

Appeal brought on 30 September 2011 by ThyssenKrupp Elevator AG against the judgment of the General Court (Eighth Chamber) delivered on 13 July 2011 in Joined Cases T-144/07, T-147/07, T-148/07, T-149/07, T-150/07 and T-154/07 ThyssenKrupp Liften Ascenseurs and Others v European Commission

(Case C-505/11 P)

(2011/C 347/33)

Language of the case: German

Parties

Appellant: ThyssenKrupp Elevator AG (represented by: T. Klose, Rechtsanwalt)

Other party to the proceedings: European Commission

Form of order sought

- Set aside the judgment of the General Court (Eighth Chamber) in Joined Cases T-144/07, T-147/07, T-148/07, T-149/07, T-150/07 and T-154/07 *ThyssenKrupp Liften Ascenseurs and Others v European Commission* in so far as it dismisses the action and concerns the appellant;
- In the alternative, appropriately further reduce the fine imposed on the appellant in Article 2 of the contested decision of the European Commission of 21 February 2007;
- In the further alternative, refer the action back to the General Court for a new decision;
- Order the European Commission to pay the costs of the proceedings.

Pleas in law and main arguments

By the present appeal, the appellant alleges the lack of competence of the Commission, infringement of essential procedural requirements, infringement of the EC and FEU Treaties, the legal norms applicable in the implementation of those Treaties and misuse of powers and breach of a fundamental right in a total of six grounds of appeal:

First, the appellants claim that the General Court has erred in law in holding that the Commission had powers to initiate the proceeding. In their submission, the General Court ought to have declared the Commission's decision null and void on grounds of the inapplicability of Article 101 TFEU (formerly Article 81 EC) in the absence of inter-State effect of the local infringements alleged. Even if the General Court declares Article 101 TFEU applicable, it would have to take account of the fact that the Commission's competence in any event ran counter to the parallel powers under the European Competition Network Notice under Regulation No 1/2003.⁽¹⁾ Finally, the General

Court has disregarded the fact that the subsequent initiation of the proceeding by the Commission constitutes an infringement of the legally protected principle of legal certainty and legality as regards penalties.

Second, the General Court has disregarded the fact that there is infringement of the principle *ne bis in idem*, since the Commission failed to comply with the amnesty decisions of national cartel authorities in favour of the appellant taken before proceedings were instituted.

Third, the appellant alleges that the General Court has erred in law by confirming the Commission decision which held the appellant to be jointly liable with its subsidiaries. It cannot be disputed that the appellant did not itself participate in the infringements. An attribution of third-party acts on the basis of the incorrect premiss of the liability of the economic unit infringes the principle of personal liability, the principle of *in dubio pro reo* and the right to a fair trial.

Fourth, the General Court has erred in law by disregarding the fact that the confirmation of the appellant's joint and several liability infringes the principle of personal liability. In the alternative, the appellant alleges that the General Court has unlawfully confirmed the Commission decision as regards the lack of liability allocation within the group and the judgment is thus vitiated by a defect in reasoning.

Fifth, the appellant claims that, in its judgment, the General Court has infringed its comprehensive and legally imposed duty of investigation, in that it examined only to an insufficient degree the disproportionality of the fixing of the basic amount of the fines, the deterrence multiplier, the repeated imposition of fines for parallel infringements and the insufficiently high evaluation of the cooperation of the appellants by the Commission and thus infringed the fundamental right to a fair trial and the guarantee of legal protection included therein. In any event, the judgment is vitiated by a defect of reasoning, in that it confirms the repeated imposition of fines which departs from the Commission's decision-making practice.

Sixth, it is alleged that the principle of proportionality and that of equal treatment have been infringed as regards the fixing of the starting amount of the fines for the infringement concerning Germany, because unconnected turnover was included in the starting amount for calculation of the fines, despite the fact that there were compelling grounds against it. The General Court has thus applied an appropriately differentiated basis to Schindler, but erred in law by failing to apply that differentiation to the appellant.

⁽¹⁾ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1).