



EU AND COMPETITION LAW

CARTELS: COMMISSION MAY GET COMPENSATION, SAYS AG

On 26 June 2012, the Advocate General Cruz Villalón presented his Opinion on the possibility of the European Commission claiming damages as a customer from four lift companies that it found guilty five years ago of operating a cartel¹.

In February 2007, the Commission imposed fines totalling more than EUR 990 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.

Following this decision, the Commission started proceedings before the *Rechtbank van koophandel te Brussel* against Otis, Kone, Schindler and Thyssenkrupp seeking EUR 7 million in damages. The Commission maintained that the European Institutions had sustained a financial loss in public procurement procedures as a result of the cartel in which the undertakings had taken part, as the price established under the public procedures was allegedly higher than the market price as a consequence of such cartel.

On 28 April 2011, the *Rechtbank van koophandel te Brussel* decided to stay proceedings and sought a preliminary ruling from the CJ on the possibility of the Commission – as the EU's representative

– bringing 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, in light of the EU Charter of Fundamental Rights and the European Convention of Human Rights.

On his non-binding Opinion, the Advocate General considered that Article 47 of the EU Charter of Fundamental Rights, that establishes a right to an effective remedy and to a fair trial, is not precluded by the fact that the competent national court cannot call into question the validity of the underlying Commission's decision.

The Advocate General argued that it is upon the CJ to decide whether decisions adopted by the Commission imposing fines to a cartel are valid. This possibility to review any Commission's decision safeguards the effective judicial protection of the affected companies. If the national court has any doubts on the validity of the Commission's decision, it can suspend proceedings until a final decision is rendered by the CJ.

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International Tax Review - Tax Awards 2006, 2008

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¹Advocate General's Opinion in Case C-199/11 *European Union v Otis NV and Others*.

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July 2012

If this Opinion is upheld by the CJ it may signal a new era on the enforcement of Competition Law, where public institutions and private undertakings may start claiming damages on civil proceedings more often.

The Advocate General also considered that the claim for damages did not infringe the principle of equality of arms in civil proceedings. The undertakings had not shown that in the proceedings before the Belgian court the Commission had submitted or used any confidential information other than what was public to all concerned parties. The Advocate General also considered that establishing a duty of the Commission to demonstrate that none of such information was used would amount to a *probatio diabolica*.

PRACTICAL IMPLICATIONS:

The case marked the first time that Commission sought damages from a cartel citing the harm it suffered as a consumer. If the judges at the CJ follow the adviser's non-binding opinion, it will be an important step in establishing a private enforcement system for competition rules. If this Opinion is upheld by the CJ it may signal a new era on the enforcement of Competition Law, where public institutions and private undertakings may start claiming damages on civil proceedings more often.

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