

Action brought on 7 May 2007 — ThyssenKrupp Elevator v Commission**(Case T-149/07)**

(2007/C 155/60)

*Language of the case: German***Parties***Applicant:* ThyssenKrupp Elevator AG (Düsseldorf, Germany) (represented by: T. Klose and J. Ziebarth, lawyers)*Defendant:* Commission of the European Communities**Form of order sought**

- annul the contested decision in so far as it relates to the applicant;
- in the alternative, reduce as appropriate the amount of the fine imposed jointly and severally on the applicant in the contested decision;
- order the defendant to pay the costs of the proceedings.

Pleas in law and main arguments

The applicant is challenging Commission Decision C(2007) 512 final of 21 February 2007 in Case COMP/E-1/38.823 — PO/Elevators and Escalators. In the contested decision, fines were imposed on the applicant and other undertakings on the ground of their participation in cartels relating to the installation and maintenance of lifts and escalators in Belgium, Germany and Luxembourg. In the view of the Commission, the undertakings concerned acted in breach of Article 81 EC.

In support of its action, the applicant puts forward the following pleas in law:

- Lack of competence on the part of the Commission in the absence of any significance at inter-State level of the local infringement of which the applicant is accused;
- Infringement of the *ne bis in idem* principle inasmuch as the Commission failed to take account of the amnesty decisions which the national cartel authorities in Belgium and Luxembourg adopted in the applicant's favour before the present proceedings were instituted;
- Absence of the conditions required to establish that the applicant bears joint and several liability with its subsidiaries, inasmuch as it was not itself involved in the offences, its subsidiaries operate on a legally and economically independent basis and there is no objective justification for extending liability to the applicant;
- Disproportionate nature of the basic amounts used for the calculation of the fine when compared with the *de facto* market volume concerned;
- Disproportionate nature of the deterrent multiplication factor, inasmuch as this differs significantly from the treatment accorded to other undertakings of comparable scale in comparable cases decided at the same time;
- Lack of justification for the repeat offender surcharge in the context of the fine calculation by reason of errors of law in regard to the inclusion of previous fines;

- Breach of Article 23(2) of Regulation (EC) No 1/2003 ⁽¹⁾, inasmuch as, with regard to the upper fine limit of 10 % of the undertaking's turnover, the fine ought to have been calculated solely on the basis of the turnover of the subsidiaries concerned;
- Legally defective application of the Notice on immunity from fines and reduction of fines ⁽²⁾ inasmuch as insufficient account was taken of the added value represented by the applicant's cooperation.

⁽¹⁾ 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).

⁽²⁾ Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

Action brought on 7 May 2007 — ThyssenKrupp v Commission**(Case T-150/07)**

(2007/C 155/61)

*Language of the case: German***Parties***Applicant:* ThyssenKrupp AG (Duisburg and Essen, Germany) (represented by: M. Klusmann and S. Thomas, lawyers)*Defendant:* Commission of the European Communities**Form of order sought**

- annul the contested decision in so far as it relates to the applicant;
- in the alternative, reduce as appropriate the amount of the fine imposed jointly and severally on the applicant in the contested decision;
- order the defendant to pay the costs of the proceedings.

Pleas in law and main arguments

The applicant is challenging Commission Decision C(2007) 512 final of 21 February 2007 in Case COMP/E-1/38.823 — PO/Elevators and Escalators. In the contested decision, fines were imposed on the applicant and other undertakings on the ground of their participation in cartels relating to the installation and maintenance of lifts and escalators in Belgium, Germany, Luxembourg and the Netherlands. In the view of the Commission, the undertakings concerned acted in breach of Article 81 EC.

In support of its action, the applicant puts forward the following pleas in law:

- Lack of competence on the Commission's part in the absence of any significance at inter-State level of the local infringement of which the applicant is accused;

- Infringement of the *ne bis in idem* principle inasmuch as the Commission disregarded the amnesty decisions which the cartel authorities in Belgium, Luxembourg and the Netherlands had adopted in the applicant's favour before the present proceedings were brought;
- Absence of the conditions required to establish that the applicant bears joint and several liability with its subsidiaries, inasmuch as it was not itself involved in the offences, its subsidiaries operate on a basis of legal and economic independence, and there is no objective justification for extending liability to the applicant;
- Disproportionate nature of the basic amounts used for calculation of the fine when compared with the *de facto* market volume in question;
- Disproportionate nature of the deterrent multiplication factor inasmuch as this differed significantly from the treatment accorded to other undertakings of comparable scale in comparable cases decided at the same time;
- Lack of justification for the repeat offender surcharge in the context of the fine calculation by reason of errors of law in regard to the inclusion of previous fines;
- Breach of Article 23(2) of Regulation (EC) No 1/2003 ⁽¹⁾ inasmuch as, with regard to the upper fine limit of 10 % of the undertaking's turnover, the fine ought to have been calculated solely on the basis of the turnover posted by the subsidiaries concerned;
- Legally defective application of the Notice on immunity from fines and reduction of fines ⁽²⁾ inasmuch as insufficient account was taken of the added value of the applicant's cooperation in all four countries concerned.

⁽¹⁾ 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).

⁽²⁾ Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3).

Action brought on 8 May 2007 — KONE and Others v Commission

(Case T-151/07)

(2007/C 155/62)

Language of the case: English

Parties

Applicants: KONE Corp. (Helsinki, Finland), KONE GmbH (Hannover, Germany) and KONE BV (The Hague, The Netherlands) (represented by: T. Vinje, Solicitor, D. Paemen, J. Schindler, B. Nijs, lawyers, J. Flynn, QC and D. Scannell, Barrister)

Defendant: Commission of the European Communities

Form of order sought

The applicants request the Court to:

- annul Article 2(2) of the decision in so far as it imposes a fine on KONE Corporation and KONE GmbH, and impose either no fine or a fine at a lower amount than determined in the Commission decision;
- annul Article 2(4) of the Commission decision in so far as it imposes a fine on KONE Corporation and KONE BV, and set the fine at a lower amount than determined by the Commission decision;
- order the Commission to pay the costs.

Pleas in law and main arguments

By means of their application, the applicants seek partial annulment, pursuant to Article 230 EC, of Commission Decision C(2007)512 final of 21 February 2007 (Case COMP/E-1/38.823 — PO/Elevators and Escalators), on the basis of which the applicants, among other undertakings, were held liable for participating in four single, complex and continuous infringements of Article 81(1) EC through the sharing of markets by virtue of agreeing and/or concerting to allocate tenders and contracts for the sale, installation, service and modernisation of elevators and escalators.

The applicants, KONE Corporation and its subsidiaries, KONE GmbH and KONE BV, challenge the contested decision only in respect of its imposition of fines on KONE as a whole for its participation in infringements in Germany and in the Netherlands.

In respect of the infringement which took place in Germany, the applicants submit that the Commission erred in determining the amount of the fine. In particular, the applicants claim first, that the Commission has improperly applied the 2002 Leniency Notice ⁽¹⁾ in that (i) it ought to have granted KONE immunity under point 8(b) and point 8(a) of the Notice; or alternatively, (ii) it ought to have reduced the applicants' fine in accordance with the last paragraph of point 23 of the said Notice.

The applicants claim, secondly, that the Commission has improperly applied the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation (EC) No 17 and Article 65(5) of the ECSC Treaty of 1998 ⁽²⁾ (hereinafter, 'the 1998 Fining Guidelines') in that (i) it allegedly failed to take into account the size of the affected market in setting the fine; and in that (ii) it failed to acknowledge properly the applicants' non-contestation of the facts, as shown by its grant of a reduction of only 1 % in respect of this contribution.

Thirdly, the applicants contend that the Commission has failed to observe basic principles of EC law in that (i) it disregarded the principle of legitimate expectations by failing to inform them in a timely manner of the unavailability of the immunity; in that (ii) it disregarded the principle of equal treatment by giving differential treatment to similarly situated immunity applicants; and in that (iii) it disregarded the applicants' rights of defence by refusing access to documents.