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I. INTRODUCTION

In February 2007, the European Commission (the "Commission") adopted an infringement decision finding that a number of manufacturers of lifts and escalators had engaged in cartel behavior contrary to Article 101 TFEU (the "Decision").[2] The Commission imposed fines totaling more than EUR 990 million. In June 2008, the Commission, on behalf of the European Union, brought an action in the Belgian Commercial Court seeking damages of around EUR 7 million for harm suffered in relation to that same cartel infringement, on the basis that a number of EU institutions had overpaid for lifts and escalators during the cartel period.

Is the Commission permitted to be the Judge and a Party in relation to the same proceeding? What does this mean for the balance between public and private enforcement of EU competition law? The European Court of Justice's responses to these questions in its preliminary ruling in *Otis* are explained and considered below.[3]

II. BACKGROUND AND ECJ JUDGMENT

Following complaints, the Commission, in 2004, began an investigation into the possible existence of a cartel among the four major European manufacturers of elevators and escalators, namely the Otis, Kone, Schindler, and ThyssenKrupp groups. The investigation culminated in the Decision, which held that the four manufacturers had infringed Article 81 EC (now Article 101 TFEU) by (1) allocating tenders and other contracts in Belgium, Germany, Luxembourg, and the Netherlands in order to share markets and fix prices; (2) agreeing on a compensation scheme in certain cases; (3) exchanging information on sales volumes and prices; and (4) participating in regular meetings and establishing other contacts in order to decide on the above-mentioned restrictions and implement them.

Several companies appealed the Decision, first to the EU General Court and subsequently to the European Court of Justice ("ECJ").[4] The appeals to the ECJ were either removed or dismissed.

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[2] Commission Decision C(2007) 512 of 21 February 2007 (Case COMP/E-1/38.823 – *Elevators and Escalators*).

[3] Case C-199/11 *Otis and Others* [2012] ECR I-0000 ("*Otis*").

[4] Cases T-141/07, T-142/07, T-145/07 and T-146/07 *General Technic-Otis and Others v Commission* [2011] ECR II-4977 and Case C-494/11 P *Otis Luxembourg and Others v Commission* [2012] ECR I-0000.

In 2008, the European Community, now the European Union (the "EU"), represented by the Commission, brought proceedings in Belgium, seeking, primarily, an order that certain elevator and escalator manufacturers (the "Defendants") pay the EU the provisional sum of EUR 7,061,688 (exclusive of interest and costs) in respect of the loss sustained by it as a result of the anticompetitive practices established in the Decision. Several EU institutions had concluded contracts with the Defendants for the installation, maintenance, and renewal of elevators and escalators in various buildings, located in Belgium and Luxembourg.

The Defendants requested that the Belgian Commercial Court refer to the ECJ under Article 267 TFEU the questions of (1) whether the EU may be represented by the Commission, and (2) whether the Commission's actions (namely penalizing the actions of the Defendants in the administrative phase and subsequently claiming damages) were reconcilable with Article 47 of the Charter on Fundamental Rights of the European Union (the right to a fair trial and equality of arms) ("Article 47 of the Charter") given, in particular, the fact that the Belgian Commercial Court is bound by EU law to follow the findings of fact and law contained in the Decision.

The Defendants argued, *inter alia*, that by acting as a judge and a party in relation to the same proceedings, the Commission had breached the *nemo judex in causa sua* principle and Article 47 of the Charter. In particular, the Defendants argued that:

- They were deprived of a fair hearing/access to an independent tribunal because the Belgian court charged with hearing the damages claim was bound to follow the Commission's own findings of fact under the *Masterfoods* doctrine[5] and Article 16 of Regulation 1/2003 and so the Commission was able to adopt findings that were binding as to the Defendant's liability; and
- The Commission was in a privileged position, having unique access to all the information required to establish the infringement from its administrative file. There was, so the Defendants alleged, no equality of arms between the parties.

The ECJ's responses to these arguments in its preliminary ruling are summarized below.

A. Judge And A Party In Relation To The Same Proceedings

As to whether the Commission was acting in breach of the *nemo judex in sua causa* principle and Article 47 of the Charter, the ECJ held that the decisions in *Manfredi*[6] and *Crehan*[7] emphasized that any person can rely on a breach of Article 101 TFEU before a national court and that the full effectiveness of Article 101 would be put at risk were it not open to any person to claim damages. In principle, therefore, the Commission enjoys the standing to claim damages against undertakings who breach antitrust rules.

That said, the Commission's standing in damages proceedings where it had also been a "judge" during the administrative phase was conditional upon Article 47 of the Charter being

[5] Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369.

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

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

observed. The question was, therefore, whether the Defendants had been afforded in relation to the Decision the safeguards required by Article 47 of the Charter.

The ECJ held that the Defendants obtained all of the safeguards required by Article 47 of the Charter because they were afforded the opportunity to **request** that the Decision be subject to comprehensive judicial review by the European courts; an opportunity they had in fact availed themselves of in this case.

The ECJ did not accept the argument that the scope of judicial review was limited because the Belgian Commercial Court was required by Article 16 of Regulation 1/2003 to follow the findings of fact and law established in the Decision. It held that that provision concerned the effective separation of powers and did nothing to hinder the level of judicial scrutiny that would attach to the Decision.

Similarly, the ECJ did not accept the argument that the scope of judicial review conducted by the European courts was insufficient because of the margin of discretion that those courts allow the Commission in economic matters. Affirming the judgments in *Chalkor*[8] and *KME,*[9] the ECJ held that the European courts:

- Need not refrain from reviewing the Commission's interpretation of information of an economic nature. Those courts must, among other things, not only establish whether the evidence relied on is factually accurate, reliable, and consistent but also ascertain whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it.
- Must establish of their own motion that the Commission has stated reasons for its decision and, among other things, that it has explained the weighting and assessment of the factors taken into account.
- Must carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward. In carrying out such a review, the courts cannot use the Commission's margin of discretion—either as regards the choice of factors taken into account or as regards the assessment of those factors—as a basis for dispensing with the conduct of an in-depth review of the law and of the facts.

The ECJ also reiterated the European courts' jurisdiction, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce, or increase the fine or penalty payment imposed. On this basis, and because the Member State courts were still required to assess causation and quantum, the ECJ held that the review provided for by the Treaties meets the requirements of the principle of effective judicial protection in Article 47 of the Charter (effectively side-stepping the argument that the inability to review and interpret economic

[8] Case C‑386/10 P *Chalkor v Commission* [2011] ECR I‑0000.

[9] Cases C-272/ 09 P and C-389/10 P *KME v Commission* [2011] ECR I-0000.

evidence differently from the Commission remains a fundamental deficiency in the level of review).[10]

The ECJ also dismissed the Defendants' objection that the standard of review was insufficient because the European courts are themselves EU institutions, relying on the independence and impartiality of the European courts.

B. Equality Of Arms

The ECJ dismissed the argument that the Commission had privileged or unique access to evidence (such that the litigants did not have equality of arms) on the basis that (1) the departments responsible for the damages claim, namely the Offices for Infrastructure and Logistics in Brussels and Luxembourg, did not have a right of privileged access to the confidential file of the Directorate-General for Competition and relied only on information contained in the non-confidential version of the Decision when preparing its damages claim, and (2) EU legislation precludes the Commission from using information on its file outside of the infringement proceedings.

The ECJ did not give any weight to the argument that the Commission was in a privileged position because the Decision was adopted by the entire College of Commissioners, pointing to the safeguards afforded by the system of judicial review described above.

III. COMMENTARY

A. Is the Commission Both the Judge and a Party?

It is easy to have sympathy with the Defendants in *Otis*. From their perspective, the Commission investigated their conduct, controlled the administrative procedure, found guilt against them, imposed a fine, adopted findings of fact and law against them that were binding on Member State courts, *and* commenced a damages claim against them in respect of those findings of law and fact. Put in this way, it is instinctive to allege that the Commission is both Judge and Party in the same proceedings.

As explained, the ECJ did not agree, holding that the right to access what it considered to be comprehensive judicial review ensured that the Defendants' right of access to a tribunal, as referred to in Article 47 of the Charter, was not infringed. Consequently, the Commission could not be said to be both Judge and a Party in its own cause. One can understand the ECJ's ruling to be that the system of judicial review meant that the Decision was, in a sense, no longer an autonomous decision *of the Commission* such as to engage the *nemo judex in causa sua* principle. There was no guarantee that the form of the Decision that was binding on Member States and the subject of the Commission's private damages claim would be that initially adopted by the Commission. It was a decision that was amenable to being, and in the case was, vetted, affirmed, and potentially amended by the European courts so as to provide the safeguards required by Article 47 of the Charter.

This is distinct from the fact, which the ECJ also mentioned, that the respective jurisdictions of the national court and the Commission are not coterminous. While the national

[10] *Otis*, §§37-67.

court is obliged to accept the existence of a prohibited agreement or practice as found in the Decision, there is no question of the Commission being a Judge and Party in its own cause when it comes to the national court assessing the existence of loss and of a direct causal link between the loss and the agreement or practice in question.

Leaving aside the question of whether the standard of judicial review is, given the margin of discretion afforded to the Commission in economic matters, in fact sufficient to satisfy the requirements of Article 47 of the Charter—which, as noted below, the ECJ has answered affirmatively in its recent judgments in *Chalkor*[11] and *KME*[12]—the ECJ's ruling gives rise to a number of interesting questions:

- In this case, the Commission's claim for damages was made on behalf of the Council of the European Union, the European Parliament, the European Economic and Social Committee, the Committee of the Regions of the European Union, the Publications Office of the European Union, and the Commission itself. No claim was made on behalf of the General Court or the ECJ (despite the fact that there are lifts in the building currently occupied by the European courts in Luxembourg—see below—which may or may not have been purchased during the cartel period). If the principle is that the Commission is not Judge and a Party in its own cause in national proceedings where the decision relied upon has been affirmed by the European courts, would it not follow that, in such cases, a claim brought on behalf of the European courts would lead to the European courts themselves being Judge and Party in their own cause? If so, must the European courts forgo the possibility to claim private damages in such a case and simply absorb any overcharges resulting from purchases of cartelized products and how does this fit with the objectives of ensuring access to justice and effective redress?

[11] Case C‑386/10 P *Chalkor v Commission* [2011] ECR I‑0000, §67.
[12] Case C-389/10 P *KME v Commission* [2011] ECR I-0000, §133.

- As stated above, the ECJ found that the Commission is not the Judge and a Party in relation to the same proceedings because it was possible to have the Decision examined and affirmed by the European courts and, in this case, the Defendants did so:

> …EU law **provides for** a system of judicial review of Commission decisions relating to proceedings under Article 101 TFEU which affords all the safeguards required by Article 47 of the Charter.
>
> In this connection, it must be stated that the legality of a Commission decision **may be reviewed** by the EU Courts under Article 263 TFEU. In this case, the defendants in the main proceedings, to whom the decision had been addressed, **did in fact bring actions** for the annulment of that decision, as has been recalled in paragraphs 20 to 22 of this judgment.[13] [Emphasis added]

The finding that the system of judicial review provided for by EU law satisfies the requirements of Article 47 of the Charter is consistent with the judgments in *Chalkor* and *KME*, and is logical insofar as the ECJ considers that Article 47 protects the right to a fair trial. But, what of Commission decisions that defendants elect not to appeal and are therefore not in fact reviewed and affirmed by the European courts? Would the ECJ have so readily accepted, in such a case, that the mere fact that a defendant *had the opportunity* to appeal the decision entails that the decision is Article 47-compliant, as it seems to suggest in *Otis*?

It seems difficult credibly to sustain that a decision which has not undergone review and affirmation is one that is, in any sense, no longer of the Commission's sole purview. In such a case, the allegation of the Commission being a judge in its own cause must be stronger. Of course, if the ECJ had distinguished the situations where a decision is actually appealed and where a defendant elects not to appeal, it might have created a situation where the Commission could be precluded from claiming damages based solely on a defendant's decision whether to appeal. The ECJ was perhaps mindful that a defendant should not be worse off for having elected to exercise the right afforded to them of judicial review of the Commission decision.

The answers to these questions are by no means clear and, given the peculiar facts required before the courts are likely to have an opportunity to consider these issues further, there is no guarantee that answers will be forthcoming. That said, it can not be excluded that the application of the ECJ's reasoning gives rise to some unconventional results.

B. Is the Balance Between Public and Private Enforcement of EU Competition Law Appropriate?

The Defendants' challenge to the Commission's role as private claimant raised again the question of how to balance the public and private enforcement of EU competition law, something the ECJ had previously evaluated in its preliminary ruling in *Pfleiderer*.[14] The ruling in *Otis* leaves a number of unanswered questions, however, as to the implications of the Commission's potential role as private litigant in the national courts.

[13] *Otis*, §§56-57.

[14] Case C-360/09 *Pfleiderer v Bundeskartellamt* [2011] ECR I-5161.

Pfleiderer was an ECJ preliminary ruling arising out of a decision of the German national competition authority (the Bundeskartellamt, or "BKA") finding that a number of European paper manufacturers had infringed EU competition law. Pfleiderer, a purchaser of paper, applied to the BKA for full access to its file, with a view to preparing a private damages action. The BKA supplied certain information, but refused to provide Pfleiderer with documents relating to the manufacturers' voluntary leniency applications. On appeal against the BKA's refusal, the German court referred a question to the ECJ for a preliminary ruling concerning the ability of private parties adversely affected by a cartel to gain access to leniency applications provided to a national competition authority.

The ECJ acknowledged the tension at the heart of the case. On the one hand, granting access to defendants' leniency statements to private claimants may, by facilitating such private claims, deter companies from making leniency applications in the first place, and such applications are an important tool in detecting and terminating infringements of the competition rules. On the other hand, granting access to such information would support private actions in the national courts, and such actions are an important element in the maintenance of effective competition in the EU.

The ECJ did not consider that, as a matter of principle, one of these considerations should have pre-eminence over the other. Rather, it ruled that there was a balance to be struck between promoting public enforcement through the protection of voluntary leniency statements and promoting private enforcement through the provision of access to such information, and that this balancing exercise ought to be undertaken by the national courts on a case-by-case basis.

The ECJ confirmed its approach in *Pfleiderer* in its recent preliminary ruling in *Donau Chemie*,[15] finding that an Austrian law that effectively precluded the national court from conducting the balancing test laid down in *Pfleiderer* in relation to leniency documents was incompatible with EU law (under Austrian law, the disclosure of a defendant's leniency documents required the defendant's consent, which was routinely withheld). The ECJ thereby affirmed the principle that one aspect of competition enforcement (*in casu*, protection of the public leniency program) could not simply be elevated over the other (*viz.*, ensuring that claimants have access to the information necessary for the effective enjoyment of their private right to damages).[16]

In *Otis*, the question before the ECJ was whether the Commission's role as public enforcer—and therefore author of the cartel infringement decision on which the damages claim was founded—should preclude it from bringing a private action *qua* consumer following on from that decision. The ECJ was hereby again being asked to rule on the relationship between the public and private aspects of EU competition law enforcement.

[15] Case C-536/11 *Bundeswettbewerbsbehörde v Donau Chemie AG and Ors* [2013] ECR I-0000.

[16] Note, however, that the Commission's recently-published Draft Directive on private actions proposes that defendants' leniency corporate statements and settlement submissions should never be disclosed to claimants in private actions; *see* Proposal for a Directive of the European Parliament and of the Council 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, COM(2013) 404, June 11, 2013, Article 6(1).

The ECJ's reasoning in *Otis* is encapsulated in five short paragraphs (§§40-44). The ECJ's key point is that damages actions can make a significant contribution to effective competition in Europe[17] and, therefore, cannot simply be subordinated to the interests of public enforcement. Thus, whether reconciling the protection of the leniency regime with the ability of private claimants to access the information necessary to bring a claim (*Pfleiderer*), or the role of the Commission as public enforcer with the right of the EU to obtain redress for damage it has suffered *qua* consumer (*Otis*), the ECJ has strived to find a balance between the public enforcement of EU competition rules and the private right to damages for competition infringements.

The judgments in *Pfleiderer*, *Donau Chemie*, and *Otis* have not, however, resolved all of the issues raised by the parallel existence of public and private competition law enforcement regimes. In particular, *Otis* leaves a number of unanswered questions concerning the possible role of the Commission as a private litigant.

- Consider, for instance, the ECJ's reasoning in Otis as to whether the Commission's role in finding the infringement upon which its private action is founded means that the Defendants did not enjoy equality of arms with the Commission. In rejecting the Defendants' complaint, the ECJ had regard to the fact that the Commission departments responsible for the national damages action—namely the Offices for "Infrastructure and Logistics" in Brussels and Luxembourg—"do not have a right of privileged access to the confidential file of the Directorate-General for Competition," which is responsible for the public infringement proceedings (§70). The Commission departments bringing the private action are therefore, on the ECJ's reasoning, effectively in the same position as the claimants in Pfleiderer as regards access to information.

  It would appear to follow that the Commission, *qua* claimant, could ask for access to documents on the Commission's file, *qua* public authority, and the Belgian court would be required to conduct the balancing test laid down by the ECJ in Pfleiderer in determining such a request. Indeed, it may well be that the Commission has to ask a defendant for copies of documents that are on the Commission's confidential file but to which the relevant Commission departments do not have access (e.g., the Commission's Statement of Objections).

  This also raises the question of in what sense the Commission is a party to the domestic proceedings within the meaning of the relevant national civil procedure rules. Accepting the dichotomy between, on the one hand, the Commission departments responsible for the national proceedings and, on the other hand, the Directorate-General for Competition responsible for the infringement proceedings, would a request for documents on the Commission's confidential case file be, within the meaning of the national civil procedure rules, a request for disclosure against a party to the proceedings or against a non-party?

[17] *Courage and Crehan*, *supra*, §27; cited in *Pfleiderer*, §29, and *Otis*, §42.

In many national jurisdictions, different procedural rules would apply depending on whether a request for disclosure is against a party or a non-party.[18] Indeed, from the outset of proceedings, would national procedural rules even accommodate the notion of the Commission being in one sense a party to the proceedings and in another sense a non-party? Insofar as the national court would simply regard "the Commission" as a party, could the Commission nonetheless argue that it is not subject to its ordinary disclosure obligations as a party in respect of documents on its confidential file (otherwise the national court would be acting contrary to the dichotomy endorsed by the ECJ in Otis)? Could the Commission (*qua* private claimant) ask the national court to make a request under Article 15(1) of Regulation 1/2003 for the Commission (*qua* public authority) to provide copies of documents? The practical implementation of the ruling in Otis for domestic proceedings involving the Commission is still largely to be worked out.

- Consider too that a private party may bring stand-alone proceedings for cartel damages in the national courts. If the Commission suspects the existence of a cartel that has harmed EU consumers (including the Commission and/or other EU institutions), can the Commission then choose among instigating infringement proceedings, *qua* public authority; commencing national stand-alone proceedings, *qua* private claimant; and doing both?

  The Commission is not under an obligation to investigate suspected infringements *qua* public authority,[19] but it is entitled *qua* private claimant to launch a stand-alone damages action; it would therefore be within the Commission's rights to choose only to do the latter. Would the position be different if the Commission has already launched an investigation into suspected anticompetitive behavior, but wished to launch pre-emptive stand-alone proceedings (say, to avoid a torpedo[20]) while its investigation was on-going? Would a national court faced with a torpedo claim even entertain negative declaration proceedings against the Commission while the Commission's own public investigation was on-going?[21]

The logic of the ECJ's position in *Otis* is that the Commission (or, at least, the Commission departments responsible for pursuing national damages claims) is in no different a position from any other private claimant, which implies that the Commission may indeed seek disclosure of confidential documents on the Commission's file, launch stand-alone proceedings,

[18] *See*, *e.g.*, Part 31 of the Civil Procedure Rules in England and Wales.

[19] Case T-24/90 *Automec v Commission* [1992] ECR II-2223, §76 ("[a]s the Commission is under no obligation to rule on the existence or otherwise of an infringement it cannot be compelled to carry out an investigation, because such investigation could have no purpose other than to seek evidence of the existence or otherwise of an infringement, which it is not required to establish").

[20] A "torpedo" is a claim by a putative defendant in a slow moving jurisdiction (commonly Italy) for a declaration that alleged anticompetitive conduct did not cause the putative claimant loss, which is aimed at precluding a claim against the putative defendant for damages in light of the *lis pendens* rule of the Brussels Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 27).

[21] *Cf. Conex Banninger Ltd v European Commission* [2010] EWHC 1978 (Ch), in which the High Court of England and Wales refused to hear a claim for declaratory relief concerning an on-going Commission investigation.

and the like. The significance of this may not be readily apparent if, as has been the case until now, the Commission rarely pursues claims for damages *qua* consumer in the national courts.

However, as large international organizations purchasing a wide variety of goods and services, the Commission and other EU institutions are potential claimants in a number of industries that have been, or may be, affected by cartel behavior, and the EU institutions arguably have a responsibility—to EU taxpayers—to seek to recover damages where they have been harmed by others' illegal conduct. It is, therefore, only a matter of time until these tensions will have to be addressed.

IV. CONCLUSION

The ECJ's ruling in *Otis* was directly concerned with a quite rare category of case in which the EU believes that it has suffered loss—*qua* consumer—as a result of a competition infringement and relies in a private damages action on a Commission decision establishing that infringement. However, the implications of the ruling potentially go much wider, both in terms of how judicial scrutiny effectively dissociates an infringement decision from the particular institution—*viz.* the Commission—adopting it (justifying the finding that the Commission cannot be said to have been a judge in its own cause when it seeks to rely on that decision) and in terms of how the Commission is to be treated as two distinct entities, pursuing public and private competition enforcement roles respectively, which gives rise to a number of unresolved questions about the role of the Commission in national damages claims. Expect the *Otis* ruling to crop up more often than just in cases where there is a claim for damages by an EU institution.