Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

13 July 2011 *

(Competition – Agreements, decisions and concerted practices – Market for the installation and maintenance of elevators and escalators – Decision finding an infringement of Article 81 EC – Bid-rigging – Market sharing – Price fixing)

In Cases T-141/07, T-142/07, T-145/07 and T-146/07,

General Technic-Otis Sàrl, established in Howald (Luxembourg), represented initially by M. Nosbusch and subsequently by A. Winckler, lawyers, and J. Temple Lang, Solicitor,

applicant in Case T-141/07,

General Technic Sàrl, established in Howald, represented by M. Nosbusch,

applicant in Case T-142/07,

Otis SA, established in Dilbeek (Belgium),

Otis GmbH & Co. OHG, established in Berlin (Germany),

Otis BV, established in Amersfoort (Netherlands),

Otis Elevator Company, established in Farmington, Connecticut (United States),

represented by A. Winckler and J. Temple Lang,

applicants in Case T-145/07,

United Technologies Corporation, established in Wilmington, Delaware (United States), represented by A. Winckler and J. Temple Lang,

applicant in Case T-146/07,

v

European Commission, represented in Cases T-141/07 and T-142/07, by A. Bouquet and R. Sauer, acting as Agents, and by A. Condomines, lawyer, and, in Cases T-145/07 and T-146/07, by A. Bouquet, R. Sauer and J. Bourke, acting as Agents, and by A. Condomines,

defendant,

* Languages of the case: French and English.

APPLICATIONS for annulment of 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) or, in the alternative, reduction of the amounts of the fines imposed on the applicants,

THE GENERAL COURT (Eighth Chamber),

composed of M.E. Martins Ribeiro (Rapporteur), President, N. Wahl and A. Dittrich, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearings on 1, 6 and 7 October 2009,

gives the following

Judgment

1 These cases concern applications for annulment of 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 contested decision'), a summary of which was published in the *Official Journal of the European Union* on 26 March 2008 (OJ 2008 C 75, p. 19), or, in the alternative, for reduction of the amounts of the fines imposed on the applicants.

2 In the contested decision, the Commission of the European Communities held that the following companies had infringed Article 81 EC:

– Kone Belgium SA ('Kone Belgium'), Kone GmbH ('Kone Germany'), Kone Luxembourg Sàrl ('Kone Luxembourg'), Kone BV Liften en Roltrappen ('Kone Netherlands') and Kone Oyj ('KC') (referred to, collectively and individually, as 'Kone');

– Otis SA ('Otis Belgium'), Otis GmbH & Co. OHG ('Otis Germany'), General Technic-Otis Sàrl ('GTO'), General Technic Sàrl ('GT'), Otis BV ('Otis Netherlands'), Otis Elevator Company ('OEC') and United Technologies Corporation ('UTC') (referred to, collectively and individually, as 'Otis');

– Schindler SA ('Schindler Belgium'), Schindler Deutschland Holding GmbH ('Schindler Germany'), Schindler Sàrl ('Schindler Luxembourg'), Schindler Liften BV ('Schindler Netherlands') and Schindler Holding Ltd ('Schindler Holding') (referred to, collectively and individually, as 'Schindler');

– ThyssenKrupp Liften Ascenseurs NV ('TKLA'), ThyssenKrupp Aufzüge GmbH ('TKA'), ThyssenKrupp Fahrtreppen GmbH ('TKF'), ThyssenKrupp Elevator AG ('TKE'), ThyssenKrupp AG ('TKAG'), ThyssenKrupp Ascenseurs Luxembourg Sàrl ('TKAL') and ThyssenKrupp Liften BV ('TKL') (referred to, collectively and individually, as 'ThyssenKrupp'); and

– Mitsubishi Elevator Europe BV ('MEE').

3 UTC is a world leader in the building systems and aerospace industries. OEC is a wholly-owned subsidiary of UTC which is based in the United States and carries out its activities in the elevator and escalator sector through national subsidiaries. Those subsidiaries include, in Belgium, Otis Belgium, in Germany, Otis Germany, in Luxembourg, GTO, and, in the Netherlands, Otis Netherlands. At the time of adoption of the contested decision, Otis Belgium had a 75% stake in GTO, the remaining 25% being held by GT (recitals 21 to 26 of the contested decision).

Administrative procedure

Commission investigation

4 In the summer of 2003, the Commission received information concerning the possible existence of a cartel among the four major European manufacturers of elevators and escalators engaged in business activities in the European Union, namely Kone, Otis, Schindler and ThyssenKrupp (recitals 3 and 91 of the contested decision).

Belgium

5 Starting on 28 January 2004, and during March 2004, the Commission carried out inspections under Article 14(2) and (3) of Council Regulation (EEC) No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87) at, inter alia, the premises of the national subsidiaries of Kone, Otis, Schindler and ThyssenKrupp in Belgium (recitals 92, 93, 95 and 97 of the contested decision).

6 Applications for leniency, under the Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) ('the 2002 Leniency Notice'), were submitted in turn by Kone, Otis, ThyssenKrupp and Schindler. Those applications were subsequently supplemented by the undertakings concerned (recitals 94, 96, 98 and 103 of the contested decision).

7 On 29 June 2004, conditional immunity was granted to Kone in application of point 8(b) of the 2002 Leniency Notice (recital 99 of the contested decision).

8 Between September and December 2004, the Commission also sent requests for information, pursuant to Article 18 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1), to the undertakings which had participated in the infringement in Belgium, to a number of customers in Belgium and to the Belgian association Agoria (recitals 101 and 102 of the contested decision).

Germany

9 Starting on 28 January 2004, and during March 2004, the Commission carried out inspections under Article 14(3) of Regulation No 17 at, inter alia, the premises of the subsidiaries of Otis and ThyssenKrupp in Germany (recitals 104 and 106 of the contested decision).

10 On 12 and 18 February 2004, Kone supplemented its application under the 2002 Leniency Notice concerning Belgium, made on 2 February 2004, with information concerning Germany. Likewise, Otis, between March 2004 and February 2005, supplemented its leniency application in respect of Belgium with information concerning Germany. On 25 November 2004, Schindler made an application under the 2002 Leniency Notice which contained information concerning Germany, which it supplemented between December 2004 and February 2005. Last, in December 2005, ThyssenKrupp submitted an application for leniency to the Commission, also under the 2002 Leniency Notice, in respect of Germany (recitals 105, 107, 112 and 114 of the contested decision).

11 Between September and November 2004, the Commission also sent requests for information, pursuant to Article 18 of Regulation No 1/2003, to the undertakings which had participated in the infringement in Germany, to a number of customers in Germany and to the associations VDMA, VFA and VMA (recitals 110, 111 and 113 of the contested decision).

Luxembourg

12 On 5 February 2004, Kone supplemented its application of 2 February 2004 concerning Belgium with information relating to Luxembourg. Applications under the 2002 Leniency Notice were made orally by Otis and ThyssenKrupp in respect of Luxembourg. Schindler made an application under the notice in respect of Luxembourg (recitals 115, 118, 119 and 124 of the contested decision).

13 Starting on 9 March 2004, the Commission carried out inspections under Article 14(3) of Regulation No 17 at, inter alia, the premises of the subsidiaries of Otis and ThyssenKrupp in Luxembourg (recital 116 of the contested decision).

14 On 29 June 2004, conditional immunity was granted to Kone pursuant to point 8(b) of the 2002 Leniency Notice for the part of its application relating to Luxembourg (recital 120 of the contested decision).

15 In September and October 2004, the Commission sent requests for information pursuant to Article 18 of Regulation No 1/2003 to the undertakings which had participated in the infringement in Luxembourg, to a number of customers in Luxembourg and to the Fédération luxembourgeoise des ascensoristes (recitals 122 and 123 of the contested decision).

The Netherlands

16 In March 2004, Otis made an application under the 2002 Leniency Notice in respect of the Netherlands, which was subsequently supplemented. In April 2004, ThyssenKrupp made an application under the notice, in respect of which supplementary information was subsequently also provided on a number of occasions. Finally, on 19 July 2004, Kone supplemented its application of 2 February 2004 for Belgium with information concerning the Netherlands (recitals 127, 129 and 130 of the contested decision).

17 On 27 July 2004, conditional immunity was granted to Otis pursuant to point 8(a) of the 2002 Leniency Notice (recital 131 of the contested decision).

18 From 28 April 2004, the Commission carried out inspections pursuant to Article 14(3) of Regulation No 17 at, inter alia, the premises of the subsidiaries of Kone, Schindler, ThyssenKrupp and MEE in the Netherlands, and also at the premises of the association Boschduin (recital 128 of the contested decision).

19 In September 2004, the Commission sent requests for information pursuant to Article 18 of Regulation No 1/2003 to the undertakings which had participated in the infringement in the Netherlands, to a number of customers in the Netherlands and to the associations VLR and Boschduin (recitals 133 and 134 of the contested decision).

Statement of objections

20 On 7 October 2005, the Commission adopted a statement of objections, addressed inter alia to the undertakings mentioned in paragraph 2 above. All the addressees of the statement of objections sent written observations in response to the objections raised by the Commission (recitals 135 and 137 of the contested decision).

21 No hearing was held, since none of the addressees of the statement of objections had requested a hearing (recital 138 of the contested decision).

Contested decision

22 On 21 February 2007, the Commission adopted the contested decision, in which it stated that the undertakings to which the decision was addressed had participated in four single, complex and continuous infringements of Article 81(1) EC in four Member States by sharing the markets among themselves by agreeing or concerting to allocate tenders and contracts for the sale, installation, service and modernisation of elevators and escalators (recital 2 of the contested decision).

23 As regards the addressees of the contested decision, the Commission considered that apart from the subsidiaries of the undertakings concerned in Belgium, Germany, Luxembourg and the Netherlands, the parent companies of those subsidiaries should be held jointly and severally liable for the infringements of Article 81 EC committed by their respective subsidiaries because they had been able to exercise decisive influence on the subsidiaries' commercial policy during the time of the infringement and because it could be presumed that they had made use of that power (recitals 608, 615, 622, 627 and 634 to 641 of the contested decision). The parent companies of MEE were not held jointly and severally liable for their subsidiary's conduct because it could not be established that they had exercised decisive influence over its conduct (recital 643 of the contested decision).

24 For the purpose of calculating the fines, the Commission applied in the contested decision the method set out in the Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3) ('the 1998 Guidelines'). It also considered whether, and to what extent, the undertakings concerned satisfied the requirements set by the 2002 Leniency Notice.

25 The Commission characterised the infringements as 'very serious' on account of their nature and of the fact that each of them covered the whole territory of a Member State (Belgium, Germany, Luxembourg or the Netherlands), even though their actual impact could not be measured (recital 671 of the contested decision).

26 In order to take account of the effective economic capacity of the undertakings concerned to cause significant damage to competition, the Commission divided them, for each country, into a number of categories by reference to the turnover achieved in elevators and/or escalators, including, where appropriate, maintenance and modernisation services (recitals 672 and 673 of the contested decision).

27 As regards the Belgian cartel, Kone and Schindler were placed in the first category and the starting amount of the fine, determined according to the gravity of the infringement, was set at EUR 40 000 000. Otis was placed in the second category and the starting amount of its fine was set at EUR 27 000 000. ThyssenKrupp was placed in the third category and the starting amount of its fine was set at EUR 16 500 000 (recitals 674 and 675 of the contested decision). A multiplier of 1.7 was applied to the starting amount of the fine to be imposed on Otis and a multiplier of 2 was applied to the starting amount for ThyssenKrupp, in order to take account of their size and their global resources, so that the starting amounts of their fines were increased to EUR 45 900 000 and EUR 33 000 000 respectively (recitals 690 and 691 of the contested decision). As the infringement had lasted seven years and eight months (from 9 May 1996 to 29 January 2004), the Commission increased the starting amount for the undertakings concerned by 75%. The basic amount of the fine was thus set at EUR 70 000 000 for Kone, EUR 80 325 000 for Otis, EUR 70 000 000 for Schindler and EUR 57 750 000 for ThyssenKrupp (recitals 692 and 696 of the contested decision). The Commission considered that ThyssenKrupp had to be regarded as a repeat infringer and for that reason increased its fine by 50% to take account of that aggravating circumstance (recitals 697, 698 and 708 to 710 of the contested decision). No attenuating circumstance was taken into account for the undertakings concerned (recitals 733, 734, 749, 750 and 753 to 755 of the contested decision). Under the 2002 Leniency Notice, Kone was granted total immunity from fines. Otis received a reduction of 40% of the fine in the band provided for in the first indent of point 23(b) of the 2002 Leniency Notice and a reduction of 1% of the fine for not contesting the facts. ThyssenKrupp was granted a reduction of 20% of the

fine in the band provided for in the second indent of point 23(b) of the 2002 Leniency Notice and also a reduction of 1% of the fine for not contesting the facts. Schindler was granted a reduction of 1% of the fine for not contesting the facts (recitals 760 to 777 of the contested decision).

28 As regards the German cartel, Kone, Otis and ThyssenKrupp were placed in the first category and the starting amount of the fine was set at EUR 70 000 000. Schindler was placed in the second category and the starting amount of its fine was set at EUR 17 000 000 (recitals 676 to 679 of the contested decision). A multiplier of 1.7 was applied to the starting amount of the fine to be imposed on Otis and a multiplier of 2 was applied to the starting amount for ThyssenKrupp, in order to take account of their size and their global resources, so that the starting amounts of their fines came to EUR 119 000 000 and EUR 140 000 000 respectively (recitals 690 and 691 of the contested decision). As the infringement by Kone, Otis and ThyssenKrupp had lasted eight years and four months (from 1 August 1995 to 5 December 2003), the Commission increased the starting amount of the fine for those undertakings by 80%. As the infringement by Schindler had lasted five years and four months (from 1 August 1995 to 6 December 2000), the Commission increased the starting amount of its fine by 50%. The basic amount of the fine was thus set at EUR 126 000 000 for Kone, EUR 214 200 000 for Otis, EUR 25 500 000 for Schindler and EUR 252 000 000 for ThyssenKrupp (recitals 693 and 696 of the contested decision). The Commission considered that ThyssenKrupp had to be regarded as a repeat infringer and for that reason increased its fine by 50% to take account of that aggravating circumstance (recitals 697 to 707 of the contested decision). No attenuating circumstance was taken into account for the undertakings concerned (recitals 727 to 729, 735, 736, 742 to 744, 749, 750 and 753 to 755 of the contested decision). Kone received the maximum reduction of 50% of the fine provided for in the first indent of point 23(b) of the 2002 Leniency Notice and also a reduction of 1% of the fine for not contesting the facts. Otis received a reduction of 25% of the fine in the band provided for in the second indent of point 23(b) of the 2002 Leniency Notice and a reduction of 1% of the fine for not contesting the facts. Schindler received a reduction of 15% of the fine in the band provided for in the third indent of point 23(b) of the 2002 Leniency Notice and also a reduction of 1% of the fine for not contesting the facts. ThyssenKrupp received a reduction of 1% of the fine for not contesting the facts (recitals 778 to 813 of the contested decision).

29 With respect to the Luxembourg cartel, Otis and Schindler were placed in the first category and the starting amount of the fine was set at EUR 10 000 000. Kone and ThyssenKrupp were placed in the second category, and the starting amount of the fine was set at EUR 2 500 000 (recitals 680 to 683 of the contested decision). A multiplier of 1.7 was applied to the starting amount of the fine to be imposed on Otis and a multiplier of 2 was applied to the starting amount of the fine for ThyssenKrupp, to take account of their size and their global resources, and the starting amounts of their fines were thus increased to EUR 17 000 000 and EUR 5 000 000 respectively (recitals 690 and 691 of the contested decision). As the infringement had lasted eight years and three months (from 7 December 1995 to 9 March 2004), the Commission increased the starting amount of the fine for the undertakings concerned by 80%. The basic amount of the fine was thus set at EUR 4 500 000 for Kone, EUR 30 600 000 for Otis, EUR 18 000 000 for Schindler and EUR 9 000 000 for ThyssenKrupp (recitals 694 and 696 of the contested decision). The Commission considered that ThyssenKrupp had to be regarded as a repeat infringer and for that reason increased its fine by 50% to take account of that aggravating circumstance (recitals 697, 698 and 711 to 714 of the contested decision). No attenuating circumstance was taken into account for the undertakings concerned (recitals 730, 749, 750 and 753 to 755 of the contested decision). Under the 2002 Leniency Notice, Kone was granted total immunity from fines. Otis received a reduction of 40% of the fine in the band provided for in the first indent of point 23(b) of the 2002 Leniency Notice and a reduction of 1% of the fine for not contesting the facts. Schindler and ThyssenKrupp received only a reduction of 1% of the fine for not contesting the facts (recitals 814 to 835 of the contested decision).

30 As regards the Netherlands cartel, Kone was placed in the first category and the starting amount of its fine was set at EUR 55 000 000. Otis was placed in the second category and the starting amount of its fine was set at EUR 41 000 000. Schindler was placed in the third category and the starting amount of

its fine was set at EUR 24 500 000. ThyssenKrupp and MEE were placed in the fourth category and the starting amount of the fine was set at EUR 8 500 000 (recitals 684 and 685 of the contested decision). A multiplier of 1.7 was applied to the starting amount of the fine to be imposed on Otis and a multiplier of 2 was applied to the starting amount for ThyssenKrupp, to take account of their size and global resources, so that the starting amounts of their fines came to EUR 69 700 000 and EUR 17 000 000 respectively (recitals 690 and 691 of the contested decision). As the infringement by Otis and ThyssenKrupp had lasted five years and ten months (from 15 April 1998 to 5 March 2004), the Commission increased the starting amount of the fine for those undertakings by 55%. As the infringement by Kone and Schindler had lasted four years and nine months (from 1 June 1999 to 5 March 2004), the Commission increased the starting amount of the fine for those undertakings by 45%. As the infringement by MEE had lasted four years and one month (from 11 January 2000 to 5 March 2004), the Commission increased the starting amount of the fine for that undertaking by 40%. The basic amount of the fine was thus EUR 79 750 000 for Kone, EUR 108 035 000 for Otis, EUR 35 525 000 for Schindler, EUR 26 350 000 for ThyssenKrupp and EUR 11 900 000 for MEE (recitals 695 and 696 of the contested decision). The Commission considered that ThyssenKrupp had to be regarded as a repeat infringer and for that reason increased its fine by 50% to take account of that aggravating circumstance (recitals 697, 698 and 715 to 720 of the contested decision). No attenuating circumstance was taken into account for the undertakings concerned (recitals 724 to 726, 731, 732, 737, 739 to 741, 745 to 748 and 751 to 755 of the contested decision). Under the 2002 Leniency Notice, Otis was granted total immunity from fines. ThyssenKrupp was granted a reduction of 40% of the fine in the band provided for in the first indent of point 23(b) of the 2002 Leniency Notice and also a reduction of 1% of the fine for not contesting the facts. Schindler and MEE received a reduction of 1% of the fine for not contesting the facts (recitals 836 to 855 of the contested decision).

31 The operative part of the contested decision reads as follows:

'Article 1

1. In respect of Belgium, the following undertakings have infringed Article 81 [EC] by regularly agreeing collectively, for the periods indicated, in the context of related national agreements and concerted practices concerning elevators and escalators to share markets, allocate public and private tenders and other contracts in accordance with the pre-agreed shares for sale and installation and to refrain from competing with each other for maintenance and modernisation contracts:

– Kone: [KC] and [Kone Belgium]: from 9 May 1996 to 29 January 2004;

– Otis: [UTC], [OEC] and [Otis Belgium]: from 9 May 1996 to 29 January 2004;

– Schindler: Schindler Holding … and [Schindler Belgium]: from 9 May 1996 to 29 January 2004; and

– ThyssenKrupp: [TKAG], [TKE] and [TKLA]: from 9 May 1996 to 29 January 2004;

2. In respect of Germany, the following undertakings have infringed Article 81 [EC] by regularly agreeing collectively, for the periods indicated, in the context of related national agreements and concerted practices concerning elevators and escalators to share markets, allocate public and private tenders and other contracts in accordance with the pre-agreed shares for sale and installation:

– Kone: [KC] and [Kone Germany]: from 1 August 1995 to 5 December 2003;

– Otis: [UTC], [OEC] and [Otis Germany]: from 1 August 1995 to 5 December 2003;

– Schindler: Schindler Holding … and [Schindler Germany]: from 1 August 1995 to 6 December 2000; and

– ThyssenKrupp: [TKAG], [TKE], [TKA] and [TKF]: from 1 August 1995 to 5 December 2003.

3. In respect of Luxembourg, the following undertakings have infringed Article 81 [EC] by regularly agreeing collectively, for the periods indicated, in the context of related national agreements and concerted practices concerning elevators and escalators to share markets, allocate public and private tenders and other contracts in accordance with the pre-agreed shares for sale and installation and to refrain from competing with each other for maintenance and modernisation contracts:

– Kone: [KC] and [Kone Luxembourg]: from 7 December 1995 to 29 January 2004;

– Otis: [UTC], [OEC], [Otis Belgium], [GTO] and [GT]: from 7 December 1995 to 9 March 2004;

– Schindler: Schindler Holding … and [Schindler Luxembourg]: from 7 December 1995 to 9 March 2004; and

– ThyssenKrupp: [TKAG], [TKE] and [TKAL]: from 7 December 1995 to 9 March 2004.

4. In respect of the Netherlands, the following undertakings have infringed Article 81 [EC] by regularly agreeing collectively, for the periods indicated, in the context of related national agreements and concerted practices concerning elevators and escalators to share markets, allocate public and private tenders and other contracts in accordance with the pre-agreed shares for the sale and installation and to refrain from competing with each other for maintenance and modernisation contracts:

– Kone: [KC] and [Kone Netherlands]: from 1 June 1999 to 5 March 2004;

– Otis: [UTC], [OEC] and [Otis Netherlands]: from 15 April 1998 to 5 March 2004;

– Schindler: Schindler Holding … and [Schindler Netherlands]: from 1 June 1999 to 5 March 2004;

– ThyssenKrupp: [TKAG] and [TKL]: from 15 April 1998 to 5 March 2004; and

– [MEE]: from 11 January 2000 to 5 March 2004.

Article 2

1. For the infringement in Belgium referred to in Article 1(1), the following fines are imposed:

– Kone: [KC] and [Kone Belgium], jointly and severally: EUR 0;

– Otis: [UTC], [OEC] and [Otis Belgium], jointly and severally: EUR 47 713 050;

– Schindler: Schindler Holding … and [Schindler Belgium], jointly and severally: EUR 69 300 000; and

– ThyssenKrupp: [TKAG], [TKE] and [TKLA], jointly and severally: EUR 68 607 000.

2. For the infringement in Germany referred to in Article 1(2), the following fines are imposed:

– Kone: [KC] and [Kone Germany], jointly and severally: EUR 62 370 000;

– Otis: [UTC], [OEC] and [Otis Germany], jointly and severally: EUR 159 043 500;

– Schindler: Schindler Holding … and [Schindler Germany], jointly and severally: EUR 21 458 250; and

– ThyssenKrupp: [TKAG], [TKE], [TKA] and [TKF], jointly and severally: EUR 374 220 000.

3. For the infringement in Luxembourg referred to in Article 1(3), the following fines are imposed:

– Kone: [KC] and [Kone Luxembourg], jointly and severally: EUR 0;

– Otis: [UTC], [OEC], [Otis Belgium], [GTO] and [GT], jointly and severally: EUR 18 176 400;

– Schindler: Schindler Holding … and [Schindler Luxembourg], jointly and severally: EUR 17 820 000; and

– ThyssenKrupp: [TKAG], [TKE] and [TKAL], jointly and severally: EUR 13 365 000.

4. For the infringement in the Netherlands referred to in Article 1(4), the following fines are imposed:

– Kone: [KC] and [Kone Netherlands], jointly and severally: EUR 79 750 000;

– Otis: [UTC], [OEC] and [Otis Netherlands], jointly and severally: EUR 0;

– Schindler: Schindler Holding … and [Schindler Netherlands], jointly and severally: EUR 35 169 750;

– ThyssenKrupp: [TKAG] and [TKL], jointly and severally: EUR 23 477 850; and

– [MEE]: EUR 1 841 400.

…'

Proceedings and forms of order sought

32 By applications lodged at the Registry of the General Court on 4 May 2007 (in Cases T-141/07 and T-142/07) and 7 May 2007 (in Cases T-145/07 and T-146/07), the applicants, GTO, GT, Otis Belgium, Otis Germany, Otis Netherlands, OEC and UTC, brought the present actions.

33 Upon hearing the report of the Judge-Rapporteur, the Court (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of its Rules of Procedure, put questions in writing to the parties and requested them to produce documents. The parties complied within the prescribed period.

34 Following a request made by the Commission on 18 August 2009 in Case T-145/07, the Court, as a measure of organisation of procedure as provided for in Article 64 of the Rules of Procedure, also asked the Commission to reply to a number of questions and to produce documents. The Commission complied within the prescribed period.

35 The parties in Cases T-141/07, T-145/07 and T-146/07 presented oral argument and answered the oral questions put to them by the Court at the hearings on 1, 6 and 7 October 2009.

36 The applicant in Case T-142/07 was not represented at the hearing on 1 October 2009. At the hearing, the Commission nevertheless replied to the Court's questions.

37 In Case T-141/07, the applicant, at the request of the Court, produced, on 12 October 2009, a letter setting out details of the information in the case-file which it had, at the hearing, requested be omitted from the Court's publications. By letter of 12 November 2009, the Commission presented its observations on that letter. The oral procedure in Case T-141/07 was then closed.

38 In Case T-142/07, the applicant, by letter of 12 October 2009, informed the Court that it had no objection to that case being joined for the purposes of judgment with Cases T-141/07, T-145/07 and T-146/07. The oral procedure in Case T-142/07 was then closed.

39 In Cases T-145/07 and T-146/07, the applicants, at the request of the Court, produced, on 15 October 2009, a letter setting out details of the information in the case-file which they had, at the hearing, requested be omitted from the Court's publications. The oral procedure in those cases was then closed.

40 After the applicants in Cases T-141/07, T-145/07 and T-146/07 had presented oral argument on the matter at the hearing and the applicant in Case T-142/07 had also submitted its observations in writing, the Court decided, pursuant to Article 50 of the Rules of Procedure, to join the present cases for the purposes of the judgment.

41 In Case T-141/07, the applicant claims that the Court should:

– annul the contested decision in so far as it concerns the applicant;

– in the alternative, annul or reduce the fine imposed on it by the contested decision;

– order the Commission to pay the costs.

42 In Case T-142/07, the applicant claims that the Court should:

– annul the contested decision in so far as it concerns the applicant;

– in the alternative, annul or reduce the fine imposed on it by the contested decision;

– order the Commission to pay the costs.

43 In Case T-145/07, the applicants claim that the Court should:

– annul or substantially reduce the fines imposed on them by the contested decision;

– order the Commission to pay the costs;

– take any other measure which the Court considers appropriate.

44 In Case T-146/07, the applicant claims that the Court should:

– annul or substantially reduce the fines imposed on it by the contested decision;

– order the Commission to pay the costs;

– take any other measure which the Court considers appropriate.

45 The Commission contends in each case that the Court should:

– dismiss the actions;

– order the applicants to pay the costs.

Law

46 The Court observes, as a preliminary point, that the actions brought by the applicants in Cases T-141/07 and T-142/07 pursue two objectives, that is to say, principally, an application for the annulment of the contested decision and, in the alternative, an application for the annulment or reduction of the fines. By contrast, the actions brought by the applicants in Cases T-145/07 and T-146/07 seek only annulment or reduction of the fines.

47 At the hearing, the applicant in Case T-141/07, in response to a request from the Court that it submit observations on the exact scope of its arguments, stated, in essence, that the only plea that was liable to entail annulment of the contested decision in its entirety was the plea concerning infringement of the principle of equal treatment in relation to the imputation to GTO's parent companies of GTO's conduct.

48 The applicants in Cases T-141/07, T-142/07, T-145/07 and T-146/07 put forward eight pleas in law in total. The first alleges infringement of the principles governing the attribution of liability for infringements of Article 81 EC, of the presumption of innocence, of the principle that penalties must be specific to the offender, of the principle of equal treatment, of the rights of the defence and of Article 253 EC in relation to the imputation to the parent companies of infringements committed by their various subsidiaries. The second alleges breach of the 1998 Guidelines and infringement of the principles of proportionality and equal treatment, of the rights of the defence and of Article 253 EC in the determination of the starting amounts of the fines according to the gravity of the infringements. The third, advanced solely by the applicants in Case T-145/07, alleges breach of the 1998 Guidelines and infringement of the principle of proportionality in the determination of the starting amount of the fine by reference to the duration of the infringement in Germany. The fourth, put forward by the applicants in Cases T-145/07 and T-146/07, alleges breach of the 1998 Guidelines and infringement of the principle of proportionality in the application of a group multiplier for deterrence in the determination of the starting amounts of the fines. The fifth, advanced by the applicants in Cases T-141/07 and T-145/07, alleges breach of the 2002 Leniency Notice and infringement of Article 253 EC and of the principles of the protection of legitimate expectations, proportionality, fairness, equal treatment and of the rights of the defence in the assessment of the applicants' cooperation. The sixth, advanced by the applicants in Cases T-141/07 and T-145/07, alleges infringement of the principles of the protection of legitimate expectations and proportionality in the determination of the reduction of the fines granted for cooperation outside the 2002 Leniency Notice. The seventh, put forward by the applicants in Cases T-141/07 and T-145/07, alleges infringement of Article 23(2) of Regulation No 1/2003. Finally, the eighth plea, advanced by the applicant in Case T-141/07, alleges infringement of the principle of proportionality in the calculation of the final amount of the fines.

The plea alleging infringement of the principles governing the attribution of liability for infringements of Article 81 EC, infringement of the presumption of innocence, of the principle that the penalties must be specific to the offender and of the principle of equal treatment, and infringement of the rights of the defence and of Article 253 EC in relation to the imputation to the parent companies of infringements committed by their subsidiaries

Preliminary observations

49 In the context of this plea, the applicants in Cases T-141/07, T-142/07, T-145/07 and T-146/07 deny that UTC, OEC, Otis Belgium and GT are liable for the anti-competitive conduct of their various subsidiaries in Belgium, Germany, Luxembourg and the Netherlands.

50 Although the applicants in Cases T-145/07 and T-146/07 advance this plea only in relation to their application for annulment or reduction of the fines, they are to be considered by it to be seeking – like the applicants in Cases T-141/07 and T-142/07 – not only annulment or reduction of the fines imposed but also annulment of Article 1 of the contested decision, in so far as the Commission incorrectly made a finding of infringement imputed to the parent companies.

51 Thus, this plea relates, on the one hand, to the legality of the finding of infringement by the parent companies referred to in Article 1 of the contested decision and, on the other, to the legality of the fines imposed on those companies in Article 2 of the contested decision.

52 With regard to the joint and several liability of a parent company for the conduct of its subsidiary, the Court observes that the fact that a subsidiary has a separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company (Case 48/69 *Imperial Chemical Industries* v *Commission* [1972] ECR 619, paragraph 132).

53 European Union ('EU') competition law refers to the activities of undertakings and the concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraph 54 and the case-law cited).

54 The Courts of the European Union have also stated that, in the same context, the concept of an undertaking must be understood as designating an economic unit even if in law that economic unit consists of several persons, natural or legal (see Case 170/83 *Hydrotherm Gerätebau* [1984] ECR 2999, paragraph 11; *Akzo Nobel and Others* v *Commission*, paragraph 53 above, paragraph 55 and the case-law cited; and Case T-234/95 *DSG* v *Commission* [2000] ECR II-2603, paragraph 124). They have emphasised that, for the purposes of applying the competition rules, formal separation of two companies resulting from their having distinct legal identity is not decisive. The test is whether or not there is unity in their conduct on the market. Thus, it may prove necessary to establish whether two companies that have distinct legal identities form, or fall within, one and the same undertaking or economic entity adopting the same course of conduct on the market (*Imperial Chemical Industries* v *Commission*, paragraph 52 above, paragraph 140, and Case T-325/01 *DaimlerChrysler* v *Commission* [2005] ECR II-3319, paragraph 85).

55 When such an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement (*Akzo Nobel and Others* v *Commission*, paragraph 53 above, paragraph 56 and the case-law cited).

56 Thus, the conduct of a subsidiary may be imputed to the parent company in particular where, although it has a separate legal personality, that subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities (see Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraph 27; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 117; and *Akzo Nobel and Others* v *Commission*, paragraph 53 above, paragraph 58 and the case-law cited).

57 In such a situation, the parent company and its subsidiary form a single economic unit and therefore form a single undertaking for the purposes of the case-law mentioned in paragraph 54 above. Thus, the fact that a parent company and its subsidiary constitute a single undertaking within the meaning of Article 81 EC enables the Commission to address a decision imposing fines to the parent company, without having to establish the personal involvement of the latter in the infringement (*Akzo Nobel and Others* v *Commission*, paragraph 53 above, paragraph 59).

58 In that regard, it must be made clear that the Commission cannot merely find that an undertaking is able to exert a decisive influence over another undertaking, without checking whether that influence was actually exerted. On the contrary, it is, as a rule, for the Commission to demonstrate such decisive influence on the basis of factual evidence, including, in particular, any management power one of the undertakings may have over the other (see, to that effect, Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraphs 96 to 99; *Dansk Rørindustri and Others* v *Commission*, paragraph 56 above, paragraphs 118 to 122; and Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 136).

59 In the specific case in which a parent company holds 100% of the shares in a subsidiary which has infringed the EU competition rules, first, the parent company can exercise a decisive influence over the conduct of the subsidiary and, second, there is a rebuttable presumption that the parent company does in fact exercise a decisive influence over the conduct of its subsidiary (see *Akzo Nobel and Others* v *Commission*, paragraph 53 above, paragraph 60 and the case-law cited).

60 In those circumstances, it is sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company in order to presume that the parent exercises a decisive influence over the commercial policy of the subsidiary. The Commission will then be able to regard the parent company as jointly and severally liable for payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market (see *Akzo Nobel and Others* v *Commission*, paragraph 53 above, paragraph 61 and the case-law cited).

61 Furthermore, whilst it is true that in paragraphs 28 and 29 of its judgment in Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925 the Court of Justice referred, not only to the fact that the parent company owned 100% of the capital of the subsidiary, but also to other circumstances, such as the fact that it was not disputed that the parent company exercised influence over the commercial policy of its subsidiary or that both companies were jointly represented during the administrative procedure, the fact remains that those circumstances were mentioned for the sole purpose of identifying all the elements on which the General Court had based its reasoning and not to make the application of the presumption mentioned in paragraph 59 above subject to the production of additional indicia relating to the actual exercise of influence by the parent company (*Akzo Nobel and Others* v *Commission*, paragraph 53 above, paragraph 62).

62 It is appropriate, in the light of the above principles, to examine the imputation of the infringements committed by Otis Germany, Otis Belgium, Otis Netherlands and GTO to their respective parent companies. In that regard, the Court will examine in turn (i) the imputation to UTC and OEC of the infringements committed in Belgium, Germany and the Netherlands by Otis Belgium, Otis Germany and Otis Netherlands (taken together 'the Otis subsidiaries') (recitals 615 to 621 of the contested decision) and (ii) the imputation to UTC, OEC, Otis Belgium and GT of the infringements committed by GTO in Luxembourg (recitals 622 to 626 of the contested decision).

The imputation to UTC and OEC of the infringements committed by the Otis subsidiaries

63 In recital 615 of the contested decision, the Commission explains that '[a]lthough [the Otis subsidiaries] were the legal entities that directly participated in the cartels, their owner, OEC and its sole-owner and ultimate parent company, UTC, were able to exercise decisive influence on the commercial policy of each of the subsidiaries during the period of the infringement and, it is presumed, made use of this power'.

64 In recitals 616 to 618 of the contested decision, the Commission finds that the argument that the Otis subsidiaries took all their commercial decisions independently and without any instructions from OEC, the argument that day-to-day operations, including decisions on whether or not to participate in bids

[*confidential*] [1], were not subject to approval at OEC level, and also the argument that [*confidential*] are 'insufficient to rebut the presumption that [the Otis] subsidiaries did not determine independently their own conduct on the market'. Concerning the last argument, the Commission adds, in recital 618 of the contested decision, that [*confidential*] and that [*confidential*].

65 The Commission also states in recital 619 of the contested decision that '[i]n their replies to the statement of objections, OEC, UTC and their relevant subsidiaries did not provide [it] with evidence clarifying their corporate relationships, the management structure and reporting requirements for the purposes of rebutting the presumption that OEC and UTC exerted decisive influence over the subsidiaries preventing them from determining independently their own conduct on the market'.

66 Finally, in recital 620 of the contested decision, the Commission states that, contrary to OEC's contention, 'OEC is not to be held jointly and severally liable for the various infringements of Article 81 [EC] on the basis of "practical or policy reasons". Rather, liability is exclusively based on the fact that OEC and UTC form part of an economic unit which has committed very serious infringements of [EU] competition law … '.

67 In a first limb of the plea, the applicants in Cases T-145/07 and T-146/07 maintain, in essence, that, having regard to the personal nature of responsibility for infringements of competition law, the latter recognises only two situations in which the parent company may be held responsible for the conduct of its subsidiary: first, where the subsidiary did not decide independently upon its own commercial policy but carried out, in all respects, the instructions given to it by the parent company, which must be proved by the Commission, and, second, where the parent company was aware that its subsidiary was acting unlawfully and failed to bring the conduct to an end although it had the power to do so. The applicants submit that there is no proof to that effect in the contested decision.

68 Thus, the applicants argue that a parent company's liability cannot be founded on its ability to exercise influence, as is the case when applying Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1). The stance adopted by the Commission has the effect that no parent company would ever be in a position to rebut the presumption as construed by the Commission, since it is impossible, except in extreme situations, for a parent of a wholly-owned stock company to have no legal power to exercise influence. The applicant in Case T-146/07 also asserts that the Commission's stance runs counter to the presumption of innocence as enshrined in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (the 'ECHR') and Article 23(2) of Regulation No 1/2003, which authorises the Commission to impose fines only for infringements committed intentionally or negligently.

69 The Court finds, first, that the applicants' arguments are based on an incorrect reading of the case-law referred to in paragraphs 52 to 61 above. According to that case-law, the Commission cannot, in order to impute the anti-competitive conduct of one company to another, take as its basis the mere ability of one company to exercise influence, as is the case regarding the application of Regulation No 139/2004, without it being necessary to ascertain whether that influence has actually been exercised. On the contrary, it is, as a rule, for the Commission to demonstrate such decisive influence on the basis of factual evidence, including, in particular, any management power one of the undertakings may have over the other. However, according to that case-law, when a parent company holds 100% of the shares in a subsidiary which has engaged in unlawful conduct, there is a rebuttable presumption that the parent company exerts a decisive influence over its subsidiary's conduct and it is thus sufficient for the Commission to prove that the subsidiary is wholly owned by the parent company. The Court of Justice has thus held that the parent company has the burden of rebutting that presumption by

1 Confidential information omitted.

adducing sufficient evidence to show that its subsidiary acts independently on the market (*Stora Kopparbergs Bergslags* v *Commission*, paragraph 61 above, paragraph 29, and *Akzo Nobel and Others* v *Commission*, paragraph 53 above, paragraph 61).

70 In the present case, it is not disputed that, during the period of the infringement, UTC directly held 100% of the share capital in OEC and, indirectly, through OEC, 100% of the share capital in Otis Belgium, Otis Germany and Otis Netherlands. The Commission was thus correct in presuming that UTC, throughout the period of the infringement, exercised decisive influence on the commercial policy of those subsidiaries. Accordingly, the applicants in Cases T-145/07 and T-146/07 cannot maintain that, in the case of subsidiaries wholly owned by their parent company, the Commission has to prove that the subsidiary did not decide independently upon its own commercial policy or that the parent company was aware of its subsidiary's unlawful conduct and did not bring it to an end although it had the power to do so.

71 Second, with regard to the alleged infringement of the principle of the presumption of innocence, it is necessary to recall that that principle, as it results in particular from Article 6(2) of the ECHR, is one of the fundamental rights which, according to the case-law of the Court of Justice, reaffirmed by Article 6(2) EU and by Article 48 of the Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1), are recognised in the EU legal order. Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, the principle of the presumption of innocence applies inter alia to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraph 115 and the case-law cited).

72 The principle of the presumption of innocence implies that every person accused is presumed to be innocent until his guilt has been established according to law (Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission* [2005] ECR II-4065, paragraph 106).

73 As regards the question whether a rule concerning the imputability of an infringement such as that stated in the case-law cited in paragraph 59 above is compatible with Article 6(2) of the ECHR, the Court points out that the European Court of Human Rights has held that that provision does not preclude presumptions of fact or of law provided for in the criminal law, but requires them to be confined within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence (see *Salabiaku v. France*, judgment of 7 October 1988, Series A no. 141, § 28; see also, to that effect, *Grayson and Barnham v. the United Kingdom*, nos. 19955/05 and 15085/06, judgment of 23 September 2008, *Reports of Judgments and Decisions* 2008, § 40). Thus, the presumption of innocence is not disregarded if in competition proceedings certain conclusions are drawn on the basis of common experience provided that the undertakings concerned are at liberty to refute those conclusions (see, by analogy, the Opinion of Advocate General Kokott in Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, I-4533, point 93).

74 In this case, the Commission, first of all, established, in the contested decision, without having recourse to any presumption of fact or law, that the Otis subsidiaries committed infringements of Article 81 EC in Belgium, Germany and the Netherlands.

75 Given that Article 81 EC concerns the conduct of undertakings, the Commission went on to examine whether the economic entity which had committed those infringements also encompassed the parent companies of the Otis subsidiaries. It established that OEC and UTC had exercised decisive influence over the conduct of their subsidiaries, relying on the presumption of liability deriving in particular from the case-law cited in paragraph 59 above. Finally, in compliance with the rights of the defence, those parent companies, which were addressees of the statement of objections, had the opportunity to

rebut that presumption by adducing evidence demonstrating the independence of the Otis subsidiaries. The Commission none the less concluded, in recital 621 of the contested decision, that that presumption had not been rebutted.

76 Since the presumption referred to in paragraph 59 above was rebuttable, concerning only the imputation to a parent company of an infringement already established in the case of its subsidiary and arising moreover in the framework of a procedure that observed the rights of the defence, the complaint alleging infringement of the principle of the presumption of innocence must be rejected.

77 Third, nor can the applicants in Cases T-145/07 and T-146/07 maintain that the principle that penalties must be specific to the offender has been infringed in this case. By virtue of that principle, which applies in any administrative procedure that may lead to the imposition of penalties under EU competition law, an undertaking may be penalised only for acts imputed to it individually (see, to that effect, Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 63). However, that principle must coexist with the concept of 'undertaking'. It is not because of a parent-subsidiary relationship in which the parent company instigates the infringement, nor a fortiori because of the parent company's involvement in the infringement, but because they constitute a single undertaking for the purposes of Article 81 EC that the Commission is able to address a decision imposing fines to the parent company (see, to that effect, Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290). In that regard, it must be stated that UTC and OEC were individually penalised for infringements which they were deemed to have committed themselves on account of their close legal and economic links with the Otis subsidiaries (see, to that effect, *Metsä-Serla and Others* v *Commission*, paragraph 56 above, paragraph 34). Accordingly, there has been no infringement of the principle that penalties must be specific to the offender.

78 It must therefore be concluded that the Commission was fully entitled to rely on the presumption that OEC and UTC exercised decisive influence on the commercial policy of the Otis subsidiaries during the period of the infringement (recital 615 of the contested decision).

79 In a second limb of this plea, the applicants in Cases T-145/07 and T-146/07 submit that, even supposing that 100% ownership of a company is sufficient to establish the presumption of parent-company liability, they produced sufficient evidence to rebut that presumption, contrary to the statement in recital 619 of the contested decision. The Court must therefore consider whether the Commission was correct, in recital 621 of the contested decision, in stating that UTC and OEC had not rebutted the presumption that they were liable for the infringements committed by the Otis subsidiaries.

80 In the first place, the Court must reject UTC's arguments that the contested decision was insufficiently reasoned with regard to the Commission's conclusion that UTC had not rebutted the presumption of liability. It is settled case-law that the statement of reasons required under Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the EU authority which adopted the measure in question, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63; Case C-301/96 *Germany* v *Commission* [2003] ECR I-9919, paragraph 87; and *Avebe* v *Commission*, paragraph 58 above, paragraph 41). In the present case, the Commission clearly explained, in recitals 616 to 620 of the contested decision (see paragraphs 64 to 66 above), the reasons why it considered that UTC had failed to rebut that presumption.

81 In the second place, if the presumption of liability is to be rebutted, the parent company must adduce sufficient evidence to show that its subsidiary acts independently on the market. The Court must therefore ascertain whether the applicants adduced such evidence, as they claim they did.

82 First, the argument of the applicant in Case T-146/07 that UTC and OEC are legal entities separate from their subsidiaries is not capable of rebutting the abovementioned presumption, since the formal separation of companies resulting from their distinct legal personality does not preclude them from forming a single undertaking for the purposes of the application of Article 81 EC because of the unity of their conduct on the market (see paragraph 52 above).

83 Second, the separation of the governing and managing organs of UTC and the Otis subsidiaries and [*confidential*] between the board of OEC and those of the subsidiaries during the period of the infringement – invoked by the applicants in Cases T-145/07 and T-146/07 – cannot be regarded as decisive. As the Commission noted in inter alia recital 618 of the contested decision, [*confidential*] does not as such show that the Otis subsidiaries determined their commercial policy independently. In any event, the fact remains that those statements are not substantiated by documentary evidence, such as the list of names of the members of the statutory organs of those undertakings at the time of the infringement (see, to that effect, Case T-69/04 *Schunk and Schunk Kohlenstoff-Technik* v *Commission* [2008] ECR II-2567, paragraph 69).

84 Third, nor does the fact that UTC is the holding company of a diversified conglomerate group, whose supervision of OEC's activities is limited to what was required by virtue of UTC's obligations to its own shareholders under the applicable law, allow the presumption of liability to be rebutted. In that regard, it must specifically be recalled that in the context of a group of companies, a holding company is a company which seeks to regroup shareholdings in various companies and whose function is to ensure that they are run as one (*Schunk and Schunk Kohlenstoff-Technik* v *Commission*, paragraph 83 above, paragraph 63). In addition, in the present case, UTC itself advanced, in its reply to the statement of objections and in the application, a number of matters attesting to its involvement in the determination of its subsidiaries' commercial policy which tend to suggest that the Otis subsidiaries do not determine their conduct on the market independently. [*confidential*].

85 Fourth, contrary to the submission of the applicants in Cases T-145/07 and T-146/07, the deployment of formal written policies for compliance with competition law does not rebut the presumption that OEC and UTC are liable for the conduct of their subsidiaries. The fact that such policies are deployed does not establish that those subsidiaries determined their commercial policy on the market independently. The fact that UTC and OEC ensure the implementation of such policies [*confidential*] or the fact, to which OEC drew attention in the application, that OEC [*confidential*] tends instead to support the proposition that the Otis subsidiaries are not managed independently.

86 In that context, the Court must also reject the arguments of the applicants in Case T-145/07 (i) that the fact that a parent company issues rules and business guidelines on certain principles is not evidence of control over detailed day-to-day conduct and (ii) that it is contrary to common sense and elementary principles of justice to use the existence of instructions designed to prevent illegal conduct in order to establish liability for that conduct when the instructions were not obeyed. Those arguments are based on the incorrect premiss that the Commission relied on the fact that those rules and guidelines existed in order to establish OEC's liability, which is not the case here, as the Commission relied, in recital 615 of the contested decision, on the presumption of liability as stated in settled case-law (see paragraphs 59 and 60 above).

87 Fifth, the fact, to which the applicant in Case T-146/07 drew attention, that certain employees had disobeyed UTC's instructions, in particular by concealing their behaviour from their superiors and UTC, does not reverse the presumption that the subsidiaries concerned were not autonomous. In that regard, the distinction drawn by UTC between, on the one hand, the Otis subsidiaries and, on the other, the employees of those subsidiaries, who are said to have committed the infringements whilst concealing their behaviour from their superiors and UTC, is artificial. Those employees are, in relation to the Otis subsidiaries which employ them, in a relationship characterised by the fact that they work for and under the management of each of them and are, throughout the term of that relationship, integrated into those undertakings, thereby forming with each of them an economic unit

(see, to that effect, Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 539, and Case C-22/98 *Becu and Others* [1999] ECR I-5665, paragraph 26).

88 Sixth, as regards the argument raised by the applicants in Case T-145/07 that the Otis subsidiaries have a 'degree of autonomy that is sufficient' to determine all aspects of their conduct on the market in relation to customers and competitors and 'autonomy' to conduct their businesses involving all transactions [*confidential*], the Court finds that the applicants do not maintain that the subsidiaries acted fully autonomously on the market but that instead they had only a degree of autonomy restricted to limited commercial activities.

89 In the third place, the Court must reject the argument of the applicant in Case T-146/07 that the presumption of liability referred to in paragraph 59 above is an irrebuttable presumption or amounts to a rule of strict liability. The Court of Justice has confirmed in its recent judgment in *Akzo Nobel and Others* v *Commission*, paragraph 53 above (paragraphs 60 and 61) that the presumption is rebuttable. The fact that the applicants have not produced, in this instance, evidence capable of rebutting the presumption that the subsidiaries were not autonomous does not mean that the presumption can never be reversed (see, to that effect, the Opinion of Advocate General Kokott in *Akzo Nobel and Others* v *Commission*, paragraph 53 above, ECR I-8241, point 75, and footnote 67).

90 It follows from all the foregoing that the Commission was fully entitled to impute the infringements committed by the Otis subsidiaries in Belgium, Germany and the Netherlands to their parent companies OEC and UTC.

The imputation of the infringement committed by GTO to GT, Otis Belgium, OEC and UTC

– *Contested decision*

91 In recital 626 of the contested decision, the Commission found that GT, which held [*confidential*]% of the capital in GTO at the time of the infringement, and Otis Belgium, which held the remaining [*confidential*]%, had '[to] be held jointly and severally liable with GTO for the infringement of Article 81 [EC] which took place in Luxembourg'. It explained to that end that because of 'close personal, economic and legal links between GTO and its two parents, they [were] considered to form an economic unit … and it [appeared] that GTO [had] not decided independently upon its own conduct on the market but [had] carried out, in all material respects, the instructions given to it by the parents' (recital 622 of the contested decision). The Commission held that 'Otis Belgium and GT [had] not rebutted the evidence that they were in a position to exert decisive influence over the commercial policy of GTO, and that they [had] actually exercised their controlling rights and made use of all other means to exercise decisive influence to which they were entitled' (recital 626 of the contested decision).

92 With regard to the exercise by GT and Otis Belgium of decisive influence over the commercial policy of GTO, the Commission observed, in recital 622 of the contested decision:

'… [*confidential*] Therefore, the Commission takes the view that during the infringement in Luxembourg, GTO operated under the joint control of Otis [Belgium] and GT and the commercial policy of GTO was determined by the common understanding of its two shareholders. In addition, the parent companies are linked to GTO's operation in Luxembourg in the following ways: [*confidential*].'

93 The Commission notes in recital 623 of the contested decision that 'the fact that the day-to-day operations of a subsidiary are managed solely by the subsidiary's officers is not a decisive factor when imputing liability to the parent' and adds in recital 624 that, 'because of the allocation of voting rights

among the shareholders on the GTO Board' [*confidential*], it had to be concluded that 'every major decision adopted by GTO during the infringement necessarily reflected the will of both Otis [Belgium] and GT'.

94 With regard to the argument put forward by GT that it was not in a position to exercise decisive influence over the development of GTO's commercial policy, the Commission goes on to explain in recital 625 of the contested decision:

'[*confidential*].'

95 Finally, the Commission states in recital 622 of the contested decision that 'OEC and UTC should also be held liable [for the anti-competitive conduct of GTO], [UTC] being the 100% ultimate parent company of Otis [Belgium]. Via Otis [Belgium], OEC and UTC were able to exercise decisive influence on the commercial policy of GTO throughout the period of the infringement and, it is presumed, made use of this power'.

– *The imputation of the infringement committed by GTO to GT*

96 The applicant in Case T-142/07 argues, in the first place, that the reasons stated by the Commission concerning GT's involvement in the Luxembourg infringement did not meet the requisite legal standard.

97 As has been recalled in paragraph 80 above, the statement of reasons required under Article 253 EC must disclose in a clear and unequivocal fashion the reasoning followed by the EU authority which adopted the measure in question, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. As has been seen in paragraphs 91 to 93 above, it is apparent from recital 622 of the contested decision that the Commission considered that, during the period of the infringement in Luxembourg, GTO was operating under joint control of Otis Belgium and GT. With regard to the involvement of GT, the Commission stated in recital 625 of the contested decision [*confidential*].

98 It follows that the plea concerning the inadequacy of the statement of reasons must be rejected.

99 In the second place, the applicant in Case T-142/07 claims that there are no grounds for attributing the infringement committed by GTO to GT.

100 The applicant in Case T-142/07 maintains that the Commission failed to establish that GT exercised decisive influence over GTO's conduct on the market. It refers to that end to the fact that GT is purely a financial company without any commercial activity of its own whose results depend solely on what its shareholdings produce. It has never generated any turnover, has never had any employees and has never incurred operating costs. Furthermore, GT's shareholding in GTO is a minority shareholding, which does not exceed what is necessary to protect GT's financial interests.

101 In that regard, it should be recalled that in the field of competition law, the concept of undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. The mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, depending on the circumstances, the receipt of dividends, which are merely the fruits of the ownership of an asset. On the other hand, an entity which, owning controlling shareholdings in a company, actually exercises that control by involving itself directly or indirectly in the management thereof must be regarded as taking part in the economic activity carried on by the controlled undertaking (Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 107, 111 and 112).

102 In this instance, although GT held only [*confidential*]% of the share capital of GTO, it is clear that, as is shown by the management agreement [*confidential*] entered into by GTO and GT ('the 1987 Agreement') and the management agreement [*confidential*] entered into by GTO and Mr D ('the 1995 Agreement'), the [*confidential*] operations [*confidential*]. Under the terms of the 1987 and 1995 Agreements, the [*confidential*] management entrusted initially to GT and subsequently to Mr D [*confidential*].

103 Under the 1987 and 1995 Agreements, the person responsible [*confidential*]. In that regard, the Court observes that, when analysing the existence of an economic entity among a number of companies forming part of a group, account may be taken of the influence of the parent company on pricing policy, production and distribution activities, sales objectives, gross margins, sales costs, cash flow, stocks and marketing (see, to that effect, Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, paragraph 64 and the case-law cited) but also of all the relevant factors relating to economic, organisational and legal links which tie those companies to one another, which may vary from case to case and cannot therefore be set out in an exhaustive list (see, to that effect, *Akzo Nobel and Others* v *Commission*, paragraph 53 above, paragraph 74). It follows that the Commission was fully entitled to hold that GT and, from 1995, Mr D, [*confidential*], exercised a decisive influence over GTO's commercial policy.

104 Furthermore, it is not disputed that Mr D himself participated in the anti-competitive meetings referred to in Article 1(3) of the contested decision (see Tables 8 and 10 in recitals 311 and 347 of the contested decision), [*confidential*] from 1 January 1996, and that GT was therefore perfectly well aware of GTO's actions and was implicated in them. The General Court has, in that regard, already held that the anti-competitive conduct of a subsidiary may be imputed to the parent company where there is specific evidence implicating the parent company in the subsidiary's anti-competitive actions. That is obviously the position in this case, [*confidential*] (see, to that effect, Case T-309/94 *KNP BT* v *Commission* [1998] ECR II-1007, paragraph 47). Thus, having regard to the case-law cited in paragraph 87 above, Mr D cannot be dissociated from GT, [*confidential*], but must on the contrary be regarded as forming an economic unit with it.

105 Accordingly, the Commission established to the requisite legal standard that GT exercised a decisive influence over GTO's conduct on the market. The complaint concerning the allegedly unlawful imputation of GTO's conduct to GT must therefore be rejected.

– *The imputation of the infringement committed by GTO to Otis Belgium, OEC and UTC*

106 The applicants in Cases T-141/07 and T-145/07 maintain that the Commission has not established to the requisite legal standard that Otis Belgium, OEC and UTC were responsible for the actions of GTO.

107 In the first place, they submit that the fact that Otis Belgium, OEC and UTC had a stake in GTO does not suffice for GTO's infringement to be imputed to them. Thus, the notion of joint control, used by the Commission, is irrelevant. In accordance with the Commission's practice in previous decisions, which was approved by the General Court in *Avebe* v *Commission*, paragraph 58 above, parent companies which have a stake in a joint venture are liable for the anti-competitive practices of the latter only if they have been involved in such practices or have been aware of them.

108 As a preliminary point, with regard to the reliance placed by the applicants in Cases T-141/07 and T-145/07 on the Commission's practice in previous decisions, the Court notes that the question of any joint management power of parent companies over their subsidiary must be assessed by reference to the circumstances of each case. Consequently, the Commission's assessments of the facts in earlier cases cannot be transposed to the present case (see, to that effect, Case T-282/06 *Sun Chemical Group and Others* v *Commission* [2007] ECR II-2149, paragraph 88). It should also be observed that decisions concerning other cases can be no more than indicative when the circumstances of the cases

are not the same (see, to that effect, Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraphs 201 and 205, and Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 60).

109 Contrary to the contention of the applicants in Cases T-141/07 and T-145/07, the Court did not, in *Avebe* v *Commission*, paragraph 58 above, require that the Commission show, for the purpose of imputing to a parent company the infringement of a jointly-owned subsidiary, that the parent company has itself participated in the cartel or has been aware of the subsidiary's participation in the cartel. In that judgment, the Court held that a situation in which the parent companies of a common subsidiary jointly control all the shares in the subsidiary and have a joint management power with respect to the subsidiary amounts to a situation analogous to that in *Stora Kopparbergs Bergslags* v *Commission*, paragraph 61 above, in which a single parent company held 100% of the shares in its subsidiary, for the purpose of establishing the presumption that that parent company actually exerted influence over its subsidiary's conduct. It should be noted inter alia that the Court found in *Avebe* v *Commission* that the two partners which each held a 50% stake in the joint venture concerned were empowered only jointly to act and sign on behalf of the joint venture, to bind it towards third parties, to bind third parties to it, and to receive and spend funds on its behalf. In addition, the day-to-day management was entrusted to two directors appointed by the parent companies. Last, the parent companies assumed the subsidiary's commitments jointly and without limitation. The Court found that, as a whole, that factual evidence provided a sufficient basis for the presumption that the parent companies determined jointly their subsidiary's course of action on the market to the point where it was deemed not to have any real autonomy in the matter (*Avebe* v *Commission*, paragraph 58 above, paragraphs 138 and 139).

110 In the present case, contrary to the contention of the applicants in Cases T-141/07 and T-145/07, the Commission did not rely merely on the shareholdings of Otis Belgium and, indirectly, OEC and UTC in their subsidiary for the purpose of finding them liable. In recital 622 of the contested decision, the Commission held, first, [*confidential*]. Second, the Commission held that Otis Belgium was also linked to GTO's operation in Luxembourg in a number of ways. [*confidential*] (recital 622 of the contested decision).

111 In the second place, the applicants in Cases T-141/07 and T-145/07 maintain that Otis Belgium, OEC and UTC were not in a position to exercise influence over GTO's commercial policy. In particular, the role of Otis Belgium was limited to providing capital and collecting dividends. Relying in particular on the 1987 Agreement, which entrusted the [*confidential*] management of GTO to GT, and on the 1995 Agreement, which entrusted it to Mr D, the applicants assert that Otis Belgium did not have power to involve itself in the management of GTO or to appoint the persons authorised to represent GTO and that consequently responsibility for GTO's unlawful conduct cannot be imputed to Otis Belgium. The Court must therefore consider whether the matters advanced by the Commission in the contested decision establish to the requisite legal standard that Otis Belgium exercised decisive influence on GTO's commercial policy.

112 In accordance with Article 8 of GTO's articles of association, decisions of GTO's board had to be taken with a majority of 80% of the votes. Having regard to the fact that [*confidential*]% of GTO was owned by Otis Belgium, the remaining [*confidential*]% being held by GT, and given that, under Article 7 of GTO's articles of association, each shareholder was represented on the company's board in proportion to its shareholding, Otis Belgium necessarily, through its representative(s) on the board, during the whole period of the infringement, signalled its agreement to all decisions of the board which had to be taken with a majority of 80% of the votes. It should also be noted in that respect that the quorum required for the adoption of resolutions of GTO's board was set jointly by GT and Otis Belgium in the instrument creating GTO.

113 Under Article 8 of GTO's articles of association, the board had powers in respect of all matters not strictly reserved to the shareholders by law or by the articles of association. The board could delegate day-to-day management powers to a manager. Under that provision, day-to-day management of GTO was none the less restricted, as matters not falling within its scope were reserved to the board and required the approval of 80% of its members. Furthermore, as provided in the third resolution of GTO's board [*confidential*], confirmed by the GTO board's decision [*confidential*], the GTO board had specific powers, which it was not entitled to delegate, [*confidential*]. It must therefore be found that, first, those powers, held by the board, related to the determination of GTO's commercial policy, in particular [*confidential*] and, second, that the exercise of those powers necessarily required the approval of the representative(s) of Otis Belgium within GTO's board.

114 In response to a written question from the Court, the applicant in Case T-141/07 also stated that an examination of the records available showed that GTO's board had not exercised the abovementioned powers, which had been reserved to it by the resolution of 10 February 1987. [*confidential*]

115 Notwithstanding the matters referred to in paragraphs 112 to 114 above, the applicants in Cases T-141/07 and T-145/07 maintain that Otis Belgium, OEC and UTC were not able to exercise decisive influence over GTO's commercial policy, since its [*confidential*] management, defined very broadly in the 1987 and 1995 Agreements [*confidential*], was entrusted, initially, to GT and, subsequently, to Mr D. They claim that, contrary to the Commission's statement in recital 622 of the contested decision, [*confidential*]. In their submission, GTO was, throughout the whole period of the infringement, run wholly independently by Mr D.

116 Although, as the applicants in Cases T-141/07 and T-145/07 maintain and as has been stated in paragraph 102 above, the [*confidential*] management powers conferred on Mr D were [*confidential*], GTO's articles of association none the less explicitly provided, in Article 8, that 'this day-to-day management [would] none the less be restricted and [that] matters not falling within the scope thereof [would] be reserved to the board and [would] require the approval of 80% of its members'.

117 In that regard, the Court notes that, in response to a written question from the Court, the applicant in Case T-141/07 produced the minutes of a number of board meetings held during the period of the infringement. [*confidential*]

118 In view of the foregoing, the Commission was fully entitled to hold, in recital 622 of the contested decision, that all major decisions within GTO had to be taken with a majority of 80% of the votes and that accordingly during the period of the Luxembourg infringement, GTO operated under the joint control of Otis Belgium and GT and that GTO's commercial policy was determined by the common agreement of its two shareholders. Consequently, the Commission was entitled to conclude that Otis Belgium and GT should be held liable for the infringement of GTO in Luxembourg.

119 Since, as has been stated in paragraphs 63 to 90 above, OEC and UTC may be considered to have exercised decisive influence on the commercial policy of Otis Belgium, the Commission was also entitled to hold, in recital 622 of the contested decision, that OEC and UTC should be held liable for GTO's infringement.

120 Since it is clear from the foregoing reasoning that the Commission was fully entitled to hold Otis Belgium, OEC and UTC liable for GTO's infringement, there is no need to consider the argument of the applicants in Cases T-141/07 and T-145/07 that the participation of Otis Belgium in the Belgian cartel is irrelevant.

– Infringement of the rights of the defence

121 The applicants in Cases T-141/07 and T-145/07 submit that their rights of defence were infringed because no mention was made in the statement of objections [*confidential*], on which it claims the Commission relied in recital 622 of the contested decision in order to establish that Otis Belgium was linked to the operation of GTO [*confidential*].

122 It is settled case-law that in all proceedings in which sanctions, especially fines or penalty payments, may be imposed, observance of the rights of the defence is a fundamental principle of EU law which must be complied with even if the proceedings in question are administrative proceedings. In that regard, the statement of objections constitutes the procedural safeguard applying the fundamental principle of EU law which requires observance of the rights of the defence in all proceedings. That principle requires, in particular, that the statement of objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential elements used against it, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it (see, to that effect, Joined Cases C-322/07 P, C-327/07 P and C-338/07 P *Papierfabrik August Koehler and Others* v *Commission* [2009] ECR I-7191, paragraphs 34 to 36 and the case-law cited; see also Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 26).

123 Respect for the rights of the defence requires that the undertaking concerned must have been afforded the opportunity, during the administrative procedure, to make known its views on the truth and relevance of the facts and circumstances alleged and on the documents used by the Commission to support its claim that the undertaking has committed an infringement (see Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 66 and the case-law cited).

124 In that regard, the failure to communicate a document constitutes a breach of the rights of the defence only if the undertaking concerned shows, first, that the Commission relied on that document to support its objection concerning the existence of an infringement and, second, that the objection could be proved only by reference to that document. If there were other documentary evidence of which the parties were aware during the administrative procedure that specifically supported the Commission's findings, the fact that an incriminating document not communicated to the person concerned was inadmissible as evidence would not affect the validity of the objections upheld in the contested decision. It is thus for the undertaking concerned to show that the result at which the Commission arrived in its decision would have been different if a document which was not communicated to that undertaking and on which the Commission relied to make a finding of infringement against it had to be disallowed as evidence (*Aalborg Portland and Others* v *Commission*, paragraph 123 above, paragraphs 71 to 73).

125 In the present case, since it is apparent from paragraphs 106 to 118 above that, irrespective of [*confidential*], the Commission was entitled to hold, in recital 622 of the contested decision, that, during the period of the infringement in Luxembourg, GTO operated under the joint control of Otis Belgium and GT and that the commercial policy of GTO was determined by the common understanding of its two shareholders, the Commission's alleged irregularity in failing to mention [*confidential*] in the statement of objections does not amount to an infringement of the applicants' rights of defence. The administrative procedure would not have had a different outcome had that piece of information been included in the statement of objections.

126 Furthermore, it is true that the Commission, in point 597 of the statement of objections, merely indicated that it was considering holding Otis Belgium and GT liable for the infringement committed by their subsidiary GTO and stated that major decisions at GTO required the agreement of GT and

Otis Belgium. It also remarked upon the direct participation of Otis Belgium in the Belgian cartel and upon the personal links between Mr D, [*confidential*] of GT, and GTO, of which he was [*confidential*]. The existence of [*confidential*] was therefore not mentioned in the statement of objections.

127 However, in any event, the fact that [*confidential*] can be seen from a number of documents which the applicants in Cases T-141/07 and T-145/07 provided to the Commission, in response to the statement of objections, in particular [*confidential*].

128 The Commission specifically mentioned, in point 597 of the statement of objections, that it was considering holding Otis Belgium liable for the infringement committed by GTO in Luxembourg. Furthermore, the applicants in Cases T-141/07 and T-145/07 could not have failed to be aware of the content of those documents and their possible relevance to that liability when they provided them to the Commission, as the applicants had expressly relied on those documents to support their arguments. Accordingly, they cannot, having regard to the case-law referred to in paragraphs 122 to 124 above, plead an infringement of their rights of defence (see, to that effect, Case T-59/02 *Archer Daniels Midland* v *Commission* [2006] ECR II-3627, paragraph 270).

129 This complaint must accordingly be rejected.

– *Infringement of the principle of equal treatment*

130 The applicants in Cases T-141/07, T-145/07 and T-146/07, relying on the articles of association of MEE, which do not form part of the Commission's file and have not been included with their application, argue, in essence, that the Commission infringed the principle of equal treatment by holding Otis Belgium and GT liable for the infringement committed by their subsidiary GTO, whilst it, correctly, considered the control exercised over MEE by its parent companies Mitsubishi Electric Corporation ('MEC') and TBI Holding not to be sufficient for the infringement committed by their subsidiary to be imputed to them.

131 In that regard, it is to be noted that, as is clear from paragraphs 106 to 118 above, the Commission was entitled to hold, in recital 622 of the contested decision, that, during the period of the infringement in Luxembourg, GTO operated under the joint control of Otis Belgium and GT and that the commercial policy of GTO was determined by the common understanding of its two shareholders. The Court cannot therefore accept the argument that, like MEE's parent companies, GTO's parent companies should not have been held liable for the infringement of GTO.

132 In view of the foregoing and given that the applicants in Cases T-141/07, T-145/07 and T-146/07 maintain that the Commission was correct in finding that the control exercised over MEE by its parent companies was not sufficient for the infringement committed by their subsidiary to be imputed to them, the situations of MEE and GTO cannot be regarded as comparable and consequently the complaint alleging infringement of the principle of equal treatment cannot, in any event, succeed.

133 It is clear from the foregoing that all the complaints concerning the imputability of the infringements of GTO and the Otis subsidiaries to their respective parent companies must be rejected.

The plea alleging breach of the 1998 Guidelines and infringement of the principles of proportionality and equal treatment, of the rights of the defence and of Article 253 EC in the determination of the starting amounts of the fines according to the gravity of the infringements

Preliminary observations

134 As a preliminary point, it should be observed that it is settled case-law that the Commission enjoys a broad discretion as regards the method for calculating fines. That method, set out in the 1998 Guidelines, displays flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Article 23(2) of Regulation No 1/2003 (see *Papierfabrik August Koehler and Others* v *Commission*, paragraph 122 above, paragraph 112 and the case-law cited).

135 The gravity of infringements of EU competition law must be determined by reference to numerous factors such as, in particular, the specific circumstances and context of the case and the deterrent effect of fines, although no binding or exhaustive list of the criteria to be applied has been drawn up (Case C-510/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-1843, paragraph 72, and *Prym and Prym Consumer* v *Commission*, paragraph 122 above, paragraph 54).

136 As has been stated in paragraph 24 above, the Commission, in the present case, determined the amounts of the fines by applying the method laid down in the 1998 Guidelines.

137 Although the 1998 Guidelines may not be regarded as rules of law which the administration is always bound to observe, they nevertheless form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment (see *Dansk Rørindustri and Others* v *Commission*, paragraph 56 above, paragraph 209 and the case-law cited, and Case T-73/04 *Carbone-Lorraine* v *Commission* [2008] ECR II-2661, paragraph 70).

138 In adopting such rules of conduct and announcing through their publication that they will henceforth apply to the cases to which they relate, the Commission imposes a limit on the exercise of its discretion and cannot depart from those rules without running the risk of suffering the consequences of being in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see *Dansk Rørindustri and Others* v *Commission*, paragraph 56 above, paragraph 211 and the case-law cited, and *Carbon-Lorraine* v *Commission*, paragraph 137 above, paragraph 71).

139 Furthermore, the 1998 Guidelines determine, generally and abstractly, the method which the Commission has bound itself to use in assessing the fines imposed by the decision and, consequently, ensure legal certainty on the part of the undertakings (*Dansk Rørindustri and Others* v *Commission*, paragraph 56 above, paragraphs 211 and 213).

140 Finally, it should be recalled that the 1998 Guidelines provide, in the first place, for the assessment of the gravity of the infringement as such, on the basis of which a general starting amount can be set (Section 1.A, second paragraph). In the second place, the gravity is assessed in relation to the nature of the infringements committed, the characteristics of the undertaking involved, in particular its size and its position on the relevant market, which can give rise to the weighting of the starting amount, to grouping the undertakings into categories and to setting a specific starting amount (Section 1.A, third to seventh paragraphs).

Contested decision

141 In the first place, in the section of the contested decision dealing with the gravity of the infringements (Section 13.6.1), the Commission examines the four infringements identified in Article 1 of the contested decision in parallel 'since [they] … present common features' (recital 657 of the contested

decision). That section is divided into three subsections, the first headed 'Nature of the infringements' (Subsection 13.6.1.1), the second headed 'The size of the relevant geographic market' (Subsection 13.6.1.2) and the third headed 'Conclusion on the gravity of the infringement' (Subsection 13.6.1.3).

142 In the subsection headed 'Nature of the infringements', the Commission explains in recitals 658 and 659 of the contested decision:

'(658) The infringements that are the subject of this Decision consisted primarily of secret collusion between cartel participants to share markets or freeze market shares by allocating projects for the sale and installation of new elevators and/or escalators, as well as not to compete with each other for maintenance and modernisation of elevators and escalators (except in Germany where the maintenance and modernisation business were not [the] subject of discussions between the cartel members). Such horizontal restrictions are, by their very nature, among the most serious violations of Article 81 [EC]. The infringements in this case artificially nullified and denied customers the advantages they could expect to obtain from a process of competitive bidding. It is also noteworthy that some of the rigged projects were public tenders financed by taxes and carried out specifically with a view to receiving competitive and cost-effective bids.

(659) For assessing the gravity of an infringement factors relating to its object are generally more significant than those relating to its effects, in particular where agreements, as in this case, relate to infringements which are very serious, such as price fixing and market sharing. The effects of an agreement are generally an inconclusive criterion in assessing the gravity of the infringement.'

143 The Commission states that it 'did not attempt to demonstrate the precise effects of the infringement since it [was] impossible to determine with sufficient certainty the relevant competitive parameters (price, commercial terms, quality, innovation, and others) in the absence of the infringements' (recital 660 of the contested decision). Nevertheless, it considers that '[i]t is obvious that the infringements did have an actual impact' and explains to that end that '[t]he fact that the various anti-competitive arrangements were implemented by the cartel participants in itself suggests an impact on the market, even if the actual effect is difficult to measure because it is, in particular, not known if and how many other projects were subject to bid-rigging, nor how many projects may have been subject to allocation between cartel members without there being a need for contacts between them' (recital 660 of the contested decision). In the same recital, the Commission adds that '[t]he high aggregate market shares of the cartel participants make anti-competitive effects appear likely and the relative stability of these market shares throughout the duration of the infringements would confirm these effects'.

144 In recitals 661 to 669 of the contested decision, the Commission addresses the arguments raised by the applicants during the administrative procedure which sought to show that the infringements had only a limited effect on the market.

145 In the subsection headed 'The size of the relevant geographic market', the Commission maintains, in recital 670 of the contested decision, that '[t]he cartels that are the subject of [the contested] decision covered the whole territories of Belgium, Germany, Luxembourg or the Netherlands, respectively' and that '[i]t is clear from case-law that a national geographic market extending to the whole of a Member State in itself already represents a substantial part of the common market'.

146 In the subsection headed 'Conclusion on the gravity of the infringement', the Commission states, in recital 671 of the contested decision, that '[t]aking into account the nature of the infringements and the fact that each of them covered the whole territory of a Member State (Belgium, Germany, Luxembourg or the Netherlands)', each addressee has committed one or several very serious infringements of Article 81 EC. It concludes that 'these factors are such that the infringements must be regarded as very serious even if their actual impact cannot be measured'.

147 In the second place, in the section of the contested decision headed 'Differential treatment' (Section 13.6.2), the Commission sets a starting amount of the fine for each undertaking to have participated in the various cartels (see paragraphs 27 to 30 above), which takes account, according to recital 672 of the contested decision, of 'the effective economic capacity of the offenders to cause significant damage to competition'. The Commission explains in recital 673 of the contested decision that, '[t]o that end, the undertakings can be sub-divided into several categories according to their turnover in elevators and/or escalators, including, where applicable, maintenance and modernisation services'.

The classification of the Luxembourg infringement as 'very serious'

148 The applicant in Case T-141/07 maintains that, by classifying the Luxembourg infringement as 'very serious', the Commission misapplied the 1998 Guidelines, regard being had to the limited geographic scope of the infringement, which is usually taken into account when the Commission takes decisions, and to the limited impact of the practices concerned on the relevant market. It concludes that the starting amount of EUR 10 million set for the Luxembourg infringement must be reduced. The applicant also argues that the Commission failed to take account of the total value of the market affected by the Luxembourg cartel. Although the applicant in Case T-141/07 put the latter argument forward in the context of its plea alleging the incorrect classification of the Luxembourg infringement, it is clear from its pleadings that the complaint relates, in essence, to the determination of the general starting amount of the fine and it is therefore considered in paragraphs 166 to 178 below.

149 In the first place, the applicant in Case T-141/07 maintains that the assessment of the gravity of an infringement must take into account the actual impact of the infringement on the market where this can be measured. In its submission, the impact of the Luxembourg infringement was insignificant, which should have led the Commission to limit the amount of the fine imposed on GTO. To substantiate that claim, GTO refers in particular to the fact that the agreements were not complied with and were ineffective, to the fact that some undertakings did not participate in the cartel, which allowed some degree of competition to be maintained, and to the fact that, amongst the cartel members, the loss of tenders to third-party undertakings was not offset by a reallocation of existing projects. The applicant in Case T-141/07 also argues that only some projects were covered by the cartel.

150 The Court recalls that, as regards the assessment of the gravity of the infringement, the 1998 Guidelines state, in the first and second paragraphs of Section 1.A, that:

'In assessing the gravity of the infringement, account must be taken of its nature, its actual impact on the market, where this can be measured, and the size of the relevant geographic market.

Infringements will thus be put into one of three categories: minor infringements, serious infringements and very serious infringements.'

151 Under the first paragraph of Section 1.A of the 1998 Guidelines, the Commission, when assessing the gravity of the infringement, must thus undertake an examination of the actual impact on the market only where it is apparent that that impact can be measured (see, to that effect, *Prym and Prym Consumer* v *Commission*, paragraph 122 above, paragraph 74; Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 143; and *Degussa* v *Commission*, paragraph 71 above, paragraph 216).

152 It is settled case-law that, in order to assess the actual impact of an infringement on the market, the Commission must take as a reference the competition that would normally have existed had there been no infringement (*Carbone-Lorraine* v *Commission*, paragraph 137 above, paragraph 83 and the case-law cited).

153 In this case, the Commission states, in recital 660 of the contested decision, that '[it] did not attempt to demonstrate the precise effects of the infringement since it [was] impossible to determine with sufficient certainty the relevant competitive parameters (price, commercial terms, quality, innovation, and others) in the absence of the infringements'. Even though the Commission concludes, in recital 660 of the contested decision, that it is obvious that the cartels did have an actual impact, since they were implemented, and even though the Commission rejects, in recitals 661 to 669, the arguments of the undertakings concerned which sought to demonstrate the limited effects of the cartels, it must be found that, in the contested decision, the assessment of the gravity of the infringements did not take account of their possible impact on the market.

154 Hence the Commission, in recital 671 of the contested decision, bases its conclusion on the assessment of the gravity of the infringements solely on the nature of those infringements and their geographic scope. The Commission concludes in that recital that '[t]aking into account the nature of the infringements and the fact that each of them covered the whole territory of a Member State (Belgium, Germany, Luxembourg or the Netherlands), … [it must be held] that each addressee has committed one or several very serious infringements of Article 81 [EC]'.

155 First, the Court finds that the applicant in Case T-141/07 does not establish that the actual impact of the Luxembourg cartel could be measured but merely states that its effects were necessarily insignificant. In that regard, the circumstances relied on by that applicant, concerning the fact that the agreements were not complied with and were ineffective, the fact that some undertakings did not participate in the cartel and the fact that existing projects were not reallocated in the case of tenders being lost to third-party undertakings (see paragraph 149 above), even if they were proved, do not lead to the conclusion that the effects of the agreements could be measured on the Luxembourg market, particularly since the applicant does not challenge the Commission's assertion that it was impossible, in this instance, to determine with sufficient certainty the relevant competitive parameters in the absence of the infringements.

156 In those circumstances, the applicant in Case T-141/07 has not established that in this instance the Commission was obliged, by virtue of the 1998 Guidelines and the case-law cited in paragraph 151 above, to take account of the actual impact of the infringements for the purpose of assessing their gravity.

157 Second, even supposing that the actual impact of the infringements could be measured and that the arguments of the applicant set out in paragraph 149 above are founded in that they establish that the cartel had a limited impact on the Luxembourg market, the fact remains that the classification of this infringement as 'very serious' none the less remains appropriate.

158 It must be stated that, by their very nature, the infringements identified in the contested decision are among the most serious breaches of Article 81 EC, since they had as their object 'secret collusion between cartel participants to share markets or freeze market shares by allocating projects for the sale and installation of new elevators and/or escalators, as well as not to compete with each other for maintenance and modernisation of elevators and escalators (except in Germany where the maintenance and modernisation business were not [the] subject of discussions between the cartel members)' (recital 658 of the contested decision). In that regard, the 1998 Guidelines explain that 'very serious' infringements consist generally in horizontal restrictions such as price cartels and market-sharing quotas, or other practices which jeopardise the proper functioning of the single market. Those infringements are also among the examples of agreements explicitly declared to be incompatible with the common market in Article 81(1)(c) EC. Apart from the serious distortion of competition which they entail, such agreements, by obliging the parties to respect distinct markets, often delimited by national frontiers, cause the isolation of those markets, thereby counteracting the EC Treaty's main objective of integrating the Community market. Thus, infringements of this type, especially where horizontal cartels are concerned, are classified by the case-law as 'particularly serious' or 'obvious infringements' (Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063,

paragraph 109; Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 136; and Case T-241/01 *Scandinavian Airlines System* v *Commission* [2005] ECR II-2917, paragraph 85).

159 Furthermore, it has consistently been held that the effect of an anti-competitive practice is not a conclusive criterion for assessing the gravity of an infringement. Factors relating to the intentional aspect may be more significant than those relating to the effects, particularly where they relate to infringements which are intrinsically serious, such as market sharing (Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 118; *Prym and Prym Consumer* v *Commission*, paragraph 122 above, paragraph 96; *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 77 above, paragraph 199; and *Degussa* v *Commission*, paragraph 71 above, paragraph 251).

160 Accordingly, the nature of the infringement plays a primary role, in particular in classifying infringements as 'very serious'. It follows from the description of very serious infringements given by the 1998 Guidelines that agreements or concerted practices seeking inter alia, as in this case, to share markets may, solely on account of their nature, be classified as 'very serious', there being no need to categorise such behaviour on the basis of particular impact or geographic extent (see, to that effect, *Prym and Prym Consumer* v *Commission*, paragraph 122 above, paragraph 75, and Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 103). That conclusion is corroborated by the fact that, whilst the description of serious infringements expressly mentions their impact on the market and their effects on extensive areas of the common market, that of very serious infringements, on the other hand, does not mention any requirement as to the actual market impact or the effects produced in a particular geographic area (see, to that effect, *Schunk and Schunk Kohlenstoff-Technik* v *Commission*, paragraph 83 above, paragraph 171 and the case-law cited). Accordingly, in view of their object, the infringements concerned by the contested decision are intrinsically very serious, even if it were to be established that the agreements did not produce all the effects hoped for.

161 Moreover, even supposing that the Commission had deemed it fit to take into account the impact of the infringement on the market (a factor which it has the option of taking into account) and should as a consequence have provided, in the contested decision, specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition in the market (*Prym and Prym Consumer* v *Commission*, paragraph 122 above, paragraph 82), the Court finds that it fulfilled that obligation. As regards the Luxembourg infringement, the Commission found that the undertakings concerned by the agreements had accounted for nearly 100% of combined sales of elevators and escalators in 2003, noting that the local subsidiaries of Kone, Otis, Schindler and ThyssenKrupp were the only suppliers established in Luxembourg which supplied escalators (recital 52 of the contested decision). It also drew attention to the fact that there were regular meetings (recital 302 of the contested decision), to the measures taken to conceal meetings and contacts (recitals 304 to 307 of the contested decision) and to the existence of an adjustment mechanism (recitals 317 and 336 of the contested decision).

162 Thus, as has been observed in paragraph 153 above, the Commission concluded, in recital 660 of the contested decision, that the fact that the various anti-competitive arrangements were implemented in itself suggests an impact on the market, even if the actual effect was difficult to measure, because it was, in particular, not known if and how many other projects had been subject to bid-rigging, nor how many projects may have been subject to allocation between cartel members without there being a need for contacts between them. It added that the high aggregate market shares of the competitors made anti-competitive effects appear likely and that the relative stability of those market shares throughout the duration of the infringements would confirm those effects.

163 With regard, in the second place, to the argument based on the Commission's practice in previous decisions, according to which the infringement should have been classified as 'serious' in view of the limited size of the geographic market concerned by it, it is clear from settled case-law that the

Commission's practice in previous decisions cannot itself serve as a legal framework for the imposition of fines in competition matters (*JCB Service* v *Commission*, paragraph 108 above, paragraphs 201 and 205, and *Britannia Alloys & Chemicals* v *Commission*, paragraph 108 above, paragraph 60; *Carbone-Lorraine* v *Commission*, paragraph 137 above, paragraph 92; see, also, *Scandinavian Airlines System* v *Commission*, paragraph 158 above, paragraph 132). In any event, in view of the analysis in paragraphs 158 to 160 above, such an argument cannot be accepted.

164 Furthermore, it follows from the case-law that the size of the geographic market is only one of the three criteria which, according to the 1998 Guidelines, are relevant for the purpose of the overall assessment of the gravity of the infringement. Among those interdependent criteria, the nature of the infringement plays a major role. On the other hand, the size of the geographic market is not an autonomous criterion in the sense that only infringements affecting several Member States would be classifiable as 'very serious'. Neither the EC Treaty, nor Regulation No 1/2003, nor the 1998 Guidelines, nor the case-law support the conclusion that only geographically very extensive restrictions may be considered as such (see, to that effect, Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 311 and the case-law cited). Furthermore, the entire territory of a Member State, even if relatively small in comparison with the other Member States, in any event constitutes a substantial part of the common market (Case 322/81 *Michelin* v *Commission* [1983] ECR 3461, paragraph 28; see *Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 312 and the case-law cited). Since the cartel in question covered the entire territory of Luxembourg, it must be held to represent a substantial part of the common market.

165 It is clear from all the foregoing that the arguments of the applicant in Case T-141/07 set out in paragraphs 148 and 149 above must be rejected.

The alleged illegality of the starting amounts of the fines

– *The general starting amounts of the fines*

166 In the first place, the applicant in Case T-141/07 submits that, as far as the Luxembourg infringement is concerned, the Commission failed to take into account the limited size of the market affected, even though it expressly stated that that factor was relevant for the purpose of calculating the fines. It maintains in that regard that the starting amount of EUR 10 million (which represented 31.3% of the value of the market concerned) is manifestly disproportionate in view of the general starting amount set for the infringements in Belgium (15.7% of the value of the market affected), the Netherlands (15.2% of the value of the market affected) and Germany (12% of the value of the reference market chosen by the Commission), and that it should be reduced.

167 It is to be noted that the applicant in Case T-141/07 does not dispute the legality of the method set out in Section 1.A of the 1998 Guidelines concerning the determination of the general starting amounts of the fines. That method entails a fixed-band approach, whereby the general starting amount of the fine, determined according to the gravity of the infringement, is calculated by reference to the nature and geographical extent of the infringement and by reference to the actual impact of the infringement on the market where that can be measured (Case T-15/02 *BASF* v *Commission* [2006] ECR II-497, paragraph 134, and Case T-116/04 *Wieland-Werke* v *Commission* [2009] ECR II-1087, paragraph 62).

168 Furthermore, the size of the relevant market is not as a rule a factor which must be taken into account, but just one among a number of other factors for evaluating the gravity of the infringement, since the Commission – as stated in the case-law moreover – is not obliged to define the market concerned or to assess its size where the infringement in question has an anti-competitive object (see, to that effect, *Prym and Prym Consumer* v *Commission*, paragraph 122 above, paragraphs 55 and 64, and Case T-161/05 *Hoechst* v *Commission* [2009] ECR II-3555, paragraph 109).

169 Thus, for the purpose of determining the general starting amount of the fine, the Commission may have regard to the value of the market on which the infringement has taken place but is not obliged to do so (see, to that effect, *BASF* v *Commission*, paragraph 167 above, paragraph 134, and *Wieland-Werke* v *Commission*, paragraph 167 above, paragraph 63). The 1998 Guidelines do not provide that fines are to be calculated according to the overall turnover of undertakings or their turnover in the market affected. However, nor do they preclude the Commission from taking either figure into account in determining the amount of the fine in order to ensure compliance with the general principles of EU law and where circumstances demand it (*Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 151 above, paragraph 187).

170 The argument of the applicant in Case T-141/07 that the general starting amount of the fine imposed on GTO should reflect the limited size of the Luxembourg market is therefore based on an incorrect assumption and must be rejected.

171 In addition, the Court notes that, although the Commission stated, in recital 666 of the contested decision – in response to an argument that the effect of the Luxembourg cartel should be regarded as limited because it covered a single Member State – that '[t]he size of the Luxembourg market in relation to other Member States is appropriately taken into account for the calculation of the fine (see recitals 680 to 683)', the recitals of the contested decision to which the Commission refers concern the division of the Luxembourg cartel members into categories for the purposes of applying differential treatment as between them. It is also to be noted that the Commission set the general starting amount of the fine at EUR 10 million. Accordingly, although the Commission determined the gravity of the infringement according to its nature and its geographic scope, it deemed it appropriate to set a general starting amount of the fine representing half the minimum level of EUR 20 million normally envisaged by the 1998 Guidelines for this type of very serious infringement (see Section 1.A, second paragraph, third indent).

172 In view, on the one hand, of the particularly serious nature of the infringement and, on the other, of the fact that it covered a substantial part of the common market, the Court finds that the starting amount of EUR 10 million imposed on Otis for the Luxembourg infringement should not be reduced.

173 The applicant in Case T-141/07 also states that the starting amount set for the Luxembourg cartel is disproportionate when compared with the starting amounts set for the infringements in Belgium, Germany and the Netherlands.

174 As has been observed in paragraphs 167 to 170 above, having regard to the fixed-band approach implicit in the method set out in Section 1.A of the 1998 Guidelines, the Commission is not required, when it sets the general starting amount of the fine, to take into account the size of the market affected and still less to set that amount according to a fixed percentage of the total turnover on the market (see, to that effect, *BASF* v *Commission*, paragraph 167 above, paragraph 134).

175 Even assuming that the Commission, when it finds in one and the same decision that a number of very serious infringements have been committed, were required to keep a proportionate relationship between the general starting amounts and the sizes of the various markets affected, there is nothing in this case to show that the general starting amount set for the Luxembourg cartel is disproportionate as compared with the general starting amounts set for the Belgian, German and Netherlands cartels.

176 Consideration of the relevant information shows that, having regard to the size of the markets affected, the Commission set the general starting amounts for the fines in a coherent manner. Thus, the Commission set starting amounts that were larger where the size of the market was larger, although it did not use a precise mathematical formula – and was not in any event required to do (see paragraphs 167 to 170 above). First, for the largest market by far, that of Germany, which amounts to EUR 576 million, the starting amount was set at EUR 70 million. For the next two markets, taken in order of size, those of the Netherlands and Belgium, which amount to EUR 363 million and

EUR 254 million respectively, the general starting amount was set at EUR 55 million and EUR 40 million, respectively. Second, in the case of the Luxembourg market, which was obviously much smaller, amounting to EUR 32 million, the Commission – although the 1998 Guidelines provide, in the case of very serious infringements, for the amount to be set for gravity to be 'above [EUR] 20 million' – deemed it appropriate to restrict that amount to EUR 10 million.

177 In those circumstances, even though the size of the Luxembourg market was small in comparison with the size of the markets concerned by the other infringements, the Commission's task was to set the starting point for the fine at a level that was sufficiently high to reflect the 'very serious' nature of the infringement in question.

178 It follows that the arguments of the applicant in Case T-141/07 must be rejected in so far as they rely on the allegedly disproportionate nature of the general starting amount of the fine set for the Luxembourg infringement.

179 In the second place, the applicants in Case T-145/07 maintain, with regard to the German infringement, that the Commission based the starting amount of the fine on the size of the elevator and escalator market which, according to recital 82 of the contested decision, amounted to EUR 576 million. In doing so, it breached the 1998 Guidelines and infringed the principle of proportionality when determining that starting amount, since the illegal arrangements affected only escalator sales and a small proportion of elevator sales in Germany. Thus, the Commission did not identify the markets affected by the arrangements or the size of those markets. Nor did it determine the actual impact of the infringement. It is clear from the documents provided by Otis that the cartel did not concern the whole of the elevator market but only escalator projects and high-value elevator projects, which are high-speed elevator projects. Only a very small part of the high-speed elevator projects included standard elevators. Thus, according to Otis, the total sales affected by the German cartel amounted to EUR 128 million, and not EUR 576 million (recitals 82 and 280 of the contested decision).

180 It is important to make clear at the outset that the applicants in Case T-145/07 do not dispute the legality of the method set out in Section 1.A of the 1998 Guidelines concerning the determination of the starting amount of the fine, which, as has been observed in paragraph 174 above, entails a fixed-band approach. In addition, as stated in the case-law cited in paragraph 168 above, the size of the relevant market is just one factor relevant for evaluating the gravity of the infringement, which the Commission is not obliged to take into account when determining the starting amount of the fine.

181 First, contrary to the contention of the applicants in Case T-145/07, the Commission did not base the general starting amount of the fine for the German infringement on the size of the market affected. As is apparent from recitals 657 to 671 of the contested decision, the Commission based its conclusion concerning the assessment of the gravity of the infringements on the nature of those infringements and their geographic scope.

182 Second, with regard to the determination of the impact of the German infringement, as has already been observed in paragraph 151 above, the Commission, when assessing the gravity of the infringement, must undertake an examination of the actual impact on the market only where it is apparent that that impact can be measured. That was not the case in this instance.

183 Contrary to the applicants' contention, it is clear from recital 664 of the contested decision, in which the Commission responds to the arguments raised by Kone and Otis concerning the allegedly limited impact of the infringement, that it was 'impossible to demonstrate the precise effects of the infringement' and that the German agreements were not confined to escalator and high-value elevator projects, as the Commission had concluded that it was likely 'that the parties' illegal agreements concerning elevator projects with a value of more than EUR 1 million, which also included high-speed/high-value elevators, could influence the operation of the remainder of the elevator

market'. In that recital, the Commission also stated that the overall value of a project was more important than the number and type of elevators, that it was impossible to demonstrate the precise effects of the infringement and that it was clear from the facts that it was not the intention of the parties to exclude certain product types but to collude on those projects where competition could most easily be eliminated.

184 Furthermore, the applicants in Case T-145/07 do not establish that the impact of the German infringement could be measured but solely that, in their view, the infringement concerned an allegedly limited market. Thus, they claim to have provided proof that the German arrangements concerned only escalator projects and high-value/high-speed elevator projects and that standard elevators were included only incidentally in those projects. In their submission, the standard elevator market was therefore not affected. Those arguments must in any event be rejected.

185 First of all, the applicants in Case T-145/07 assert that the cartel concerned only high-speed elevator projects, in respect of which Otis, Kone and ThyssenKrupp were the only companies capable of bidding and that it concerned standard elevators only incidentally to the extent that they were part of a high-value/high-speed elevator project or escalator project. They maintain that that is substantiated by the documents attached to the application, including an affidavit from Dr R.

186 In that regard, the Court must reject the assertion that high-value elevator projects are high-speed elevator projects. Contrary to what is argued by the applicants in Case T-145/07, Kone, Otis and ThyssenKrupp were not the only effective bidders for high-value elevator projects. Apart from Schindler, which the applicants claim did not actively participate in the discussions as of December 2000, it can be seen from Dr R's affidavit, produced by the applicants in support of their arguments, that, whilst Kone, Otis, Schindler and ThyssenKrupp accounted for all sales of high-speed elevators in Germany in 2003, '[o]ther firms were even able to win a substantial portion of German elevator projects greater than EUR 1 million', which confirms that, according to the very words of the expert report produced by the applicants in Case T-145/07, high-value elevator projects are not identical to high-speed elevator projects.

187 Furthermore, as the Commission states, having regard to the average price of a high-speed elevator (around EUR 167 000) and to the applicants' statement that all high-value elevator projects included at least one high-speed elevator, it is not inconceivable that a good many standard elevators were included in such projects. In that regard, OEC stated, in a memorandum of [*confidential*], that the practices concerning new-equipment projects included, in addition to escalator projects, 'prestige projects'. OEC also stated that, in certain limited cases, prestige projects did not involve high-speed elevators but were special projects involving a substantial number of units. Kone also stated that what mattered was the overall value of a project regardless of the number and type of elevators (see point 254 of the statement of objections and recital 241 of the contested decision). The applicants have not in any case disputed that statement.

188 As the applicants themselves have stated, many competitors other than Otis, Kone and ThyssenKrupp were capable of bidding for projects of over EUR 1 million, which included only standard elevators. Thus, they affirm in the application, on the basis of Dr R's statements, that '[*confidential*]'. Kone also stated, in its submissions of 12 February 2004, that in the elevators segment [*confidential*]. The applicants' assertion that the unlawful arrangements concerned solely elevator projects for which Otis, Kone and ThyssenKrupp were the only companies capable of bidding must therefore be rejected.

189 Next, the applicants in Case T-145/07 argue that the allegations, in recital 664 of the contested decision, that there was a likely and indirect 'spillover' of the high-value elevator discussions into all other elevators are vague and paradoxical and at odds with the facts and economic evidence.

190 In that regard, the Court must disregard the applicants' complaint that the contested decision is not sufficiently reasoned because the Commission does not explain how the discussions on high-speed elevators could indirectly affect the remainder of elevator sales or why they were likely to have affected it. In fact, in recital 664 of the contested decision, the Commission expressly stated that the German agreements covered projects which contained escalators, elevators and high-speed elevators in a variety of combinations and that what mattered was the overall value of a project regardless of the number and types of elevators. It also stated that the activities of the cartel relating to elevator projects with a value of more than EUR 1 million, which included high-speed/high-value elevators, had influenced the operation of the remainder of the elevator market, from which it could not be separated since all product varieties (high-speed, low-speed and other elevators) had been affected in varying degrees. It finally pointed out that it was not the intention of the parties to exclude certain product types, but to collude on those projects where competition could be most easily eliminated (see also recital 242 of the contested decision).

191 Furthermore, as is clear from paragraphs 186 and 187 above, it has not been established that there was a separate, unaffected, market for standard elevators, since high-value elevator projects and escalator projects included standard elevators and sometimes even only such elevators.

192 Moreover, contrary to what is argued by the applicants in Case T-145/07, the finding that there were effects – at the very least indirect – on the whole of the elevator and escalator market is not at odds with the 'facts and economic evidence' which they have presented. With regard to their argument that Otis' profit margins for sales of standard elevators in projects with a value below EUR 1 million were no higher during the period of the infringement than before or after that period, it should be noted that ThyssenKrupp has affirmed that the initial threshold for a project to be covered by the arrangements had moved from DEM 500 000 to DEM 1 000 000 in 1998 and to EUR 1 000 000 with effect from 2002 and that projects with a value below EUR 1 million were thus also discussed (recital 241 of the contested decision); consequently, Otis' profit margins in projects with a value below EUR 1 million could also have been affected by the cartel. In any event, since the applicants' argument is based solely on data relating to sales of the Otis group, it is impossible to determine with sufficient certainty the competitive parameters that would have applied in the absence of the infringement. Moreover, the applicants themselves drew attention on a number of occasions, in the context of the administrative procedure, to the great advertising value of 'prestige projects', which rules out the possibility that the cartel had no effect on the standard elevator market.

193 Finally, even supposing that the Commission had deemed it fit to take into account the impact of the infringement on the market (a factor which it has the option of taking into account) and should have provided, in the contested decision, specific, credible and adequate evidence with which to assess what actual influence the infringement may have had on competition in the market (*Prym and Prym Consumer* v *Commission*, paragraph 122 above, paragraph 82), the Court finds that it would in any event have fulfilled that obligation.

194 So far as the German infringement is concerned, apart from the indicia mentioned in paragraph 192 above, the Commission noted inter alia that Kone, Otis, Schindler and ThyssenKrupp accounted, by value, for over 60% of elevator sales and close to 100% of escalator sales (recitals 51 and 232 of the contested decision). In addition, after 2000, the three cartel members accounted for approximately 75% of the escalator market and close to 50% of the elevator market (recitals 278 and 280 of the contested decision). Moreover, the objective of the cartel was to freeze the respective market shares of the undertakings concerned (recital 236 et seq. of the contested decision). The Commission also drew attention to the fact that there were regular meetings (recitals 217 and 218 of the contested decision) and to the measures taken by the participants to conceal the contacts between them (recitals 219 to 221 of the contested decision).

195 Thus, the Commission concluded, in recital 660 of the contested decision, that the fact that the various anti-competitive arrangements were implemented in itself suggested that there was an impact on the market, even if the actual effect was difficult to measure because it was, in particular, not known if and how many other projects had been subject to bid-rigging, nor how many projects might have been subject to allocation between cartel members without there being a need for contacts between them. The Commission added that the high aggregate market shares of the cartel participants made anti-competitive effects appear likely and that the relative stability of these market shares throughout the duration of the infringements would confirm those effects.

196 Third, the applicants in Case T-145/07 maintain that, contrary to recital 664 of the contested decision, the statement of objections did not suggest that the discussions concerning elevator projects with a value of more than EUR 1 million had affected the elevator market with a value below that amount. Accordingly, they submit that their rights of defence were infringed.

197 As has been observed in paragraph 122 above, the fundamental principle of EU law which calls for observance of the rights of the defence in all proceedings requires, in particular, that the statement of objections which the Commission sends to an undertaking on which it envisages imposing a penalty for an infringement of the competition rules contain the essential elements used against the undertaking, such as the facts, the characterisation of those facts and the evidence on which the Commission relies, so that the undertaking may submit its arguments effectively in the administrative procedure brought against it.

198 In the present case, it can be seen in particular from point 583 of the statement of objections that the Commission considered that the cartel was likely to have had effects on the whole of the elevator and escalator sector in Germany and referred in that regard specifically to the cartel members' aggregate market share in the elevator sector overall and in the escalator sector. With regard to the assessment of the gravity of each infringement for the purpose of determining the fine, the Commission also stated, in point 617(b) of the statement of objections, that it was going to take into account, in its assessment of the gravity of the infringements, the fact that 'the cartel arrangements [permeated] the entire elevator and escalator sector'.

199 The applicants in Case T-145/07 adopted a position on this matter in their reply to the statement of objections. Thus, amongst other things, they informed the Commission [*confidential*].

200 There is thus no factual basis for the argument that the Commission violated the applicants' rights of defence in failing to suggest in the statement of objections that the discussions concerning elevator projects with a value of more than EUR 1 million had affected the elevator market with a value below that amount and the Court must reject it.

201 Fourth, the applicants in Case T-145/07 claim that the starting amount of EUR 70 million, set for the German cartel, is manifestly disproportionate to the value of sales actually subject to the unlawful arrangements. Thus, even though the Commission stated, in recital 664 of the contested decision, that it would take into account the fact that the entire elevator sector might not have been directly affected by the cartel activities, it did not take into account the fact that only a limited subset of the whole elevator market had been the subject of the discussions. Moreover, when determining the starting amount of the fine for Germany, the Commission failed to follow the method for calculating the fine applied in the contested decision. As the Commission had recognised that the scope of the German arrangements was more limited than in the three Benelux countries, it could not apply the same criteria when calculating the fine imposed in respect of the German infringement.

202 First of all, it has been recalled, in paragraph 174 above, that, having regard to the fixed-band approach implicit in the method set out in Section 1.A of the 1998 Guidelines, the Commission is not required, when it sets the general starting amount of the fine, to take into account the size of the market affected.

203 Next, although the Commission did not attempt to demonstrate the precise effects of the infringement (recital 660 of the contested decision), it none the less, in the case of the German cartel, set a lower starting amount in order to take into account, in favour of the undertakings concerned, the possibility that the entire elevator market might not have been directly affected by the arrangements. Thus, as the Commission stated in recital 664 of the contested decision, it in fact took 'the fact into account that the entire elevator market [might] not have been directly affected by the cartel activities' in determining the starting amount of the fine. It is apparent that the starting amount of the fine for the German cartel was set at a lower level, when expressed as a percentage of the total size of the market, than the amounts applied in relation to the other cartels covered by the contested decision (see paragraph 176 above).

204 Furthermore, even supposing that, so far as elevators are concerned, the German cartel affected only high-value/high-speed elevator projects (see paragraphs 184 to 191 above), the starting amount of the fine would remain justified even if it were compared with the amounts set for the other cartels. For the purpose of such a comparison, the Court points out that the geographic market concerned by the German cartel was far more extensive than the geographic markets concerned by the other cartels.

205 Finally, even if, as is claimed by the applicants in Case T-145/07, the German cartel had affected only a part of the elevator market, namely high-value/high-speed elevator projects, the total volume of sales affected by the cartel would, according to the estimates put forward by Otis, be EUR 128 million, and thus the starting amount would represent 54% of the sales affected.

206 It has already been held that starting amounts of such a percentage may be warranted in cases of very serious infringements (see, to that effect, *BASF* v *Commission*, paragraph 167 above, paragraphs 130 and 133 to 137, and *Carbone-Lorraine* v *Commission*, paragraph 137 above, paragraph 121). Furthermore, as the Commission stated in recital 659 of the contested decision, it has consistently been held that the effect of an anti-competitive practice is not a conclusive criterion for assessing the gravity of an infringement. Factors relating to the intentional aspect may be more significant than those relating to the effects, particularly where they relate to infringements which are intrinsically serious, such as market sharing (*Thyssen Stahl* v *Commission*, paragraph 159 above, paragraph 118; *Prym and Prym Consumer* v *Commission*, paragraph 122 above, paragraph 96; *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission*, paragraph 77 above, paragraph 199; and *Degussa* v *Commission*, paragraph 71 above, paragraph 251).

207 Even assuming that the Commission, when it finds in one and the same decision that a number of very serious infringements have been committed, were required to keep a proportionate relationship between the general starting amounts and the sizes of the various markets affected, there is nothing in this case to show that the general starting amounts set for the infringements in Belgium, Germany, Luxembourg and the Netherlands lack coherence or are disproportionate.

208 Indeed, as has been stated in paragraph 176 above, consideration of the relevant information shows that, having regard to the size of the markets affected, the Commission set the general starting amounts for the fines in a reasonable and coherent manner.

209 Accordingly, the complaints concerning the general starting amounts of the fines must be rejected.

– *The specific starting amounts of the fines*

210 The Court recalls that, in the context of calculating fines imposed under Article 23(2) of Regulation No 1/2003, differentiated treatment of the undertakings concerned is inherent in the exercise of the Commission's powers under that provision. In exercising its discretion, the Commission is required to fit the penalty to the individual conduct and specific characteristics of the undertakings concerned in

order to ensure that, in each case, the EU competition rules are fully effective (see, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 109, and *Britannia Alloys & Chemicals* v *Commission*, paragraph 108 above, paragraph 44).

211 Thus the 1998 Guidelines provide that, where an infringement is sufficiently serious, it may be necessary in cases involving several undertakings, such as cartels, to apply weightings to the general starting amount in order to establish a specific starting amount taking account of the weight and, therefore, the real impact of the offending conduct of each undertaking on competition, particularly where there is considerable disparity between the sizes of the undertakings committing infringements of the same type (Section 1.A, sixth paragraph). In particular, it is necessary to take account of the effective economic capacity of offenders to cause significant damage to other operators, in particular consumers (Section 1.A, fourth paragraph).

212 The 1998 Guidelines also state that the principle of equal punishment for the same conduct may, if the circumstances so warrant, lead to different fines being imposed on the undertakings concerned without that differentiation being governed by arithmetic calculation (Section 1.A, seventh paragraph).

213 It is evident from the case-law that the 1998 Guidelines do not provide that fines are to be calculated according to the turnover of the undertakings on the market concerned. Thus, for the purpose of assessing the influence of an undertaking on the market or, in the words of the Guidelines, its effective economic capacity to cause significant damage to other operators, the Commission is not obliged first to define the market and to assess its size (*Prym and Prym Consumer* v *Commission*, paragraph 122 above, paragraph 63). However, nor do the 1998 Guidelines preclude the Commission from taking that figure into account in determining the amount of the fine in order to ensure compliance with the general principles of EU law and where circumstances demand it (Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraphs 283 and 284; Case T-220/00 *Cheil Jedang* v *Commission* [2003] ECR II-2473, paragraph 82; and Case T-38/02 *Groupe Danone* v *Commission* [2005] ECR II-4407, paragraph 157).

214 In the present case, it is clear from recitals 672 to 685 of the contested decision that the Commission applied, for each infringement identified in Article 1 of the contested decision, 'differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition' (recital 672 of the contested decision). For each infringement, it placed the undertakings in categories for the purpose of setting the specific starting amounts of the fine, according to their turnover on each national market for the products concerned (recitals 673 to 685 of the contested decision). Except when it determined the specific starting amount for Schindler in respect of its participation in the German cartel, the Commission took as its basis, when determining the specific starting amounts of the other undertakings, for each infringement, the 2003 turnover, which in its view was the most recent full year in which those undertakings were active in the cartels concerned (recitals 674, 676, 680 and 684 of the contested decision).

215 In the first place, with regard to the Luxembourg infringement, the applicant in Case T-141/07 argues that, under the 1998 Guidelines, the Commission must take into consideration, when determining the starting amount of the fine, the economic capacity of offenders to cause significant damage to other operators. It submits that GTO is a small company run wholly independently which could under no circumstances have caused significant damage on the market. The applicant in Case T-141/07 is a small local undertaking, both in terms of the number of employees and in terms of its turnover, which is active only on the Luxembourg market.

216 In that regard, it must first of all be stated that, as is clear from the reasoning which has gone before (see paragraphs 63 to 90 and 96 to 105 above), the Commission was fully entitled, in the contested decision, to find that GTO formed, for the purposes of applying the competition rules, an economic unit with UTC, OEC, the Otis subsidiaries and GT. The arguments of the applicant in Case T-141/07 concerning its allegedly small size must therefore be rejected.

217 Moreover, the applicant in Case T-141/07 does not deny that 'GTO's 2003 turnover was the highest of the participants in the Luxembourg cartel' (recital 681 of the contested decision) or that the cartel members together accounted for around 80% of the relevant market (recitals 324 and 325 of the contested decision). In those circumstances, GTO has no grounds for claiming that its participation in the cartel could not have caused significant damage to other operators, in particular consumers, within the meaning of the fourth paragraph of Section 1.A of the 1998 Guidelines.

218 In the second place, as regards the German infringement, the applicants in Case T-145/07 claim that they were not treated in the same way as Schindler, so far as the specific starting amounts of the fines were concerned.

219 In their submission, the starting amount of the fine imposed on them was in fact calculated solely on the basis of the nature and geographic scope of the unlawful conduct, whilst the starting amount of Schindler's fine took account of the fact that that conduct concerned only one part of the relevant product market. If the approach that the Commission chose to take vis-à-vis Schindler were applied to the situation of the applicants in Case T-145/07, that should also result in a reduction of the starting amount of their fine.

220 It must be stated that, in the case of the German cartel, Schindler's situation is different from that of Otis. Indeed, it is not disputed that, throughout the whole period of Schindler's participation in the German cartel, between August 1995 and December 2000, the cartel concerned only escalators (recital 213 and Article 1(2) of the contested decision). Schindler thus participated only in the escalator part of the infringement identified in Article 1(2) of the contested decision. Otis, by contrast, participated in both parts of the infringement, namely that concerning escalators (between August 1995 and December 2003) and that concerning elevators (between December 2000 and December 2003) (recitals 212 and 213 and Article 1(2) of the contested decision). The application of differential treatment is intended precisely to take into account the differences between undertakings so far as their capacity to cause significant damage to competition is concerned, which, in Schindler's case, was necessarily less since it did not participate in the part of the infringement relating to elevators.

221 In those circumstances, the applicants in Case T-145/07 cannot reasonably plead that they were discriminated against on the ground that in Schindler's case only turnover on the escalator market was taken into account for the purpose of determining the specific starting amount of the fine. On the contrary, what prompted the Commission – in compliance with the principle of equal treatment – to take into account different turnovers for the two categories of undertakings concerned was, in particular, the fact that account had been taken of differences between Schindler's situation, on the one hand, and that of the other cartel members, on the other.

222 It is clear from all the foregoing that all the complaints concerning the specific starting amounts of the fines must be rejected.

223 This plea must therefore be rejected in its entirety.

The plea alleging breach of the 1998 Guidelines and infringement of the principle of proportionality when setting the increase in the starting amount of the fine on account of the duration of the infringement in Germany

224 The applicants in Case T-145/07 argue that the increase in the starting amount of the fine of 10% per year on account of the duration of the German infringement is disproportionate. First, for more than half of the period covered by the arrangements, the discussions concerned escalators only and could therefore affect only a market on which sales amounted to EUR 70 million in 2003 (recital 82 of the contested decision). Second, for more than half of the period of the infringement, Otis had only a limited market share and had a weaker position than Kone and ThyssenKrupp on the escalator

market. The Commission should therefore have applied a weighting when determining the share of escalators in the starting amount, taking into account the relative position of each of the companies involved in the escalator arrangements, as it did for Schindler (recital 676 of the contested decision).

225 In that regard, the Court recalls that under Article 23(2) of Regulation No 1/2003, the duration of the infringement is one of the factors to be taken into consideration when determining the amount of the fine to be imposed on undertakings which have infringed the competition rules.

226 With regard to the factor relating to the duration of the infringement, the 1998 Guidelines draw a distinction between infringements of short duration (in general, less than one year), for which the starting amount determined on the basis of the gravity of the infringement should not be increased, infringements of medium duration (in general, one to five years), for which the amount may be increased by up to 50%, and infringements of long duration (in general, more than five years), for which the amount may be increased by up to 10% for each year (Section 1.B, first paragraph, first to third indents, of the 1998 Guidelines).

227 It is not disputed that Otis participated in the German cartel from 1 August 1995 to 5 December 2003, that is, a period of infringement of eight years and four months, representing an infringement of long duration.

228 The Commission thus applied the rules which it imposed on itself in the 1998 Guidelines when it increased the starting amount of the fine on the basis of the duration of the German infringement by 80%, namely 10% for each year.

229 Furthermore, that 80% increase in the starting amount cannot be considered to be manifestly disproportionate having regard to the lengthy duration of the infringement (see, to that effect, Case T-68/04 *SGL Carbon* v *Commission* [2008] ECR II-2511, paragraph 113).

230 In essence, the applicants' arguments end by confusing the criterion of gravity and that of duration provided for by Article 23(3) of Regulation No 1/2003. Their arguments challenge the increase in the starting amount of the fine at a rate of 10% per year by referring to matters connected to the assessment of the gravity of the infringement. Thus they refer to the fact, first, that during the first five years of the unlawful arrangements the German cartel concerned only escalators and, second, that they had a limited share of the relevant market for more than half the cartel's duration in particular because of their weak position on the escalator market.

231 Even supposing that considerations pertaining to the gravity of the infringement could be taken into account for the purpose of determining the percentage increase in the starting amount of the fine on the basis of duration, the applicants' arguments cannot in any case be accepted.

232 First, it is not disputed that the complex, collusive escalator and elevator arrangements in Germany constituted one single and continuous infringement (recital 569 of the contested decision) given that, throughout the whole period of the infringement, the participants pursued a common objective of, inter alia, allocating projects between them and restricting their individual commercial conduct when they submitted tenders. Since the applicants in Case T-145/07 do not challenge the classification of the infringement as a single and continuous infringement, they cannot take issue with the Commission for having used a combined starting amount for the arrangements concerning escalators and elevators. Having regard to the nature of the infringement and to its geographic scope, the Commission classified it as 'very serious' (recital 671 of the contested decision), and did so irrespective of the question whether there had been changes in the products concerned (elevators and/or escalators). Since the infringement was, throughout the whole of the period at issue, 'very serious' in nature, the Commission was entitled to apply the same rate of increase for the entire period of the infringement (see, to that effect, judgment of 12 September 2007 in Case T-30/05 *Prym and Prym Consumer* v *Commission*, not published in the ECR, paragraph 196).

233 Second, it has already been seen that Otis' situation is not comparable to that of Schindler (see paragraphs 220 and 221 above). Since Otis does not deny (i) that it participated in unlawful arrangements concerning both escalators and elevators, (ii) that those unlawful arrangements constitute a single and continuous infringement and (iii) that the Commission used, for the purpose of applying differential treatment to the undertakings, their turnovers for the products which were the subject of the cartel, in order to take account of their effective economic capacity to cause damage to competition, the Commission was fully entitled to take into account Otis' market share in 2003, the most recent full year in which the cartel was active, on the whole of the escalator and elevator market in order to determine the specific starting amount of the fine. Otis' overall turnover on that market in 2003 was similar to that of Kone and ThyssenKrupp (recital 677 of the contested decision). The placing of Otis in the same category as Kone and ThyssenKrupp for the purpose of determining the specific starting amount of the fines is thus coherent and objectively justified. Having regard to the reasoning in paragraph 232 above, nor can the applicants in Case T-145/07 challenge the application to all the undertakings within that category of a single rate of increase of that amount on the basis of the duration of the infringement.

234 Accordingly, the present plea must be rejected.

The plea alleging breach of the 1998 Guidelines and infringement of the principle of proportionality in the application of a group multiplier for deterrence in the determination of the starting amounts of the fines

235 In the contested decision, the Commission alludes to the need to set the fines 'at a level which ensures that they have sufficient deterrent effect, taking into account the size of each undertaking' (recital 686 of the contested decision). Thus, having stated that 'with their respective worldwide turnovers of EUR 47 100 000 000 and EUR 34 300 000 000, ThyssenKrupp and UTC/Otis are much larger players than the other addressees', the Commission considered that 'the appropriate starting amount for a fine [required] further upward adjustment to take account of the size and the overall resources' of those undertakings and that 'the application of a multiplying factor of 2 (increase of 100%) in respect of the starting amount of the fine to be imposed on ThyssenKrupp and of 1.7 (increase of 70%) in respect of the starting amount of the fine to be imposed on UTC/Otis [was] appropriate' (recital 690 of the contested decision).

236 The applicants in Cases T-145/07 and T-146/07 argue that the Commission breached the 1998 Guidelines and infringed the principle of proportionality when it applied a multiplier of 1.7 to the starting amounts of the fines imposed on the Otis group companies in the four Member States concerned in order to ensure that the fines had a sufficiently deterrent effect.

237 In the first place, the applicants object to UTC's turnover being taken into account for the purpose of determining the factor for deterrence.

238 In that regard, the Court recalls first of all that the Commission was entitled to hold that the applicants in Cases T-141/07, T-142/07, T-145/07 and T-146/07 form an economic unit (see paragraphs 67 to 90 and 106 to 120 above).

239 Next, the need to ensure that a fine has a sufficient deterrent effect, where that need is not found to justify raising the general level of fines in the context of the implementation of a competition policy, requires that the amount of the fine be adjusted in order to take account of the desired impact on the undertaking on which it is imposed, so that the fine is not rendered negligible, or on the contrary excessive, in particular in the light of the financial capacity of the undertaking in question, in accordance with the requirements arising from, on the one hand, the need to ensure effectiveness of the fine and, on the other, compliance with the principle of proportionality (judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission*, not published in the ECR, paragraph 670).

240 It is true that the Commission did not lay down in the 1998 Guidelines any method or specific criteria as to the manner in which the objective of deterrence was to be taken into account and which, had they been set out expressly, would have been capable of having binding effect. In the indications concerning the evaluation of the gravity of an infringement, the fourth paragraph of Section 1.A of the guidelines refers only to the need to set the fine at a level which ensures that it will have sufficient deterrent effect (*Schunk and Schunk Kohlenstoff-Technik* v *Commission*, paragraph 83 above, paragraph 193).

241 However, it is clear from the case-law that the Commission is entitled to use the overall turnover of each undertaking participating in a cartel as a criterion relevant for the purpose of setting a deterrence multiplier (see, to that effect, Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraphs 17 and 18). Thus, the size and overall resources of an undertaking are relevant criteria in view of the objective pursued, namely ensuring that the fine is effective by adjusting its amount having regard to the overall resources of the undertaking and its capacity to raise the funds necessary to pay that fine. The setting of the rate of increase of the starting amount in order to ensure that the fine has a sufficiently deterrent effect is intended more to ensure the effectiveness of the fine than to reflect the harmfulness of the infringement to normal competition and thus the gravity of the infringement (*Lafarge* v *Commission*, paragraph 239 above, paragraph 672).

242 Consequently, the Commission did not breach the 1998 Guidelines or infringe the principle of proportionality when it relied on the overall turnover of the Otis group for the purpose of applying the deterrence factor.

243 In the second place, the applicants in Cases T-145/07 and T-146/07 maintain that the Commission should have considered whether deterrence was necessary in the case of Otis, taking into account the likelihood of a repeat infringement, and that it should have taken due consideration of the applicants' efforts to prevent infringements of the competition rules, the applicants having done everything reasonably possible to prevent the infringements identified in the contested decision. They refer to that effect to the compliance programme within the Otis group, to their cooperation during the administrative procedure and to the termination of the contracts of the employees responsible for the infringement who, moreover, made great efforts to conceal their conduct from their superiors.

244 In the present case, it is not disputed that, when applying a multiplier to Otis in order to enhance the deterrent effect of the fines, the Commission did not undertake an assessment of the likelihood of a repeat infringement. As is clear from recitals 688 to 690 of the contested decision, it took account solely of Otis' size and overall resources, in particular its worldwide turnover.

245 However, the fact that there was no evaluation of the likelihood of repeated infringement on Otis' part does not in any way affect the lawfulness of the multiplier (see, to that effect, *BASF* v *Commission*, paragraph 167 above, paragraph 229, and Joined Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraph 47 and the case-law cited). The link between the size and overall resources of the undertakings, on the one hand, and the need to ensure that a fine has deterrent effect, on the other, is not open to challenge. It should be noted in this connection that a large undertaking, owing to its considerable financial resources by comparison with those of the other members of a cartel, can more readily raise the necessary funds to pay its fine, which, if the fine is to have a sufficiently deterrent effect, justifies the imposition, in particular by the application of a multiplier, of a fine proportionately higher than that imposed in respect of the same infringement on an undertaking without such resources (see *BASF* v *Commission*, paragraph 167 above, paragraph 235 and the case-law cited).

246 The complaint concerning failure to evaluate the likelihood of a repeat infringement must therefore be rejected.

247 As regards the competition law compliance programme within Otis and the fact that Otis terminated the contracts of the employees who were responsible for the infringements, the Court notes that, as the Commission correctly observed in recital 688 of the contested decision, such measures do not alter the fact that infringements were committed. Since the increase in the starting amount to ensure that the fine has a sufficiently deterrent effect is intended, inter alia, to guarantee that the fine is effective in view of the undertaking's financial capacity, the Commission is not obliged to take account of such measures when it determines the applicable multiplier (see, to that effect, *BASF and UCB* v *Commission*, paragraph 245 above, paragraph 52).

248 The argument based on Otis' cooperation during the administrative procedure must be rejected on the same grounds. It should be added that the Commission acknowledged that Otis had in actual fact cooperated and rewarded it within the framework of the 2002 Leniency Notice as well as outside the notice (see Chapter 13.8 of the contested decision). The Commission's assessment of Otis' cooperation is addressed in paragraphs 252 to 379 below.

249 In the third place, the applicant in Case T-146/07 observes that the Commission, by applying a multiplier on the basis of the group turnover, could circumvent the ceiling of 10% of turnover laid down by Article 23(2) of Regulation No 1/2003.

250 That argument must also be rejected. The applicant in Case T-146/07 does not explain how the increase in the amount of the fine on the basis of the group's turnover was liable to breach the upper limit of 10% referred to in Article 23(2) of Regulation No 1/2003, which refers to the total turnover of the undertaking concerned. In any event, the applicant in Case T-146/07 does not claim that in this instance the 10% limit was exceeded.

251 It follows from all the foregoing that this plea must be rejected.

The plea alleging breach of the 2002 Leniency Notice and infringement of Article 253 EC and of the principles of the protection of legitimate expectations, proportionality, fairness, equal treatment and of the rights of the defence

252 The applicants in Cases T-141/07 and T-145/07 point out that they applied for immunity from fines or for a reduction of the fines under the 2002 Leniency Notice. The Commission, however, violated the notice, Article 253 EC, the principles of the protection of legitimate expectations, proportionality, fairness and equal treatment as well as their rights of defence when assessing the quality and usefulness of their cooperation.

The 2002 Leniency Notice

253 The Court observes that in the 2002 Leniency Notice the Commission defined the conditions under which undertakings which cooperate with it for the purpose of establishing there to have been a cartel may be exempted from fines, or may be granted reductions in the fine which would otherwise have been imposed upon them.

254 First of all, the 2002 Leniency Notice provides, in Section A, at point 8:

'The Commission will grant an undertaking immunity from any fine which would otherwise have been imposed if:

(a) the undertaking is the first to submit evidence which in the Commission's view may enable it to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 in connection with an alleged cartel affecting the Community; or

(b) the undertaking is the first to submit evidence which in the Commission's view may enable it to find an infringement of Article 81 EC in connection with an alleged cartel affecting the Community.'

255 The 2002 Leniency Notice goes on to provide, in Section B, at point 20, that '[u]ndertakings that do not meet the conditions under Section A above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed' and, at point 21, that '[i]n order to qualify, an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence'.

256 As regards the concept of added value, the following explanation is given at point 22 of the 2002 Leniency Notice:

'The concept of "added value" refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question. In this assessment, the Commission will generally consider written evidence originating from the period of time to which the facts pertain to have a greater value than evidence subsequently established. Similarly, evidence directly relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance.'

257 The first paragraph of point 23(b) of the 2002 Leniency Notice provides for reductions in fines to be classified in three categories:

'– first undertaking to meet point 21: a reduction of 30-50%;

– second undertaking to meet point 21: a reduction of 20-30%;

– subsequent undertakings that meet point 21: a reduction of up to 20%.'

258 The second paragraph of point 23(b) of the 2002 Leniency Notice provides:

'In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence fulfilling the condition in point 21 was submitted and the extent to which it represents added value. It may also take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission.'

259 Finally, the last paragraph of point 23(b) of the 2002 Leniency Notice provides:

'In addition, if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence.'

The Commission's margin of assessment and review by the Courts of the European Union

260 The Court recalls that Article 23(2) of Regulation No 1/2003, which is the legal basis for imposing fines in the event of infringement of the EU competition rules, confers on the Commission a margin of assessment in setting fines (see, to that effect, Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127), which will depend, in particular, on its general policy in competition matters (*Musique Diffusion française and Others* v *Commission*, paragraph 210 above, paragraphs 105 and 109). That was the context in which, in order to ensure the transparency and objectivity of its

fining decisions, the Commission adopted and published the 2002 Leniency Notice. The notice constitutes an instrument intended to define, while complying with higher-ranking law, the criteria which the Commission proposes to apply in the exercise of its discretion, which is thus subject to a self-imposed limitation (see, by analogy, Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 89), in so far as the Commission must comply with self-imposed guidelines (see, by analogy, Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 57).

261 The limitation which the Commission has imposed on its discretion by adopting the 2002 Leniency Notice is not, however, incompatible with the retention of a considerable margin of assessment (see, by analogy, *Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 164 above, paragraph 224).

262 The 2002 Leniency Notice displays flexibility in a number of ways, enabling the Commission to exercise its discretion in accordance with Article 23 of Regulation No 1/2003, as interpreted by the Court of Justice (see, by analogy, *Raiffeisen Zentralbank Österreich and Others* v *Commission*, paragraph 164 above, paragraph 224).

263 Thus, the Commission enjoys a broad margin of assessment when it is required to determine whether the evidence provided by an undertaking that has stated that it wishes to benefit from the 2002 Leniency Notice represents significant added value for the purposes of point 21 of the notice (see, to that effect, Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 88, and Case T-410/03 *Hoechst* v *Commission* [2008] ECR II-881, paragraph 555). As regards point 8(a) and (b) of the notice, it is clear that that considerable margin of assessment results from the actual wording of that provision, which expressly refers to the provision of evidence which, 'in the Commission's view' either enables it to adopt a decision to carry out an investigation or enables it to find an infringement. The assessment of the quality and usefulness of the cooperation provided by an undertaking involves complex assessments of fact (see, to that effect, *SGL Carbon* v *Commission*, paragraph 81, and *Carbone-Lorraine* v *Commission*, paragraph 137 above, paragraph 271).

264 Similarly, the Commission, once it has found that the evidence represents significant added value within the meaning of point 21 of the 2002 Leniency Notice, has a margin of assessment when it is required to determine the exact level of the reduction of the fine to be granted to the undertaking concerned. The first paragraph of point 23(b) of the notice provides for fine-reduction bands for the various categories of undertakings concerned, whilst the second paragraph of point 23(b) sets the criteria to be taken into account by the Commission in order to determine the level of reduction within those bands.

265 In view of the margin of assessment available to the Commission in evaluating the cooperation of an undertaking under the 2002 Leniency Notice, it is only where it manifestly goes beyond the bounds of that margin that it may be criticised by the General Court (see, to that effect, *SGL Carbon* v *Commission*, paragraph 263 above, paragraphs 81, 88 and 89, and *Hoechst* v *Commission*, paragraph 263 above, paragraph 555).

Otis' cooperation in establishing the infringement in Belgium

266 The Commission decided, in recital 767 of the contested decision, 'to grant Otis a reduction of 40% within the band provided for in the first indent of point 23(b) of the 2002 Leniency Notice'.

267 In recital 763 of the contested decision, the Commission explained that 'Otis was second to submit information concerning Belgium shortly after the second round of inspections in Belgium' and that 'Otis' application [under the 2002 Leniency Notice] consists mainly of oral corporate statements and limited contemporaneous evidence'.

268 Concerning the value of Otis' cooperation, the Commission states in recital 766 of the contested decision that that cooperation was continuous and that it 'strengthened the Commission's ability to prove the infringement in particular due to contemporaneous documentary evidence submitted and which thus represented significant added value'. The Commission added in that recital: '[h]owever, the evidence submitted only provides very limited information on facts previously unknown to the Commission'.

269 According to the applicants in Case T-145/07, Otis should have been granted a 50% reduction of the fine, since it provided, at an early stage extensive evidence concerning the arrangements in Belgium, including contemporaneous evidence such as project lists. They refer to that effect to their reply to the statement of objections. According to Otis, the extent and probative value of the evidence submitted exceeded by far the information submitted by Kone concerning Germany, for which the Commission granted a 50% reduction.

270 In that regard, it must be stated that the applicants in Case T-145/07 do not dispute that Otis' cooperation falls within the first indent of point 23(b) of the 2002 Leniency Notice and that on that account Otis was entitled to a reduction of the fine of between 30% and 50%. The 40% reduction of the fine awarded to Otis in respect of its cooperation (recital 767 to the contested decision) is thus within the band provided for by the notice.

271 Without it being necessary to adjudicate upon the admissibility of the applicants' arguments, which refer in essence to observations made in a document annexed to the application, it is clear that, in this instance, the applicants have not established that the Commission manifestly went beyond the bounds of its margin of assessment in awarding Otis a 40% reduction of its fine in respect of its cooperation in establishing the infringement in Belgium.

272 For that purpose, it should be borne in mind that the 2002 Leniency Notice provides, in the second paragraph of point 23(b), that in order to determine the level of reduction of the fine within a band, the Commission will take into account both 'the time at which the evidence fulfilling the condition in point 21 was submitted and the extent to which it represents added value'.

273 It is apparent from findings in the contested decision which have not been challenged (recitals 95, 96 and 766 of the contested decision) that, although Otis fulfilled the condition in point 21 of the 2002 Leniency Notice a relatively short time after the commencement of the procedure, the fact none the less remains that Otis' evidence relating to the Belgian cartel which was the basis for the reduction of its fine was provided to the Commission only after the Commission had already received a leniency application from Kone under the notice enabling it to find an infringement in Belgium (recital 760 of the contested decision). Furthermore, the Commission had already organised two rounds of inspections in Belgium, in particular at the premises of Otis Belgium.

274 Irrespective of the quality and usefulness of the evidence provided by Otis, the Commission, in view of the date on which the evidence was provided, did not manifestly go beyond the bounds of its margin of assessment in awarding Otis a 40% reduction of its fine in respect of its cooperation in establishing the Belgian cartel.

275 That conclusion is not undermined by the argument concerning the 50% reduction awarded to Kone in the context of the German cartel. The assessment of what represents significant added value by definition entails an analysis specific to the context of all the evidence available to the Commission in connection with a particular infringement; accordingly, information connected with separate infringements, in this instance the infringements in Belgium and Germany, is not comparable. As the situations of the various undertakings are not comparable, the Commission did not infringe the principle of equal treatment when it awarded Otis a 40% reduction in respect of its cooperation in establishing the Belgian cartel, whilst granting Kone a 50% reduction for its cooperation in establishing the infringement in Germany.

276 In any event, first, the applicants in Case T-145/07 do not substantiate their claim that the extent and probative value of the evidence submitted by Otis concerning the Belgian cartel exceeded by far the information submitted by Kone concerning Germany.

277 Second, it is not disputed that Kone provided the Commission with evidence of significant added value in relation to Germany on 12 and 18 February 2004, that is to say, in the month following the Commission's first inspection on 28 January 2004 (recitals 104 to 106 and 792 of the contested decision), whilst Otis' cooperation relating to the Belgian cartel began on [*confidential*], that is to say, after a second round of inspections had been organised in Belgium, on 9 March 2004 (recitals 95 and 96 of the contested decision).

278 Third, when Otis, whose cooperation fell within the first indent of point 23(b) of the 2002 Leniency Notice, provided the Commission with evidence relating to the Belgian cartel, the Commission already had sufficient evidence – contained in Kone's earlier application – to find the infringement and Kone was granted full immunity from fines (recitals 760 and 761 of the contested decision). By contrast, in the case of the German infringement, no undertaking was awarded immunity from fines, which means that the Commission did not have sufficient evidence to make a finding of infringement in Germany at the time when Kone submitted its application under that notice.

279 It is apparent from all the foregoing that all Otis' complaints relating to the way in which the 2002 Leniency Notice was applied to its cooperation in establishing the infringement in Belgium must be rejected.

Otis' cooperation in establishing the infringement in Germany

280 Otis, which made an application under the 2002 Leniency Notice in respect of the German cartel on [*confidential*], was the second undertaking to do so (recital 107 of the contested decision); it obtained a 25% reduction of its fine under point 23(b) of the notice for its cooperation in establishing the German cartel (recital 800 of the contested decision). The Commission gives the following explanation in that connection in recitals 796 and 799 of the contested decision:

> '(796) Considering the importance of the evidence submitted and the quality and timing of Otis' submission, it does indeed represent significant added value strengthening the Commission's ability to prove the facts in question. This, however, is the standard prerequisite for granting a reduction of fines according to points 21 and 22 of the [2002] Leniency Notice. Otis did not demonstrate in which way its cooperation would amount to exceptional circumstances. In addition, the wording of the 2002 Leniency Notice does not allow for a reduction other than within the band of 20-30% for the second undertaking submitting evidence.
>
> …
>
> (799) The reduction of the fine within the indicated band takes account of the time at which the evidence was submitted, the extent to which it represents added value, as well as the extent and continuity of the undertaking's cooperation after its submissions. Otis completely fulfilled the condition of point 21 only after the [*confidential*] supplement. Otis did provide significant added value that considerably strengthened the Commission's ability to prove the infringement. [*confidential*]. However, the evidence submitted does not contain contemporaneous evidence.'

281 In the first place, the applicants in Case T-145/07 maintain that the Commission violated the 2002 Leniency Notice since Otis had fulfilled the conditions for obtaining immunity from fines under point 8(b) of the notice. The Commission informed Otis [*confidential*] that immunity under the 2002 Leniency Notice was still available for Germany and that it might be granted conditional immunity.

However, the application for immunity was rejected [*confidential*]. Contrary to the Commission's view, the evidence, explanations and information with which Otis provided it before [*confidential*] enabled the Commission to find an infringement of Article 81 EC under point 8(b) of the notice.

282 The Court recalls that, in view of the margin of assessment available to the Commission in evaluating the cooperation of an undertaking under the 2002 Leniency Notice, it is only where the Commission manifestly goes beyond the bounds of that margin that it may be criticised by the General Court (see, to that effect, *SGL Carbon* v *Commission*, paragraph 263 above, paragraphs 81, 88 and 89, and *Hoechst* v *Commission*, paragraph 263 above, paragraph 555).

283 It should also be recalled that one of the conditions on which immunity may be obtained under point 8(b) of the 2002 Leniency Notice is that the undertaking must be the first to submit evidence which in the Commission's view may enable it to find an infringement of Article 81 EC in connection with an alleged cartel affecting the Community.

284 At the time of Otis' application under that notice in respect of the German infringement ([*confidential*]), the Commission had already completed two rounds of inspections in Germany, on 28 January and 9 March 2004 (recitals 104 and 106 of the contested decision). Furthermore, the Commission had already received information from a third-party informant in the summer of 2003 (recital 91 of the contested decision) and had, on 12 February 2004, received an application under the 2002 Leniency Notice from Kone (recital 105 of the contested decision).

285 According to the applicants in Case T-145/07, it is nevertheless clear from the Commission's letter to Otis [*confidential*] that the Commission was not in a position to prove the infringement in Germany before it had the information provided by Otis.

286 In that letter, the Commission, after observing that [*confidential*], informed Otis that it had now taken a decision on the earlier application under the 2002 Leniency Notice and that [*confidential*]. The Commission added that it was going to verify [*confidential*]. The Commission none the less stressed that [*confidential*] in relation to its participation in the German infringement.

287 The letter [*confidential*] must be read in the light of point 18 of the 2002 Leniency Notice, according to which '[t]he Commission will not consider other applications for immunity from fines before it has taken a position on an existing application in relation to the same suspected infringement'. Thus, that letter was intended solely to inform Otis that the Commission, having made a decision on another undertaking's application for immunity, in this instance that of Kone, could now consider Otis' application for immunity. It does not, however, include any evaluation of the quality of Otis' cooperation. On the contrary, the letter expressly states that the Commission still had to examine whether the evidence submitted by Otis met the conditions of point 8(b) of the notice.

288 As regards the quality of Otis' cooperation concerning the infringement in Germany, the case-file shows that that cooperation consisted, in essence, in unilateral statements.

289 Unilateral statements by an undertaking, even if they are detailed, cannot suffice for a finding of infringement unless they are supported by precise and consistent documentary evidence. The Commission is required to set out in its decision sufficiently precise and consistent evidence to give grounds for a firm conviction that the alleged infringement took place (see Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 43 and the case-law cited).

290 It is true that Otis submitted, in the context of its application under the 2002 Leniency Notice, some documentary evidence, [*confidential*].

291 However, the probative value of that evidence is limited. It does not in itself include any indication of the anti-competitive conduct identified in the contested decision. [*confidential*]

292 In those circumstances, although the evidence provided by Otis included some contemporaneous documents (the expense reports of two Otis employees), the Commission did not manifestly go beyond the bounds of its margin of assessment when it decided that Otis' submissions were not sufficient for it to find an infringement of Article 81 EC in Germany. Accordingly, the Commission was fully entitled to refuse Otis immunity from fines under point 8(b) of the 2002 Leniency Notice.

293 That conclusion is not undermined by the fact that the contested decision includes numerous references to Otis' submissions. It must be recalled in that regard that the Commission had already received an application under the 2002 Leniency Notice from Kone when it received Otis' application under the notice and that the first application, like that of Otis, consisted in essence in unilateral statements and was unsupported by evidence other than its own written statements based on memory (recital 788 of the contested decision). Since the Commission could not rely solely on Kone's unilateral statements in order to find the infringement in Germany – nor on those of Otis – it had to refer, in the contested decision (recitals 209 to 288), to a body of other corroborating evidence, including that provided by Otis, which was, however, insufficient in itself to find the infringement (see paragraph 289 above).

294 In the second place, the applicants in Case T-145/07 submit that at the time when the Commission rejected Otis' application for immunity ([*confidential*]) it had not fully analysed the information supplied by Otis, and in particular the documents [*confidential*]. A proper analysis of those documents would have led the Commission to grant Otis immunity.

295 That argument must be rejected since it is apparent from the analysis in paragraphs 282 to 293 above that as a whole the evidence provided by Otis to the Commission, and thus also the documents [*confidential*], did not meet the conditions of point 8(b) of the 2002 Leniency Notice. Indeed, Otis' unilateral statements, which were not supported by precise and consistent documentary evidence, did not in themselves enable the Commission to find an infringement in Germany.

296 In any event, the allegation made by the applicants in Case T-145/07 that the Commission failed to analyse the documents [*confidential*] is incorrect. The Commission's letter to Otis [*confidential*] informing Otis that the Commission was going to verify whether Otis met the conditions of point 8(b) of the 2002 Leniency Notice specifically refers to the statement made [*confidential*] and to the document provided [*confidential*]. The Commission also made use of the information submitted by Otis [*confidential*] (see points 108, 228, 253, 255, 257, 265, 266, 268 and 270 of the statement of objections and recitals 213, 240, 242, 244, 251 to 254, 257 and 260 of the contested decision) and [*confidential*] (see points 255, 275 and 282 of the statement of objections and recitals 242 and 272 of the contested decision). As regards the e-mail from Otis to the Commission [*confidential*], suffice it to state that it merely contains an offer by Otis to make its employees and, so far as possible, its former employees available to the Commission.

297 In the third place, the applicants in Case T-145/07 maintain that the Commission had an incomplete record of the documents submitted by Otis and that, as a consequence, the factual basis of the Commission's assessment of its cooperation was incomplete and therefore flawed. Thus, no account was taken, in the contested decision, of a contribution [*confidential*] including a table summarising trips to Germany, of a contribution [*confidential*] including travel expense records and two CD-ROMs containing e-mails, a contribution [*confidential*] summarising the steps taken by Otis to assist the Commission and a contribution [*confidential*], including an offer to make former Otis employees available to the Commission. In addition, the contested decision fails to mention the way in which Otis cooperated with the Commission by responding to numerous informal requests for information concerning Germany.

298 That complaint must be rejected on the same grounds as those set out in paragraph 295 above. In any event, the Court cannot but conclude, contrary to what is maintained by the applicants in Case T-145/07, that Otis' contributions [*confidential*] are part of the Commission's case-file, were duly

mentioned in point 108 of the statement of objections and in recital 107 of the contested decision, and were also made use of by the Commission, as can be seen from points 231, 232 and 258 of the statement of objections and from recitals 216, 217, 245 and 247 of the contested decision. As regards the two CD-ROMs which were provided to the Commission and which allegedly are not in its file, suffice it to state that, as the applicants in Case T-145/07 point out, those CD-ROMs were part of Otis' contribution [*confidential*], which was duly mentioned in recital 107 of the contested decision. The fact that there are no specific references to those CD-ROMs in the statement of objections or in the contested decision is explained by the fact that they did not contain any information which was useful to the Commission's investigation: that is clear from, inter alia, an analysis of some documents found on those CD-ROMs, which were produced by Otis in response to a written question from the Court. As regards the contribution [*confidential*] including a summary of the steps taken by Otis to assist the Commission and that [*confidential*] comprising an offer to make former Otis employees available to the Commission, they do not constitute information concerning the German cartel. Finally, the e-mails which are allegedly not part of the Commission's file concern, in essence, as the Commission correctly observes, only purely practical aspects of Otis' cooperation (such as the organisation of meetings or the absence of certain colleagues). The Court cannot therefore accept the complaint of the applicants in Case T-145/07 that there were errors in the assessment of Otis' cooperation.

299 In the fourth place, the applicants in Case T-145/07 submit that the Commission failed to explain in the contested decision the reasons why it rejected Otis' application for immunity. The Commission thus infringed Article 253 EC, the 2002 Leniency Notice, the principle of the protection of legitimate expectations and Otis' rights of defence; as a result, the fine imposed on Otis in respect of the German cartel should be annulled.

300 It is clear from point 31 of the 2002 Leniency Notice, specifically relied on by the applicants, that 'the fact that an undertaking cooperated with the Commission during its administrative procedure will be indicated in any decision, so as to explain the reason for the immunity or reduction of the fine'.

301 Furthermore, it is settled case-law that the question whether the statement of reasons for a decision meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, to that effect, Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 94 and the case-law cited).

302 Moreover, the Court of Justice has already held that the reasoning may be implicit on condition that it enables the persons concerned to know why the measures in question were taken and provides the General Court with sufficient material for it to exercise its power of review (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 123 above, paragraph 372, and Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraph 46).

303 In this case, the Commission, in recital 795 of the contested decision, stated that 'Otis [claimed] immunity under point 8(b) of the [2002] Leniency Notice, arguing it was first to provide additional elements without which the Commission would not have been able to prove the existence of the cartel in Germany'.

304 Although the Commission did not explicitly address that argument, it addressed it implicitly, explaining in recitals 796 to 800 of the contested decision that the evidence provided by Otis entitled it to a 25% reduction of the fine under points 21 to 23 of the 2002 Leniency Notice.

305 Having regard to the legal framework in which Otis' cooperation was considered, its application for immunity from fines was bound to be rejected because the conditions of point 8(b) of the 2002 Leniency Notice were not met or, in other words, because the evidence submitted by Otis did not enable the Commission to find the infringement in Germany.

306 The contested decision thus enables Otis to know the reasons why the Commission refused to grant it immunity from fines for its cooperation within the framework of the 2002 Leniency Notice and enables the Court to exercise its power of review. Accordingly, the complaints alleging infringement of Article 253 EC and of the 2002 Leniency Notice must be rejected. Since the applicants in Case T-145/07 base their complaint concerning infringement of their rights of defence solely on the alleged failure of the contested decision to state reasons explaining why Otis' application for immunity was refused, that complaint must also be rejected. The same is true of the complaint concerning infringement of the principle of the protection of legitimate expectations which, in the applicants' view, required the Commission to provide explanations on its decision not to grant Otis immunity.

307 In the fifth place, the protection of the applicants in Case T-145/07 maintain that, if the Court should find that Otis cannot be granted immunity from fines, the Commission none the less acted in breach of the 2002 Leniency Notice by not granting it 'partial immunity' for certain aspects of the illegal arrangements that Otis was the first to disclose, in accordance with the last paragraph of point 23(b) of the notice. Thus, the Commission should not have imposed a fine on Otis in respect of the elevator cartel for the period from December 2000 to June 2002 or in respect of the escalator cartel for the period from August 1995 to June 2002.

308 The last paragraph of point 23(b) of the 2002 Leniency Notice provides that, 'if an undertaking provides evidence relating to facts previously unknown to the Commission which have a direct bearing on the gravity or duration of the suspected cartel, the Commission will not take these elements into account when setting any fine to be imposed on the undertaking which provided this evidence'.

309 Even though the cooperation provided by Otis represented significant added value with respect to the evidence already in the Commission's possession, which led the Commission to grant Otis a 25% reduction of the fine under the second indent of point 23(b) of the 2002 Leniency Notice (recitals 796 to 800 of the contested decision), the Commission was entitled to hold that Otis was not eligible for a further reduction of the fine under the last paragraph of point 23(b) of the notice.

310 It must be recalled for that purpose, first, that, when Otis sent its application to the Commission [*confidential*], the Commission had already received (on 12 February 2004) an application from Kone concerning the same infringement and had also received information from a third-party informant. It had also organised two rounds of inspections in Germany in the elevator and escalator sector. Thus, in its application of 12 February 2004, Kone had already informed the Commission, [*confidential*]. Furthermore, the applicants in Case T-145/07 do not challenge the Commission's finding that there was a single and continuous infringement in the elevator and escalator sector; accordingly, the argument that Otis should not have been fined in respect of the 'elevator cartel' for the period from December 2000 to June 2002 or in respect of the 'escalator cartel' for the period from August 1995 to June 2002 cannot succeed.

311 In that situation, contrary to what is maintained by the applicants in Case T-145/07, the fact that the specific details concerning the dates and places of meetings between competitors were not known to the Commission is irrelevant, since, for the purpose of assessing the facts in relation to Article 81 EC, it is not essential for the date, and a fortiori the place, of the meetings between the producers to be established by the Commission (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 675; see also, to that effect, Joined Cases T-25/95, T-26/95, T-30/95 to T-32/95, T-34/95 to T-39/95, T-42/95 to T-46/95, T-48/95, T-50/95 to T-65/95, T-68/95 to T-71/95, T-87/95, T-88/95, T-103/95 and T-104/95 *Cimenteries CBR and Others* v *Commission* [2000] ECR II-491, paragraph 2354). Accordingly, contrary to the applicants' assertion, when they lodged their application under the 2002 Leniency Notice, the Commission had already been informed that the cartel had existed since August 1995.

312 Second, as has already been stated in paragraph 295 above, Otis' application comprised unilateral statements which were not supported by precise and consistent documentary evidence of the infringement. In those circumstances, Otis' application in respect of Germany did not contain any evidence having a direct bearing on one of the identifiable elements of the gravity or duration of the infringement. Indeed, Otis' contribution could have only an indirect influence on the establishment of the gravity and duration of the infringement, since each aspect of its contribution had to be corroborated by other evidence which the Commission gathered in the course of its investigation.

313 The complaint based on failure to apply the last paragraph of point 23(b) of the 2002 Leniency Notice must therefore be rejected.

314 The applicants in Case T-145/07 also allege that the Commission infringed Article 253 EC in that it failed to explain the reason why Otis was not entitled to 'partial immunity' under the last paragraph of point 23(b) of the 2002 Leniency Notice.

315 It must be stated, however, that the last paragraph of point 23(b), which is in Section B of the 2002 Leniency Notice entitled 'Reduction of a fine', is part of the system for determining the level of reduction of a fine to which an undertaking that has provided the Commission with evidence of significant added value may be entitled. Since the Commission, in its evaluation of Otis' cooperation under the 2002 Leniency Notice (recitals 795 to 800 of the contested decision), awarded Otis a 25% reduction of its fine under the second indent of point 23(b) of the notice, it rejected, by necessary implication, Otis' request that the last paragraph of point 23(b) of the notice be applied in its case.

316 Having regard to the legal framework in which Otis' cooperation was considered and given that the Commission concluded, in recitals 795 to 800 of the contested decision, that Otis was entitled only to a reduction of 25% of its fine, Otis' request that the last paragraph of point 23(b) of the 2002 Leniency Notice be applied in its case was necessarily rejected on the ground that the conditions of that provision were not met or, in other words, that the evidence which it had submitted concerning facts that were supposedly previously unknown to the Commission did not have a direct bearing on the gravity or duration of the suspected cartel.

317 The contested decision thus enables Otis to know why the Commission refused to apply the last paragraph of point 23(b) of the 2002 Leniency Notice when setting the reduction of its fine and enables the Court to exercise its power of review. The complaint alleging infringement of Article 253 EC must therefore be rejected.

318 In the sixth place, the applicants in Case T-145/07 submit that, were the Court to consider that Kone should have been granted immunity for Germany, Otis' cooperation should be analysed within the first band of reduction provided for by point 23(b) of the 2002 Leniency Notice and give rise to a 50% reduction of its fine with regard to Germany or, in any event, to a reduction significantly greater than 25%. That argument cannot be accepted. It is based on the purely hypothetical assumption that Kone should have been granted immunity for Germany, which is in any event unsubstantiated.

319 In the seventh place, as regards the 25% reduction of the fine which was granted to Otis in respect of its cooperation in the framework of the 2002 Leniency Notice, the applicants in Case T-145/07 maintain, first, that the reasons for that reduction are not properly explained, in breach of Article 253 EC.

320 That complaint must be rejected. The Commission explained, in recitals 796 to 800 of the contested decision, the reasons which led it to grant Otis a 25% reduction of its fine in respect of its cooperation within the framework of the 2002 Leniency Notice. The contested decision thus enables Otis to know the reasons for the reduction and enables the Court to exercise its power of review.

321 Second, the applicants in Case T-145/07 claim that the Commission, in accordance with points 21 and 22 of the 2002 Leniency Notice, should have awarded Otis a 50% reduction of its fine and, in any event, should have granted it a reduction significantly greater than 25%, given that Otis' cooperation had represented significant added value, enabling the Commission to prove the infringement.

322 In that regard, it should be stated first of all that Otis' first contribution in the context of its 2002 Leniency Notice application concerning the infringement in Germany, [*confidential*], was submitted after Kone's application relating to the same infringement, which was made on 12 February 2004 and supplemented on 18 February 2004. Kone was therefore the first undertaking to meet point 21 of the notice.

323 Application of the fine-reduction band provided for in the first indent of point 23(b) of the 2002 Leniency Notice was precluded, since that band is reserved for the first undertaking to have met the requirements of point 21 of the notice.

324 Otis' cooperation, as the second undertaking to have fulfilled the requirements of point 21 of the 2002 Leniency Notice, thus necessarily falls within the second indent of point 23(b) of the notice. On that account, Otis was entitled to a reduction of the fine of between 20% and 30%. The 25% reduction awarded to Otis in respect of its cooperation in establishing the German infringement (recital 800 of the contested decision) thus falls within the band provided for to that end by the notice.

325 Since Otis was not the first undertaking to make an application under the 2002 Leniency Notice in respect of Germany, it could not be granted a 50% reduction of its fine. Its argument that, contrary to what is stated in recital 799 of the contested decision, it met the requirements of point 21 of the notice before [*confidential*] is irrelevant in that regard.

326 Next, it must be borne in mind that the Commission has a margin of assessment when it is required to determine the exact level of the reduction of the fine to be granted within the bands provided for in the first paragraph of point 23(b) of the 2002 Leniency Notice and it is only where it manifestly goes beyond the bounds of that margin that it may be criticised by the General Court (see, to that effect, *SGL Carbon* v *Commission*, paragraph 263 above, paragraphs 81, 88 and 89, and *Hoechst* v *Commission*, paragraph 263 above, paragraph 555).

327 The Court must therefore consider whether the applicants in Case T-145/07 have proved that the Commission manifestly went beyond the bounds of its margin of assessment in awarding Otis a 25% reduction of its fine in respect of its cooperation in establishing the infringement in Germany. In that regard, the applicants in Case T-145/07 argue that the evidence which the Commission had before Otis submitted its documents was vague and related only to 2002 and 2003, that Otis continued to cooperate even after its application for immunity was rejected and that the findings in the contested decision are based on information submitted by Otis, which proves that they represent significant added value.

328 To that end, it should be borne in mind that the 2002 Leniency Notice provides, in the second paragraph of point 23(b), that in order to determine the level of reduction of the fine within the applicable band, in this instance the band between 20% and 30%, the Commission will take into account both 'the time at which the evidence fulfilling the condition in point 21 was submitted and the extent to which it represents added value'.

329 First, even supposing that – as the applicants in Case T-145/07 claim to be the case – Otis had already met the requirements of point 21 of the 2002 Leniency Notice before [*confidential*], the fact remains that Otis could not in any case have met those requirements before [*confidential*], the date on which it submitted its application for Germany (recital 107 of the contested decision). At that time, the Commission already had the statements provided by an informant (recital 91 of the contested

decision), had already organised two rounds of inspections in Germany (recitals 104, 106 and 107 of the contested decision) and had already received Kone's application, which described the objectives, organisation, participants, object and duration of the cartel.

330 Second, as regards the degree of added value represented by Otis' cooperation, it is to be recalled that, in its application under the 2002 Leniency Notice in respect of its participation in the German infringement, Otis provided the Commission, in essence, with unilateral statements concerning that infringement. It is true, as the Commission points out in recital 799 of the contested decision, that 'Otis did provide significant added value that considerably strengthened the Commission's ability to prove the infringement'. Nevertheless, evidence established by an undertaking for the purpose of an application under that notice will be of less value than written evidence originating from the period of time to which the facts pertain (see point 22 of the 2002 Leniency Notice).

331 Furthermore, it must be recalled that the contemporaneous documents that Otis provided to the Commission were of only limited probative value in that they did not give any indication of the anti-competitive conduct identified in the contested decision (see paragraph 291 above).

332 In view of the foregoing, the Commission did not manifestly go beyond the bounds of its margin of assessment in awarding Otis, in respect of its cooperation in establishing the infringement in Germany, a reduction of its fine falling within the middle of the applicable band under the second indent of point 23(b) of the 2002 Leniency Notice.

333 Third, even supposing that – as the applicants in Case T-145/07 claim to be the case – the quality of Otis' contribution exceeded that of Kone's, such a finding would not give grounds for concluding that the Commission clearly infringed the principles of proportionality and fairness in granting a reduction of the fine of 25% to Otis and of 50% to Kone. It is not disputed that Kone cooperated before Otis and that the quality of Kone's cooperation was sufficient for it to be regarded as adding significant value to the evidence already in the Commission's possession. Since it is in the Community's interest that secret cartels should be detected and an end put to them within the shortest possible time, it is in keeping with the principles of proportionality and fairness to give a greater reward to the first undertaking to strengthen significantly, by its cooperation, the Commission's ability to prove the infringement in question.

334 Fourth, as regards the complaint of the applicants in Case T-145/07 that the fact that Otis and Kone were treated differently infringed the principle of equal treatment, the Court recalls that Kone's cooperation pre-dated that of Otis and that Kone's cooperation began shortly after the first round of inspections in Germany, whilst that of Otis began only after the second round of inspections (recitals 104 to 107 of the contested decision). Even supposing that Otis' contribution was inherently of better quality than that of Kone, the assessment of the added value of an application under the 2002 Leniency Notice is carried out by reference to the evidence already in the Commission's possession. The Commission had far more evidence available to it at the time when Otis made its application than it did at the time of Kone's application.

335 As the situations of the various undertakings were not comparable, the Commission did not infringe the principle of equal treatment when it awarded Kone a 50% reduction of its fine under the first indent of point 23(b) of the 2002 Leniency Notice and Otis a 25% reduction of its fine under the second indent of that provision.

336 Fifth, the argument raised by the applicants in Case T-145/07 in a footnote to the reply, which alleges that their rights of defence were infringed because they were not given access to the information provided by the informant during the administrative procedure cannot be accepted either, since they do not explain how it is possible that the contested decision might have been different in content had they had access to those documents (see *Thyssen Stahl* v *Commission*, paragraph 159 above, paragraph 31 and the case-law cited).

337 Eighth, and in the alternative, the applicants in Case T-145/07 submit that, were the Court to consider that Otis is not entitled to a 50% reduction under the 2002 Leniency Notice, it should none the less consider its cooperation to be an attenuating circumstance under the 1998 Guidelines.

338 That plea, which was advanced in a footnote to the application and has not been developed in any way by the applicants, does not fulfil the requirements of Article 44(1)(c) of the Rules of Procedure and is therefore inadmissible.

339 It is apparent from all the foregoing that all Otis' complaints relating to the way in which the 2002 Leniency Notice was applied to its cooperation in establishing the infringement in Germany must be rejected.

Otis' cooperation in establishing the infringement in Luxembourg

340 The Commission decided, in recital 823 of the contested decision, 'to grant Otis [a] reduction of 40% within the band provided for in the first indent of point 23(b) of the [2002] Leniency Notice'.

341 In recital 818 of the contested decision, the Commission explains that 'Otis was the second applicant [under the 2002 Leniency Notice] providing information concerning the cartel in Luxembourg'. It stated, in recital 819 of the contested decision, that Otis had provided [*confidential*]. The Commission added, in recital 820 of the contested decision, that [*confidential*].

342 With regard to the value of Otis' cooperation, the Commission made the following statement in recitals 821 and 822 of the contested decision:

'(821) The Commission concludes that the combination of statements concerning [*confidential*] with the contemporaneous evidence [*confidential*] provided by Otis constitutes significant added value. [*confidential*]

(822) … Otis completely fulfilled the condition of point 21 after the [*confidential*] supplement, providing significant added value that considerably strengthened the Commission's ability to prove the infringement and explicitly confirming the start and end dates of the cartel. The new information contained in the submission, however, was limited [*confidential*].'

343 The applicants in Cases T-141/07 and T-145/07 maintain that Otis' cooperation under the 2002 Leniency Notice warranted – applying the test in the first indent of point 23(b) of the notice – the maximum reduction, namely 50% of the amount of the fine, in view of (i) the date on which it provided the Commission with evidence, (ii) the added value of the evidence as regards both the Commission's understanding of the infringement and the documentary evidence made available to it and (iii) Otis' continuous and full cooperation throughout the whole of the investigation. The applicant in Case T-141/07 submits in that regard that the evidence produced by GTO served, inter alia, to identify the precise duration of the cartel, to bring to light an adjustment mechanism which did not compensate for the loss of tenders to competitors who were not cartel members and to give a picture of the price-monitoring mechanism used by cartel members. The applicants in Case T-145/07 further submit that the evidence produced by Otis in relation to the Luxembourg cartel was far more extensive than the documents submitted by Kone concerning Germany, for which the Commission granted a 50% reduction.

344 The Court notes first of all that the applicants in Cases T-141/07 and T-145/07 do not deny that Otis' cooperation falls within the first indent of point 23(b) of the 2002 Leniency Notice and that, on that basis, Otis was entitled to a reduction of the fine of between 30% and 50%. The 40% reduction awarded to Otis for its cooperation (recital 823 of the contested decision) thus falls within the band provided for to that end by the notice.

345 Next, it should be borne in mind that the Commission has a margin of assessment when it is required to determine the exact level of the reduction of the fine to be granted within the bands provided for in the first paragraph of point 23(b) of the 2002 Leniency Notice and it is only where it manifestly goes beyond the bounds of that margin that it may be criticised by the General Court (see, to that effect, *SGL Carbon* v *Commission*, paragraph 263 above, paragraphs 81, 88 and 89, and *Hoechst* v *Commission*, paragraph 263 above, paragraph 555).

346 The 2002 Leniency Notice provides, in the second paragraph of point 23(b), that in order to determine the level of the reduction of the fine within a band, the Commission will take into account both 'the time at which the evidence fulfilling the condition in point 21 was submitted and the extent to which it represents added value'. In addition, under the same provision the Commission 'may also take into account the extent and continuity of any cooperation provided by the undertaking following the date of its submission'.

347 First, it is quite clear from findings in the contested decision which have not been challenged that, although Otis' cooperation fulfilled the requirements of point 21 of the 2002 Leniency Notice, the fact remains that the evidence produced by Otis relating to the Luxembourg cartel which was the basis for the reduction of its fine was provided to the Commission only after the Commission had already (i) received information concerning the cartel from Kone enabling it to find the infringement, for which information Kone was granted immunity under point 8(b) of the notice (recital 816 of the contested decision) and (ii) carried out an inspection at the premises of suspected cartel members in Luxembourg (recital 116 of the contested decision).

348 Second, as regards the degree of added value represented by Otis' evidence with respect to the evidence already in the Commission's possession, the Court in this instance shares the Commission's view that, since Kone had already provided the Commission with evidence allowing it to find an infringement in Luxembourg, the value added by the assistance given by Otis – which provided the Commission with a certain amount of information of which it was not yet aware and some new documentary evidence, namely project lists – was necessarily limited.

349 In those circumstances, regardless of the extent and continuity of Otis' cooperation, the Commission did not manifestly go beyond the bounds of its margin of assessment in awarding Otis a 40% reduction of its fine in respect of its cooperation in establishing the infringement in Luxembourg.

350 That conclusion is not undermined by the argument of the applicants in Case T-145/07 concerning the 50% reduction awarded to Kone in the context of the German cartel.

351 As has been observed in paragraph 275 above, the assessment of what represents significant added value by definition entails an analysis specific to the context of all the evidence available to the Commission in connection with a particular infringement; accordingly, information connected with separate infringements, in this instance the infringements in Luxembourg and Germany, is not comparable. As the situations of the various undertakings are not comparable, the Commission did not infringe the principle of equal treatment when it awarded Otis a 40% reduction in respect of its cooperation in establishing the Luxembourg cartel, whilst granting Kone a 50% reduction for its cooperation in establishing the infringement in Germany.

352 In any event, first, the applicants in Case T-145/07 do not substantiate their claim that the extent and probative value of the evidence submitted by Otis concerning the Luxembourg cartel exceeded 'by far' the information submitted by Kone concerning Germany.

353 Second, when Otis, whose cooperation fell within the first indent of point 23(b) of the 2002 Leniency Notice, provided the Commission with evidence relating to the Luxembourg cartel, the Commission already had sufficient evidence – contained in Kone's earlier application – to find the infringement and Kone was granted total immunity from fines (recital 816 of the contested decision). By contrast,

in the case of the German infringement, no undertaking was awarded immunity from fines. The Commission thus did not have sufficient evidence to make a finding of infringement in Germany when Kone submitted its application under that notice. Even supposing, as the applicants in Case T-145/07 assert, that the evidence concerning the German infringement provided by Kone (whose cooperation also fell within the first indent of point 23(b) of the notice) was less detailed than the evidence submitted by Otis concerning the Luxembourg cartel, the Commission did not manifestly go beyond the bounds of its margin of assessment in awarding Otis a 40% reduction of its fine and Kone a 50% reduction of its fine for their cooperation concerning the cartels in Luxembourg and Germany, respectively, since the added value of the evidence is assessed, in accordance with point 21 of the notice, by reference to the evidence already in the Commission's possession.

354 It is apparent from all the foregoing that all Otis' complaints relating to the way in which the 2002 Leniency Notice was applied to its cooperation in establishing the infringement in Luxembourg must be rejected.

The plea alleging infringement of the principles of the protection of legitimate expectations and proportionality in the determination of the reduction of the fines granted for cooperation outside the 2002 Leniency Notice

355 The Commission stated in point 614 of the statement of objections that it was considering whether 'to grant any reduction [of the fines] for cooperation outside the [2002] Leniency Notice, in particular where a company [did] not contest, or where it [provided] further assistance in clarifying or supplementing, the facts found by the Commission'.

356 In recital 758 of the contested decision, the Commission explained that, '[t]o the extent [that point] 614 of the statement of objections created expectations in this case, [it] [had] decided to interpret [that point] in favour of those undertakings relying on it and assisting in the establishment of the infringement in [the contested] decision by not contesting the facts or by providing additional information or further clarifications'.

357 The Commission thus granted all the participants in the four infringements, with the exception of (i) undertakings granted immunity from fines (recitals 762, 817 and 839 of the contested decision) and (ii) Kone in relation to the Netherlands cartel (recital 851 of the contested decision), a 1% reduction of the fines for their cooperation outside the 2002 Leniency Notice, in recognition of the fact that they had not contested the facts set out in the statement of objections (recitals 768, 774, 777, 794, 801, 806, 813, 824, 829, 835, 845, 854, 855 and 856 of the contested decision).

358 In the first place, the applicants in Cases T-141/07 and T-145/07 submit that they could legitimately expect a reduction of 10% of the fines imposed on Otis for the infringements in Belgium, Germany and Luxembourg since they had not contested the facts in the statement of objections. Such legitimate expectations derive, in their submission, from point 614 of the statement of objections and from the Commission's practice in previous decisions, whereby an undertaking not substantially contesting the facts complained of in the statement of objections would be granted a 10% reduction of its fine. The Commission's case team gave assurances to that effect to Otis' representative on 7 March 2006.

359 First, the Court recalls that the right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is clear that the EU authorities have given him precise assurances, thereby causing him to entertain justified expectations (Case C-104/97 *Atlanta* v *European Community* [1999] ECR I-6983, paragraph 52; Joined Cases C-37/02 and C-38/02 *Di Lenardo and Dilexport* [2004] ECR I-6911, paragraph 70; Case T-203/96 *Embassy Limousines & Services* v *Parliament* [1998] ECR II-4239, paragraph 74; and judgment of 15 November 2007 in Case T-71/06 *Enercon* v *OHIM (Wind Turbine)*, not published in the ECR, paragraph 36).

360 However, a person may not plead infringement of the principle of the protection of legitimate expectations unless he has been given precise assurances by the authorities (Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379, paragraph 72, and Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 68). Information that is precise, unconditional and consistent and comes from an authorised and reliable source constitutes such assurances (Joined Cases T-66/96 and T-221/97 *Mellett* v *Court of Justice* [1998] ECR-SC I-A-449 and II-1305, paragraphs 104 and 107).

361 It is true that the 2002 Leniency Notice, unlike the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4) ('the 1996 Leniency Notice'), does not provide for any reduction of fines for undertakings which do not substantially contest the facts on which the Commission bases its allegations in the statement of objections. However, the Commission acknowledged, in recital 758 of the contested decision, that point 614 of the statement of objections created for the undertakings a legitimate expectation that if the facts were not contested, that would entail a reduction of the fine outside the 2002 Leniency Notice.

362 In point 614 of the statement of objections, the Commission had stated that 'it [was considering] whether to grant any reduction [of the fines] for cooperation outside the [2002] Leniency Notice, in particular where a company [did] not contest, or where it [provided] further assistance in clarifying or supplementing, the facts found by the Commission'. Such a statement cannot be regarded as a precise assurance which could have caused the applicants to entertain justified expectations that a reduction greater than 1% of the amount of the fine would be granted to them. Point 614 of the statement of objections does not give any indication of the extent or rate of the reduction which would, where appropriate, be granted to the undertakings concerned, so that it can in no case have given rise to any legitimate expectation whatsoever in that regard. In that connection, the applicants' assertion, contested by the Commission, that the latter had indicated to Otis' representative, during a meeting on [*confidential*], that point 614 of the statement of objections would be applied in the same way as under the 1996 Leniency Notice, is not supported by the least evidence and must be rejected.

363 Second, the Court must also reject the applicants' argument that the Commission departed from its previous practice, whereby an undertaking which did not substantially contest the facts complained of in the statement of objections would be granted a 10% reduction of the fine which would have been imposed on it, since, as has been stated in paragraph 163 above, it has consistently been held that the Commission's practice in previous decisions cannot itself serve as a legal framework for the imposition of fines in competition matters.

364 Furthermore, the applicants do not dispute that it is only the 2002 Leniency Notice which applies to their leniency application, the latter having in any case expressly been made under that notice. Therefore, the Commission's practice in previous decisions, or the case-law, relating to the application of the second indent of Section D.2 of the 1996 Leniency Notice cannot in any event cause the applicants to entertain a legitimate expectation, on the basis of point 614 of the statement of objections, concerning the rate by which the fines would be reduced on the ground that they did not contest the facts relating to the Belgian, German and Luxembourg cartels.

365 In the second place, the applicants in Case T-145/07 maintain that the Commission infringed the principle of proportionality in failing to award them a 10% reduction for not contesting the facts.

366 It should be recalled in that regard that the principle of proportionality requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued (Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraph 96, and *Prym and Prym Consumer* v *Commission*, paragraph 232 above, paragraph 223).

367 As regards the rate of any reduction of the fine on the ground that the facts have not been contested, it is clear from the case-law that an undertaking which expressly states that it is not contesting the allegations of fact on which the Commission bases its objections may be regarded as having facilitated the Commission's task of finding infringements of the EU competition rules and bringing them to an end (Case T-352/94 *Mo och Domsjö* v *Commission* [1998] ECR II-1989, paragraph 395, and Case T-327/94 *SCA Holding* v *Commission* [1998] ECR II-1373, paragraph 157).

368 In recital 758 of the contested decision, the Commission none the less stated that '[t]he extent of the reduction should take into account that cooperation offered after the statement of objections, after the Commission has established all the elements of the infringement, at a time when the undertaking is aware of all the results of the investigation and has had access to the investigation file, can only assist the Commission marginally, if at all, in its investigation'. It added that '[i]n general, admission of the facts in these circumstances is at most corroborating evidence of facts that the Commission would regularly consider already sufficiently proven by other evidence in the file'.

369 It should be borne in mind in that regard that the 2002 Leniency Notice requires a high level of cooperation with the Commission, envisaging moreover 'a closer alignment between the level of reduction of fines and the value of a company's contribution to establishing the infringement' (point 5 of the 2002 Leniency Notice). Thus, first, unlike the 1996 Leniency Notice, the 2002 Leniency Notice does not provide for a reduction of fines for not contesting the facts and, second, as regards applications made to the Commission under the 2002 Leniency Notice, the maximum reduction which may be awarded to undertakings that are neither the first nor the second to meet point 21 of the notice, but whose evidence none the less represents significant added value with respect to the evidence already in the Commission's possession, amounts to 20%.

370 Having regard to the foregoing, to the fact that the reductions granted in this instance for not contesting the facts are added to the reductions of the fines already granted under the 2002 Leniency Notice and to the limited value of cooperation offered after the statement of objections (recital 758 of the contested decision), the Commission did not infringe the principle of proportionality when it did not grant Otis a 10% reduction for not contesting the facts relating to the cartels in Belgium, Germany and Luxembourg.

371 In the third place, the applicants in Case T-145/07 submit that the Commission did not grant Otis any reduction of the fine for its cooperation and its additional explanations or for the additional information which it submitted in its reply to the statement of objections and also after that reply was submitted; the Commission thus infringed the legitimate expectations which Otis derived from point 614 of the statement of objections. Otis is thus entitled to a further reduction.

372 First, as regards the German infringement, Otis claims that it provided additional explanations and supplementary information, in particular concerning the unlawful meetings. Thus, before the Commission received Otis' reply to the statement of objections, it did not have sufficient evidence to prove that meetings had taken place [*confidential*]. Those meetings were mentioned in a footnote on page 333 of the contested decision.

373 As a preliminary point, it must be borne in mind that, for the purpose of assessing the facts in relation to Article 81 EC, it is not essential for the date, and a fortiori the place, of the meetings between the producers to be established by the Commission (see paragraph 311 above).

374 Furthermore, and in any event, it is apparent from the case-file and in particular from Kone's submissions of 18 February 2004 that the Commission knew, before Otis' 'further assistance' about the meetings [*confidential*], the last-mentioned meeting having, moreover, already been referred to in point 260 of the statement of objections.

375 In those circumstances, even though Otis did in fact inform the Commission after the statement of objections that a meeting had been held [*confidential*], a fact of which the Commission was not aware, the Commission did not manifestly go beyond the bounds of its margin of assessment in not granting any reduction of the fine for the supplementary information provided by Otis in its reply to the statement of objections concerning the holding of four unlawful meetings in the context of the German infringement.

376 Second, Otis, in its reply to the statement of objections and subsequently, provided further information which the Commission did not take into account. Thus, Otis suggested in [*confidential*] to its reply to the statement of objections corrections of certain of the Commission's findings. In [*confidential*] to its reply to the statement of objections, Otis also provided information on the employees who had been dismissed and included, in [*confidential*] to its reply to the statement of objections, a printout of an electronic list revealing hidden lines containing additional information. Otis also provided economic evidence on the scope of the elevator arrangements applied in Germany. Furthermore, [*confidential*], Otis' representatives met the case team in order to answer any questions and to discuss further possibilities for Otis to continue to cooperate with the investigation. Finally, Otis explained recent developments in the case-law to assist the Commission in its determination of the correct addressee of the decision in Luxembourg.

377 The fact remains, however, that none of the elements mentioned in the preceding paragraph provided clarifications or useful information of which the Commission was not already aware. Thus, in [*confidential*] to its reply to the statement of objections, Otis merely suggested a number of corrections concerning 'peripheral' or immaterial findings in the statement of objections. In essence, Otis proposed that references to its employees should make clear that in certain cases those employees had been dismissed. In [*confidential*] to its reply to the statement of objections, Otis provided details about the employees who had been dismissed. Such information is not of such a nature as to facilitate the Commission's task of finding and putting an end to an infringement (*BASF* v *Commission*, paragraph 167 above, paragraph 589). In addition, the printout of an electronic list, which was included with the reply to the statement of objections, has no added evidential value since Otis had already provided the electronic version of that list to the Commission [*confidential*]. Furthermore, the applicants fail to explain what use the information allegedly hidden in the electronic version of that list might have. As regards the 'economic evidence' relating to the scope of the German cartel, that evidence did not assist with finding the infringement, as the Commission did not accept Otis' arguments that the elevator market and the high-speed elevator market constituted two different markets. Nor does Otis show how the meetings with the Commission in [*confidential*] provided new information which facilitated the finding and bringing to an end of the infringement. Finally, nor did the fact that Otis provided legal arguments to the Commission concerning the presumption of the liability of parent companies for their subsidiaries, in an attempt to minimise the fine and in contradiction with the Commission's position, facilitate the finding and bringing to an end of the infringements.

378 It is clear from the foregoing that Otis' complaints concerning the Commission's refusal to grant it a reduction of its fine on the ground that it provided supplementary explanatory information cannot be accepted.

379 Accordingly, this plea must be rejected in its entirety.

The plea alleging infringement of Article 23(2) of Regulation No 1/2003

380 The applicants in Cases T-141/07 and T-145/07 submit that the fines imposed on GTO must be limited to 10% of its turnover, in accordance with Article 23(2) of Regulation No 1/2003.

381 Given that the applicants do not claim that the fine imposed on GTO in the contested decision exceeds the ceiling of 10% of the turnover of all the undertakings forming the economic unit that committed the infringements in the course of the preceding business year, it is clear that this complaint overlaps with the complaints examined in paragraphs 63 to 90 and 106 to 120 above, relating to the imputation to UTC, OEC and Otis Belgium of GTO's conduct. It is apparent from the reasoning relating thereto that the Commission was entitled to impute to those companies the conduct of their subsidiary, which forms with them an economic unit. This plea must therefore be rejected.

The plea alleging infringement of the principle of proportionality in the calculation of the final amount of the fines

382 The applicant in Case T-141/07 maintains that the final amount of the fine imposed on it is disproportionate.

383 As has been stated in paragraph 366 above, the principle of proportionality requires that measures adopted by EU institutions do not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.

384 It follows that fines must not be disproportionate to the aims pursued, that is to say, to compliance with the competition rules, and that the amount of the fine imposed on an undertaking for an infringement of competition law must be proportionate to the infringement, viewed as a whole, account being taken, in particular, of the gravity of the infringement (*Prym and Prym Consumer* v *Commission*, paragraph 232 above, paragraph 224). Furthermore, in determining the amounts of fines, the Commission is entitled to take into account the need to ensure that fines have a sufficient deterrent effect (see, to that effect, *Musique Diffusion française and Others* v *Commission*, paragraph 210 above, paragraph 108, and Case T-304/94 *Europa Carton* v *Commission* [1998] ECR II-869, paragraph 89).

385 In order to establish an infringement of the principle of proportionality, the applicant in Case T-141/07, first, invokes the national dimension of the unlawful practices in Luxembourg, which it claims had a limited impact on the market. It relies for that purpose exclusively on the arguments which it developed in the framework of its pleas relating to the allegedly incorrect classification of the infringement and the allegedly disproportionate nature of the starting amount of the fine imposed for the Luxembourg infringement. Second, it bases an argument on the limited size of GTO and on the fact that GTO was run wholly autonomously and refers to that end solely to the arguments which it put forward in the framework of its plea concerning the application of a group multiplier for deterrence in the setting of the starting amount of its fine. Third, it states that at the material time Luxembourg had no legislation concerning compliance with the competition rules and no national competition authority. Fourth, relying on the matters put forward in its plea concerning its cooperation during the administrative procedure, it submits that it cooperated closely and extensively with the Commission.

386 The applicant in Case T-141/07 confirmed, when questioned on this matter at the hearing, that this plea had no significance of its own beyond that of the other pleas in which it advanced identical arguments. Thus, since the applicant puts forward no other arguments than those it has developed in the other pleas supporting its action, the arguments relating to the limited size of the market, the allegedly insignificant impact of the infringement, the supposedly small size of GTO and to its cooperation during the administrative procedure must be rejected for the reasons stated in paragraphs 148 to 165, 167 to 172, 238 to 242, 344 to 354 and 359 to 364 above.

387 As regards the argument based on the fact that Luxembourg had no legislation concerning compliance with the competition rules and no competition authority, it must be stated that although it is the case that Luxembourg did not, during the period of the infringement, have any national legislation concerning compliance with the competition rules or any national competition authority, Regulation No 17 was, in accordance with Article 24 thereof, applicable in all the Member States throughout the whole period of the infringement. This plea must therefore be rejected.

388 It follows that the actions must be dismissed in their entirety.

Costs

389 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

390 Since the applicants in Cases T-141/07, T-142/07, T-145/07 and T-146/07 have been unsuccessful, they must be ordered to pay the costs, in accordance with the forms of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. **Joins Cases T-141/07, T-142/07, T-145/07 and T-146/07 for the purposes of this judgment;**

2. **Dismisses the actions;**

3. **In Case T-141/07, orders General Technic-Otis Sàrl to pay the costs;**

4. **In Case T-142/07, orders General Technic Sàrl to pay the costs;**

5. **In Case T-145/07, orders Otis SA, Otis GmbH & Co. OHG, Otis BV and Otis Elevator Company to pay the costs;**

6. **In Case T-146/07, orders United Technologies Corporation to pay the costs.**

Martins Ribeiro Wahl Dittrich

Delivered in open court in Luxembourg on 13 July 2011.

[Signatures]

Table of contents

Administrative procedure 3

Commission investigation 3

Belgium 3

Germany 3

Luxembourg 4

The Netherlands 4

Statement of objections 4

Contested decision 5

Proceedings and forms of order sought 9

Law 11

The plea alleging infringement of the principles governing the attribution of liability for infringements of Article 81 EC, infringement of the presumption of innocence, of the principle that the penalties must be specific to the offender and of the principle of equal treatment, and infringement of the rights of the defence and of Article 253 EC in relation to the imputation to the parent companies of infringements committed by their subsidiaries 11

Preliminary observations 11

The imputation to UTC and OEC of the infringements committed by the Otis subsidiaries 13

The imputation of the infringement committed by GTO to GT, Otis Belgium, OEC and UTC 18

– Contested decision 18

– The imputation of the infringement committed by GTO to GT 19

– The imputation of the infringement committed by GTO to Otis Belgium, OEC and UTC 20

– Infringement of the rights of the defence 23

– Infringement of the principle of equal treatment 24

The plea alleging breach of the 1998 Guidelines and infringement of the principles of proportionality and equal treatment, of the rights of the defence and of Article 253 EC in the determination of the starting amounts of the fines according to the gravity of the infringements 25

Preliminary observations 25

Contested decision 25

The classification of the Luxembourg infringement as ‘very serious’ 27

The alleged illegality of the starting amounts of the fines 30

– The general starting amounts of the fines 30

– The specific starting amounts of the fines 36

The plea alleging breach of the 1998 Guidelines and infringement of the principle of proportionality when setting the increase in the starting amount of the fine on account of the duration of the infringement in Germany 38

The plea alleging breach of the 1998 Guidelines and infringement of the principle of proportionality in the application of a group multiplier for deterrence in the determination of the starting amounts of the fines 40

The plea alleging breach of the 2002 Leniency Notice and infringement of Article 253 EC and of the principles of the protection of legitimate expectations, proportionality, fairness, equal treatment and of the rights of the defence 42

The 2002 Leniency Notice 42

The Commission's margin of assessment and review by the Courts of the European Union 43

Otis' cooperation in establishing the infringement in Belgium 44

Otis' cooperation in establishing the infringement in Germany 46

Otis' cooperation in establishing the infringement in Luxembourg 54

The plea alleging infringement of the principles of the protection of legitimate expectations and proportionality in the determination of the reduction of the fines granted for cooperation outside the 2002 Leniency Notice 56

The plea alleging infringement of Article 23(2) of Regulation No 1/2003 59

The plea alleging infringement of the principle of proportionality in the calculation of the final amount of the fines 60

Costs 61