Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

18 July 2013 *

(Appeal — Agreements, decisions and concerted practices — Market for the installation and maintenance of elevators and escalators — Liability of the parent company for infringements of the law on cartels committed by its subsidiary — Holding company — Internal compliance programme — Fundamental rights — Principles of the rule of law in the context of determination of the fines imposed — Separation of powers, and principles of legality, of non-retroactivity, of the protection of legitimate expectations and of fault — Regulation (EC) No 1/2003 — Article 23(2) — Validity — Legality of the 1998 Commission guidelines)

In Case C-501/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 27 September 2011,

Schindler Holding Ltd, established in Hergiswil (Switzerland),

Schindler Management AG, established in Ebikon (Switzerland),

Schindler SA, established in Brussels (Belgium),

Schindler Sàrl, established in Luxembourg (Luxembourg),

Schindler Liften BV, established in The Hague (Netherlands),

Schindler Deutschland Holding GmbH, established in Berlin (Germany),

represented by R. Bechtold and W. Bosch, Rechtsanwälte, and J. Schwarze, Prozessbevollmächtigter,

appellants,

the other parties to the proceedings being:

European Commission, represented by R. Sauer and C. Hödlmayr, acting as Agents, and A. Böhlke, Rechtsanwalt, with an address for service in Luxembourg,

defendant at first instance,

Council of the European Union, represented by F. Florindo Gijón and M. Simm, acting as Agents,

intervener at first instance,

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas (Rapporteur), E. Juhász, D. Šváby and C. Vajda, Judges,

Advocate General: J. Kokott,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 17 January 2013,

after hearing the Opinion of the Advocate General at the sitting on 18 April 2013,

gives the following

Judgment

1 By their appeal, Schindler Holding Ltd ('Schindler Holding'), Schindler Management AG ('Schindler Management'), Schindler SA ('Schindler Belgium'), Schindler Sàrl ('Schindler Luxembourg'), Schindler Liften BV ('Schindler Netherlands') and Schindler Deutschland Holding GmbH ('Schindler Germany') (collectively 'the Schindler group' or 'the appellants') request the Court to set aside the judgment of the General Court of the European Union of 13 July 2011 in Case T-138/07 *Schindler Holding and Others* v *Commission* [2011] ECR II-4819 ('the judgment under appeal'), by which the General Court dismissed their action 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 decision at issue'), a summarised version of which was published in the *Official Journal of the European Union* (OJ 2008 C 75, p. 19), or, in the alternative, for reduction of the amount of the fines which were imposed on them.

Legal context

2 Article 23 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), which replaced Article 15(2) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81 EC] and [82 EC] (OJ, English Special Edition 1959-1962, p. 87), provides in paragraphs 2 to 4:

'2. The Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently:

(a) they infringe Article 81 [EC] or Article 82 [EC]; or

…

For each undertaking and association of undertakings participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year.

…

3. In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

4. When a fine is imposed on an association of undertakings taking account of the turnover of its members and the association is not solvent, the association is obliged to call for contributions from its members to cover the amount of the fine.

Where such contributions have not been made to the association within a time-limit fixed by the Commission, the Commission may require payment of the fine directly by any of the undertakings whose representatives were members of the decision-making bodies concerned of the association.

After the Commission has required payment under the second subparagraph, where necessary to ensure full payment of the fine, the Commission may require payment of the balance by any of the members of the association which were active on the market on which the infringement occurred.

However, the Commission shall not require payment under the second or the third subparagraph from undertakings which show that they have not implemented the infringing decision of the association and either were not aware of its existence or have actively distanced themselves from it before the Commission started investigating the case.

The financial liability of each undertaking in respect of the payment of the fine shall not exceed 10% of its total turnover in the preceding business year.'

3 Article 31 of Regulation No 1/2003 is worded as follows:

'The Court of Justice shall have unlimited jurisdiction to review decisions whereby the Commission has fixed a fine or periodic penalty payment. It may cancel, reduce or increase the fine or periodic penalty payment imposed.'

4 The Commission notice entitled 'Guidelines on the method of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65(5) [ECSC]' (OJ 1998 C 9, p. 3) ('the 1998 Guidelines'), which was applicable on the date upon which the decision at issue was adopted, states in its preamble:

'The principles outlined [in the 1998 Guidelines] should ensure the transparency and impartiality of the Commission's decisions, in the eyes of the undertakings and of the Court of Justice alike, while upholding the discretion which the Commission is granted under the relevant legislation to set fines within the limit of 10% of overall turnover. This discretion must, however, follow a coherent and non-discriminatory policy which is consistent with the objectives pursued in penalising infringements of the competition rules.

The new method of determining the amount of a fine will adhere to the following rules, which start from a basic amount that will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances.'

5 According to Section 1 of the 1998 Guidelines, '[t]he basic amount will be determined according to the gravity and duration of the infringement, which are the only criteria referred to in Article 15(2) of Regulation No 17'.

6 So far as concerns gravity, Section 1.A of the 1998 Guidelines provides that, in assessing the criterion of the infringement's gravity, 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 are put into one of three categories: minor infringements, serious infringements and very serious infringements.

7 According to the 1998 Guidelines, very serious infringements comprise, in particular, horizontal restrictions such as price cartels and market-sharing quotas. The basic amount of the likely fine is 'above [EUR] 20 million'.

8 Under Section 2 of the 1998 Guidelines the basic amount of the fine may be increased where there are aggravating circumstances such as, inter alia, repeated infringements of the same type by the same undertaking or undertakings. Under Section 3 of the 1998 Guidelines, the basic amount may be reduced where there are attenuating circumstances such as an undertaking's exclusively passive or 'follow-my-leader' role in the infringement, non-implementation in practice of the offending agreements, or effective cooperation by the undertaking in the proceedings outside the scope of the Commission notice on the non-imposition or reduction of fines in cartel cases (OJ 1996 C 207, p. 4).

9 The Commission notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3; 'the 2002 Leniency Notice'), which was applicable to the facts at issue, sets out the conditions under which undertakings cooperating with the Commission during an investigation conducted by it into a cartel may be exempted from fines or be granted reductions in the fine which would otherwise have been imposed upon them.

Background to the dispute and the decision at issue

10 The Schindler group is one of the largest groups in the world supplying elevators and escalators. Its parent company is Schindler Holding, established in Switzerland. The Schindler group operates through national subsidiaries, which include Schindler Belgium, Schindler Luxembourg, Schindler Netherlands and Schindler Germany.

11 After receiving information in the summer of 2003 concerning the possible existence of a cartel among the principal European manufacturers of elevators and escalators engaged in business activities in the European Union, namely Kone Belgium SA, Kone GmbH, Kone Luxembourg Sàrl, Kone BV Liften en Roltrappen, Kone Oyj, Otis SA, Otis GmbH & Co. OHG, General Technic-Otis Sàrl, General Technic Sàrl, Otis BV, Otis Elevator Company, United Technologies Corporation, the Schindler group, ThyssenKrupp Liften Ascenseurs NV, ThyssenKrupp Aufzüge GmbH, ThyssenKrupp Fahrtreppen GmbH, ThyssenKrupp Elevator AG, ThyssenKrupp AG, ThyssenKrupp Ascenseurs Luxembourg Sàrl and ThyssenKrupp Liften BV, the Commission carried out inspections at the premises of those undertakings at the beginning of 2004. Applications under the 2002 Leniency Notice were submitted by those undertakings. Between September and December 2004 the Commission also sent requests for information to the undertakings which had participated in the infringement in Belgium, to a number of customers in Belgium and to the Belgian association Agoria.

12 In the decision at issue, the Commission found that the aforesaid undertakings and Mitsubishi Elevator Europe BV had participated in four single, complex and continuous infringements of Article 81(1) EC in four Member States, sharing markets by agreeing or concerting to allocate tenders and contracts for the sale, installation, service and modernisation of elevators and escalators. In the case of the Schindler group, the earliest date on which an infringement began is the date for the infringement in Germany, namely 1 August 1995.

13 In Article 2 of the decision at issue, the Schindler group was punished as follows:

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

…

— [the] Schindler [group]: Schindler Holding … and [Schindler Belgium], jointly and severally: EUR 69 300 000 …

…

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

…

— [the] Schindler [group]: Schindler Holding … and [Schindler Germany], jointly and severally: EUR 21 458 250 …

…

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

…

— [the] Schindler [group]: Schindler Holding … and [Schindler Luxembourg], jointly and severally: EUR 17 820 000 …

…

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

…

— [the] Schindler [group]: Schindler Holding … and [Schindler Netherlands], jointly and severally: EUR 35 169 750'.

The judgment under appeal

14 By application lodged at the Registry of the Court of First Instance (now 'the General Court') on 4 May 2007, the appellants sought the annulment of the decision at issue or, in the alternative, the reduction of the amount of the fines imposed.

15 The Council of the European Union was granted leave to intervene in support of the form of order sought by the Commission. According to the pleading lodged with the General Court, it intervened with regard to the objection of illegality raised by the appellants in respect of Article 23(2) of Regulation No 1/2003.

16 By decision of 4 September 2007, notified to the General Court on 30 June 2009, the Commission corrected Article 4 of the decision at issue, so that it no longer referred to Schindler Management as an addressee. In paragraphs 43 and 44 of the judgment under appeal, the General Court held that the action had become devoid of purpose, and that there was no need to adjudicate, in so far as the action was brought by that company.

17 In support of their action, the appellants put forward 13 pleas in law, which the General Court referred to as follows in paragraph 45 of the judgment under appeal:

'… The first plea alleges breach of the principle that penalties must have a proper legal basis, in that Article 23(2) of Regulation No 1/2003 gives the Commission an unrestricted discretion in calculating fines. The second plea alleges breach of the principle of non-retroactivity in the application of the 1998 Guidelines and the 2002 Leniency Notice. The third plea alleges breach of the principle that penalties must have a proper legal basis and that the Commission lacked jurisdiction to adopt the 1998 Guidelines. The fourth plea alleges that the 2002 Leniency Notice is unlawful, in that it breaches the

principles *nemo tenetur se ipsum accusare*, *nemo tenetur se ipsum prodere* … and *in dubio pro reo*, and the principle of proportionality. The fifth plea alleges breach of the principle of the separation of powers and a failure to observe the requirement for procedures to be based upon respect for the principles of the rule of law. The sixth plea alleges the confiscatory nature of the fines imposed upon the [appellants]. The seventh and eighth pleas allege breach of the 1998 Guidelines in the setting of the starting amounts of the fines and in the assessment of the mitigating circumstances. The ninth plea alleges breach of the 1998 Guidelines and the 2002 Leniency Notice in the calculation of the fines for the infringements in Belgium, Germany and Luxembourg. The tenth plea alleges the disproportionate nature of the fines. The eleventh plea alleges that no valid notice was given of the … decision [at issue] to Schindler Holding. The twelfth plea alleges the absence of liability of the part of Schindler Holding. Lastly, the thirteenth plea alleges infringement of Article 23(2) of Regulation No 1/2003.'

18 In paragraphs 47 and 48 of the judgment under appeal, the General Court altered the order of the pleas as follows:

'47 It must be observed in this connection that several of the [appellants'] complaints concern the legality of the … decision [at issue] in its entirety. They will therefore be examined first. That applies to the complaint which the [appellants] make in the context of their fifth plea, which, in substance, alleges infringement of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 (the "ECHR"). Among the complaints concerning the legality of the … decision [at issue] in its entirety are also those which have been raised in the context of the eleventh and twelfth pleas, alleging, respectively, that the … decision [at issue] is unlawful in so far as it was addressed to Schindler Holding since no valid notice of it was given, and that the … decision [at issue] is unlawful in so far as it held Schindler Holding jointly and severally liable.

48 The complaints concerning the legality of Article 2 of the … decision [at issue], put forward in the context of the other pleas in the action, will be examined subsequently. The Court considers it appropriate to examine the [appellants'] complaints as follows. First of all, it will analyse the second, third and fourth pleas, in the context of which the [appellants] make several objections of illegality in relation to Article 23(2) of Regulation No 1/2003, the 1998 Guidelines and the 2002 Leniency Notice. Next, the Court will examine the sixth plea, alleging that the … decision [at issue] is confiscatory in nature. Lastly, the Court will examine the seventh, eighth, ninth, tenth and thirteenth pleas, in the context of which the [appellants] make several complaints concerning the calculation of their fines.'

19 The General Court rejected those pleas and dismissed the action in its entirety.

Forms of order sought

20 The appellants claim in essence that the Court should set aside the contested judgment, annul the decision at issue or, in the alternative, annul or reduce the fines, in the further alternative refer the case back to the General Court and, finally, order the Commission to pay the costs.

21 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs.

22 The Council contends that the appeal should be dismissed so far as concerns the objection of illegality in respect of Regulation No 1/2003 and requests the Court to make an appropriate order as to costs.

The appeal

23 The appellants advance 13 pleas in law in support of their claims.

The first plea: breach of the principle of the separation of powers and a failure to observe the requirements for procedures based upon respect for the principles of the rule of law

Arguments of the parties

24 By their first plea, the appellants contest the General Court's response to the plea concerning infringement of Article 6 of the ECHR, by which they contended that the Commission's procedure infringes the principle of the separation of powers and does not comply with the principles of the rule of law that are applicable to criminal procedures under that provision. They contest in particular paragraph 53 of the judgment under appeal, in which the General Court held that Commission decisions imposing fines for the infringement of competition law are not of a criminal law nature. In their submission, the General Court's reasoning does not take account of the scale of the fines imposed or of the entry into force of the Treaty of Lisbon which radically altered the situation.

25 The appellants recall the criteria set out in the judgment of the European Court of Human Rights in *Engel and Others v. the Netherlands*, 8 June 1976, § 80 et seq., Series A no. 22, and maintain that the General Court was wrong in holding that the judgment of the European Court of Human Rights in *Jussila v. Finland* [GC], no. 73053/01, § 31, ECHR 2006-XIV – according to which, for certain categories of infringements not forming part of the hard core of criminal law, the decision need not be adopted by a tribunal in so far as provision is made for full review of the decision's legality – was transposable to cartel proceedings. According to the appellants, such proceedings form part of the 'hard core of criminal law' within the meaning of that judgment. They refer in this regard to Case T-141/08 *E.ON Energie* v *Commission* [2010] ECR II-5761 and paragraph 160 of the judgment under appeal.

26 The appellants further submit that the case-law cited by the General Court, in particular Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 81, and Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 7, the judgments in which state that the Commission cannot be described as a tribunal within the meaning of Article 6 of the ECHR, is obsolete because of the entry into force of the Treaty of Lisbon and the direct applicability of the ECHR. According to the appellants, the penalty should have been imposed by a tribunal and not by an administrative authority such as the Commission. They contend in this regard that, because of the scale of the penalties, it is not possible to apply in the present instance the case-law of the European Court of Human Rights resulting from its judgments in *Öztürk v. Germany*, 21 February 1984, Series A no. 73 and *Bendenoun v. France*, 24 February 1994, Series A no. 284, which states that, in particular in the case of a large number of infringements – which constitutes 'mass offending' according to the appellants – or of minor infringements that must be prosecuted, a penalty may be imposed by an administrative authority if full judicial review can be guaranteed.

27 The Commission and the Council contend that the review of Commission decisions carried out by the European Union judicature ensures compliance with the requirements of a fair process as enshrined in Article 6(1) of the ECHR and Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

28 In their reply, the appellants submit that the principles set out by the European Court of Human Rights in *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011, a judgment cited by the Commission in its response, cannot be transposed to the present instance since unlike the

Italian competition authority, which was at issue in that judgment, the Commission is not an independent administrative authority. Nor did the General Court carry out the unlimited examination of the facts required by Article 6 of the ECHR.

29 In its rejoinder, the Commission submits that the General Court does not have to examine the facts of its own motion but that it is for the applicants to put forward pleas in law and to adduce evidence (Case C-386/10 P *Chalkor* v *Commission* [2011] ECR I-13085, paragraph 62, and *A. Menarini Diagnostics v. Italy*, § 63).

Findings of the Court

30 The first plea is founded on the incorrect premiss that the entry into force of the Treaty of Lisbon altered the legal rules applicable in this instance so that the decision at issue is contrary to Article 6 of the ECHR as it was adopted by the Commission and not by a court.

31 The decision at issue was adopted on 21 February 2007, that is to say before the Treaty of Lisbon was adopted, on 13 December 2007, and, *a fortiori*, before the Treaty of Lisbon entered into force, on 1 December 2009. It is settled case-law that, in an action for annulment, the legality of the contested measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted (see Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7; Case C-449/98 P *IECC* v *Commission* [2011] ECR I-3875, paragraph 87; and Case C-309/10 *Agrana Zucker* [2011] ECR I-7333, paragraph 31).

32 Furthermore, whilst, as Article 6(3) TEU confirms, fundamental rights recognised by the ECHR constitute general principles of the European Union's law and whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law (see Case C-571/10 *Kamberaj* [2012] ECR, paragraph 62, and Case C-617/10 *Åkerberg Fransson* [2013] ECR, paragraph 44).

33 In any event, contrary to the appellants' submissions, the fact that decisions imposing fines in competition matters are adopted by the Commission is not in itself contrary to Article 6 of the ECHR as interpreted by the European Court of Human Rights. It is to be noted in this connection that, in its judgment in *A. Menarini Diagnostics v. Italy*, relating to a penalty imposed by the Italian competition authority for anti-competitive practices similar to those of which the appellants were accused, the European Court of Human Rights considered that, given that the fine imposed was high, the penalty, because of its severity, fell within the criminal sphere.

34 It pointed out, however, in paragraph 58 of that judgment, that, entrusting the prosecution and punishment of breaches of the competition rules to administrative authorities is not inconsistent with the ECHR in so far as the person concerned has an opportunity to challenge any decision made against him before a tribunal that offers the guarantees provided for in Article 6 of the ECHR.

35 In paragraph 59 of its judgment in *A. Menarini Diagnostics v. Italy*, the European Court of Human Rights explained that, in administrative proceedings, the obligation to comply with Article 6 of the ECHR does not preclude a 'penalty' from being imposed by an administrative authority in the first instance. For this to be possible, however, decisions taken by administrative authorities which do not themselves satisfy the requirements laid down in Article 6(1) of the ECHR must be subject to subsequent review by a judicial body that has full jurisdiction. The characteristics of such a body include the power to quash in all respects, on questions of fact and law, the decision of the body below. The judicial body must in particular have jurisdiction to examine all questions of fact and law relevant to the dispute before it.

36 Ruling on the principle of effective judicial protection, a general principle of European Union law to which expression is now given by Article 47 of the Charter and which corresponds, in European Union law, to Article 6(1) of the ECHR, the Court of Justice has held that, in addition to the review of legality provided for by the FEU Treaty, the European Union judicature has the unlimited jurisdiction which it is afforded by Article 31 of Regulation No 1/2003, in accordance with Article 261 TFEU, and which empowers it to substitute its own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or periodic penalty payment imposed (*Chalkor* v *Commission*, paragraph 63).

37 As regards the review of legality, the Court has pointed out that the European Union judicature must carry it out on the basis of the evidence adduced by the applicant in support of the pleas in law put forward and that it cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the 1998 Guidelines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts (*Chalkor* v *Commission*, paragraph 62).

38 As the review provided for by the Treaties involves review by the European Union judicature of both the law and the facts, and means that it has the power to assess the evidence, to annul the contested decision and to alter the amount of a fine, the Court has concluded that the review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, is not contrary to the requirements of the principle of effective judicial protection which is currently set out in Article 47 of the Charter (*Chalkor* v *Commission*, paragraph 67).

39 It follows from the foregoing that the first plea is unfounded.

The second plea: breach of the requirement for directness of the taking of evidence

Arguments of the parties

40 By their second plea, the appellants refer to the fourth plea put forward in support of their action at first instance. In their submission, the requirement for 'directness' of the taking of evidence means that the General Court must form a direct impression from the persons making statements or adducing other evidence. Witnesses must be heard on oath before a court, in public, and the undertakings accused must be able to question them.

41 The Commission's investigation of the facts and the review by the General Court do not satisfy those requirements because they are often based solely on the written presentation of the facts by the undertakings cooperating with the Commission. In the case of statements made in the context of the 2002 Leniency Notice, there is a significant risk of the facts being distorted or exaggerated by the cooperating undertakings.

42 The Commission contends that the second plea is inadmissible.

Findings of the Court

43 As follows from Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, and Article 112(1)(c) of the Rules of Procedure of the Court of Justice in the version applicable on the date upon which the present appeal was brought, an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (see, inter alia, Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 34, and Case C-248/99 P *France* v *Monsanto and Commission* [2002] ECR I-1, paragraph 68).

44 As the Commission has pointed out in its response, the second plea is couched in abstract terms and does not indicate the paragraphs of the judgment under appeal that are contested. The only identifying factor is the reference to the fourth plea in the action at first instance, which alleged that the 2002 Leniency Notice was unlawful in that it breached the principles *nemo tenetur se ipsum accusare*, *nemo tenetur se ipsum prodere* and *in dubio pro reo* and the principle of proportionality. It is apparent that this plea is unrelated to the second plea of the appeal.

45 It follows from the foregoing that the second plea is too obscure for a response to be given and must be declared inadmissible.

46 In any event, in so far as the appellants criticise the fact that witnesses were not heard before the General Court, it need merely be recalled that, in an action challenging a Commission competition decision, it is as a rule for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas (see *Chalkor* v *Commission*, paragraph 64). As the Advocate General has observed in point 48 of her Opinion, the appellants did not contest the facts set out in the statement of objections or apply to the General Court for the examination of witnesses.

47 Consequently, the second plea is inadmissible.

The third plea: invalidity of Article 23 of Regulation No 1/2003 on account of breach of the principle of legality

Arguments of the parties

48 By their third plea, the appellants recall the first plea put forward in support of their action at first instance, that Article 23(2) of Regulation No 1/2003 is incompatible with the principle of the rule of law and precise definition of the applicable law (*nulla poena sine lege certa*) which results from Article 7 of the ECHR and Article 49 of the Charter.

49 They contend that the legislature itself must adopt the essential elements of the matters requiring to be regulated. Since the Treaty of Lisbon, this principle has been expressly laid down in the final sentence of the second subparagraph of Article 290(1) TFEU, according to which '[t]he essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power'.

50 The appellants maintain that breach of the principle of legality results from the imprecision of the term 'undertaking' used in Article 23 of Regulation No 1/2003. The Commission and the European Union judicature extend that term's scope excessively by means of the concept of an economic entity totally divorced from the concept of a legal person from which the European Union legislature certainly drew its inspiration. According to the appellants, use of the term 'undertaking' compromises the rights of the parent company which is jointly and severally liable without any provisions actually being laid down in detail in a formal law.

51 Breach of the principle of legality is also said to result from the imprecision of the penalties imposed if the competition rules are infringed. According to the appellants, the gravity and the duration of the infringement are not sufficiently precise criteria. The 1998 Guidelines and the 2002 Leniency Notice are not a remedy since they are not binding, as the Court found in Case C-360/09 *Pfleiderer* [2011] ECR I-5161, paragraph 23. The limit of 10% of turnover indicated as the ceiling for the fine in Article 23 of Regulation No 1/2003 is variable and depends in particular on the Commission's decision-making practice and the companies to which the infringement is attributed, it is linked not to the act but to the undertaking, and it does not constitute a 'quantifiable and absolute ceiling' as the

General Court incorrectly stated in paragraph 102 of the judgment under appeal. Nor, finally, can the unlimited jurisdiction replace the absence of precision in the law, irrespective of the fact that this jurisdiction exists only in theory and is generally not exercised by the General Court.

52 The Commission and the Council contend that Article 290 TFEU is not relevant for determining the legality of Article 23 of Regulation No 1/2003. So far as concerns the lack of precision of the term 'undertaking' in Article 23, the Council contends that this argument is new and therefore inadmissible. The Commission and the Council further observe that the concept of 'undertaking' has been defined by the case-law of the European Union judicature, a practice which accords with the case-law of the European Court of Human Rights. In their submission, the argument alleging imprecision of the penalty must also be rejected in the light of the case-law relating to Article 15 of Regulation No 17 and Article 23 of Regulation No 1/2003.

Findings of the Court

53 By their third plea, the appellants refer to the reply given by the General Court to the first plea in the action at first instance, but they do not specify which paragraphs of the judgment under appeal are contested. Since that plea at first instance was dealt with by the General Court in paragraphs 93 to 116 of the judgment under appeal, reference should be made to that part of the judgment.

54 It is apparent from examination both of the judgment under appeal and of the action at first instance that, as the Advocate General has noted in point 139 of her Opinion, the argument concerning the imprecision of the term 'undertaking' in the light of the principle of legality was not raised by the appellants before the General Court or examined by the latter.

55 It follows that that argument must be declared inadmissible, since in an appeal the jurisdiction of the Court of Justice is in principle confined to review of the findings of law on the pleas argued at first instance (Case C-380/09 P *Melli Bank* v *Council* [2012] ECR, paragraph 92).

56 As regards the argument concerning the imprecision of the level of fines in the light of the principle of legality, it should be noted that, as has just been explained in paragraph 31 of the present judgment, the provisions of the Treaty of Lisbon are not relevant to assessment of a plea relating to a competition decision adopted before that Treaty was even signed. It follows that the argument alleging infringement of Article 290 TFEU is ineffective.

57 In paragraph 96 of the judgment under appeal, the General Court, without committing an error of law, recalled that the principle of legality requires legislation to define clearly offences and the penalties which they attract (Case C-413/08 P *Lafarge* v *Commission* [2010] ECR I-5361, paragraph 94). In paragraph 99 of that judgment, it likewise did not commit an error of law in recalling the criteria for assessing the clarity of the law under the case-law of the European Court of Human Rights, namely that the clarity of a law is assessed having regard not only to the wording of the relevant provision but also to the clarification provided by settled, published case-law (see, to this effect, the judgment of the European Court of Human Rights in *G. v. France*, 27 September 1995, § 25, Series A no. 325-B) and that the fact that a law confers a discretion is not in itself inconsistent with the requirement of foreseeability, provided that the scope of the discretion and the manner of its exercise are indicated with sufficient clarity, having regard to the legitimate aim in question, to give the individual adequate protection against arbitrary interference (judgment of the European Court of Human Rights in *Margareta and Roger Andersson v. Sweden*, 25 February 1992, § 75, Series A no. 226-A).

58 According to the case-law of the Court of Justice, although Article 23(2) of Regulation No 1/2003 leaves the Commission a discretion, it nevertheless limits the exercise of that discretion by establishing objective criteria to which the Commission must adhere. Thus, first, the amount of the fine that may be imposed on an undertaking is subject to a quantifiable and absolute ceiling, so that

the maximum amount of the fine that can be imposed on a given undertaking can be determined in advance. Second, the exercise of that discretion is also limited by rules of conduct which the Commission imposed on itself in the 2002 Leniency Notice and the 1998 Guidelines. Furthermore, the Commission's well-known and accessible administrative practice is subject to unlimited review by the European Union judicature, whose settled case-law has enabled the concepts that Article 23(2) might contain to be defined. A prudent trader, if need be by taking legal advice, can thus foresee in a sufficiently precise manner the method of calculation and order of magnitude of the fines which he incurs for a given line of conduct, and the fact that that trader cannot know in advance precisely the level of the fines which the Commission will impose in each individual case cannot constitute a breach of the principle that penalties must have a proper legal basis (see also, to this effect, the judgment of 22 May 2008 in Case C-266/06 P *Evonik Degussa* v *Commission and Council*, paragraphs 50 to 55).

59 Having regard to these factors, it must be held that the General Court did not commit an error of law when it examined the Commission's discretion in the light, in particular, of the objective criteria, the general principles of law and the 1998 Guidelines to which the Commission must adhere and concluded, in paragraph 116 of the judgment under appeal, that the objection that Article 23(2) of Regulation No 1/2003 is unlawful in that it breaches the principle that penalties must have a proper legal basis had to be rejected.

60 It follows that the third plea is in part inadmissible and in part unfounded.

The fourth plea: invalidity of the 1998 Guidelines because the Commission lacked competence as a legislative organ

Arguments of the parties

61 By their fourth plea, the appellants contest the General Court's determination that the 1998 Guidelines 'merely contributed to defining the limits of the exercise of the discretion which the Commission … had'. They submit that those guidelines, which, in practice, are decisive for the setting of fines, should have been adopted by the Council as the legislature. They refer in this regard to Article 290(1) TFEU, relating to delegation of power to the Commission by a legislative act.

62 The appellants also contest paragraph 136 of the judgment under appeal, in particular the General Court's argument that, in the light of the deterrent purpose of fines, their method of calculation and order of magnitude were rightly left for determination by the Commission. By expressing itself in this way, the General Court sacrifices compliance of a penalty with the rule of law to the objectives of punishment and deterrence.

63 The Commission contends that the 1998 Guidelines do not constitute the legal basis for the fines imposed, but merely explain the application by the Commission of Article 23(2) of Regulation No 1/2003 and guarantee a uniform administrative practice. They are merely administrative provisions of the Commission which in principle do not bind the European Union judicature (*Chalkor* v *Commission*, paragraph 62). This is what the General Court indicated in paragraph 133 of the judgment under appeal.

64 The 1998 Guidelines do not constitute delegated legislation. In any event, Article 290(1) TFEU, which was introduced after the decision at issue was adopted, regulates not the question of when an action requires delegation but only the question of how the delegation of power in a particular area that is not relevant here must be set out. Furthermore, as the rules in Article 23(2) of Regulation No 1/2003 do not infringe the principle of precision, the criticism is all the less founded as regards a lack of precision of the 1998 Guidelines.

Findings of the Court

65 Again, it should be recalled that, as has been stated in paragraph 31 of the present judgment, the provisions of the Treaty of Lisbon are not relevant to assessment of a plea relating to a competition decision adopted even before that Treaty was signed.

66 In any event, the 1998 Guidelines are not legislation, delegated legislation for the purposes of Article 290(1) TFEU, or the legal basis for fines imposed in competition matters, which are adopted on the basis of Article 23 of Regulation No 1/2003 alone.

67 The 1998 Guidelines form rules of practice from which the administration may not depart in an individual case without giving reasons compatible with the principle of equal treatment (see Case C-397/03 P *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2006] ECR I-4429, paragraph 91) and merely describe the method used by the Commission to examine infringements and the criteria that the Commission requires to be taken into account in setting the amount of a fine (see *Chalkor* v *Commission*, paragraph 60).

68 No provision of the Treaties prohibits an institution from adopting such rules of practice.

69 It follows that the Commission had competence to adopt the 1998 Guidelines, so that the fourth plea is unfounded.

The fifth plea: breach of the principles of non-retroactivity and of the protection of legitimate expectations

Arguments of the parties

70 By their fifth plea, the appellants criticise paragraphs 117 to 130 of the judgment under appeal. They submit that, even if the 1998 Guidelines were valid, they could not apply because of a breach of the principle of non-retroactivity.

71 The case-law cited by the General Court in paragraph 125 of the judgment under appeal, according to which the Commission cannot be estopped from raising the level of fines if that is necessary for the proper application of the competition rules, and that cited in paragraph 126 of the judgment, according to which undertakings cannot acquire a legitimate expectation either that the Commission will not exceed the level of fines previously imposed or in a method of calculating the fines, are incompatible with Article 7 of the ECHR, which prohibits a retroactive strengthening of penalties which is not sufficiently foreseeable.

72 In the appellants' submission, the General Court was wrong in considering that the fact that the penalty cannot exceed 10% of turnover constitutes a fundamental limitation of discretion. Nor could the General Court, on the one hand, invoke the fact that the 1998 Guidelines increased the foreseeability of the penalty and, on the other, permit the Commission to amend the guidelines retroactively to the detriment of the undertakings concerned.

73 The appellants submit, finally, that since the 1998 Guidelines are not a 'law' for the purposes of Article 7(1) of the ECHR, the prohibition on retroactivity must apply all the more to the Commission's administrative practice.

74 The Commission contends that the General Court adhered to the Court of Justice's case-law (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 231) in concluding, in paragraphs 123 and 125 of the judgment under appeal, that there was no breach of the principles of non-retroactivity and of the protection of legitimate expectations.

Findings of the Court

75 As the Advocate General has stated in points 169 and 170 of her Opinion, the General Court did not commit an error of law when, in paragraphs 118 to 129 of the judgment under appeal, it recalled and applied the settled case-law of the European Union judicature that neither the 1998 Guidelines nor the Commission's practice as regards the level of the fines imposed in competition matters infringe the principle of non-retroactivity or the principle of the protection of legitimate expectations (see *Dansk Rørindustri and Others* v *Commission*, paragraphs 217, 218 and 227 to 231; *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission*, paragraph 25; and Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraphs 87 to 92).

76 Therefore, the fifth plea is unfounded.

The sixth plea: breach of the principle of the presumption of innocence

Arguments of the parties

77 By their sixth plea, the appellants refer to the twelfth plea in the action at first instance. They submit that the Commission does not observe the elementary principles concerning attribution of infringements but considers that a company incurs liability as soon as some or other member of the staff of one of its subsidiaries has acted contrary to the law on cartels in the course of his employment.

78 Such an approach is contrary to Article 23(2) of Regulation No 1/2003, which requires the undertaking to have acted 'intentionally or negligently', and to the principle of the presumption of innocence laid down in Article 48(1) of the Charter and Article 6(2) of the ECHR.

79 According to the appellants, a legal provision is necessary in order to establish the criteria in accordance with which it is possible to attribute to a legal person the conduct of its legal representatives or other members of its staff. Depending on the circumstances, attribution of the infringements may require breach of the duty of supervision. However, the General Court found, in paragraph 88 of the judgment under appeal, that Schindler Holding did its utmost to prevent its subsidiaries engaging in conduct contrary to Article 81 EC.

80 The Commission contends that the appellants are putting forward a plea which they did not put forward in their action before the General Court and which must accordingly be declared inadmissible. In any event, the argument is based on the incorrect premiss that no infringement was found in respect of the parent company.

Findings of the Court

81 The appellants refer to the twelfth plea in the action at first instance without, however, specifying which paragraphs of the judgment under appeal they contest, although it is clear from settled case-law, recalled in paragraph 43 of the present judgment, that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal.

82 In any event, if reference is made to the order of examination of the pleas which is set out by the General Court in paragraphs 47 and 48 of the judgment under appeal, it may be supposed that the part of that judgment which the sixth plea concerns is constituted by paragraphs 63 to 92 of the judgment, in which the General Court examined the plea alleging that the decision at issue was unlawful in so far as it held Schindler Holding jointly and severally liable. However, those paragraphs deal not with the question of the attribution to a legal person of the conduct of its legal representatives or members of its staff, but with attribution to a parent company of the conduct of its subsidiaries.

83 If the appellants' intention is to object to the attribution to a legal person of the conduct of its legal representatives or members of its staff, a new plea, inadmissible in an appeal, is involved. As is clear from the case-law recalled in paragraph 55 of the present judgment, in an appeal the jurisdiction of the Court of Justice is in principle confined to review of the findings of law on the pleas argued at first instance.

84 It follows from the foregoing that the sixth plea does not specify sufficiently the paragraphs of the judgment under appeal that are contested, is too obscure for a response to be given and, in any event, is new. Consequently, it is inadmissible.

The seventh plea: an error of law in finding Schindler Holding jointly and severally liable

Arguments of the parties

85 By their seventh plea, the appellants contest paragraphs 63 to 92 of the judgment under appeal, by which the General Court dismissed the twelfth plea of the action at first instance, in which the appellants contended that the conditions for joint and several liability of Schindler Holding for the infringements committed by its subsidiaries were not met.

86 They contend that the case-law of the Court of Justice and the General Court allowing joint and several liability of the parent company for the infringements committed by its subsidiary breaches national company law regimes which, in principle, do not allow an extension of the liability of legally distinct legal persons and observe the principle of limited liability of shareholders for the debts of their company. In particular, liability of the parent company solely on the basis of presumed influence exercised by its management over its subsidiaries does not exist in the legal systems of the Member States.

87 The principle of limited liability is also recognised in secondary European Union legislation. The appellants cite in this regard Article 1(2) of Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1), which provides that '[t]he capital of an SE shall be divided into shares. No shareholder shall be liable for more than the amount he has subscribed'. They also cite Article 3(1)(b) of the Proposal for a Council Regulation on the statute for a European private company (COM(2008) 396 final), according to which 'a shareholder shall not be liable for more than the amount he has subscribed or agreed to subscribe', and Twelfth Council Company Law Directive 89/667/EEC of 21 December 1989 on single-member private limited-liability companies (OJ 1989 L 395, p. 40).

88 In the appellants' submission, Article 3(1)(b) TFEU confers legislative competence on the European Union only for the establishing of the competition rules necessary for the functioning of the internal market. The rules governing attribution in the context of the relationship between a parent company and its subsidiary still fall within Member State competence. The appellants cite in this regard point 57 of the Opinion delivered by Advocate General Trstenjak in Case C-81/09 *Idryma Typou* [2010] ECR I-10161 and the judgment in Case C-104/96 *Rabobank* [1997] ECR I-7211, paragraphs 22 to 28.

89 The appellants thus complain that joint and several liability of the parent company for its subsidiary's infringements has been developed by means of decision-making practice and not legislative intervention, which is required by Article 290(1) TFEU and occurred in the case of Article 23(4) of Regulation No 1/2003, under which the members of an association of undertakings are jointly and severally liable for a fine imposed on that association in so far as it is not solvent.

90 In the alternative, the appellants contest the case-law, as construed by the General Court, resulting from Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, the effect of which is that the parent company is liable without fault on its part. In the appellants' submission, the parent company must be accused of a fault of its own, which may result from its own participation in an infringement or from breach of certain organisational obligations existing within the group. Schindler Holding did not commit such a fault, as it did its utmost to prevent its subsidiaries from engaging in conduct contrary to the law on cartels by establishing and developing a compliance programme which is a model of its kind.

91 In the further alternative, the appellants contend that, even applying the principles governing liability as laid down in *Akzo Nobel and Others* v *Commission* in the same way as the General Court, Schindler Holding should not be found liable since its four subsidiaries worked independently in their respective Member States and Schindler Holding exercised no influence over their day-to-day operations. The appellants contest paragraph 86 of the judgment under appeal, in which the General Court held that the evidence which they had adduced was insufficient without, however, having offered them the opportunity of adducing other evidence in the course of the judicial proceedings. According to the appellants, the application at first instance contained sufficient details and it was for the Commission to prove the contrary.

92 The appellants also contest the broad interpretation of the concept of 'commercial policy' adopted by the General Court in paragraph 86 of the judgment under appeal. According to the case-law of the Court of Justice, it is necessary to prove independent conduct and not commercial policy in the broad sense.

93 The appellants contest finally what they consider to be the paradoxical assessment of the General Court which, in paragraph 88 of the judgment under appeal, infers that Schindler Holding exercised control over its subsidiaries from the fact that a large-scale compliance programme had been established at group level and that compliance with the programme was checked by means of regular audits and other measures.

94 The Commission contends that the first part of the seventh plea is inadmissible in that the appellants do not criticise the judgment under appeal and put forward a new plea, that the European Union lacks competence.

95 In any event, that line of argument grants a company law concept of an undertaking precedence over the economic and functional concept of an undertaking that is in force in European Union competition law, and it is unfounded. Contrary to the appellants' assertions, what is involved is not a regime providing for liability for the acts of others, or recourse liability of the members of legal persons, but a regime providing for liability because the companies concerned constitute a single undertaking for the purposes of Article 81 EC (see Case C-521/09 *Elf Aquitaine* v *Commission* [2011] ECR I-8947, paragraph 88). This regime can therefore be distinguished from the regime referred to in Article 23(4) of Regulation No 1/2003, which concerns a number of undertakings.

96 The Commission submits that the presumption that the parent company exercises decisive influence over the conduct of its subsidiary rests, like any prima facie proof, on a typical causal relationship confirmed by experience. The fact that it is difficult to adduce the evidence necessary to rebut a presumption does not in itself mean that it is in fact irrebuttable. Nor does recourse to the presumption result here in a reversal of the burden of proof incompatible with the principle of the

presumption of innocence. A rule of evidence is involved, not a rule on the attribution of fault. It is clear, moreover, from the case-law of the Court of Justice and the European Court of Human Rights that a presumption, even where it is difficult to rebut, remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the defence are safeguarded.

97 The Commission contends that the appellants did not rebut the presumption that the parent company exercises decisive influence over the conduct of its subsidiary by their mere statements unsupported by evidence. In its submission, the compliance instructions and the application of the organisational structures linked to them show in this instance the decisive influence of Schindler Holding over its subsidiaries and are not such as to exempt it from its liability.

98 In their reply, the appellants contend that, as is apparent from the judgment in *Elf Aquitaine* v *Commission*, the question of the legality, in the light of Article 6 of the ECHR, of the presumption that the parent company exercises decisive influence over the conduct of its subsidiary is still not decided. They point out that, according to paragraph 40 of the judgment of the European Court of Human Rights in *Klouvi v. France*, no. 30754/03, 30 June 2011, Article 6(2) of the ECHR must be interpreted in such a way as to guarantee rights which are practical and effective as opposed to theoretical and illusory. However, the presumption as interpreted by the General Court is impossible to rebut. It is not liability for one's own fault but collective liability that is involved. The appellants point in this regard to the evidence adduced before the General Court.

99 The appellants contend finally that the General Court was obliged to review the statement of reasons for the decision at issue of its own motion. The reasons stated in that decision, in particular in recitals 629, 630 and 631, are only superficial, which does not satisfy the criterion laid down by the Court in *Elf Aquitaine* v *Commission*.

100 In its rejoinder, the Commission contests that line of argument of the appellants.

Findings of the Court

101 By the first part of the seventh plea, the appellants submit that the case-law of the European Union judicature infringes the principle of personal liability of legal persons. However, as the Advocate General has observed in points 65 and 66 of her Opinion, whilst this principle is of particular importance especially as regards liability in the sphere of civil law, it cannot be relevant for defining the perpetrator of an infringement of competition law, which is concerned with the actual conduct of undertakings.

102 The authors of the Treaties chose to use the concept of an undertaking to designate the perpetrator of an infringement of competition law, who is liable to be punished pursuant to Articles 81 EC and 82 EC, now Articles 101 TFEU and 102 TFEU, and not the concept of a company or firm or of a legal person, used in Article 48 EC, currently Article 54 TFEU. The secondary legislation cited by the appellants is connected with the latter provision and therefore is not relevant to determining the perpetrator of an infringement of competition law.

103 The concept of an undertaking has been defined by the European Union judicature and designates an economic unit even if in law that economic unit consists of several natural or legal persons (see, to this effect, *Akzo Nobel and Others* v *Commission*, paragraph 55, and *Elf Aquitaine* v *Commission*, paragraph 53 and the case-law cited).

104 It follows that, after recalling that case-law in paragraph 66 of the judgment under appeal, the General Court did not commit an error of law in holding, in paragraph 67 of the judgment, that, when an economic entity infringes the competition rules, it falls to that entity to answer for that infringement.

105 By the second part of the seventh plea, the appellants contend that the European Union does not have legislative competence to determine the rules governing attribution of infringements in the context of the relationship between a parent company and its subsidiary and that it is for the legislature and not the European Union judicature to define a rule of law as elementary as the concept of a perpetrator of an infringement of the competition rules.

106 However, the appellants do not indicate what aspects of the judgment under appeal they contest and paragraphs 63 to 92 of that judgment do not reveal the slightest reference to such an argument. That argument must therefore be declared inadmissible because it is new or, in any event, utterly imprecise.

107 In their reply, the appellants contest the basis of the case-law resulting from *Akzo Nobel and Others* v *Commission* in the light of Article 6 of the ECHR, submitting that the question of the legality, in the light of that provision, of the presumption that the parent company exercises decisive influence over its subsidiary is still not decided. The Court pointed out, however, in *Elf Aquitaine* v *Commission*, paragraph 62, that a presumption, even where it is difficult to rebut, remains within acceptable limits so long as it is proportionate to the legitimate aim pursued, it is possible to adduce evidence to the contrary and the rights of the defence are safeguarded (see, to this effect, Case C-45/08 *Spector Photo Group and Van Raemdonck* [2009] ECR I-12073, paragraphs 43 and 44, and the judgment of the European Court of Human Rights in *Janosevic v. Sweden*, no. 34619/97, § 101 et seq., ECHR 2002-VII).

108 The presumption that decisive influence is exercised over a subsidiary wholly or almost wholly owned by its parent company is intended, in particular, to strike a balance between, on the one hand, the importance of the objective of combatting conduct contrary to the competition rules, in particular to Article 81 EC, and of preventing a repetition of such conduct and, on the other hand, the requirements flowing from certain general principles of European Union law such as the principle of the presumption of innocence, the principle that penalties should be applied solely to the offender and the principle of legal certainty as well as the rights of the defence, including the principle of equality of arms (*Elf Aquitaine* v *Commission*, paragraph 59). It follows that such a presumption is proportionate to the legitimate aim pursued.

109 Furthermore, first, the aforesaid presumption is based on the fact that, save in quite exceptional circumstances, a company holding all, or almost all, the capital of a subsidiary can, by dint merely of holding it, exercise decisive influence over that subsidiary's conduct and, second, it is within the sphere of operations of those entities against which the presumption operates that evidence of the lack of actual exercise of that power to influence is generally apt to be found. The presumption is, however, rebuttable and the entities wishing to rebut it may adduce all factors relating to the economic, organisational and legal links tying the subsidiary to the parent company that they consider to be capable of demonstrating that the subsidiary and the parent company do not constitute a single economic entity, but that the subsidiary acts independently on the market (see Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2008] ECR I-9925, paragraph 29; *Akzo Nobel and Others* v *Commission*, paragraph 61; and *Elf Aquitaine* v *Commission*, paragraphs 57 and 65).

110 Finally, the parent company must be heard by the Commission before the latter adopts a decision against it and review of that decision may be sought from the European Union judicature which must, in deciding the case, observe the rights of the defence.

111 Accordingly, the General Court did not make an error of law in adopting, in paragraph 71 of the judgment, the principle that the parent company is presumed to be liable for the conduct of its wholly-owned subsidiary.

112 By the third part of the seventh plea, the appellants contest the application by the General Court of the case-law resulting from *Akzo Nobel and Others* v *Commission*, submitting that in paragraph 86 of the judgment under appeal the General Court adopted too broad an interpretation of the concept of

commercial policy. It should, however, be recalled that, in order to ascertain whether a subsidiary determines its conduct on the market independently, account must be taken of all the relevant factors relating to economic, organisational and legal links which tie the subsidiary to the parent company, 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*, paragraphs 73 and 74, and *Elf Aquitaine* v *Commission*, paragraph 58). Commercial policy is therefore only one of a number of factors and, moreover, contrary to the appellants' assertions, must not be interpreted restrictively.

113 The appellants also submit, in essence, that Schindler Holding cannot incur liability since it had established a compliance programme. In so far as that argument is considered admissible because it is directed against an assessment criterion used by the General Court, it need merely be stated that the General Court did not commit an error of law in holding, in paragraph 88 of the judgment under appeal, that the adoption by Schindler Holding of a code of conduct to prevent its subsidiaries from infringing competition law, along with related guidelines, does not alter the reality of the infringement found against it and, moreover, does not demonstrate that those subsidiaries determined their commercial policy independently.

114 As the General Court held correctly, and moreover without contradicting itself, in paragraph 88 of the judgment under appeal, the implementation of that code of conduct suggests rather that the parent company did in fact supervise the commercial policy of its subsidiaries. The fact that certain employees of its subsidiaries did not comply with the code of conduct is not sufficient to demonstrate independence of the commercial policy of the subsidiaries in question.

115 The appellants contest, finally, the General Court's assessment, in paragraph 86 of the judgment under appeal, that they adduced no evidence in support of their assertions and that, in any event, such assertions would not be sufficient to rebut the presumption that the parent company exercises decisive influence over its subsidiaries. It is, however, to be recalled that assessment of the evidence falls within the jurisdiction of the General Court and that the Court of Justice does not have the task or reviewing that assessment in an appeal.

116 It follows from all of those considerations that the seventh plea must be dismissed as in part inadmissible and in part unfounded.

The eighth plea: breach of the upper limit for a fine, laid down in Article 23(2) of Regulation No 1/2003

Arguments of the parties

117 By their eighth plea, the appellants contest paragraphs 362 to 364 of the judgment under appeal. In their submission, the argument that a parent company and its subsidiaries constitute a single undertaking and that reference should therefore be made to group turnover when setting all the fines is wrong in law.

118 The Commission contends that the eighth plea is unfounded for the reasons advanced by it in connection with the seventh plea.

Findings of the Court

119 As has just been held in response to the seventh plea, the argument that a parent company and its subsidiaries are capable of constituting, and constitute in the case in point, a single undertaking is not wrong in law.

120 The eighth plea must therefore be dismissed.

The ninth plea: breach of the right to property

Arguments of the parties

121 By their ninth plea, the appellants contest paragraphs 185 to 196 of the judgment under appeal, by which the General Court dismissed the sixth plea advanced in the action at first instance. They submit that the setting of the fines produces, in breach of international law, the same effects as an expropriation. In ruling as it did, the General Court infringed Article 17(1) of the Charter and Article 1 of Protocol No 1 to the ECHR. It wrongly failed to verify whether the fine in question could be regarded as proportionate in the light of the case-law of the European Court of Human Rights, in particular its judgment in *Mamidakis v. Greece*, no. 35533/04, 11 January 2007, and referred solely to its own case-law and that of the Court of Justice although, because of the entry into force of the Treaty of Lisbon, it was obliged to subject its previous case-law to critical examination in the light of the case-law of the European Court of Human Rights.

122 Furthermore, the General Court's reasoning is founded on an incorrect premiss, namely that Schindler Holding and its subsidiaries form an economic entity.

123 The Commission submits that, in the action at first instance, the appellants did not rely on the right to property as a fundamental right. That explains the fact that the General Court did not rule on the Charter or the judgment of the European Court of Human Rights in *Mamidakis v. Greece*. In any event, the review of proportionality carried out by the General Court in paragraphs 191 to 195 of the judgment under appeal is the same as that carried out by the European Court of Human Rights in *Mamidakis v. Greece*.

Findings of the Court

124 As the Court has recalled in paragraph 32 of the present judgment, as long as the European Union has not acceded to the ECHR, it does not constitute a legal instrument which has been formally incorporated into European Union law. However, in accordance with settled case-law, fundamental rights, which include the right to property, form an integral part of the general principles of law the observance of which the Court ensures (see, to this effect, Case 44/79 *Hauer* [1979] ECR 3727, paragraphs 15 and 17). Protection of the right to property is, moreover, provided for in Article 17 of the Charter.

125 Here, the appellants complain that the General Court did not carry out the review of proportionality in the light of the case-law of the European Court of Human Rights, in particular its judgment in *Mamidakis v. Greece*, but referred solely to its own case-law and that of the Court of Justice.

126 It is to be observed at the outset that the appellants never relied on protection of the right to property as a fundamental right. On the contrary they stated in paragraph 97 of their application at first instance that '[i]t is immaterial whether and to what extent the European Community already protects the private property of undertakings, for example within the framework of fundamental rights'. They invoked, on the other hand, in the same paragraph, 'the standard of protection specific to international law in favour of foreign operators investing in the European Community'.

127 Therefore, the appellants cannot complain that the General Court did not respond to pleas that they did not advance. Nor do they assert that the General Court was required to carry out of its own motion the review of proportionality in the light of the case-law of the European Court of Human Rights.

128 In any event, in so far as the appellants plead infringement of the Charter, they can establish an error of law in the review carried out by the General Court only by demonstrating that it did not give the right to property the same meaning and scope as those laid down by the ECHR.

129 So far as concerns the taking into account of Schindler Holding and its subsidiaries as an economic entity, suffice it to state that this is not an incorrect premiss in the General Court's reasoning, but involves a fundamental principle of competition law that is covered by settled case-law, as has just been pointed out in paragraphs 101 to 103 of the present judgment in response to the seventh plea. The perpetrator of an infringement of competition law is indeed defined by reference to economic entities even if in law those entities consist of several natural or legal persons.

130 Consequently, the ninth plea must be dismissed.

The tenth plea: breach of the 1998 Guidelines in that the starting amounts used to calculate the fine are too high

Arguments of the parties

131 By their tenth plea, the appellants contest paragraphs 197 to 270 of the judgment under appeal, by which the General Court rejected the seventh plea in the action at first instance. They submit that the General Court misapplied the case-law relating to the 1998 Guidelines and was wrong in holding that the impact of the infringements could not be measured. The appellants argue, first, that they adduced circumstantial evidence that the agreements in question had no, or limited, impact and, second, that that impact could have been determined by means of an econometric report. Since the Commission did not provide such a report, the General Court should itself have adopted measures of inquiry and exercised its unlimited jurisdiction within the meaning of Article 31 of Regulation No 1/2003.

132 The Commission contests the appellants' arguments.

Findings of the Court

133 By their tenth plea, the appellants contest not that the infringements were classified as 'very serious infringements' on the basis solely of their nature and their geographic scope, as is apparent from recital 671 of the decision at issue which is recalled in paragraph 217 of the judgment under appeal, but solely the General Court's assessment that the actual impact of the cartel could not be measured.

134 As the Advocate General has recalled in point 178 of her Opinion, it is settled case-law that, while the actual impact of an infringement on the market is a factor to be taken into account in assessing the gravity of the infringement, it is one of a number of criteria, such as the nature of the infringement and the size of the geographic market (see, to this effect, *Musique Diffusion française and Others* v *Commission*, paragraph 129). It follows from this that the effect of an anti-competitive practice is not, in itself, a conclusive criterion for assessing the proper amount of a fine. In particular, 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, a factor which is present in this case (Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 118; Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 96; and judgment of 12 November 2009 in Case C-554/08 P *Carbone-Lorraine* v *Commission*, paragraph 44).

135 Furthermore, it is apparent from the first paragraph of Section 1.A of the 1998 Guidelines that that impact is to be taken into account only where this can be measured (Case C-511/06 P *Archer Daniels Midland* v *Commission* [2009] ECR I-5843, paragraph 125, and *Prym and Prym Consumer* v *Commission*, paragraph 74).

136 Consequently, had the General Court taken account of the actual impact of the infringement at issue on the market, assuming that that impact could in fact be measured, it would have done so for the sake of completeness (see, to this effect, order of 13 December 2012 in Case C-654/11 P *Transcatab* v *Commission*, paragraph 43, and Case C-511/11 P *Versalis* v *Commission* [2013] ECR, paragraphs 83 and 84).

137 It follows that the tenth plea, even if it is well founded, cannot call into question the General Court's assessment, in paragraph 232 of the judgment under appeal, that the arguments contesting the legality of the classification of the infringements found in Article 1 of the decision at issue as 'very serious' should be rejected.

138 This plea is therefore ineffective.

The eleventh plea: breach of the 1998 Guidelines because the reductions of the fines for mitigating circumstances were too small

Arguments of the parties

139 By their eleventh plea, the appellants contest paragraphs 271 to 279 of the judgment under appeal, in which the General Court justified the Commission's decision not to take into account, as a mitigating circumstance, the Schindler group's voluntary cessation of the infringement in Germany by relying on the fact that, in accordance with the Court of Justice's case-law, there can be a mitigating circumstance under the third indent of Section 3 of the 1998 Guidelines only where the infringement has been terminated because of intervention by the Commission. In the appellants' submission, the General Court's assessment is not consistent with *Prym and Prym Consumer* v *Commission*, which concerned a cartel that all the participants had terminated before any intervention by the Commission, whereas in the case in point just one undertaking withdrew from the cartel. Furthermore, the argument that voluntary cessation of an infringement is already taken into account sufficiently when considering the infringement's duration is incorrect. Finally, the General Court's appraisal in paragraph 275 of the judgment under appeal that the fact that agreements are manifestly unlawful precludes recognition of a mitigating circumstance is supported only by judgments of the General Court and not by judgments of the Court of Justice.

140 The appellants also contest paragraph 282 of the judgment under appeal, by which the General Court rejected the argument that account should be taken of the compliance programme adopted by the Schindler group as a mitigating circumstance. In the appellants' submission, the question whether compliance measures are such as to 'change the reality of an infringement' is not decisive. The sole decisive factor is that, by adopting internal measures, the Schindler group sought to prevent infringements and that Schindler Holding, in particular, did its utmost to that end. The reduction in the fine must be all the greater because one of the side effects of the compliance system adopted by the Schindler group is to make it more difficult to discover internally infringements that are none the less committed, because infringing staff are threatened with severe penalties.

141 The Commission maintains that the appellants do not contest the findings in paragraph 276 of the judgment under appeal which relates to the circumstances in which the appellants terminated the infringement, namely that they left the cartel at issue solely because of a disagreement with the other members on the ground that they refused to allow it a larger share of the market.

142 As regards taking account of the compliance programme, the Commission submits that the appropriate recompense for such a programme is ideally the absence of anti-competitive conduct, but not reduction of a fine for participation in a cartel which nevertheless took place.

Findings of the Court

143 By a determination of fact which it is not for the Court of Justice to review, the General Court found, in paragraph 276 of the judgment under appeal, that, 'according to the file, [the Schindler group] left the cartel solely because of a disagreement with the other members over their refusal to allow it a larger share of the market'. In the light of the case-law noted in paragraphs 274 and 275 of the judgment under appeal and of that finding of fact, the General Court did not commit an error of law in rejecting the appellants' argument relating to the voluntary cessation of the infringement.

144 So far as concerns the compliance programme established by the Schindler group, as the Advocate General has observed in point 185 of her Opinion, it evidently had no positive effect and, on the contrary, made it more difficult to uncover the infringements at issue. It follows that the General Court did not commit an error of law in rejecting the appellants' argument in this regard.

145 Consequently the eleventh plea is unfounded.

The twelfth plea: breach of the 2002 Leniency Notice because the reductions in the amount of the fines for cooperation were too small

Arguments of the parties

146 By their twelfth plea, the appellants contest paragraphs 287 to 361 of the judgment under appeal, by which the General Court rejected the ninth plea in the action at first instance.

147 First, they complain of insufficient reductions in the amount of the fines and of unequal treatment in the application of the 2002 Leniency Notice.

148 They contest in particular paragraph 296 of the judgment under appeal, by which the General Court held that the Commission has a considerable margin of discretion, and paragraph 300 of that judgment, by which it held that only the manifest exceeding of the bounds of that margin can be challenged. In the appellants' submission, such a margin of discretion does not exist and the General Court was obliged to review in full the decision at issue so far as concerns determination of the amount of the fine, thereby exercising the unlimited jurisdiction that is conferred upon it by Article 31 of Regulation No 1/2003.

149 Furthermore, the General Court wrongly rejected, in paragraph 309 of the judgment under appeal, the statement provided by the appellants to the Commission.

150 Finally, in paragraphs 312 to 319 of the judgment under appeal, the General Court applied the principle of equal treatment incorrectly with regard to the evidence that had been furnished by the appellants.

151 Second, the appellants contest paragraphs 350 to 361 of the judgment under appeal, by which the General Court rejected the part of the ninth plea in the action at first instance in which they contended that a 1% reduction of the fine for their cooperation outside the 2002 Leniency Notice, on the ground that they had not contested the findings of fact in the statement of objections, was too small. They consider that the General Court's reasoning is flawed and contradicts the earlier case-law.

152 The Commission submits that the General Court correctly set out, in paragraph 308 of the judgment under appeal, the reason why the appellants' statement was not significant, which is a necessary condition for reduction of a fine under point 21 of the 2002 Leniency Notice. A finding of fact not amenable to review by the Court of Justice on appeal is involved.

153 As regards the argument alleging breach of the principle of equal treatment, the Commission contends that the appellants silently pass over the 'detailed explanations about the system' furnished by one of the undertakings participating in the cartel and which justify the significant added value of that undertaking's leniency application.

154 As regards paragraphs 350 to 361 of the judgment under appeal, the Commission maintains that the mitigating circumstance under the sixth indent of Section 3 of the 1998 Guidelines is not intended to reward none the less applications for leniency which have failed or been satisfied insufficiently, because that would undermine the incentive effect of the 2002 Leniency Notice and the obligations of cooperation resulting from that notice, given that it is specifically only if 'significant added value' is provided, and depending on the date of the cooperation, that graduated reductions are granted.

Findings of the Court

155 It is to be recalled that, when the European Union judicature reviews the legality of a decision imposing fines for infringement of the competition rules, it cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the criteria mentioned in the 1998 Guidelines or as regards the assessment of those factors – as a basis for dispensing with the conduct of an in-depth review of the law and of the facts (*Chalkor* v *Commission*, paragraph 62). Such a rule also applies where the judicature determines whether the Commission applied the 2002 Leniency Notice correctly.

156 Whilst the principles set out by the General Court in paragraphs 295 to 300 do not correspond to that case-law, it is necessary, however, to examine the manner in which the General Court conducted its review in the present case in order to determine whether it infringed those principles. As the Advocate General has observed in point 191 of her Opinion, what matters is the criterion that the General Court in fact applied in the specific examination of the added value offered by the cooperation of the undertaking in question with the Commission.

157 In paragraphs 301 to 349 of the judgment under appeal, the General Court examined the evidence relied upon by the appellants, in order to determine whether they had provided significant added value within the meaning of point 21 of the 2002 Leniency Notice.

158 Even though that examination contains findings of fact which it is not for the Court of Justice to review in an appeal, it must be held that the General Court carried out an in-depth review in which it itself assessed the evidence without referring to the Commission's margin of discretion, stating detailed grounds for its own decision.

159 As regards the criticisms of paragraphs 309 and 312 to 319 of the judgment under appeal, it must be stated that they put in question findings of fact by the General Court which it is not for the Court of Justice to review in an appeal. In any event, the principle of equal treatment does not prevent according favourable treatment only to the undertaking which provides significant added value within the meaning of point 21 of the 2002 Leniency Notice since the aim of that provision is legitimate.

160 The criticism of paragraphs 350 to 361 of the judgment under appeal must be declared unfounded for the reason set out by the Commission and reproduced in paragraph 154 of the present judgment.

161 Consequently the twelfth plea is unfounded.

The thirteenth plea: disproportionateness of the amount of the fines

Arguments of the parties

162 By their thirteenth plea, the appellants contest paragraphs 365 to 372 of the judgment under appeal, by which the General Court rejected the tenth plea advanced in the action at first instance. They consider that the premiss of the General Court's reasoning is incorrect, as the infringements cannot be attributed to Schindler Holding. Furthermore, a fine is not to be considered proportionate merely because it does not exceed the ceiling of 10% of turnover. It follows from Article 49 of the Charter that examination of the fine's proportionality constitutes a separate aspect that is additional to verification of whether the ceiling of 10% of turnover has been observed. They cite in this regard the judgment of the European Court of Human Rights in *Mamidakis v. Greece*, in which a fine totalling roughly EUR 8 million was considered disproportionate.

163 The Commission contends that the thirteenth plea is unfounded.

Findings of the Court

164 In accordance with settled case-law, it is not for the Court of Justice, when ruling on questions of law in the context of an appeal, to substitute, on grounds of fairness, its own assessment for that of the General Court exercising its unlimited jurisdiction to rule on the amount of fines imposed on undertakings for infringements of European Union law (*Dansk Rørindustri and Others* v *Commission*, paragraph 245).

165 It is only in so far as the Court of Justice considers that the level of the penalty is not merely inappropriate, but also excessive to the point of being disproportionate, that it would have to find that the General Court erred in law, due to the inappropriateness of the amount of a fine (Case C-89/11 P *E.ON Energie* v *Commission* [2012] ECR, paragraph 126).

166 In this instance, the General Court did not merely verify whether the amount of the fines exceeded the ceiling of 10% of turnover, referred to in the second subparagraph of Article 23(2) of Regulation No 1/2003, but carried out an in-depth examination of the proportionality of the fines in paragraphs 368 to 370 of the judgment under appeal.

167 As to the criticism of the fact that the turnover of Schindler Holding was taken into account, this is based on an incorrect premiss regarding the legality of the recourse to the concept of an undertaking, as has been demonstrated in responding to the seventh plea.

168 In so far as the reference to the judgment of the European Court of Human Rights in *Mamidakis v. Greece* is relevant in a competition case involving a commercial company and its subsidiaries and not a natural person, it is to be pointed out that, as the Advocate General has observed in point 214 of her Opinion, it is not possible to assess whether a fine entails a disproportionate burden for the person upon whom it is imposed solely on the basis of its nominal amount. That is also dependent, in particular, on the person's ability to pay.

169 In a situation where fines are imposed on an undertaking which constitutes an economic unit and which is composed only formally of a number of legal persons, those persons' ability to pay cannot be taken into consideration individually. In this context, the General Court was correct in holding in paragraph 370 of the judgment under appeal, having regard to gravity of the practices concerned and to the size and economic strength of the Schindler group, that the total amount of the fines imposed on the appellants represents approximately 2% of their aggregated turnover in 2005, which cannot be regarded as disproportionate in relation to the size of the group concerned.

170 It follows from the foregoing that the thirteenth plea is unfounded.

171 Since none of the pleas advanced by the appellants has been upheld, the appeal must be dismissed in its entirety.

Costs

172 In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs.

173 Under Article 138(1) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the appellants have been unsuccessful, the latter must be ordered to bear their own costs and, in addition, to pay those incurred by the Commission. Since the Council has not applied for costs against the appellants, but has requested the Court to make an appropriate order as to costs, it will bear its own costs.

On those grounds, the Court (Fifth Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders Schindler Holding Ltd, Schindler Management AG, Schindler SA, Schindler Sàrl, Schindler Liften BV and Schindler Deutschland Holding GmbH to bear their own costs and, in addition, to pay those incurred by the European Commission;**

3. **Orders the Council of the European Union to bear its own costs.**

[Signatures]