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JUDGMENT OF THE COURT (Tenth Chamber)

24 October 2013 (*)

(Appeal – Competition – Agreements, decisions and concerted practices – Market for the installation and maintenance of elevators and escalators – Fines – Notice on immunity from fines and reduction of fines in cartel cases – Effective judicial remedy)

In Case C-510/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 23 September 2011,

Kone Oyj, established in Helsinki (Finland),**Kone GmbH**, established in Hanover (Germany),**Kone BV**, established in The Hague (Netherlands),

represented by T. Vinje, Solicitor, D. Paemen, avocat, and A. Tomtsis, dikigoros,

appellants,

the other party to the proceedings being:

European Commission, represented by E. Gippini Fournier and R. Sauer, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Tenth Chamber),

composed of A. Rosas (Rapporteur), acting as President of the Tenth Chamber, D. Šváby and C. Vajda, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 March 2013,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

By their appeal, Kone Oyj, Kone GmbH and Kone BV (together referred to as 'the Kone group' or 'the appellants') seek to have set aside the judgment of the General Court of the European Union of 13 July 2011 in Case T-151/07 *Kone and Others v Commission* [2011] ECR II-5313 ('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 summary 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 fines imposed on them.

Legal framework*Regulation (EC) No 1/2003*

Under Article 23(2)(a) 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), the European Commission may by decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 81 EC or Article 82 EC.

In accordance with Article 31 of Regulation No 1/2003, the Court of Justice is to 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.

The 2002 Leniency Notice

The Commission Notice on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) ('the 2002 Leniency Notice') sets out the conditions under which undertakings cooperating with the Commission during an investigation it is carrying out into a cartel may be exempted from fines, or may be granted reductions in any fine which would otherwise have been imposed on them.

Points 8 to 12 of the 2002 Leniency Notice, which are in Section A thereof, headed 'Immunity from Fines', state: '8. The Commission will grant an undertaking immunity from any fine which would otherwise have been imposed

if:

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

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

Immunity pursuant to point 8(a) will only be granted on the condition that the Commission did not have, at the time of the submission, sufficient evidence to adopt a decision to carry out an investigation in the sense of Article 14(3) of Regulation No 17 in connection with the alleged cartel.

Immunity pursuant to point 8(b) will only be granted on the cumulative conditions that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement of Article 81 EC in connection with the alleged cartel and that no undertaking had been granted conditional immunity from fines under point 8(a) in connection with the alleged cartel.

In addition to the conditions set out in points 8(a) and 9 or in points 8(b) and 10, as appropriate, the following cumulative conditions must be met in any case to qualify for any immunity from a fine:

the undertaking cooperates fully, on a continuous basis and expeditiously throughout the Commission's administrative procedure and provides the Commission with all evidence that comes into its possession or is available to it relating to the suspected infringement. In particular, it remains at the Commission's disposal to answer swiftly any request that may contribute to the establishment of the facts concerned;

the undertaking ends its involvement in the suspected infringement no later than the time at which it submits evidence under points 8(a) or 8(b), as appropriate;

the undertaking did not take steps to coerce other undertakings to participate in the infringement.

...

An undertaking wishing to apply for immunity from fines should contact the Commission's Directorate-General for Competition. Should it become apparent that the requirements set out in points 8 to 10, as appropriate, are not met, the undertaking will immediately be informed that immunity from fines is not available for the suspected infringement.

Once the Commission has received the evidence submitted by the undertaking under point 13(a) and has verified that it meets the conditions set out in points 8(a) or 8(b), as appropriate, it will grant the undertaking conditional immunity from fines in writing.'

Points 20 to 23 of the 2002 Leniency Notice, which are in Section B thereof, headed 'Reduction of a fine', provide:

Undertakings that do not meet the conditions under section A above may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.

In order to qualify, an undertaking must provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession and must terminate its involvement in the suspected infringement no later than the time at which it submits the evidence.

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

The Commission will determine in any final decision adopted at the end of the administrative procedure:

whether the evidence provided by an undertaking represented significant added value with respect to the evidence in the Commission's possession at that same time;

the level of reduction an undertaking will benefit from, relative to the fine which would otherwise have been imposed, as follows. For the:

first undertaking to meet point 21: a reduction of 30-50%,

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

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

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

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

Point 29 of the 2002 Leniency Notice provides:

'The Commission is aware that this notice will create legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission.'

Background to the dispute and the decision at issue

Kone Oyj is a global service and engineering undertaking, established in Finland, which sells, manufactures, installs, maintains and modernises elevators and escalators and services automatic building doors. Kone Oyj operates through its national subsidiaries, such as Kone GmbH in Germany and Kone BV in the Netherlands.

In the summer of 2003, the Commission received information 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, Schindler SA, Schindler Deutschland Holding GmbH, Schindler Sàrl, Schindler Liften BV, Schindler Holding Ltd as well as ThyssenKrupp Liften Ascenseurs NV, ThyssenKrupp Aufzüge GmbH, ThyssenKrupp Fahrtreppen GmbH, ThyssenKrupp Elevator AG, ThyssenKrupp AG, ThyssenKrupp Ascenseurs Luxembourg Sàrl and ThyssenKrupp Liften BV (together referred to as 'the ThyssenKrupp group'). Early in 2004, the Commission carried out inspections at the premises of those undertakings in Belgium, Germany, Luxembourg and the Netherlands.

Leniency applications were made by those undertakings. On 2 February 2004 the Kone group submitted such an application under point 8(b) of the 2002 Leniency Notice, which included information concerning Belgium and which it subsequently supplemented with, inter alia, information concerning Germany (on 12 and 14 February 2004) and information concerning the Netherlands (on 19 July 2004).

In the decision at issue, the Commission found that the undertakings mentioned in paragraph 9 of the present judgment together with Mitsubishi Elevator Europe BV had participated in four single, complex and continuous infringements of Article 81 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.

The Kone group was granted immunity from fines in respect of the infringements in Belgium and Luxembourg. However, under Article 2(2) and (4) of the decision at issue, so far as the infringements in Germany and the Netherlands were concerned, fines of EUR 62 370 000 and EUR 79 750 000 respectively were imposed jointly and severally on Kone Oyj and its national subsidiaries.

Proceedings before the General Court and the judgment under appeal

By application lodged at the Registry of the General Court on 8 May 2007, the Kone group brought an action challenging (i) the legality of Article 2(2) of the decision at issue, which imposed fines on the undertakings concerned for the infringements in Germany, and (ii) the legality of Article 2(4) of that decision, which imposed fines on the undertakings concerned for the infringements in the Netherlands.

In support of the action, the Kone group put forward three pleas in law. Those pleas alleged (i) infringement of the Commission 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) and breach of the principle of proportionality in the setting of the starting amounts of the fines, (ii) infringement of the 2002 Leniency Notice and of the principles of the protection of legitimate expectations, equal treatment and the rights of the defence and (iii) infringement of the principles of the protection of legitimate expectations and equal treatment on the occasion of the calculation of the reduction of the fines granted for cooperation outside the framework of the 2002 Leniency Notice.

By the judgment under appeal, the General Court dismissed that action and ordered the Kone group to pay the costs.

Forms of order sought

The appellants claim that the Court should:

set aside the judgment under appeal;

annul Article 2(2) of the decision at issue in so far as it imposes a fine on Kone Oyj and Kone GmbH, and impose either no fine or a fine at a lower amount than determined in that decision;

annul Article 2(4) of the decision at issue in so far as it imposes a fine on Kone Oyj and Kone BV, and set the fine at a lower amount than determined in that decision; and

order the Commission to pay the costs.

The Commission contends that the Court of Justice should:

dismiss the appeal; and

order the appellants to pay the costs.

The appeal

The appellants raise six grounds of appeal in support of the form of order sought, which allege (i) misinterpretation of point 8(b) of the 2002 Leniency Notice, (ii) misinterpretation of point 8(a) of that notice, (iii) infringement of the principle of the protection of legitimate expectations, (iv) misinterpretation of points 21 to 23 of the 2002 Leniency Notice, (v) infringement of the principle of equal treatment and (vi) infringement of the right to a fair trial, as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter') and Article 6 of the European Convention on the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR').

The appellants maintain, in several of their grounds of appeal, that the review carried out by the General Court in the judgment under appeal was marginal and cannot be regarded as a 'full review'. In order to address this

criticism, which is made in relation to a number of the grounds of appeal, it is appropriate to recall, before going on to consider those grounds, the underlying principles of both the review of legality carried out by the European Union judiciary and the unlimited jurisdiction which the latter is afforded in certain circumstances.

Preliminary considerations

The principle of effective judicial protection is a general principle of European Union (EU) law to which expression is now given by Article 47 of the Charter and which corresponds, in EU law, to Article 6(1) of the ECHR (see, *inter alia*, Case C-501/11 P *Schindler Holding and Others v Commission* [2013] ECR I-0000, paragraph 36 and the case-law cited).

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 EU law (see Case C-571/10 *Kamberaj* [2012] ECR I-0000, paragraph 62, and Case C-617/10 *Åkerberg Fransson* [2013] ECR I-0000, paragraph 44).

As the Court of Justice has already observed in paragraph 35 of *Schindler Holding and Others v Commission*, the European Court of Human Rights has held 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. According to the European Court of Human Rights, compliance with that provision requires, however, that decisions taken by administrative authorities which do not themselves satisfy the requirements laid down in Article 6(1) of the ECHR be subject to subsequent review by a judicial body that has full jurisdiction. The characteristics of such a body include, according to the same judgment of the European Court of Human Rights, 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 (judgment of the European Court of Human Rights in *A. Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08, 27 September 2011, § 59).

Ruling on the principle of effective judicial protection, a general principle of EU law to which expression is now given by Article 47 of the Charter, the Court of Justice has held that, in addition to the review of legality provided for by the FEU Treaty, the European Union judiciary 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 (Case C-386/10 P *Chalkor v Commission* [2011] ECR I-0000, paragraph 63, and *Schindler Holding and Others v Commission*, paragraph 36).

As regards the review of legality, the Court has pointed out that the European Union judiciary 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 2002 Leniency Notice 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 (see, to that effect, *Schindler Holding and Others v Commission*, paragraphs 37 and 155 and the case-law cited).

As the review provided for by the Treaties involves review by the European Union judiciary of both the law and the facts, and means that it has the power to assess the evidence, to annul the decision at issue 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 (*Schindler Holding and Others v Commission*, paragraph 38, and, to that effect, Case C-272/09 P *KME Germany and Others v Commission* [2011] ECR I-0000, paragraph 106; *Chalkor v Commission*, paragraph 67, and Case C-199/11 *Otis and Others* [2012] ECR I-0000, paragraph 63).

It should also be recalled that the analysis by the European Union judiciary of the pleas in law raised in an action for annulment has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure. As such a limitation of judicial review is, however, inherent in the notion of the review of legality, it cannot be understood as unduly limiting the review of legality which the European Union judiciary is authorised to carry out (see, to that effect, Case C-399/08 P *Commission v Deutsche Post* [2010] ECR I-7831, paragraph 84 and the case-law cited).

Indeed, when it falls to the European Union judiciary to review the legality of Commission decisions imposing fines for infringements of the EU competition rules, it cannot encroach upon the discretion available to the Commission in the administrative proceedings by substituting its own assessment of complex economic circumstances for that of the Commission, but, where relevant, must demonstrate that the way in which the Commission reached its conclusions was not justified in law (see, to that effect, Case C-441/07 P *Commission v Alrosa* [2010] ECR I-5949, paragraph 67).

In that regard, whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must

refrain from reviewing the Commission's interpretation of information of an economic nature. Those Courts must, among other things, not only establish whether the evidence relied on is factually accurate, reliable and consistent but also ascertain whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, paragraph 39; Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947, paragraphs 56 and 57; *Chalkor v Commission*, paragraph 54, and *Otis and Others*, paragraph 59).

Moreover, although the 2002 Leniency Notice sets out 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, by analogy, *Schindler Holding and Others v Commission*, paragraph 67 and the case-law cited), the fact remains that that notice does not affect the intensity of the review which the Courts of the European Union must carry out in accordance with paragraph 28 of the present judgment.

It should, however, be borne in mind that proceedings before the Courts of the European Union are *inter partes*. With the exception of grounds involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas (see, to that effect, *KME Germany and Others v Commission*, paragraph 104, and *Chalkor v Commission*, paragraph 64).

That requirement, which is procedural in nature, does not conflict with the rule that, in the case of infringements of the competition rules, it is for the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement. What the applicant is required to do in the context of a legal challenge is to identify the impugned elements of the contested decision, to formulate grounds of challenge in that regard and to adduce evidence – direct or circumstantial – to demonstrate that its objections are well founded (*KME Germany and Others v Commission*, paragraph 105, and *Chalkor v Commission*, paragraph 65).

Moreover, the failure to review the whole of the contested decision of the court's own motion does not contravene the principle of effective judicial protection. Compliance with that principle does not require that the General Court – which is indeed obliged to respond to the pleas in law raised and to carry out a review of both the law and the facts – should be obliged to undertake of its own motion a new and comprehensive investigation of the file (*KME Germany and Others v Commission*, paragraph 106, and *Chalkor v Commission*, paragraph 66).

It is in the light of that review of the case-law that it is appropriate to analyse the grounds of appeal put forward by the appellants in the present proceedings and to consider, in relation to those grounds, the review carried out by the General Court in the judgment under appeal.

Sixth ground of appeal: infringement of the right to a fair trial

Arguments of the parties

By their sixth ground of appeal, which it is appropriate to consider first, the appellants take issue with paragraphs 10 to 23, 29 to 37, 80, 82 to 85 and 95 of the judgment under appeal. They also refer, in the reply, to paragraphs 99 to 101, 104, 105, 114, 117 and 155 of that judgment. They complain that the General Court failed in its duty fully to review Commission decisions – both in the standard of review that it applied, and in the way that standard was applied. In their submission, the General Court deferred completely to the Commission's analysis and, so far as their cooperation was concerned, incorrectly took the view that complex factual and economic assessments were involved and that the review which it could carry out in that regard was therefore very limited. Furthermore, in the reply, while criticising the General Court for having infringed their right to a fair trial, the appellants complain that it rejected their plea alleging infringement of the rights of the defence without examining the documents to which the Kone group had requested access. Thus, so the appellants argue, the General Court failed to respect their right to a fair trial, as guaranteed by Article 47 of the Charter and Article 6 of the ECHR.

The Commission contends that the appellants do not indicate where precisely in the judgment under appeal the General Court unduly deferred to the Commission's discretion or failed to review the law and the facts. Since none of the paragraphs of that judgment to which the appellants refer constitutes a response to the pleas in law relied on or, *a fortiori*, the necessary basis for the operative part of that judgment, the Commission submits that the sixth ground of appeal should be rejected.

Findings of the Court

As regards the argument which the appellants put forward in the reply, according to which the General Court should have examined certain Commission documents before reaching the conclusions contained in paragraphs 114, 117 and 155 of the judgment under appeal, it should be observed at the outset that, as is clear from Articles 42(2) and 118 of the Rules of Procedure of the Court of Justice in the version applicable on the date on which the present appeal was brought, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

In order for such an argument to be admissible at the stage of the reply, the appellants should have established in what respect it was based on matters of fact which have come to light in the course of these proceedings (see, to that effect, Case C-219/95 P *Ferriere Nord v Commission* [1997] ECR I-4411, paragraph 56). Since the appellants have adduced no evidence of this, the argument must be regarded as inadmissible.

As regards the other arguments raised in the sixth ground of appeal, the appellants assert, in essence, that the

General Court did not exercise its unlimited jurisdiction when reviewing the legality of the decision at issue and that it thus infringed their right to a 'fair trial'.

The sixth ground of appeal should be understood as being directed at, in the first place, the statements made by the General Court concerning the scope of the Commission's margin of assessment and, in the second place, the review in fact carried out by the General Court with regard to the decision at issue, having regard to its definition of that margin of assessment.

As regards the principles set out by the General Court in the judgment under appeal, concerning the Commission's margin of assessment, the General Court stated, in particular in paragraph 85 of that judgment, that '[i]n view of the margin of assessment available to the Commission in evaluating the cooperation of an undertaking under the 2002 Leniency Notice, it is only where it manifestly goes beyond the bounds of that margin that it may be criticised by the General Court'. Similarly, the General Court stated, in paragraph 95 of the judgment, that '[it] must consider, in the present case, whether the Commission manifestly went beyond the bounds of [its] margin of assessment'.

In that regard, it should be noted that, by the sixth ground of appeal, the appellants merely criticise an abstract description of the applicable rules of law set out by the General Court in paragraphs 85 and 95 of the judgment under appeal.

It is true that, as can be seen from the case-law of the Court of Justice referred to in particular in paragraph 24 of the present judgment, the General Court cannot use the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the 2002 Leniency Notice 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.

However, for the purposes of determining whether the General Court failed to comply with the requirements stemming from that line of case-law, account is not to be taken of the abstract and declaratory descriptions of judicial review in paragraphs 85 and 95 of the judgment under appeal, given that what matters is the criterion that the General Court in fact applied in the specific examination of the added value represented by the cooperation of the undertakings in question with the Commission (see, to that effect, *Schindler Holding and Others v Commission*, paragraph 156).

While it cannot be denied that that description of judicial review is not consonant with the case-law referred to inter alia in paragraph 24 of the present judgment, the fact remains that, by their sixth ground of appeal, the appellants in no way criticise the review which the General Court in fact carried out in respect of the decision at issue. Therefore that line of criticism is not on its own a sufficient substantiation of the present ground of appeal, which is, consequently, ineffective.

However, in its consideration below of the other grounds of appeal, the Court will also examine, where appropriate, the question as to whether the review in fact carried out by the General Court in the judgment under appeal meets the requirements of a fair trial, in the light in particular of the case-law of the Court of Justice set out in paragraphs 20 to 32 of the present judgment.

First ground of appeal: misinterpretation of point 8(b) of the 2002 Leniency Notice

Arguments of the parties

By their first ground of appeal, the appellants criticise paragraphs 88, 98 to 101 and 105 of the judgment under appeal. They complain that the General Court misinterpreted the wording of point 8(b) of the 2002 Leniency Notice when it held that, for a grant of immunity from fines under that provision, the evidence provided by undertakings must be incriminating and contemporaneous and in itself enable the Commission to find an infringement and must be such that the Commission can rely on it without reference to any other evidence in finding the infringement. The General Court allowed the Commission an unduly broad margin of assessment in respect of the provision, in particular in relation to the words 'in the Commission's view', in that it did not undertake even a limited review of the Commission's evaluation of the evidence.

The Commission contends that the appellants' interpretation of the 2002 Leniency Notice is incorrect and that the General Court did not make an error of law in the interpretation thereof. It submits that the first ground of appeal is inadmissible as to the remainder, given that it seeks to challenge the probative value of the evidence, although the appellants do not maintain that the General Court distorted the true sense of the evidence.

Findings of the Court

It should be noted, first, that the present ground of appeal is based on a misreading of the judgment under appeal in so far as the appellants maintain that the General Court found that the evidence provided must be such that the Commission may rely on that evidence without reference to any other evidence in finding the infringement.

The General Court stated, in particular in paragraph 94 of the judgment under appeal, that '[a]lthough it is not necessary for the evidence provided to be sufficient to prove the infringement in its entirety or down to its every last detail, the evidence must none the less be sufficient in nature, precision and probative value to enable the Commission to find an infringement of Article 81 EC'. Thus, the appellants' argument must be rejected as unfounded.

Secondly, as regards the argument that the General Court erred in law in stating that the evidence provided by undertakings must be incriminating and contemporaneous, it must be recalled that the General Court held, in

particular in paragraph 100 of the judgment under appeal, that the probative value of the evidence provided by the Kone group was limited because either it had been drawn up by the Kone group for the purposes of its application under the 2002 Leniency Notice and was not contemporaneous with the infringement or it was not, in itself, such as to enable the Commission to find an infringement.

In that regard, it is clear from point 8(b) of the 2002 Leniency Notice that, if it is to be granted immunity from fines under the notice, the undertaking concerned must submit to the Commission evidence which in the Commission's view may enable it to find an infringement.

Whether evidence is such as to allow a finding of infringement entails an assessment of the value represented by the evidence concerned. When the General Court assessed, in paragraph 100 of the judgment under appeal, the probative value of the evidence provided by the Kone group and considered that value to be limited, it did not make an error of law in reaching that conclusion on the basis of the criterion that it adopted for the purposes of that appraisal.

Thirdly, as regards the Commission's margin of assessment under point 8(b) of the 2002 Leniency Notice, it is necessary to refer to the observation made in paragraph 51 of the present judgment that, under that notice, it is for the Commission to decide whether the evidence provided is such that it enables it to find the infringement.

Although, as the 2002 Leniency Notice also states, the Commission has a discretion for that purpose, it is the task of the European Union judicature, as has been recalled in paragraph 24 of the present judgment, to carry out its review of legality, without using the Commission's margin of discretion – either as regards the choice of factors taken into account in the application of the 2002 Leniency Notice 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.

However, it should be noted, in that regard, that the General Court carried out a detailed analysis, in paragraphs 96 to 101 of the judgment under appeal, of the value represented by the evidence provided by the appellants.

Even though the General Court referred on a number of occasions, in particular in paragraphs 95 and 103 of the judgment under appeal, to whether the Commission had 'manifestly' gone beyond the bounds of its margin of assessment, such references did not prevent the General Court from carrying out the full and unrestricted review, in law and in fact, required of it (see, to that effect, *inter alia*, *Chalkor v Commission*, paragraph 82).

It follows from all of the foregoing considerations that the first ground of appeal must be rejected as unfounded.

Second ground of appeal: misinterpretation of point 8(a) of the 2002 Leniency Notice

Arguments of the parties

By their second ground of appeal, the appellants criticise paragraphs 111 to 117 of the judgment under appeal. They complain that the General Court, in the first place, erred in law in holding that the Kone group could not, so far as the infringement in Germany was concerned, be granted immunity from fines under point 8(a) of the 2002 Leniency Notice because the Commission was already in possession of evidence enabling it to adopt a decision of the kind referred to in that provision, when that was not the case. In the second place, the appellants maintain that the General Court erred in law in regarding as relevant the fact that the Kone group had made its leniency application concerning the infringement in Germany only on the basis of point 8(b) of the 2002 Leniency Notice, and not under point 8(a), since that application had been submitted as a supplement to the Kone group's application concerning the infringement in Belgium, which had been made under point 8(b) of the notice. The appellants argue that, while it was the duty of the Commission to qualify the evidence put forward and to interpret the notice in favour of the Kone group in accordance with the principle of good administration, thus assessing its application under point 8(a) as well, the General Court erred in law in failing to review the Commission's application of EU law and of the 2002 Leniency Notice in this regard.

According to the Commission, the only question which arose for the purposes of determining whether the conditions for a grant of immunity under point 8(a) of the 2002 Leniency Notice were met in the present case was whether, at the time the Kone group made its leniency application, the Commission had sufficient evidence to adopt a decision to carry out an inspection in Germany in connection with an alleged cartel affecting the European Union. In that regard, the Commission contends that the General Court did not make an error in its interpretation of point 8(a) and submits that the fact that the General Court's own independent interpretation coincides with that of the Commission does not make that interpretation wrong. At the hearing before the Court of Justice, the Commission stated, in response to a question put by the Court, that it is not obliged to consider on its own initiative whether the conditions for a grant of immunity under point 8(a) of the 2002 Leniency Notice are met when an application for immunity has been made only under point 8(b) of the notice.

Findings of the Court

As regards proceedings before the European Union judicature, it should be recalled, as a preliminary point, that the General Court has exclusive jurisdiction to find and assess the facts and, in principle, to examine the evidence which it accepts in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, *inter alia*, Case C-551/03 P *General Motors v Commission* [2006] ECR I-3173, paragraph 52, and Case C-535/06 P *Moser Baer India v Council* [2009]

ECR I-7051, paragraph 32 and the case-law cited).

It is also important to point out that an appeal is inadmissible in so far as it simply repeats the pleas in law and arguments already put forward before the General Court, including those based on facts expressly rejected by the latter, without even including an argument specifically identifying the error of law allegedly vitiating the judgment of the General Court. Such an appeal amounts in reality to no more than a request for re-examination of the application submitted to the General Court, which the Court of Justice does not have jurisdiction to undertake on appeal (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others v Commission* [2004] ECR I-123, paragraph 51 and the case-law cited).

By contrast, provided that an appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (Case C-229/05 P *PKK and KNK v Council* [2007] ECR I-439, paragraph 32 and the case-law cited, and judgment of 30 May 2013 in Case C-70/12 *Quinn Barlo and Others v Commission*, paragraph 27).

With regard, first, to the argument that the General Court erred in law in holding that the Kone group was not entitled to immunity from fines under point 8(a) of the 2002 Leniency Notice because the Commission was already in possession of evidence enabling it to adopt a decision of the kind referred to in that provision, it must be held that, although the appellants describe this argument as one relating to a point of law, it ultimately amounts to calling in question the General Court's assessment of the facts and evidence produced before it, as regards, in particular, the information which the Commission had at the time the Kone group made its application for immunity from fines in respect of the infringement in Germany.

It should be noted that the appellants do not claim that the facts or the evidence was distorted. Rather, in contending that the information held by the Commission was not sufficient, they merely maintain that the General Court erred in law.

Such an assessment, based on facts, is not open to challenge in an appeal (see, inter alia, Case C-328/05 P *SGL Carbon v Commission* [2007] ECR I-3921, paragraph 86). The appellants' argument must therefore be rejected as inadmissible.

The appellants also maintain that the General Court made an error of law in accepting, inter alia in paragraph 113 of the judgment under appeal, that, solely because the Kone group had not enabled the Commission to 'detect' the infringement in Germany, it could not claim to be entitled to immunity from fines under point 8(a) of the 2002 Leniency Notice; such an interpretation does not, in the appellants' submission, accord with the notice.

In that regard, contrary to what is maintained by the appellants, point 8(a) of the 2002 Leniency Notice, read in the light of point 6 thereof, lends itself to an interpretation whereby information enabling the Commission to detect a cartel has an intrinsic value. Moreover, the General Court made the statement in question only after finding, in paragraph 112 of the judgment under appeal, that the Commission had already carried out inspections in Germany at the time the Kone group submitted its application concerning Germany. Given that the General Court has already made a finding of fact in that regard and that it is not for the Court of Justice to review that finding in an appeal, the General Court's subsequent statement that the Kone group had not enabled the Commission to detect the cartel in Germany is only the consequence following from its previous characterisation of the factual situation. This argument must therefore be rejected.

As regards, next, the argument that the General Court erred in law in holding that the Commission was entitled to reject the Kone group's application under point 8(a) of the 2002 Leniency Notice on the basis that the group had submitted an application for immunity only under point 8(b) of the notice, it is to be observed that the General Court considered that contention, without approving it, in paragraph 114 of the judgment under appeal. However, it did so only for the sake of completeness, having already previously concluded, in particular in paragraph 113 of the judgment under appeal, that the Kone group was not entitled to immunity from fines under point 8(a) of the 2002 Leniency Notice, given that the information provided by it had not enabled the Commission to detect the cartel in Germany.

That is therefore an argument directed against a ground included in the judgment under appeal purely for the sake of completeness which cannot lead to the judgment being set aside and is thus ineffective (see, in particular, 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 148).

Finally, the appellants complain that the General Court erred in law in failing to review the Commission's application of point 8 of the 2002 Leniency Notice. They argue that in that application the Commission did not adopt an interpretation in favour of the Kone group as it should have done on the basis of the principle of good administration, as it results in particular from Article 41 of the Charter, and did not examine the Kone group's application for immunity from fines, not only under point 8(b) of the Leniency Notice, but also under point 8(a) thereof.

However, it does not appear from the application which the appellants lodged before the General Court that they raised that argument before it. Nor does the General Court refer to such an argument in the judgment under

appeal.

In that regard, according to settled case-law, to allow a party to put forward for the first time before the Court of Justice a plea and arguments which it did not raise before the General Court would be to authorise it to bring before the Court of Justice, whose jurisdiction in appeals is limited, a case of wider ambit than that which came before the General Court. In an appeal, the jurisdiction of the Court of Justice is thus confined to examining the assessment by the General Court of the pleas argued before it (see, to that effect, *Dansk Rørindustri and Others v Commission*, paragraph 165, and Joined Cases C-514/07 P, C-528/07 P and C-532/07 P *Sweden and Others v API and Commission* [2010] ECR I-8533, paragraph 126). That argument must therefore be rejected as inadmissible.

Consequently, the second ground of appeal should be rejected as in part inadmissible and in part ineffective.

Third ground of appeal: infringement of the principle of the protection of legitimate expectations

Arguments of the parties

By their third ground of appeal, the appellants criticise paragraphs 129 to 131 of the judgment under appeal. They maintain that the General Court erred in law in finding that the Commission did not breach their legitimate expectations by failing to inform them in a timely manner that immunity from fines was not available. Although the application for immunity was submitted to the Commission on 12 February 2004 and was supplemented on 18 February 2004, the Commission informed the Kone group of its refusal only on 29 June 2004, whilst, according to the appellants, it should, under the 2002 Leniency Notice, have done so immediately.

The Commission contends that this ground of appeal is clearly unfounded, given that the Kone group did not have any precise assurance from the Commission so far as a grant of immunity from fines was concerned, and that, in any event, in this case the period of time that elapsed was not excessive.

Findings of the Court

According to the Court's settled case-law, the principle of the protection of legitimate expectations is among the fundamental principles of EU law and any economic operator whom an institution has, by giving him precise assurances, caused to entertain justified expectations may rely on that principle (see, to that effect, Case C-369/09 P *ISD Polska and Others v Commission* [2011] ECR I-2011, paragraphs 122 and 123, and Case C-335/09 P *Poland v Commission* [2012] ECR I-0000, paragraph 180).

In that regard, it is appropriate to reiterate the observation made by the General Court in paragraph 130 of the judgment under appeal that point 15 of the 2002 Leniency Notice explicitly states that the Commission will grant an undertaking conditional immunity from fines in writing.

Furthermore, the Court has already had occasion to explain that the Commission cannot, in the phase of the procedure prior to the adoption of the final decision, give any precise assurance as to any reduction of, or immunity from, fines (see, to that effect, Case C-511/06 P *Archer Daniels Midland v Commission* [2009] ECR I-5843, paragraph 118). Thus, the General Court was correct in concluding that the appellants could not entertain a legitimate expectation in that regard.

Consequently, the third ground of appeal must be rejected as unfounded.

Fourth ground of appeal: misinterpretation of points 21 to 23 of the 2002 Leniency Notice

Arguments of the parties

By their fourth ground of appeal, the appellants criticise paragraphs 165, 168, 169, 171, 173, 176, 179 and 180 of the judgment under appeal. They complain that the General Court erred in law in relying, in its assessment of the value of the information provided by the Kone group to the Commission, entirely on the appellants' characterisation of that information when it should have determined the value of that information not in the light of that characterisation but on the basis of the objective value of the information. In its assessment of the added value represented by that information, the General Court should have appraised the value of the information by reference to the criteria set out in points 21 and 22 of the 2002 Leniency Notice. The appellants submit that the General Court also erred in law in failing to recognise the distinction between, on the one hand, points 21 and 22 of the notice, which concern the actual entitlement to a reduction of the fine and, on the other, point 23 of the notice, which concerns the level of cooperation provided by the undertaking concerned.

The Commission contends that the distinction drawn by the appellants between points 21 and 22 of the 2002 Leniency Notice, on the one hand, and point 23 of the notice, on the other, is artificial. It submits that the fourth ground of appeal is clearly inadmissible inasmuch as the appellants are asking the Court of Justice to substitute its own assessment of the probative value of the evidence for that of the General Court. In any event, the General Court did look at the nature and level of detail of the alleged information provided by Kone as part of its assessment of the probative value of the evidence.

Findings of the Court

As has been observed in paragraph 60 of the present judgment, the Court of Justice does not have jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. It is, however, for the Court of Justice to ascertain whether the General Court, in its assessment of the facts and evidence, made an error of law.

In that regard, it should first be observed that, although a contention such as that contained in the fourth ground of appeal – according to which the General Court misinterpreted the wording of the 2002 Leniency Notice – may

have an impact on the findings of fact made by the General Court, it is, contrary to what is maintained by the Commission, a point of law amenable, as such, to review by the Court of Justice (see, to that effect, *Quinn Barlo and Others v Commission*, paragraph 37).

Next, it should be recalled that, under Article 23(2) of Regulation No 1/2003, the Commission has the power to impose fines on undertakings for infringements of the European Union competition rules. In the context of its general competition policy, the Commission has adopted, among other measures, the 2002 Leniency Notice, which sets out the conditions under which an undertaking may be granted – on account of its cooperation with the Commission – an exemption from fines or a reduction of the fines imposed, with a view to ensuring that such exemptions or reductions are granted in conditions of increased transparency and certainty.

In so far as the 2002 Leniency Notice describes the criteria that the Commission requires to be taken into account in assessing an undertaking's cooperation, the notice sets out 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, by analogy, *Schindler Holding and Others v Commission*, paragraph 67 and the case-law cited).

It is apparent from points 20 to 22 of the 2002 Leniency Notice, in particular, that the undertakings at which those provisions are directed may be eligible to benefit from a reduction of any fine which would otherwise have been imposed when they provide the Commission with evidence of the suspected infringement which represents significant added value with respect to the evidence already in the Commission's possession, the concept of 'added value' referring in particular to 'the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question'.

The appellants' argument that the General Court relied solely on their characterisation of the information provided to the Commission is based on a misreading of the judgment under appeal.

After first correctly outlining the notion of 'added value', as it follows from point 22 of the 2002 Leniency Notice, the General Court went on, in paragraph 165 of the judgment under appeal, to consider the value of the evidence provided by the Kone group from the point of view of its very nature and, in paragraph 166 et seq. of that judgment, its level of detail. In addition, the General Court noted, in paragraphs 165 and 168 of the judgment, in particular, that the information submitted by the Kone group denied that the discussions between competitors had an anti-competitive purpose and, in paragraph 169 of the judgment, that the information had, therefore, tended to reduce the probative value of the evidence which the Commission already had. Finally, in paragraphs 171, 173 and 176 of the judgment under appeal, the General Court set out in detail the reasons why the information which the appellants had provided to the Commission was not sufficiently detailed to be regarded as representing significant added value.

As regards the appellants' argument that the General Court erred in law in its interpretation of points 21 to 23 of the 2002 Leniency Notice in failing to recognise the distinction between, on the one hand, points 21 and 22 of the notice, which concern the actual entitlement to a reduction of the fine, and, on the other, point 23 thereof, which relates to the level of cooperation provided by the undertaking concerned, the appellants' reading of those points, which all form part of Section B of the notice, which is headed 'Reduction of a fine', is incorrect.

While point 21 of the 2002 Leniency Notice makes clear that, in order to qualify for reduction of the fine, undertakings must provide information which represents significant added value, point 22 explains, inter alia, the notion of added value. Point 23 of the notice states that the Commission will determine in its decisions, first, whether the information provided represents significant added value and, second, the level of reduction of the fine from which the undertaking concerned will benefit, that level being established according to the reduction bands specified in point 23; finally, point 23 sets out the criteria for determining that level of reduction within those bands.

In that regard, as the Commission submits in the response, the criteria set out in point 23 of the 2002 Leniency Notice for determining the level of reduction of the fine from which an undertaking may benefit are an aspect of the analysis of the notion of the significant added value which undertakings seeking to benefit from such a reduction must provide. The General Court therefore did not err in law when, in the judgment under appeal, it did not analyse the appellants' cooperation in the way they describe in the fourth plea.

Finally, when the General Court stated, in paragraph 179 of the judgment under appeal, that the Commission '[had] not on any view manifestly [gone] beyond the bounds of its margin of assessment in concluding that that evidence did not represent significant added value within the meaning of point 21 of the 2002 Leniency Notice', it is to be observed that, whilst that finding is not consonant with the case-law referred to inter alia in paragraph 24 of the present judgment, the General Court made it only for the sake of completeness and consequently that finding cannot lead to the judgment under appeal being set aside.

In any event, even though the General Court referred, in paragraph 179 of the judgment under appeal, to the question whether the Commission 'manifestly' went beyond the bounds of its margin of assessment, the reference to such a question did not prevent the General Court, as can be seen in particular from paragraph 88 of the present judgment, from carrying out the full and unrestricted review, in law and in fact, required of it (see, to that effect, inter alia, *Chalkor v Commission*, paragraph 82).

Consequently, the fourth ground of appeal must be rejected as unfounded.

Fifth ground of appeal: infringement of the principle of equal treatment

Arguments of the parties

By their fifth ground of appeal, the appellants criticise paragraphs 108 and 192 to 197 of the judgment under appeal. They complain that the General Court breached the principle of equal treatment in failing to conduct an assessment of the value added by the Kone group's leniency application concerning the infringement in the Netherlands as compared with the value added by the ThyssenKrupp group's leniency application concerning the infringement in Belgium.

The Commission contends that this ground of appeal is clearly unfounded, given that information connected with separate infringements is not comparable and asserts that, in any event, the General Court conducted an analysis which showed that the Kone group's leniency submission concerning the infringement in the Netherlands did not represent significant added value.

Findings of the Court

The principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and that different situations must not be treated in the same way, unless such treatment is objectively justified (see, to that effect, *inter alia*, Case C-127/07 *Arcelor Atlantique and Lorraine and Others* [2008] ECR I-9895, paragraph 23 and the case-law cited).

The appellants complain in essence that the General Court did not fulfil its obligation to exercise its power of review with regard to the added value represented by the information provided by the Kone group in its leniency application.

In that regard, as has been observed in paragraphs 60 and 82 of the present judgment, save where the clear sense of the evidence has been distorted, the appraisal of the facts does not constitute a point of law which is subject as such to review by the Court of Justice.

As regards the assessment, in law, carried out by the General Court concerning the comparability of the value added by the information contained, on the one hand, in the Kone group's leniency application concerning the infringement in the Netherlands and, on the other, in that of the ThyssenKrupp group in relation to the infringement in Belgium, the General Court stated, in paragraph 196 of the judgment under appeal, that 'the assessment of what constitutes significant added value by definition entails an analysis specific to the context of all the evidence available to the Commission in connection with a particular infringement; accordingly, information connected with separate infringements, in this instance the infringements in Belgium and the Netherlands, is not comparable'.

Moreover, in paragraph 197 of the judgment under appeal, the General Court stated that, in any event, the situations of the Kone group and the ThyssenKrupp group were not comparable for reasons which the General Court explained in that paragraph and which concerned, in particular, the added value represented by the evidence provided in those two situations.

Thus, given that the General Court had concluded that the situations in question were not comparable, it was fully entitled to find, in paragraph 197 of the judgment under appeal, that the Commission had not breached the principle of equal treatment.

Accordingly, the fifth ground of appeal must be rejected as unfounded.

Since the appellants' grounds of appeal are in part inadmissible or ineffective and in part unfounded, the appeal must be dismissed in its entirety.

Costs

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 costs.

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 to be awarded against the appellants and the latter have been unsuccessful, they must be ordered to bear their own costs and, in addition, to pay those incurred by the Commission.

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

Dismisses the appeal;

Orders Kone Oyj, Kone GmbH and Kone BV to bear their own costs and, in addition, to pay the costs incurred by the European Commission.

[Signatures]

* Language of the case: English.