whether, in view of the EU Charter of Fundamental Rights (specifically, the right of access to a tribunal and the principle of equality of arms between the parties to proceedings), the Commission may – as the EU's representative – bring an action for damages on the basis of anti-competitive conduct when it was the Commission itself which previously adopted the decision finding that conduct unlawful and

[1] Commission Decision C (2007) 512 final of 21 February 2007 relating to a proceeding under Article 81 [EC] (Case COMP/E-1/38.823 − Elevators and Escalators), a summary of which was published in the *Official Journal of the European Union* (OJ 2008 C 75, p. 19).
[2] Case T-138/07 *Schindler Holding and Others* v *Commission*; Joined Cases T-141/07, T-142/07, T-145/07 and T-146/07 *General Technic-Otis and Others* v *Commission*[; Joined Cases T-144/07, T-147/07, T-148/07, T-149/07, T-150/07 and T-154/07 *ThyssenKrupp Liften Ascenseurs and Others* v *Commission*, and Case T-151/07 *Kone and Others* v *Commission* (see Press Release No 72/11)

when the decision binds the competent national court, which cannot call into question the validity of that decision.

In his Opinion of today, **the Advocate General considers, firstly, that the right of access to a tribunal does not preclude a national court from ruling on a claim in respect of damage sustained by the EU when the anti-competitive conduct which caused the damage has been established by a Commission decision.**

In that regard, Mr Cruz Villalón recalls that **the Brussels Commercial Court is exercising its judicial power in a context in which there is a division of tasks between national and EU courts**.

In that context, it is for the Court of Justice to decide on the validity of acts of the EU, including decisions adopted by the Commission. Thus, when a Commission decision is addressed to a particular person, that person may bring an action for annulment, challenging the validity of the decision, before the General Court and, in the last resort, before the Court of Justice (as has happened in this case). **The action for annulment before these Courts is therefore a procedure which allows there to be a comprehensive judicial review of the Commission's decision and which safeguards the effective judicial protection of the person concerned.**

It is for the national courts to declare and quantify the damage suffered by the EU as the result of anti-competitive conduct established by a Commission decision. Moreover, if in the course of those proceedings, the national court has doubts as to the validity of the Commission's decision, it will always be able to stay proceedings until the General Court or the Court of Justice confirms its validity.

Thus, **although the Brussels Commercial Court is bound by the finding of unlawful conduct made in the Commission's decision, that by no means implies that the judicial review of that decision has been restricted and that the parties do not have access to a tribunal.**

Secondly, the Advocate General concludes that the right to equality of arms does not preclude the Commission from bringing, on behalf of the EU, a claim for damages before the national courts, even though it was the Commission itself which previously conducted an infringement procedure which culminated in the decision that has formed the basis for the claim.

In that respect, the Advocate General recalls that the purpose of the principle of equality of arms is to ensure a balance between the parties to the proceedings, thus guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings. Hence, there is inequality when the court has information which favours one party to the detriment of the other, without the latter having any effective means of challenging it. Thus, in the Advocate General's view, the Commission – simply because it has obtained certain information during an earlier investigation which it has not made available to the court – is not necessarily in an advantageous situation that infringes the principle of equality of arms.

Thus, in this case, the Advocate General concludes that the information obtained by the Commission during the infringement procedure (information which, moreover, is not in the possession of all the defendants, because it may be information subject to professional secrecy) has not been produced to the Brussels Commercial Court. Indeed, in this case, the defendant undertakings have not shown that in the proceedings before the Belgian court the Commission has submitted any information other than that in the public version of its decision.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

Press contact: Christopher Fretwell ☎ (+352) 4303 3355