and/or a salary increase (at [64]). As with all areas of employment law, it remains to be seen whether less wealthy employees are able to take advantage of these legal developments.

ALYSIA BLACKHAM

LEADING BY EXAMPLE: PRIVATE COMPETITION ENFORCEMENT BY THE EUROPEAN COMMISSION

THE right of private parties to claim damages for losses suffered due to breaches of European Union (EU) competition law has been well established since *Courage and Crehan* (Case C-453/99, [2001] E.C.R. I-6297). Article 16(1) of Regulation 1/2003 (OJ L 1, 4.1.2003, p. 1) further facilitates private enforcement by rendering infringement decisions taken by the European Commission binding on national courts, thus assisting follow-on actions. Although the Commission itself has spent the past decade attempting to encourage a culture of private enforcement, a harmonised EU-wide regime remains elusive. Levels of private enforcement lag far behind those of the United States, while, across the EU, national procedures remain disparate and often highly unfavourable to private litigants.

With the domestic proceedings that underpin the preliminary ruling of the Grand Chamber of the Court of Justice in *Europese Gemeenschap v Otis NV and others* (C-199/11, Judgment of 6 November 2012, not yet reported), the Commission hit upon a novel mechanism to advance private damages actions in Europe: namely, leading by example. The *Otis* judgment stems from Commission Decision C(2007) 512 of 21 February 2007 in *Elevators and Escalators* (Case COMP/E-1/38.823), which determined that four European manufacturers of elevators and escalators participated in a secret cartel, contrary to what is now Article 101(1) TFEU. Fines totalling over €990 million were imposed on the undertakings concerned. These fines, although high in absolute terms, are increasingly commonplace in EU competition law enforcement. More unusually, the EU was also an alleged victim of the cartel, because cartelised escalator and elevator products are installed in numerous EU institution buildings. Accordingly, the Commission brought follow-on proceedings in Belgium, to recover €7 million in damages on behalf of the EU. In so doing, the Commission sought to rely upon its own infringement decision as binding proof of breach of Article 101(1) TFEU.

At this juncture, a familiar objection to public competition enforcement in the EU came into focus. Enforcement proceedings are administrative in nature: the Commission acts as investigator,

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prosecutor and decision-maker. As fines have increased dramatically, critics of the current system argue that it fails to provide adequate protection for due process rights of defendants. In *Menarini Diagnostics S.R.L. v Italy* (No.43509/08, judgment of 27 September 2011), the European Court of Human Rights held that the equivalent Italian system was compatible with Article 6(1) of the European Convention on Human Rights (ECHR) provided that the administrative holding was susceptible to comprehensive review by an independent court. Subsequently, in *Chalkor v Commission* (Case C-386/10 P, Judgment of 8 December 2011, not yet reported), the Second Chamber of the Court of Justice determined that the intensity of review performed by the General Court was sufficient to address any fundamental rights concerns that arose because of the Commission's tripartite functions. Yet judicial review in EU competition law is not "full" in the ordinary sense, as the EU courts grant the Commission a significant margin of discretion in the assessment of economic matters. Thus, it is arguable that, in practice, current EU procedures do not satisfy the *Menarini* requirements for administrative decision-making.

Additionally, the *Otis* case before the Belgian court envisaged a fourth role for the Commission: that of the alleged victim. To allay fears that a mechanistic application of Article 16(1) of Regulation 1/2003 in such unusual circumstances would breach the defendants' fundamental rights, the national court sought guidance from the Court of Justice under Article 267 TFEU.

The first question was a jurisdictional one: did the Commission have authority to bring the action on behalf of other EU institutions? The Court of Justice answered succinctly, and in the affirmative. Under Article 282 EC, in force when the action was launched, the Commission was empowered to represent the European Community (now Union) in legal proceedings. Hence, it had the power to take the instant action. Moreover, the Court explained that this authority was not vitiated by the entry into force of the Lisbon Treaty, which replaced Article 282 EC with Article 335 TFEU, nor was it ousted by the rights and duties imposed by the Financial Regulation (OJ (2006) L 390/1).

Considerably more controversial, however, was the second question: could Article 6(1) ECHR, and the equivalent right to effective judicial protection contained in Article 47 of the Charter of Fundamental Rights of the European Union, prohibit the Commission from invoking its own infringement decision in follow-on actions? In effect, this question required the Court to consider both the general validity of Article 16(1) of Regulation 1/2003 in light of the Commission's decision-making procedures, and its application in the particular instance.

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The court began by restating the orthodoxy that "any person" that can establish harm caused by a breach of Article 101 TFEU has a right to claim compensation from the wrongdoer(s) (at [40]–[43]). By logical extension, the EU itself enjoys that right (at [44]), meaning that the underlying action was, at first glance, compatible with EU law. Nonetheless, fundamental rights function as a constraint, insofar as these rights must be respected by both the EU institutions and Member States when implementing EU law. Accordingly, the Court then considered whether fundamental rights – specifically, the right to effective judicial protection – might limit the collateral estoppel-type impact of Commission decisions in such circumstances.

First, the court espoused a clear priority for the Charter as the paramount source of fundamental rights obligations within the EU. It noted that Article 47 of the Charter "secures in EU law the protection afforded by Article 6(1) of the ECHR," meaning that it was necessary "to refer only to Article 47" in considering the impact of fundamental rights (at [47]). Rather than making reference to Strasbourg jurisprudence, the court instead emphasised its own prior pronouncements regarding the scope of Article 47 of the Charter, reaffirming the judgment in *Chalkor* (C-386/10 P, above). The approach in *Otis* thus aligns with recent judgments of the EU courts that prioritise the Charter, and apparently seek to confine the ECtHR to a largely residual or formalistic role within EU law. This restrictive interpretation is all the more remarkable given the express reference to the ECHR in Article 6(3) of the revised Treaty on European Union, as well as on-going efforts by the EU to accede to the ECtHR.

Secondly, the Court held that Article 16(1) of Regulation 1/2003, together with case-law stretching back to *Masterfoods and H.B.* (Case C-344/98 [2000] E.C.R. I-11369), prohibit national courts from taking decisions that run counter to infringement decisions adopted by the Commission, including in the context of follow-on litigation. Furthermore, it confirmed that national courts do not have the power to declare the invalidity of such decisions, given the exclusive jurisdiction of the EU courts, a finding that the Court had made in its fundamental decision in *Foto-Frost* (Case 314/85 [1987] ECR 4199). Nonetheless, the Court stated unambiguously that the existing system of direct judicial review, under Article 263 TFEU, affords "all the safeguards required by Article 47 of the Charter" (at [56]). In particular, the Court emphasised that the EU courts can assess the factual accuracy and completeness of the evidence invoked by the Commission, and its compliance with the duty to state reasons and, moreover, have unlimited jurisdiction to vary the fine imposed (at [59]–[62]). Thus, the Court concluded that the margin of discretion

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allowed to the Commission in competition cases is sufficiently closely circumscribed to comply with Article 47 of the Charter (at [63]).

Finally, the Court noted two further points that served to confirm that the domestic litigation was compatible with the right to effective judicial protection. In follow-on actions, infringement decisions of the Commission are not determinative of recovery, because matters of loss and causation remain to be assessed by the national courts. Accordingly, the Commission did not act as judge and party in its own cause (at [67]). Furthermore, in this instance the domestic proceedings had been brought by a separate division of the Commission that did not have access to privileged material disclosed during the original investigation. The principle of equality of arms was therefore respected as a result (at [73]–[75]).

With its ruling in *Otis*, the Court of Justice has confirmed a relatively benign and permissive approach to the Commission's competition enforcement procedures. Even taking into account the hierarchically superior status of fundamental rights within EU law following the Lisbon Treaty, the case suggests that reform of this system is unlikely to be driven by the EU courts. Acceptance of the existing framework is all the more notable given the huge increases in the level of competition fines imposed in recent years, as well as efforts to develop private enforcement premised on the binding effect of Commission decisions. Moreover, the ECtHR is effectively side-lined, and it is unclear whether the protections offered by the Charter are truly equivalent here.

Despite its apparent logic, therefore, the result in *Otis* is unsettling. At the least, the case creates a perception that the Commission can "double dip" as public prosecutor and private applicant, while in neither circumstance is it subject to the scrutiny of a fully judicial process. Whatever the merits of the underlying private litigation in this case, the court's judgment must add urgency to calls for a comprehensive review of the framework for competition enforcement at EU level.

NIAMH DUNNE

TRUST ISSUES AND THE EUROPEAN COMMON ASYLUM SYSTEM: FINDING THE RIGHT BALANCE

ON 21 January 2011, the European Court of Human Rights (ECtHR) held, among other things, that by returning an asylum seeker to Greece in application of Council Regulation (EC) No. 323/2003 (O.J. 2003 L50/1) (the "Dublin Regulation"), Belgium infringed Article 3 of the

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