

Representing the European Union in Follow-On Actions for Damages: A Battle between the EU Institutions

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I. Introduction

Brussels is home to many of the European institutions and agencies, occupying an approximate triangle between *Brussels Park*, *Cinquantenaire Park*¹ and *Leopold Park*. The *European Quarter*, as is the unofficial name of this area, is dominated by vast, modern and prolific buildings that contain 45 lifts and 12 escalators. Our story begins with this simple and seemingly unimportant fact. However, the future implications of this mundane detail were hard to predict. The facts that led to the current discussion date back to early 2004, when the Commission decided to start an investigation into the lifts and escalators markets on its own initiative, using information brought to its attention in ‘a number of complaints’.² This investigation culminated in the adoption of a Decision in early February 2007, finding that four manufacturers of lifts and escalators, i.e. the *Otis*, *KONE*, *Schindler* and *ThyssenKrupp* groups, ran illegal cartels in the Benelux countries and Germany, at least during the period from 1995 till 2004.³ The companies allocated tenders and other contracts for the sale, installation, maintenance and modernisation of lifts and escalators with the aim of freezing market shares and fixing prices and thus, they were fined just over 992 million in

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¹ French for "Park of the Fiftieth Anniversary".

² Case C-199/11 *EuropeseGemeenshcap v Otis and Others* (CJEU, 6 November 2012), para 18.

³ *PO/Elevators and Escalators* (Case COMP/E-1/38.823) Commission Decision C (2007) 512 final, of 27 February 2007.

total. The undertakings involved appealed this Decision to the General Court, which rejected all of their arguments, although it eventually reduced *ThyssenKrupp*'s fine.⁴ Following that judgment, *Otis* lodged an appeal to the Court of Justice of the European Union (CJEU) against the General Court's ruling in which it seeks a reduction of its fine.⁵

The European Commission (Commission), as the representative of the European Union (EU), brought an action for damages before the Brussels Commercial Court (Rechtbank).⁶ The Commission argued that overpriced contracts were concluded between the EU institutions and the four companies regarding the installation, maintenance and renovation of escalators and lifts in their buildings. In reply, the lift-makers disputed 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'.⁷ They also claimed a lack of impartiality of the Belgian court and violation of the principle of equality of arms due to the particular position that the Commission occupies in the context of article 101 TFEU proceedings.⁸ In light of these arguments, the Belgian court sent a preliminary reference to the CJEU.⁹ Advocate General (AG) Villalón handed down his Opinion¹⁰ in this case on 26 June 2012. In an impressive demonstration of efficiency and rapidity, the Grand Chamber of the CJEU pronounced its judgement on 6 November 2012.¹¹

The two preliminary questions submitted by the referring court concern the legal representation of the Union before national courts and the independence of the judiciary and the equality of arms in a tort action in a

⁴ Joined Cases T-141/07, T-142/07, T-145/07 and T-146/07 *General Technic-Otis and Others v European Commission* [2011] OJ C 269.

⁵ Case C-494/11 P *OtisLuxembourg Sàrl and Others v European Commission* OJ 2011 C347/18.

⁶ Case C-199/11 *Otis and Others v Commission* (CJEU, 6 November 2012); Opinion of AG Villalón, paras 10 and 13.

⁷ Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 24.

⁸ *ibid.*

⁹ Reference for a preliminary ruling from the Rechtbank van koophandel, Brussel (Belgium), lodged on 28 April 2011 — European Union, represented by *the European Commission v Otis NV and Others*, Case C-199/11, OJ 2011/C 219/03

¹⁰ Case C-199/11 *Otis and Others v Commission* (CJEU, 6 November 2012), Opinion of AG Villalón.

¹¹ Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012).

civil court respectively. The analysis of these two issues forms the two main parts of this article, followed by some concluding remarks.

II. Representing the Union before National Courts: A Role for the Commission or for the Institutions?

Prior to the entry into force of the Lisbon Treaty,¹² article 282 EC (now article 335 TFEU) formed the basis for the legal representation of the Union. This article was interpreted as requiring the Commission to grant a mandate to the EU institution that wanted to bring an action before a national court.¹³ With that in mind, the novelty of the *Otis* case is that it constitutes the first time that the Commission lodged itself a complaint before a national court as the legal representative of the Union.¹⁴ This choice of the Commission choice raised the issue of the legal representation of the Union before the national courts and led the Belgian court to send the reference for a preliminary ruling to the CJEU. Thus, in its first question, the Rechtbank asked the following: although article 282 EC states that the Commission is the legal representative of the Union, shouldn't the European institutions themselves be parties to proceedings in national courts in accordance firstly, with article 335 TFEU and articles 101 and 104 of the Financial Regulation¹⁵ and secondly, with the principle "*lex specialis generalibus derogat*" given that the latter constitutes part of Belgian law and to the extent that it is also applicable in European Law, since 'there is no doubt that receipt by contractors etc. of payment of inflated prices as a result of collusive practices comes within the concept of fraud'?¹⁶ Moreover, shouldn't the institutions have at least authorised the Commission 'to represent them for the purpose of safeguarding their legal rights'?¹⁷

¹² Consolidated Version of the Treaty on the Functioning of the European Union (hereinafter 'Lisbon Treaty' or 'TFEU'), [2008] OJ C115/47.

¹³ See, for example, Case C-137/10 *European Commission v Région de Bruxelles-Capitale* (CJEU, 5 May 2011).

¹⁴ Sophie Mosca, 'Commission may claim compensation for loss caused by cartel' (*Europolitics*, 26 June 2012) <<http://www.europolitics.info/commission-may-claim-compensation-for-loss-caused-by-cartel-art338160-32.html>> accessed 3 November 2012; Benjamin Fox, 'EU Commission can seek own damages from cartel cases' (EUObserver, 28 June 2012) <<http://euobserver.com/institutional/116784>> accessed 13 July 2012.

¹⁵ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities [2002] OJ L 248/1.

¹⁶ See *supra* note 9, Question 1(a).

¹⁷ See *supra* note 9, Question 1(b).

In reformulating the question, the AG acknowledged that it encompasses two tenets, that is the temporal application (*ratione temporis*) of article 282 EC and the proper interpretation of article 335 TFEU respectively.

1. The *Ratione Temporis* Argument

Article 282 provided that the European Commission enjoys the most extensive legal capacity in each Member State and may be a party to legal proceedings in which it represents the Community (now Union).¹⁸ Article 335 TFEU, which replaced article 282 EC, contains the exact same language as article 282 EC, but it also adds that ‘the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation’.¹⁹

According to the AG, although article 335 TFEU stipulates in a primary law norm the pre-existing practice of the Union’s representation by the various institutions duly authorised for this purpose, it appears to have reversed the rule in article 282 EC. The CJEU’s judgement in *European Commission v Région de Bruxelles-Capitale*²⁰ supports this argument. The Court ruled in that case that ‘in accordance with articles 281 EC and 184 EAEC²¹ the Communities were a legal person governed by public law. That remains true now under article 47 TEU²² as regards the EU. Under article 282 EC and article 185 EAEC the Communities enjoyed the most extensive legal personality under the national laws of the Member States’. To that end, the Commission could delegate this power through a mandate to the other institutions ‘in matters relating to their respective operation’. Sound administration principles dictated that in actions before national courts the institution concerned represented the Communities as part of its administrative and operational autonomy, because it was better placed to assess and defend the interests of the Communities.²³ Based on these

¹⁸ Consolidated Version of the Treaty Establishing the European Community [2002] OJ C325/33, art 282.

¹⁹ TFEU, art 335.

²⁰ Case C-137/10 *European Commission v Région de Bruxelles-Capitale* (CJEU, 5 May 2011).

²¹ Consolidated Version of the Treaty Establishing the European Atomic Energy Community [2010] OJ C84/1, art 184.

²² Consolidated Version of the Treaty on European Union [2008], OJ C115/13, art 47, which states that ‘The Union shall have legal personality’.

²³ Case C-137/10 *European Commission v Région de Bruxelles-Capitale* (CJEU, 5 May 2011), paras 18-20.

observations, the AG is of the opinion that articles 282 EC and 335 TFEU are not merely procedural norms, but two substantive rules that relate to the internal organisation of the Union. This means that they positively establish which institution is responsible for the Union's external representation, including representation in current legal proceedings before national courts. Thus, AG Villalón feels that it is important to determine which of the two rules applies to these proceedings that commenced on June 20, 2008, over a year and a half before the entry into force of the Lisbon Treaty.

In this context, it is worth reminding ourselves that the Lisbon Treaty contains no provision relating to the *ratione temporis*. Therefore, there can be no retrospective effect and the *acquis communautaire* and precedents under article 282 EC cannot be called into question. In light of this, the easy conclusion is that article 282 EC is the one applicable in this case. This argumentation seems rational and encompasses a fundamental principle of international law in accordance with article 28 of the Vienna Convention on the Law of Treaties (the Vienna Convention).²⁴ Article 28 of the Vienna Convention is also binding on the EU institutions, as it constitutes a rule of customary international law and it provides that its provisions do not apply to events or acts that predate its entry into force, in the absence of a contrary intent expressed in the Treaty in question.²⁵ Moreover, 'there is no indication, whatsoever, in the Treaties of any such different intention under which the European Union's competence could be extended to events, such as those of the case in the main proceedings, which took place before it existed'.²⁶

Therefore, in his Opinion AG Villalón engages in a reasonable form of judicial activism, but he does not overstep the limits of his proper role as a vital member of the Court. In that sense, he does not go beyond what the Member States assume and understand as being his duties. In the opposite scenario, excessive judicial activism would enable the AG to 'run amok, actively expanding (...) [European law] in ways not explicitly based on state consent'²⁷ and may result in the Court 'riding rough-sod over national

²⁴ Vienna Convention on the Law of Treaties (Vienna Convention) [1969], art 28.

²⁵ Case C-466/11 *Gennaro Currà and others v Bundesrepublik Deutschland* (CJEU, 12 July 2012), paras 22-23.

²⁶ *ibid.*

²⁷ Karen Alter and Laurence Helfer, 'Nature or Nurture? Judicial Lawmaking in the European Court of Justice and the Andean Tribunal of Justice' (2010) 64 *International Organisation* 563.

autonomy'.²⁸ Instead, the AG chooses to merely reply to the question that the referring court asks. He interprets the question in a way that is legally correct by slightly correcting its meaning. In essence though, he refrains from laying out what would happen if article 335 TFEU were applicable, this being a question to be answered in a later case related to proceedings commenced on or after the entry into force of the Lisbon Treaty.

Admittedly this initial approach is purely formalistic: it relies on strict legal rules, such as the *ratione temporis* argument, and avoids answering the difficult question of properly allocating competence for bringing an action in the current case. On the other hand, the use of this specific rule, the *ratione temporis* rule, could be viewed as an attempt to prevent unnecessary analysis and to promote judicial expediency. Besides, the AG gives us the opportunity to ponder whether the answer to this question would be different in a future case initiated after the entry into force of the Lisbon Treaty. One could legitimately argue that the answer would not differ. The last sentence added in article 335 TFEU simply reflects the common sense argument evident in the Court's case law, while its rationale can be also exemplified on grounds of effective allocation of resources and on reasons of administrative efficiency. To put it differently, the addition of the new sentence merely illustrates another occasion, especially prevalent in the field of institutional relations and affairs, in which the Treaty has simply caught up with what has become a standard, common practice.

Regarding this issue, the CJEU does not engage in any sort of analysis and comparison of articles 282 EC and 335 TFEU similar to that of the AG. It rather avoids perplexing the situation by simply acknowledging that article 282 EC applies since 'the action before the referring court was brought' prior to 1 December 2009, the date on which the TFEU entered into force.²⁹

²⁸ *ibid* 564.

²⁹ Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), Opinion of AG Villalón, paras 28 and 29.

2. The AG's Interpretation of Article 282 EC

The AG remarks that *prima facie* the Commission has exclusive competence for representing the Union under article 282 EC.³⁰ The defendant companies do not disagree with this rule, but they argue that this is only a general provision complemented by a *lex specialis* relating to the protection of the Community's financial interests under articles 274 EC (now article 317 TFEU) and 279 EC (now article 322 TFEU), as implemented by Regulation 1605/2002.³¹ In other words, the companies 'contend that article 282 EC is only a general rule from which articles 274 and 279 EC derogate'.³² More specifically, article 274 EC provided that '[t]he Commission shall implement the budget, in accordance with the provisions of the regulations made pursuant to Article 279' and that 'the regulations shall lay down detailed rules for each institution concerning its part in effecting its own expenditure'. In addition to this, article 279 granted the power to the European Parliament and the Council to adopt those regulations in accordance with the ordinary legislative procedure. On that basis, Regulation 1605/2002 was adopted. Given the financial burden of instituting and/or being a party to legal proceedings, provision is made in the budget of each institution for the finance of such legal actions. Since each institution is responsible for the planning and implementation of its own budget, each institution alone must also decide whether to institute legal proceedings, especially against private legal and natural persons. Therefore, what the companies argue in this case where there is alleged fraud by contractors, is that each institution may recover the amounts paid and is responsible for the protection of its own interests. This is simply because 'most of the contracts were awarded in [the institutions'] own name and on their own behalf'.³³

The AG replies to those concerns with the arguments that follow.³⁴ Firstly, application of the maxim "*lex specialis legi generali derogat*" is not conclusive, because it applies when two conflicts have the same goals, but contradictory content. The latter two conditions are not fulfilled, as article 282 EC relates to the judicial representation/legal capacity of the Union,

³⁰AG Villalón Opinion (n 6), para 23.

³¹ See *supra* note 15.

³² Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 31.

³³ AG Villalón Opinion (n 6), para 23.

³⁴ *ibid* paras 25-31.

whereas articles 274 and 279 EC relate to the budget powers of each institution. In particular, article 282 EC provides that ‘each institution is competent to decide on measures to guarantee the financial resources it deserves’. This argumentation is also supported by the CJEU’s decision in *Brussels-Capital*³⁵, in which the institution itself represented the Union before the national court, having obtained a mandate from the Commission. Moreover, this observation holds true in every case where an institution other than the Commission has represented the Union in the course of legal proceedings. The CJEU implicitly agrees with the AG on this point, although it does not spell out this rationale in so much detail. It simply acknowledges that ‘the question of Community representation before those courts (i.e. the courts of the Member States) is distinct from the question concerning measures for budgetary implementation adopted by a Community institution’.³⁶ Article 282 EC governs the former, whereas article 274 and 279 EC regulate the latter. Additionally, the Court points out that ‘articles 103 and 104 TFEU of the Financial Regulation, to which the referring court alludes when formulating its first question, (...) 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’.³⁷ Moreover, the AG highlights that there is no reported case in which the Union’s representation by the institution concerned was based on articles 274 and 279 EC or the aforementioned Regulation,³⁸ contrary to what the defendants contend.³⁹ Therefore, the CJEU’s case law supports the AG’s contention that the only competent body to bring an action before a national court is the Commission, regardless of whether it can *ad hoc* delegate this power to other institutions according to the issue at hand.

In addition to this, the AG also argues that if it were otherwise, the reforms to article 282 EC - manifested in article 335 TFEU - would be superfluous. Thus, the Commission was right in its reliance on article 282 EC, because it is the *Community* and *not* the Commission that is party to the proceedings before the national court. The Commission, as the Union’s legal representative under article 282 EC, had the right to refuse to delegate the

³⁵ Case C-137/10 *European Commission v Région de Bruxelles-Capitale* (CJEU, 5 May 2011)

³⁶ Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 32.

³⁷ *ibid*, para 33.

³⁸ See *supra* note 15.

³⁹ AG Villalón Opinion (n 6), para 29.

legal representation to each institution and thus ensure the defence of the Community as a whole. Therefore the answer to the referring court's first question is that article 282 EC should be interpreted as allowing the Commission, as the Union's legal representative, to lodge a claim for compensation for damage suffered by it, such damage also being attributable to various institutions and organs of the Union. The AG makes a logical argument here, because it is indeed the Union that is being represented in the legal proceedings before the Rechtbank and not the institutions themselves. With that in mind, if we accept that the institutions are the ones entitled to bring the action and not the Commission, this would not still have as a consequence that the institutions and not the Union are represented before the national courts. In both situations, the question is not who is the party to the legal proceedings. There is no doubt that this is typically the Union. The real issue is rather "who has the legal capacity to represent the Union": the Commission or the institutions.

The CJEU adopts a slightly different angle on this point, holding that:

so far as Article 335 TFEU is concerned, it is to be noted that the 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 [T]FEU Treaty.⁴⁰

Thus, the CJEU provides the same answer as the AG to the referring court's first question, but again it avoids engaging in a discussion about the potential interpretation of article 335 TFEU, insofar as such analysis would be pointless. The absence of any indication to the contrary makes it clear that article 282 EC is the only provision applicable here.

III. Fundamental Rights Have Their Say: The Effect of Article 47 of the Charter

Nonetheless, the issue of the legal representation of the European Union by the Commission or by the institutions cannot be completely answered

⁴⁰ Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 35.

without taking into consideration first, human rights and their impact in the specific context of competition law; and second, the importance of private enforcement and the greater attention paid to it over the recent years. The ability to seek for damages constitutes an indispensable foundation of that private enforcement system. In light of this, the CJEU established the Member States' obligation, 'as a matter of EU law, to provide a remedy in damages where harm has been inflicted as a result of an infringement of the competition rules'⁴¹ (i.e. articles 101 and 102 TFEU) in 2001 in its judgment in *Courage Ltd v Crehan*.⁴² As the Court emphasised, the right to damages ensures the full effectiveness of article 101 TFEU and discourages the breach of the EU competition rules, thus making a 'significant contribution to the maintenance of effective competition in the EU'.⁴³ *Manfredi*⁴⁴ confirmed this right and further established the requirement of a 'causal link between the harm suffered and an agreement or practice prohibited under Article [101 TFEU]'.⁴⁵ Moreover, *Manfredi*⁴⁶ recognises that since 'Member States retain autonomy in relation to the procedural rules of their domestic judicial systems, as well as the substantive rules of recovery in tort, delict, restitutionary and other actions'⁴⁷, they are able to maintain such rules even though they 'might inhibit successful damages claims'.⁴⁸ The CJEU held in this case that the 'EU, therefore, also enjoys this right'⁴⁹ and that 'when that right is exercised, (...) the fundamental rights of the defendants, as safeguarded, inter alia, by the Charter must be observed'.⁵⁰

⁴¹ Richard Whish and David Bailey, *Competition Law* (7th edition, OUP 2012) p 297.

⁴² Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297.

⁴³ *ibid* paras 26-27; Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), paras 41 and 42.

⁴⁴ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

⁴⁵ *ibid*, para 61; Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 43.

⁴⁶ Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619.

⁴⁷ Whish (n 41), p 300.

⁴⁸ *ibid* (citations omitted).

⁴⁹ Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 44.

⁵⁰ *ibid*, para 45.

1. The Requirement for an Independent and Impartial Tribunal

The second issue raised by the national court concerns the potential effect of fundamental rights and, in particular, of article 47 of the Charter of Fundamental Rights of the EU⁵¹(Charter)⁵² and article 6(1) of the European Convention on Human Rights⁵³ (ECHR) on the question of the Commission's capacity to legally represent the Union in actions for damages caused by breaches of the competition rules. In its second question the Belgian court asks whether the fact that the Commission is responsible both for penalising unlawful conduct under article 101 TFEU, after having conducted its investigation as the competition authority and for subsequently preparing a claim for compensation before the national court, the latter being bound by the Commission's decision imposing penalties, is reconcilable with the right to a fair trial and the related principle that no-one can be the judge in his or her own case, as such principle is guaranteed by article 47 of the Charter and article 6(1) ECHR.⁵⁴ Moreover, if there is irreconcilability, how can the victim, i.e. the Commission and/or the institutions and/or the Union in this case, of unlawful conduct, i.e. of a cartel in this case, assert its right to compensation under European law, which is itself a fundamental right?⁵⁵

In analysing the question, the AG identifies that the national court's concern is that it will not be an independent and impartial tribunal because the action for damages is based on a violation of article 81 EC, now article 101 TFEU, as decided by the Commission.⁵⁶ This is based on the premise that the Belgian court feels bound by the Commission's decision. In accordance with this latter sentiment, the defendant companies argue that the fact that the Belgian court is bound by the Commission's decision violates the principle of judiciary independence, as is implicit in article 47 of the Charter and explicit in article 6 ECHR. The CJEU reiterates the referring court's concern in the following manner:

⁵¹ Charter of Fundamental Rights of the European Union [2000] OJ C364/1.

⁵² Article 6 TEU provides that the Charter shall have the same legal value as the Treaties. Thus, in accordance with article 51, the Charter has become legally binding on the institutions, bodies, offices and agencies of the Union and on the Member States, when they are implementing Union law.

⁵³ European Convention for the Protection of Human Rights and Fundamental Freedoms [1950].

⁵⁴ See *supra* note 9, Question 2(a).

⁵⁵ See *supra* note 9, Question 2(b).

⁵⁶ AG Villalón Opinion (n 6), para 34.

[t]he 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’).⁵⁷

On its part, the Commission argues that it has acted legally and there is no incompatibility between on the one hand its position as applicant in the main proceedings and upstream as a competition authority, and on the other hand the requirements of article 47 of the Charter and article 6 ECHR.

According to the AG, the above arguments relating to the independence of the competent jurisdiction, namely the Rechtbank in this case, pertain more to the extent of the competence, rather than to the impartiality of the judge.⁵⁸ The AG then provides the following summary of the concern of the Brussels commercial court. The Commission’s decision finding an illegal agreement under article 101 TFEU is binding on all public authorities, including the national competition authorities. Were the Commission to institute before a national court a claim for damages for the harm suffered by the Union as a result of this anticompetitive behaviour, ‘there will be legitimate grounds for doubting the conformity of the procedure in question with the right of any person to be tried by an impartial tribunal.’⁵⁹ The Rechtbank believes that to the extent that the competent authority, in this case itself, must declare the existence of the injury based on an illegality that is imposed on it, the resulting diminution of the judge’s margin of appreciation seems to constitute an unjustifiable restriction of his independence.⁶⁰

However, the AG finds this concern unfounded based on the arguments that follow.⁶¹ First of all, the Union and not the Commission is bringing the action in damages. Consequently, this is not a case in which the Commission has taken an action and then is trying to claim itself compensation for the damage it has suffered. These observations weaken the applicants’ arguments, since the dual functions of the Commission that they

⁵⁷ Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 38.

⁵⁸ AG Villalón Opinion (n 6), para 37.

⁵⁹ *ibid.*, para 38. It is the author’s own translation, as at the time of writing the official translation in English of the Opinion had not been published yet.

⁶⁰ *ibid.*

⁶¹ AG Villalón Opinion (n 6), paras 39-41.

expose are a consequence of the normal distribution of power within a politico-administrative complex, such as the EU. These dual functions include the design and implementation of public policies and the defence of their rights and lawful interests in any jurisdiction. Secondly, the AG stresses that the Commission's jurisdiction in competition matters and its power to represent the Union in legal proceedings is not the manifestation of an arbitrary division of powers as the applicants claim.⁶² It should be noted that all political organisations, including the Member States, provide for legal remedies to 'enforce their rights and interests'.⁶³ Additionally, a government's right of access to the ordinary courts is a vital aspect of the rule of law, under which governments gradually lose their powers of self-defence and entrust their rights to the courts that ensure that law is applicable to everybody. This observation is also related to the current case, in which the Union has recourse to the national court to obtain compensation for unlawful damages, since it does not itself possess such a court. The Union's legal representation in such circumstances is entrusted to the Commission in accordance with article 282 EC and independently of the subject matter in question. In line with the foregoing, the Commission does not participate in the legal proceedings as a public authority responsible for guaranteeing competition in the internal market, but as a client, a consumer (i.e. as a private party), of the companies who are presumed responsible for having caused illegal damage.⁶⁴ This same argument was also made by the Commission and the Council with a different wording. In light of these, the AG concludes that contrary to the defendants' arguments, there is no superposition of functions, but two actions clearly differentiated not only in time, but also in means and objectives.⁶⁵

The CJEU approaches the defendant companies' complaint from a different legal perspective, analysing it under the right of access to a tribunal which is one of the various elements that comprise the principle of effective judicial protection laid down in article 47 of the Charter.⁶⁶ Under the right of access to a tribunal, 'for a tribunal to be able to determine a dispute concerning

⁶² *ibid*, para 41.

⁶³ *ibid*.

⁶⁴ AG Villalón Opinion (n 6), para 42.

⁶⁵ *ibid*.

⁶⁶ Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 47. In para 48, it is further explained that 'Article 47 of the Charter also comprises the rights of the defence, the principle of equality of arms, and the right to be advised, defended and represented'.

rights and obligations arising under EU law in accordance with article 47 of the Charter, it must have the power to consider all questions of fact and law that are relevant to the case before it'.⁶⁷ Approaching the issue from this perspective, the AG turns to the analysis of the question whether a decision that is adopted by one of the institutions, and in this case the Commission, and is binding on all national authorities including national courts, unjustifiably deprives the national court of its independence, since it is asked to rule on a claim for damages based on this decision. Thus phrased, it is clear -as the AG argues- that the objection is not addressed to the Rechtbank's independence, but rather to its ability to resolve a civil case before it as a sovereign court. In order to alleviate this doubt, the AG invokes two different arguments; first, the nature of the Commission's decision in question and its judicial effects before the national jurisdictions; and second, the fact that the Commission's decision is subject to the right of full recourse in the EU courts and that the national jurisdictions are those who are obliged to determine the harm during the proceedings for damages caused and the causal link between the infringement and the harm suffered.

Examining the nature of the Commission Decision, the AG's conclusion is that the Rechtbank's judicial power is not limited but rather that its power is exercised within a framework of a normal distribution of functions between the national jurisdiction and that of the Union. In support of this conclusion, the AG refers to article 16 of Regulation 1/2003,⁶⁸ which states that 'when national courts rule on agreements, decisions or practices under article [101] or article [102] of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.'⁶⁹ In other words, the Commission's decisions based on these provisions bind the national courts.

This means that if the European Commission has adopted a decision finding that one or more undertakings have committed an infringement of articles 101 or 102 TFEU, a court of an EU Member State ruling on an action for damages brought against one or more of

⁶⁷ Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 49.

⁶⁸ 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.

⁶⁹ *ibid.*

these same undertakings on the basis of the same infringement must take as proven the existence of the infringement.⁷⁰

Moreover, since the appeal of the defendants, who were the addressees of the Commission's Decision, in the current proceedings before the national court, has been rejected by the General Court, the decision is definitive vis-à-vis these companies.⁷¹ The CJEU follows the AG's reasoning and completes the analysis by further highlighting the element 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' as the basis when applying the EU competition rules'.⁷²

Coming to the second part of his reasoning, the AG explains that the binding effect of the Commission Decision extends only to the existence of the breach in question i.e. the harmful event. It does not cover the existence of damages nor the existence of a causal link between the infringement and the harm suffered.⁷³ These are issues for the Commission to prove; so even if the national court is bound to follow a pre-existing Commission Decision, it does not necessarily follow from this that damages will be awarded to the Commission, as there is still a number of contentious matters to examine.⁷⁴ The issue here is not really the impartiality or independence of the national court. Were it so, the same issue would arise in every follow-on action, where the national court would be forced to align with the Commission's findings and in such a situation the national court would practically be deprived of the right to formulate its own independent opinion on the facts of the case. The reason why we are concerned about the Commission's legal capacity to bring an action for damages in such cases is the observed "conflict of roles" on the part of the Commission, which reasonably rings a "moral" bell to our ears regarding its legitimacy. Moreover, the binding effect should not be seen as a mechanism depriving the independence of the national court, but rather as a vehicle to facilitate the discharge of the

⁷⁰ Woulter Wils, 'The Relationship between Public Antitrust Enforcement and Private Actions for Damages' [2009] 32 *World Competition* 3, 16.

⁷¹ Joined Cases T-125/97 and T-127/97 *The Coca-Cola Company and Coca-Cola Enterprises v. Commission* [2000] ECR II-1733.

⁷² Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 52 (references omitted).

⁷³ *ibid.*

⁷⁴ *ibid.*

burden of proof on the party bearing it and as a way of saving valuable resources and time by not wasting effort and money to prove something that has already been credibly established.⁷⁵

Besides, as the AG points out, the finding of illegal conduct contained in the Commission's Decision is imposed in all cases on national courts.⁷⁶ This finding forms the basis for any action in tort, which requires that the plaintiff has suffered injury as a result of the defendant's actions.⁷⁷ The AG is of the opinion that the referring court would justifiably be suspicious of a claim lodged by a public authority that has itself predetermined the offence with the resulting effects as above mentioned, which forms the basis of its claim for damages.⁷⁸ As the Commission rightly pointed out in its written observations, this circumstance ceases to be problematic the moment an effective right of recourse to the EU courts exists to challenge the decision that constitutes the offence. Although the jurisdiction of a national court may be limited without justification if the national court lost the ability to see or challenge the finding of a misdemeanour in the context of a follow-on action for damages, this is not the case here for the following reasons.

Firstly, although the national court cannot directly challenge the Commission's Decision since it is an act of an EU institution (*Fotofrost*)⁷⁹, it can refer a question to the CJEU regarding its validity. The CJEU also makes this very same point,⁸⁰ highlighting that this rule is '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'.⁸¹ It goes on to explain that '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'⁸² because 'EU law provides for a system of judicial review of Commission decisions relating to proceedings under article 101 TFEU which affords all the safeguards

⁷⁵ Wils (n 70) p 14.

⁷⁶ AG Villalón Opinion (n 6), para 47.

⁷⁷ *ibid.*

⁷⁸ AG Villalón Opinion(n 6), para 48.

⁷⁹ Case 314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

⁸⁰ Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 53.

⁸¹ *ibid.*, para 54.

⁸² Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 55.

required by article 47 of the Charter'.⁸³ Both the Court⁸⁴ and the AG refer to the fact that the defendant companies in the proceedings before the national court are able to institute proceedings under article 263 TFEU for the annulment of the Commission's Decision addressed to them. The CJEU also reminds us that the companies have indeed already taken advantage of this possibility.⁸⁵

Second, although the Court's jurisprudence recognises that the Commission enjoys a technical margin of appreciation, this does not mean that there is protection *a minima*, as the companies claim. The recognition of this margin finds its equivalent in the administrative law of the different legal systems represented in the EU, where the administration is controlled through the adjudication of legal issues in which the technical aspects are submitted to an examination based on the "manifest error" standard. This latter standard is applied when the validity of a European Commission Decision is challenged before the CJEU and annulment is sought.⁸⁶ The extent and the intensity of this type of judicial control in the Member States are compatible with the ECHR.⁸⁷ Thus, the AG is of the opinion that 'the control effected by the courts of the European Union on the Commission Decisions adopted under article 81 EC (now article 101 TFEU) constitutes, in a general sense, a complete judicial control, which in the case in which the Decision is unfounded, guarantees to the litigant an effective protection of his rights.'⁸⁸ In light of this, the AG concludes that the national court's judicial powers were not restricted and that the defendant parties were not deprived of their right of access to a judge having full jurisdiction.

The CJEU tackles the defendant companies' argument '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'⁸⁹ in a different way, analysing the elements of this review. Thus the CJEU reiterates what constitutes settled case law in the field and explains that the

⁸³ *ibid*, para 56.

⁸⁴ *ibid*, para 57.

⁸⁵ *ibid*, para 57.

⁸⁶ See for example Case C-12/03 *Tetra Laval v Commission* [2005] ECR I-987.

⁸⁷ AG Villalón Opinion (n 6), para 50 (references omitted).

⁸⁸ AG Villalón Opinion (n 6), para 50 (references omitted).

⁸⁹ Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 58.

EU Courts do not adopt a hands-off approach when issues of judicial review of economic assessments come to the discussion. On the contrary, the 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.⁹⁰

Moreover, the EU Courts must ascertain ‘of their own motion’ whether the Commission has ‘stated reasons for its decision’ and the amount of weight that it has attributed to the different factors that it took into account⁹¹. To that end, the CJEU must carry out an in-depth review based on the ‘evidence adduced by the applicant in support of the pleas in law put forward without being able to rely on the Commission’s margin of discretion.’⁹² Additionally, the EU Courts enjoy unlimited jurisdiction that article 17 of Regulation 1/2003 confers on them, thus being able to not only ‘carry out a mere review of the lawfulness of the penalty’, but also to ‘substitute their own appraisal for the Commission’s and consequently to cancel, reduce or increase the fine or penalty imposed.’⁹³

In addition to this, the CJEU also holds that the safeguards embedded in the Treaty that ensure the Court’s impartiality and independence undermine the companies’ argument questioning the CJEU’s independence ‘on the ground that the Court is itself an EU institution’.⁹⁴ The Court also highlights a rather obvious point that is part of the accepted legal reality and a fundamental rock on which the modern nation-state system is founded, that ‘all judicial bodies form part of the State or the 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’.⁹⁵ Finally, the CJEU also makes a fundamental point regarding the elements that must be established in a civil action for damages such as the action before the referring court, which, apart from a harmful event, also include the ‘loss and

⁹⁰ *ibid*, para 59.

⁹¹ *ibid*, para 60.

⁹² *ibid*, para 61 (references omitted).

⁹³ *ibid*, para 62 (references omitted).

⁹⁴ *ibid*, para 63.

⁹⁵ *ibid*, para 64.

a direct link between the loss and the harmful event'.⁹⁶ The national court itself must assess the latter two elements for each individual party, this assessment not being 'contrary to article 16 of Regulation 1/2003'.⁹⁷ Thus, the CJEU concludes that 'in view of all the foregoing considerations, the Commission cannot be regarded as a judge and party in its own cause in the context of a dispute such as that in the main proceedings'.⁹⁸

2. The Implications of the Principle of Equality of Arms

Another set of arguments invoked by the defendant companies concerned an alleged breach of the principle of equality of arms, as guaranteed by article 47 of the Charter and article 6 of the ECHR. According to the defendants, this principle was violated, because the Commission in its function and quality as a competition authority had inside information about them to which they did not have access. This principle is important because it is 'a corollary of the very concept of a fair hearing' and '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'.⁹⁹ The Commission counter-argued that the members of the legal service representing the Commission in the current proceedings did not communicate with the members of the legal service responsible for competition issues. To that end, the Commission makes two arguments to show that it is 'on an equal footing with every other litigant'.¹⁰⁰ Firstly the Commission assures the Court 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'.^{101,102} Secondly, the 'Commission also explains that the departments responsible for the main proceedings, namely the Offices for "Infrastructure and Logistics" in Brussels (...) do not have a right of access to the confidential file of the Directorate-General for Competition'.¹⁰³ These Commission arguments seem to suffer from serious weaknesses. On the one hand, taking

⁹⁶ *ibid*, para 65.

⁹⁷ *ibid*, paras 65 and 66.

⁹⁸ *ibid*, para 67.

⁹⁹ *ibid*, para 71.

¹⁰⁰ *ibid*, para 70.

¹⁰¹ *PO/Elevators and Escalators* (n 3).

¹⁰² Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 70.

¹⁰³ Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 70.

into consideration its small size, it is hard to believe that no communication between the various members of the legal service takes indeed place. Besides, on the other hand, the Commission failed to make an important point which would significantly strengthen its objections to an alleged infringement of the principle of the equality of arms. That point is the fact that when issuing its statement of objections, the Commission is required to list all the documents on the basis of which it reached a finding of breach of the competition rules. The right of the parties to access that list rather constitutes a strong application of the equality of arms principle.

Considering the parties' arguments, the AG accepted the premise inherent in the defendant companies' pleas and analysed whether this violates the equality of arms principle, which forms a longstanding part of EU law.¹⁰⁴ The AG examines its invocation in the context of national procedures for the implementation of EU law by the Member States, drawing heavily on the relevant jurisprudence of the European Court of Human Rights.¹⁰⁵ According to the latter Court, equality of arms is intended to create a level playing field for the parties, thus ensuring that any document presented to the court can be assessed and challenged by each party in the proceedings. 'Inversely, any harm that is caused by the imbalance between the parties must be proved by the party having suffered'.¹⁰⁶ The CJEU also accepts these points, referring explicitly to them.¹⁰⁷ However, the CJEU disagrees with the use of case law from the European Court of Human Rights by emphasising that 'it must be borne in mind (...) that the principle of effective judicial protection is a general principle of EU law, to which expression is given by article 47 of the Charter'.¹⁰⁸ Article 47 of the Charter 'secures in EU law the protection afforded by article 6(1) of the ECHR [and] it is necessary therefore to refer only to article 47'.¹⁰⁹

Turning to the case at hand, the AG accepted that the fact that the Commission did not file to the judge any information protected as professional secrets, was capable of creating the necessary circumstances

¹⁰⁴ AG Villalón Opinion (n 6), para 57.

¹⁰⁵ *ibid*, paras 58-59.

¹⁰⁶ *ibid*, para 58 (references omitted).

¹⁰⁷ Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 72.

¹⁰⁸ *ibid*, para 46 (references omitted).

¹⁰⁹ *ibid*, para 47 (references omitted).

for this impermissible imbalance between the parties to be created.¹¹⁰ This AG argument though seems to be strange and partly conflicting with his previous comments on the nature of the Commission Decision as binding on the national courts on the ground of the structure of the EU system. Besides, if one considers that the action before the *Rechtbank* simply aims to assess the amount of damage the EU suffered as a result of the operation of the cartel, but it does not question the very existence of the cartel, it is hard to understand why the Commission should have provided the national court with the confidential information collected during its investigation to the extent that such data concern the verification and establishment of the infringement and not of the damage suffered. With that in mind, such information seems not to be relevant in a private action for damages.

Nonetheless, the AG went on saying that the Commission is not in an advantageous position simply because some of its officials possess information that the lift-makers may not have. In order for the Commission to use such information in the proceedings before the national court, such information must be included in its case file shared with the defence and the judge, in which case the companies are able to defend themselves. Otherwise, if this information is not divulged, a judge would be unable to tip the balance in favour of the Commission. This reasoning disposes of the lift-makers' first argument as unfounded. The AG is also convinced that the Commission erects effective "Chinese walls"¹¹¹ that prevent any information between the officials of its legal service who worked on the cartel investigation and those who prepared its claim for damages at the Brussels Commercial Court. Advocate General Villalón is not simply applauding the Commission's goodwill and practice but highlights the fulfilment of its obligation under article 28 of Regulation 1/2003. This article prohibits the Commission from utilising information collected during an investigation for any other purpose than this one.

The CJEU also endorses this reasoning, thus disposing of the defendants' argument 'in the main proceedings [...] 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

¹¹⁰ AG Villalón Opinion (n 6), para 63.

¹¹¹ The fact that the Commission legal service is small does not preclude it from being able to adopt this practice effectively. In my experience, law firms routinely utilise this method, even in their small offices, without any complaints. Having experienced a demonstration of such a use, it should be prepared to accept the AG's argument.

claiming compensation for the loss sustained as a result of that infringement'.¹¹² The CJEU also adds that

the fact that both the decision of 27 February 2007¹¹³ and the decision to bring the action for damages in the main proceedings were taken by the College of Commissioners [does not] call the foregoing considerations in question, since EU law contains sufficient number of safeguards to ensure that the principle of equality of arms is observed in such an action – for example, the safeguards derived from article 339 TFEU,¹¹⁴ article 28 of Regulation 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.¹¹⁵

Finally, the AG argues that since the Commission's conduct is prescribed by the aforementioned Regulation, the burden of proof regarding an alleged violation of this obligation lies on the lift-makers.¹¹⁶ Since the latter has not furnished any evidence of such an allegation, their complaint regarding the violation of the principle of equality of arms is unfounded. The Advocate General's last word on the matter is that article 47 of the Charter, incorporating the principle of equality of arms, does not preclude the Commission from participation in a follow-on action for damages, even though its decision finding a violation of article 101 TFEU forms the basis for this action. Similarly, the CJEU fully endorsed the AG suggestions and also concluded that the Commission bringing an action as a representative of the EU before a national court for damages for loss sustained as a result of an agreement it had found to infringe article 101 TFEU does not violate article 47 of the Charter.^{117, 118}

¹¹² Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 74.

¹¹³ *PO/Elevators and Escalators* (n 3).

¹¹⁴ It provides that 'The Members of the institutions of the Union, the members of the committees and the officials and other servants of the Union shall be required, even after their duties have ceased, not to disclose information of this kind covered by the obligation of professional secrecy (...)'.
¹¹⁵ Case C-199/11 *Europese Gemeenschap v Otis and Others* (CJEU, 6 November 2012), para 75.

¹¹⁶ AG Villalón Opinion (n 6), para 70.

¹¹⁷ *ibid*, para 77.

¹¹⁸ It is worth mentioning here that the CJEU refused to accept the arguments that the defendants made on the basis of the Court judgment in *Yvon v France*. At paragraph 76, the

IV. Conclusion

To sum up, there is no doubt that in his Opinion Advocate General Villalón provided arguments in favour of the Commission on all counts and has enabled history to be made. This case not only marks the first time in which the EU itself has sought damages for harm suffered as a result of firms' anticompetitive behaviour, but also could pave the way for the Union to directly claim compensation from companies as a customer.¹¹⁹ As *Neelie Kroes*, former Commissioner for Competition, has said, 'the Commission is doing its utmost to encourage and facilitate actions for damages before national courts by victims of anticompetitive behaviour. In this case, we are leading by example'.¹²⁰ Moreover, this Opinion does not frustrate the underlying reasons for which the Commission has brought this action. As the Commission Vice-President *Siiim Kallas*, in charge of administration, audit and anti-fraud explained,

this case represents an important example of a coherent attitude of the Commission in acting both as market regulator and as diligent administrator of EU taxpayers' money. As a result of the anticompetitive behaviour of these companies, the EU institutions, and so the European taxpayer, have suffered financially by paying over the odds for the installation and maintenance of lifts and escalators. It is our duty to seek compensation for these damages. We act firmly where we find contractors act illegally.¹²¹

To that end, the CJEU has followed the AG's Opinion, also lending its considerable weight and leverage in support of the private enforcement

Court made clear that the factors that led the European Court of Human Rights to make a finding of infringement of Art 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'.

¹¹⁹ Benjamin Fox, 'EU Commission can seek own damages from cartel cases', (*EU Observer*, 28 June 2012) <<http://euobserver.com/18/116784>> accessed 13 July 2012.

¹²⁰ 'Commission goes to court over damages suffered from elevators cartel' (*Rapid Europa Press release*, 24 June 2008) <<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/998&type=HTML>> accessed 1 September 2012.

¹²¹ 'Commission goes to court over damages suffered from elevators cartel' (*European Law Monitor*) <<http://www.europeanlawmonitor.org/latest-eu-news/commission-goes-to-court-over-damages-suffered-from-elevators-cartel.html>> accessed 13 July 2012.

mechanism that the European Commission is trying to promote and enhance in the Member States. Moreover, by holding that the Commission and not the institutions have the legal capacity to bring follow-on actions for damages, the CJEU has practically achieved a seemingly conflicting and difficult goal. On the one hand, it has confirmed and cemented the central position of the Commission in the EU competition regime. On the other hand, though, it has also strengthened the private enforcement system, since in the case discussed the Commission is not acting as a public authority entrusted with the enforcement of competition law, but rather in its private capacity as a party to contracts.

In addition, an important side consequence of this CJEU and AG concurrence of views is the emphasis given on the conservation of the financial resources of the institutions. Such a concurrence of views is also important for the clarification regarding the binding effect of Commission Decisions on national courts, where the CJEU has understandably been particularly careful in setting any hard and fast rules. The CJEU's indication on the balancing between public and private enforcement of the competition regime in the EU and the interaction between these two interlinked systems will be a very welcome clarification and addition to the debate currently raging in the Member States. In tilting the balance towards the strengthening of private enforcement, there is no doubt that the CJEU has successfully risen to this challenge. Besides, the CJEU's decision has also breached the gap between the pre- and post-Lisbon Treaty reality regarding the Union's representation in actions before national courts of the Member States. The CJEU has continued its long, time honoured tradition of pushing towards more integration and also towards the use, as well as the application, of rights that natural and legal persons derive from EU law in the domestic legal systems of the Member States. Therefore, this decision has all the potential to hopefully mark the start of a new era for the private enforcement of EU competition law in the Member States.