



Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

6 November 2012*

(Representation of the European Union before national courts — Articles 282 EC and 335 TFEU — Claim for damages in respect of loss caused to the European Union by a cartel — Article 47 of the Charter of Fundamental Rights of the European Union — Right to fair hearing — Right of access to a tribunal — Equality of arms — Article 16 of Regulation No 1/2003)

In Case C-199/11,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Rechtbank van koophandel te Brussel (Belgium), made by decision of 18 April 2011, received at the Court on 28 April 2011, in the proceedings

Europese Gemeenschap

v

Otis NV,

General Technic-Otis Sàrl,

Kone Belgium NV,

Kone Luxembourg Sàrl,

Schindler NV,

Schindler Sàrl,

ThyssenKrupp Liften Ascenseurs NV,

ThyssenKrupp Ascenseurs Luxembourg Sàrl,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, R. Silva de Lapuerta, L. Bay Larsen, A. Rosas, E. Jarašiūnas, Presidents of Chambers, E. Levits, A. Ó Caoimh, J.-C. Bonichot, A. Arabadjiev (Rapporteur), A. Prechal and C.G. Fernlund, Judges,

Advocate General: P. Cruz Villalón,

Registrar: M. Ferreira, Principal Administrator,

* Language of the case: Dutch.

having regard to the written procedure and further to the hearing on 14 March 2012,

after considering the observations submitted on behalf of:

- Otis NV, by H. Speyart, S. Brijs and G. Borremans, advocaten,
- Kone Belgium NV, by D. Paemen, avocat, D. Vermeiren, advocaat, and T. Vinje, Solicitor,
- Schindler NV, by P. Wytinck, advocaat,
- ThyssenKrupp Liften Ascenseurs NV, by O. Brouwer, N. Lorjé and A. Pliego Selie, advocaten,
- the European Commission, by H. Krämer and C. ten Dam, acting as Agents,
- the Council of the European Union, by B. Driessen, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 26 June 2012,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 282 EC, 335 TFEU and 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and of Articles 103 and 104 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1), as amended by Council Regulation (EC, Euratom) No 1995/2006 of 13 December 2006 (OJ 2006 L 390, p. 1; 'the Financial Regulation').
- 2 The reference has been made in proceedings between (i) the Europese Gemeenschap (European Community), represented by the European Commission, and (ii) Otis NV, Kone Belgium NV, Schindler NV, ThyssenKrupp Liften Ascenseurs NV, General Technic-Otis Sàrl, Kone Luxembourg Sàrl, Schindler Sàrl and ThyssenKrupp Ascenseurs Luxembourg Sàrl, manufacturers of elevators and escalators, concerning an action for damages in respect of loss sustained as a result of an infringement by those companies of Article 81 EC.

Legal context

European Union law

The Treaties

- 3 Article 282 EC provided:

'In each of the Member States, the Community shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Community shall be represented by the Commission.'

- 4 On 1 December 2009, upon entry into force of the FEU Treaty, Article 282 EC was replaced by Article 335 TFEU, which is worded as follows:

‘In each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws; it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings. To this end, the Union shall be represented by the Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.’

- 5 Article 339 TFEU provides:

‘The members of the institutions of the Union, the members of committees and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy, in particular information about undertakings, their business relations or their cost components.’

- 6 Article 47 TEU is worded as follows:

‘The Union shall have legal personality.’

Regulation (EC) No 1/2003

- 7 Recital 37 in the preamble to 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 (OJ 2003 L 1, p. 1) states:

‘This Regulation respects the fundamental rights and observes the principles recognised in particular by the [Charter]. Accordingly, this Regulation should be interpreted and applied with respect to those rights and principles.’

- 8 Article 16 of Regulation No 1/2003, entitled ‘Uniform application of Community competition law’ provides in paragraph 1:

‘When national courts rule on agreements, decisions or practices under Article 81 [EC] or Article 82 [EC] which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under Article 234 [EC].’

- 9 Article 28 of that regulation, entitled ‘Professional secrecy’, provides:

‘1. Without prejudice to Articles 12 and 15, information collected pursuant to Articles 17 to 22 shall be used only for the purpose for which it was acquired.

2. Without prejudice to the exchange and to the use of information foreseen in Articles 11, 12, 14, 15 and 27, the Commission and the competition authorities of the Member States, their officials, servants and other persons working under the supervision of these authorities as well as officials and civil servants of other authorities of the Member States shall not disclose information acquired or exchanged by them pursuant to this Regulation and of the kind covered by the obligation of professional secrecy. This obligation also applies to all representatives and experts of Member States attending meetings of the Advisory Committee pursuant to Article 14.’

The Financial Regulation

10 Under Article 50 of the Financial Regulation, the Commission is to confer on the other institutions the requisite powers for the implementation of the sections of the budget relating to them.

11 Pursuant to Article 59 of the Financial Regulation:

‘1. The institution shall perform the duties of authorising officer.

...

2. Each institution shall lay down in its internal administrative rules the staff of an appropriate level to whom it delegates in compliance with the conditions in its rules of procedure the duties of authorising officer, the scope of the powers delegated and the possibility for the persons to whom these powers are delegated to sub delegate them.

...’.

12 Under Article 60(1) of the Financial Regulation, the authorising officer is to be responsible in each institution for implementing revenue and expenditure in accordance with the principles of sound financial management and for ensuring that the requirements of legality and regularity are complied with.

13 Article 103 of the Financial Regulation provides as follows:

‘Where the award procedure proves to have been subject to substantial errors, irregularities or fraud, the institutions shall suspend the procedure and may take whatever measures are necessary, including the cancellation of the procedure.

Where, after the award of the contract, the award procedure or the performance of the contract prove to have been subject to substantial errors, irregularities or fraud, the institutions may, depending on the stage reached in the procedure, refrain from concluding the contract or suspend performance of the contract or, where appropriate, terminate the contract.

Where such errors, irregularities or fraud are attributable to the contractor, the institutions may in addition refuse to make payments, may recover amounts already paid or may terminate all the contracts concluded with this contractor, in proportion to the seriousness of the errors, irregularities or fraud.’

14 Article 104 of that regulation provides that:

‘The Community institutions shall be deemed to be contracting authorities in the case of contracts awarded on their own account. ...’

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

15 In accordance with 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 (OJ 2004 C 101, p. 54), ‘... [t]he Commission will not transmit to national courts information voluntarily submitted by a leniency applicant without the consent of that applicant’.

Belgian law

16 Article 17 of the code on civil procedure provides that:

‘An action shall not be admissible if the claimant does not have *locus standi* and sufficient legal interest to bring it.’

17 Article 1382 of the Civil code provides:

‘Any act of an individual, which causes damage to another, obliges the one whose fault has caused it, to make good the damage.’

The main proceedings and the questions referred for a preliminary ruling

Background to the main proceedings

18 After receiving a number of 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 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) (‘the decision of 21 February 2007’).

19 In that decision the Commission found that the undertakings to which it was addressed, including the defendants in the main proceedings, had infringed Article 81 EC by allocating tenders and other contracts in Belgium, Germany, Luxembourg and the Netherlands in order to share markets and fix prices, by agreeing on a compensation scheme in certain cases, by exchanging information on sales volumes and prices and by participating in regular meetings and by establishing other contacts in order to decide on the abovementioned restrictions and implement them. The Commission imposed fines totalling more than EUR 990 million in respect of those infringements.

20 Several companies, including the defendants in the main proceedings, brought actions for annulment of that decision before the General Court of the European Union.

21 By judgments of 13 July 2011 in Case T-138/07 *Schindler Holding and Others v Commission* [2011] ECR II-4819, Cases T-141/07, T-142/07, T-145/07 and T-146/07 *General Technic-Otis v Commission* [2011] ECR II-4977, Cases T-144/07, T-147/07 to T-150/07 and T-154/07 *ThyssenKrupp Liften Ascenseurs v Commission* [2011] ECR II-5129 and Case T-151/07 *Kone and Others v Commission* [2011] ECR II-5313, the General Court dismissed those actions, with the exception of the actions brought by the ThyssenKrupp group, which it upheld in part with regard to the amounts of the fines.

22 The applicants went on to bring appeals before the Court of Justice, seeking to have those judgments set aside. The appeals were registered under case numbers C-493/11 P, C-494/11 P, C-501/11 P, C-503/11 P to 506/11 P, C-510/11 P, C-516/11 P and C-519/11 P. By orders of 24 April and 8 May 2012, the President of the Court ordered Cases C-503/11 P to 506/11 P, C-516/11 P and C-519/11 P to be removed from the register of the Court. By orders of 15 June 2012 in *United Technologies v Commission* and *Otis Luxembourg and Others v Commission*, the Court dismissed the appeals in Cases C-493/11 P and C-494/11 P. Cases C-501/11 P and C-510/11 P are pending before the Court.

Proceedings before the referring court

- 23 By an originating summons dated 20 June 2008, the European Community, now the European Union ('the EU'), represented by the Commission, brought proceedings before the referring court, seeking, primarily, an order that the defendants in the main proceedings 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 anti-competitive practices established in the decision of 21 February 2007. The EU had concluded with the defendants in the main proceedings several contracts for the installation, maintenance and renewal of elevators and escalators in various buildings, located in Belgium and Luxembourg, of the Council of the European Union, the European Parliament, the Commission, the European Economic and Social Committee, the Committee of the Regions of the European Union and the Publications Office of the European Union. In the alternative, the EU requested that an expert be appointed in order to determine, inter alia, the entirety of the loss sustained.
- 24 The defendants in the main proceedings dispute the Commission's capacity to act as the EU's representative in the absence of express authorisation to that effect from the other EU institutions that have allegedly suffered harm as a result of the infringement in question. They have also maintained that there is an infringement of the principles of judicial independence and equality of arms on account of the special role played by the Commission in proceedings relating to infringements of Article 81(1) EC. They submit that, if account is taken of the fact that, under Article 16 of Regulation No 1/2003, the decision of 21 February 2007 is binding on the referring court, there is also an infringement of the principle that no one can be a judge in his own cause (*nemo iudex in sua causa*).
- 25 The referring court has declared that it does not have jurisdiction with regard to the loss caused by the defendants in the main proceedings which are established in Luxembourg.
- 26 In those circumstances, the Rechtbank van koophandel te Brussel (Brussels Commercial Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- '(1) (a) The Treaty states in Article 282, now Article [3]35 [TFEU], that the [EU] is to be represented by the Commission. Article 335 TFEU, on the one hand, and Articles 103 and 104 of the Financial Regulation, on the other, state that, in administrative matters relating to their operation, the institutions concerned are to represent the [EU], with the possible result that [it] is the institutions, whether or not exclusively, ... which may be parties to legal proceedings. There is no doubt that receipt by, amongst others, contractors of payment of inflated prices as a result of collusive practices comes within the concept of fraud. In Belgian national law there is the principle of '*Lex specialis generalibus derogat*'. To the extent to which that principle of law also finds acceptance in [EU] law, is it then not the case that the initiative for bringing the claims (except where the Commission itself was the contracting authority) was vested in the institutions concerned?
- (b) (Subsidiary question) Ought the Commission not at least to have been conferred with authorisation by the institutions to represent them for the purpose of safeguarding their interests before the courts?
- (2) (a) Article 47 of the [Charter] and Article 6(1) of the European Convention on Human [Rights] and Fundamental Freedoms [signed in Rome on 4 November 1950 (the 'ECHR')] guarantee every person's right to a fair trial as well as the related principle that no one can be a judge in his own cause. Is it reconcilable with that principle if the Commission, in an initial phase, acts as the competition authority and penalises the conduct complained of – namely, the formation of a cartel – as a breach of Article 81 [EC], now Article 101 [TFEU] after it has itself conducted the investigation in that regard, and subsequently, in a second phase,

prepares the proceedings for seeking compensation before the national court and takes the decision to bring those proceedings, while the same Member of the Commission is responsible for both matters, which are connected, *a fortiori* as the national court seized of the matter cannot depart from the decision imposing penalties?

- (b) (Subsidiary question) If the answer to Question 2(a) is in the [negative], (there is irreconcilability), how then must the victim (the Commission and/or the institutions and/or the [EU]) of an unlawful act (the formation of the cartel) assert its entitlement to compensation under [EU] law, which is likewise a fundamental right?’

The questions referred for a preliminary ruling

First question

- 27 By its first question, the referring court asks, in essence, whether Articles 282 EC and 335 TFEU must be interpreted as meaning that the Commission is empowered to represent the EU before a national court in a civil action for damages in respect of loss caused to the EU by an agreement or practice prohibited by Articles 81 EC and 101 TFEU which may have affected certain public contracts awarded by various EU institutions and bodies, although it does not have authorisation from the other institutions or bodies concerned to represent them.
- 28 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.
- 29 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.
- 30 It is clear from the wording of Article 282 EC that the Community may be a party to legal proceedings in each of the Member States and that, for that purpose, it is to be represented by the Commission.
- 31 The defendants in the main proceedings contend, however, that Article 282 EC is only a general rule, from which Articles 274 EC and 279 EC derogate. They argue that the latter provisions have been implemented by the Financial Regulation, Articles 59 and 60 of which authorise each EU institution to implement its own budgetary items. They also maintain that it follows from Articles 103 and 104 of the Financial Regulation that it falls to each of those institutions – if they consider themselves to have suffered harm as a result of the infringement in question – to bring an action for damages, given that most of the contracts were awarded in their own name and on their own behalf.
- 32 It is to be noted in that regard that Articles 274 EC and 279 EC, and also the provisions of the Financial Regulation, determine, inter alia, the powers of the institutions to establish and implement the budget. By contrast, Article 282 EC confers legal capacity on the Community and governs the way it is represented, inter alia, before the courts of the Member States. The question of Community representation before those courts is distinct from the question concerning measures for budgetary implementation adopted by a Community institution. For that reason, the principle *lex specialis generalibus derogat* is of no relevance here.
- 33 With regard, in particular, to Articles 103 and 104 of the Financial Regulation, to which the referring court alludes when formulating its first question, it must be stated that those provisions contain rules relating to the award and enforcement of public contracts and not to the representation of the EU before the courts of the Member States.

- 34 It follows that the Commission had authority, under Article 282 EC, to represent the Community before the referring court.
- 35 So far as Article 335 TFEU is concerned, it is to be noted that the FEU Treaty contains no transitional provisions concerning the representation of the EU in proceedings which were brought before the courts of the Member States prior to that Treaty's entry into force but which were still pending thereafter. In those circumstances, the relevant provision governing that representation is Article 282 EC, since the main proceedings were commenced before the entry into force of the FEU Treaty.
- 36 In view of the foregoing considerations, the answer to the first question is that EU law must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the Commission is not precluded from representing the EU before a national court hearing a civil action for damages in respect of loss caused to the EU by an agreement or practice prohibited by Articles 81 EC and 101 TFEU which may have affected certain public contracts awarded by various institutions and bodies of the EU, there being no need for the Commission to have authorisation for that purpose from those institutions and bodies.

Second question

- 37 By its second question, the referring court asks, in essence, whether Article 47 of the Charter precludes the Commission from bringing an action, on behalf of the EU, before a national court 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 81 EC.
- 38 In particular, the referring court entertains doubts, in the first place, as to whether, in such an action, the right to a fair hearing, laid down in Article 47 of the Charter and Article 6 of the ECHR, is infringed on account of the fact that, under Article 16(1) of Regulation No 1/2003, a Commission decision relating to a proceeding under Article 81 EC is binding on that court. The referring court states that a decision adopted by one of the parties to the dispute requires it to accept the finding of an infringement of Article 81 EC, which thus prevents the national court from considering in its absolute discretion one of the elements conferring entitlement to compensation, namely the occurrence of an event giving rise to damage (a 'harmful event').
- 39 The referring court also wishes to ascertain whether, in the context of such an action, the Commission is not both judge and party in its own cause in breach of the *nemo iudex in sua causa* principle.
- 40 The Court has already had occasion to state that any person can rely on a breach of Article 81 EC before a national court and therefore rely on the invalidity of an agreement or practice prohibited under that article (see Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, paragraph 59).
- 41 As regards, in particular, the possibility of seeking compensation for loss caused by a contract or conduct liable to restrict or distort competition, it should be recalled that the full effectiveness of Article 81 EC and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC 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 (see Case C-453/99 *Courage and Crehan* [2001] ECR I-6297, paragraph 26, and *Manfredi and Others*, paragraph 60).
- 42 Such a right in fact strengthens the working of the EU competition rules and discourages agreements or practices, frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the EU (*Courage and Crehan*, paragraph 27).

- 43 It follows that any person can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81(1) EC (see *Manfredi and Others*, paragraph 61).
- 44 The EU, therefore, also enjoys that right.
- 45 When that right is exercised, however, the fundamental rights of the defendants, as safeguarded, inter alia, by the Charter, must be observed. The provisions of the Charter are addressed, pursuant to Article 51(1) thereof, both to the institutions, bodies, offices and agencies of the EU and to the Member States when they are implementing EU law.
- 46 It must be borne in mind in that regard that the principle of effective judicial protection is a general principle of EU law, to which expression is now given by Article 47 of the Charter (see Case C-279/09 *DEB* [2010] ECR I-13849, paragraphs 30 and 31; order in Case C-457/09 *Chartry* [2011] ECR I-819, paragraph 25; and Case C-69/10 *Samba Diouf* [2011] ECR I-7151, paragraph 49).
- 47 Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47 (Case C-386/10 P *Chalkor v Commission* [2011] ECR I-13085, paragraph 51).
- 48 The principle of effective judicial protection laid down in Article 47 of the Charter comprises various elements; in particular, the rights of the defence, the principle of equality of arms, the right of access to a tribunal and the right to be advised, defended and represented.
- 49 With regard, in particular, to the right of access to a tribunal, it must be made clear that, for a ‘tribunal’ to be able to determine a dispute concerning rights and obligations arising under EU law in accordance with Article 47 of the Charter, it must have power to consider all the questions of fact and law that are relevant to the case before it.
- 50 It is true in that respect that, according to the Court’s case-law (Case C-344/98 *Masterfoods and HB* [2000] ECR I-11369, paragraph 52), which is now given legislative expression in Article 16 of Regulation No 1/2003, when national courts rule on agreements, decisions or practices under, inter alia, Article 101 TFEU which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.
- 51 That rule also applies when national courts are hearing an action for damages for loss sustained as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 101 TFEU.
- 52 An application of the EU competition rules is thus based on an obligation of sincere cooperation between the national courts, on the one hand, and the Commission and the EU Courts, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty (*Masterfoods and HB*, paragraph 56).
- 53 It must be borne in mind in that regard that it is the EU Courts – not the courts of the Member States – which have exclusive jurisdiction to review the legality of the acts of the EU institutions. National courts do not have power to declare such acts invalid (see, to that effect, Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraphs 12 to 20).
- 54 The rule that national courts may not take decisions running counter to a Commission decision relating to a proceeding under Article 101 TFEU is thus a specific expression of the division of powers, within the EU, between, on the one hand, national courts and, on the other, the Commission and the EU Courts.

- 55 That rule does not mean, however, that the defendants in the main proceedings are denied their right of access to a tribunal, as referred to in Article 47 of the Charter.
- 56 Indeed, 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.
- 57 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.
- 58 Those defendants maintain, however, that the review of legality carried out by the EU Courts under Article 263 TFEU in the sphere of competition law is insufficient because of, inter alia, the margin of discretion which those Courts allow the Commission in economic matters.
- 59 The Court of Justice has stated in this connection that, whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the EU Courts must 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 (see *Chalkor v Commission*, paragraph 54 and case-law cited).
- 60 The EU Courts must also 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 (see, to that effect, *Chalkor v Commission*, paragraph 61).
- 61 The EU Courts must also 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 in the application of the criteria mentioned in the Commission notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No 1/2003' (OJ 2006 C 210, p. 2) 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 (*Chalkor v Commission*, paragraph 62).
- 62 Finally, the review of legality is supplemented by the unlimited jurisdiction which the EU Courts were afforded by Article 17 of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959 to 1962, p. 87) and which is now recognised by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU. That jurisdiction empowers the Courts, 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 (*Chalkor v Commission*, paragraph 63 and case-law cited).
- 63 The review provided for by the Treaties thus involves review by the EU Courts of both the law and the facts, and means that they have the power to assess the evidence, to annul the contested decision and to alter the amount of a fine. The review of legality provided for in Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for in Article 31 of Regulation No 1/2003, therefore meets the requirements of the principle of effective judicial protection in Article 47 of the Charter (see, to that effect, *Chalkor v Commission*, paragraph 67).

- 64 As to the objection raised by the defendants in the main proceedings that the power of review is conferred on the Court of Justice, whose independence they claim is undermined on the ground that the Court is itself an EU institution, suffice it to state that it is wholly unfounded in the light of all the safeguards laid down in the Treaties, which ensure the independence and impartiality of the Court of Justice, and the fact that all judicial bodies necessarily form part of the State or supranational organisation to which they belong, a fact which on its own is not capable of entailing an infringement of Article 47 of the Charter or Article 6 of the ECHR.
- 65 Finally, a civil action for damages, such as the action before the referring court, requires, as can be seen from the order for reference, not only that a harmful event be found to have occurred, but also that loss and a direct link between the loss and that harmful event be established. Whilst it is true that, because of its obligation not to take decisions running counter to a Commission decision finding an infringement of Article 101 TFEU, the national court is required to accept that a prohibited agreement or practice exists, the existence of loss and of a direct causal link between the loss and the agreement or practice in question remains, by contrast, a matter to be assessed by the national court.
- 66 Indeed, even when the Commission has in its decision determined the precise effects of the infringement, it still falls to the national court to determine individually the loss caused to each of the persons to have brought an action for damages. Such an assessment is not contrary to Article 16 of Regulation No 1/2003.
- 67 In view of all the foregoing considerations, the Commission cannot be regarded as judge and party in its own cause in the context of a dispute such as that in the main proceedings.
- 68 The referring court asks, in the second place, whether, in a civil action such as the one before it, there is a breach of the principle of equality of arms because the Commission itself conducted the investigation relating to the infringement in question.
- 69 The defendants in the main proceedings contend that the Commission is, on that account, in a privileged position compared with them, which has enabled it to gather and use information – including information that is confidential and thus protected by business secrecy – which is not available to all the defendants.
- 70 The Commission's response, in the context of the present reference, is that, when preparing the action in the main proceedings, it made use only of information in the public version of the decision of 27 February 2007. The Commission also explains that the departments responsible for the main proceedings, 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. For that reason, the Commission is, it submits, on an equal footing with every other litigant.
- 71 The principle of equality of arms, which is a corollary of the very concept of a fair hearing (Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533, paragraph 88), implies that each party must be afforded a reasonable opportunity to present his case, including his evidence, under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.
- 72 As the Advocate General has observed in point 58 of his Opinion, the aim of equality of arms is to ensure a balance between the parties to proceedings, guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings. Conversely, the harm which a lack of balance will be likely to cause must, as a rule, be proved by the person who has suffered it.

- 73 It emerges from the order for reference that the information to which the defendants in the main proceedings refer has not been provided to the national court by the Commission, the latter having also explained that it has relied only on the information available in the non-confidential version of the decision finding an infringement of Article 81 EC. In such circumstances a breach of the principle of equality of arms is therefore precluded.
- 74 The defendants in the main proceedings argue that the balance between the parties has been jeopardised because the Commission conducted the investigation into the infringement of Article 101 TFEU with the aim of subsequently claiming compensation for the loss sustained as a result of that infringement. That argument is belied by the prohibition, set out in Article 28(1) of Regulation No 1/2003, on using information gathered in the course of the investigation for purposes other than those of the investigation.
- 75 Nor does the fact that both the decision of 27 February 2007 and the decision to bring the action for damages in the main proceedings were taken by the College of Commissioners call the foregoing considerations in question, since EU law contains a sufficient number of safeguards to ensure that the principle of equality of arms is observed in such an action – for example, the safeguards deriving 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.
- 76 Finally, nor can the Court accept the arguments which the defendants in the main proceedings base on the judgment in *Yvon v France*, No 44962/98, ECHR 2003-V. The factors which led the European Court of Human Rights to make a finding of infringement of Article 6 ECHR – which include, inter alia, the considerable impact of the Government Commissioner’s submissions on the assessment of the court dealing with expropriation cases and the rules concerning the Government Commissioner’s access to, and use of, relevant information – were not accompanied, unlike the factors characterising the case in the main proceedings here, by judicial review or safeguards comparable or equivalent to those mentioned in paragraphs 63 and 75 of this judgment.
- 77 In view of the foregoing considerations, the answer to the second question is that Article 47 of the Charter does not preclude the Commission 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 81 EC or Article 101 TFEU.

Costs

- 78 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

- 1. European Union law must be interpreted as meaning that, in circumstances such as those at issue in the main proceedings, the European Commission is not precluded from representing the European Union before a national court hearing a civil action for damages in respect of loss caused to the European Union by an agreement or practice prohibited by Articles 81 EC and 101 TFEU which may have affected certain public contracts awarded by various institutions and bodies of the European Union, there being no need for the Commission to have authorisation for that purpose from those institutions and bodies.**

2. **Article 47 of the Charter of Fundamental Rights of the European Union does not preclude the European Commission from bringing an action before a national court, on behalf of the European Union, for damages in respect of loss sustained by the Union as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 81 EC or Article 101 TFEU.**

[Signatures]