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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21/02/2007
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COMMISSION DECISION

of

21 February 2007

relating to a proceeding under Article 81 of the EC Treaty

Case COMP/E-1/38.823 - PO/Elevators and Escalators

(Only the English text is authentic)

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COMMISSION DECISION

of

21 February 2007

relating to a proceeding under Article 81 of the EC Treaty

Case COMP/E-1/38.823 - PO/Elevators and Escalators

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation No 1/2003 of December 16 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty¹, and in particular Article 7 and Article 23(2) thereof,

Having regard to the Commission decision of October 7 2005 to initiate proceedings in this case,

Having given the undertakings concerned the opportunity to make known their views on the objections raised by the Commission pursuant to Article 27(1) of Regulation No 1/2003 and Article 12 of the Commission Regulation (EC) No 773/2004 of April 7 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty²,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the Hearing Officer³,

Whereas:

1. Introduction

(1) The addressees of this Decision are:

- Kone Corporation (KC), KONE Belgium S.A., KONE GmbH, KONE Luxembourg S.à.r.l., and KONE B.V. Liften en Roltrappen (for ease of reference these entities

¹ OJ L 1, 4.1.2003, p. 1.

² OJ L 123, 27.4.2002, p. 18.

³ OJ [...], [...], p. [...]

will also be collectively and individually referred to in this Decision as “KONE” as appropriate).

- United Technologies Corporation (UTC), Otis Elevator Company (OEC), N.V. OTIS S.A., Otis GmbH & Co. OHG, General Technic-Otis S.à.r.l., General Technic S.à.r.l. and Otis B.V. (for ease of reference these entities will also be collectively and individually referred to in this Decision as “Otis” as appropriate).
 - Schindler Holding Ltd (SH), Schindler S.A./N.V., Schindler Deutschland Holding GmbH, Schindler S.à.r.l., and Schindler Liften B.V. (for ease of reference these entities will also be collectively and individually referred to as “Schindler” in this Decision as appropriate).
 - ThyssenKrupp AG (TKAG), ThyssenKrupp Elevator AG (TKE), ThyssenKrupp Liften Ascenseurs N.V./S.A., ThyssenKrupp Aufzüge GmbH, ThyssenKrupp Fahrtreppen GmbH, ThyssenKrupp Ascenseurs Luxembourg S.à.r.l. and ThyssenKrupp Liften B.V. (for ease of reference these entities will also be collectively and individually referred to in this Decision as “ThyssenKrupp” as appropriate).
 - Mitsubishi Elevator Europe B.V.
- (2) These undertakings participated, to the extent described in the present Decision, in four single, complex and continuous infringements of Article 81(1) of the Treaty in four Member States through the sharing of markets by virtue of agreeing and/or concerting to allocate tenders and contracts for the sale, installation, service and modernization of elevators and escalators.
- (3) The Commission initiated an investigation into the elevators and escalators industry after being approached by an informant with information concerning the possible existence of a cartel among the four major manufacturers of elevators and escalators present in the European Union, KONE, Otis, Schindler and ThyssenKrupp.

2. The Industry subject to the Proceeding

2.1. The Products and Services

(4) The conduct examined in this Decision related to the following products and services:

- elevators;
- escalators;
- the provision of maintenance services of elevators and escalators; and
- the provision of modernization services of elevators and escalators.

2.2. Elevators

- (5) An elevator is a car that moves in a vertical shaft to carry passengers or freight up and down. Technically, there are roughly three types of elevators: i) hydraulic elevators, which are elevator systems which lift an elevator car using a hydraulic ram – a fluid-

driven piston mounted inside a cylinder; *ii*) roped elevators which are geared; the elevator car is raised and lowered by traction steel ropes; and *iii*) roped elevators which are gearless; in gearless elevators the machine room is either much smaller than for the geared elevators or there is no need for a separate machine room at all (so-called “machine-room-less” elevators).

- (6) There are various applications for elevators such as, for example, low-rise buildings, mid-rise buildings and high-rise buildings, residential or office, hospitals or services, transport or freight.
- (7) Elevators are to a large extent assembled in the hoist way on the job site. Elevators have a relatively long life span of 20 to 50 years.

2.3. Escalators

- (8) An escalator is essentially a pair of chains, looped around two pairs of gears. An electric motor turns on drive gears at the top, which rotate the chain loops. The motor and chain system are housed inside the truss, a metal structure extending between two floors. Escalators are inclining and continuous and used for moving many persons over short distances.
- (9) There are different applications for escalators such as escalators for commercial solutions (shopping malls, office buildings, and hotels) and transport solutions (airports, railway stations, subway systems) and especially high escalators.
- (10) Moving walkways and travellators are horizontal, or sometimes inclined, means of transport with applications in commercial and public transport segments.
- (11) According to Otis, escalators are pre-assembled in the factory due to the weight of some of the components. Escalators have a relatively long life span of up to 50 years.

2.4. Maintenance of Elevators and Escalators

- (12) Maintenance services of elevators and escalators will be used in the broader sense and include maintenance services and repair services.
- (13) Maintenance services are provided with varying content. Generally, undertakings provide monitoring and prevention service (for example, actively informing elevator and escalator owners and building managers about upcoming maintenance requirements) as well as repair and replacements of spare parts.

2.5. Modernisation of Elevators and Escalators

- (14) Modernization services require more intervention in the new equipment and replacement of parts than maintenance but substantially less than for the installation of an entirely new elevator or escalator. Modernization basically updates the original installation. While elevators are typically modernized, escalators are generally not.

3. The undertakings involved in the elevator and escalator industry

- 3.1. The Addressees of this Decision and Other Undertakings involved in the Commission Proceedings

3.1.1. KONE Corporation

- (15) KONE Corporation (“KC”) is a global service and engineering undertaking, with headquarters in Finland. It consists of two business divisions: KONE Elevators & Escalators and KONE Cargotec. KONE Elevators & Escalators sells, manufactures, installs, maintains and modernizes elevators and escalators and services automatic building doors. KC claims to be the world’s fourth largest elevator undertaking.⁴
- (16) In 2005, the most recent fiscal year preceding this decision for which complete data is available, KC’s worldwide turnover was approximately EUR 3 200 million.⁵ KC is present in all Member States except Greece, Ireland and Portugal.
- (17) KC operates in the elevator and escalator sectors in Belgium through its subsidiaries KONE International S.A. and KONE Belgium S.A. with the sub-subsidiaries Thierry N.V. and ELFAC, S.A. The turnover of KONE in Belgium was EUR [**] million (throughout the decision, '[**]' signifies a passage which was removed for publication purposes by the Commission) in 2003, the last full year of the infringement.
- (18) KC’s main subsidiary in Germany is KONE GmbH. KC also directly or indirectly controls a large number of elevator and escalator undertakings in Germany. The aggregate turnover of KONE in Germany in new elevators and escalators was approximately EUR [**] million in 2003.
- (19) KC operates in the elevator and escalator sectors in Luxembourg through its subsidiary KONE Luxembourg S.à.r.l., which was incorporated into the group in 1988. The turnover of KONE in Luxembourg was EUR [**] million in 2003.
- (20) In the Netherlands, KC operates through KONE Liften & Roltrappen B.V., a 100 % subsidiary of KONE Holland B.V. In 2002, KC acquired Hopmann B.V. with relevant activities in the fields of new elevator installation, service and modernization. The turnover of KONE in the Netherlands amounted to approximately EUR [**] million in 2003.

3.1.2. United Technologies Corporation and Otis Elevator Company

- (21) United Technologies Corporation (“UTC”) is a world leader in the building systems and aerospace industries. Otis Elevator Company (“OEC”) is a wholly-owned subsidiary of UTC, with headquarters in the United States. OEC designs, manufactures, sells and installs a wide range of passenger and freight elevators, escalators and moving walkways. OEC also provides modernization products and services to upgrade elevators and escalators as well as maintenance services. OEC claims to be the world's largest manufacturer, installer, and service provider of elevators, escalators, moving walkways and other horizontal transportation systems. OEC products are offered in more than 200 countries and the undertaking is present in all Member States.⁶

⁴ www.kone.com [**]

⁵ See KC's Annual Report 2005, Pages 5 and 78 [**].

⁶ www.otis.com

- (22) UTC's worldwide turnover was approximately EUR 34 300 million in 2005.⁷ OEC's world-wide turnover was approximately EUR [**] million in 2005.⁸
- (23) OEC has only one subsidiary in Belgium: N.V. OTIS S.A. The turnover of Otis in Belgium was EUR [**] million in 2003.
- (24) OEC operates in Germany mainly through Otis GmbH & Co. OHG but also through other subsidiaries. Otis GmbH & Co. OHG's turnover achieved from the sales and installation, of new elevators and escalators amounted to approximately EUR [**] million in 2003.
- (25) In Luxembourg, N.V. OTIS S.A. has a [**]% stake in General Technic-Otis S.à.r.l. ("GTO"). The remaining 25% of GTO is held by General Technic S.à.r.l., a Luxembourg company. The turnover of GTO was EUR [**] million in 2003.
- (26) In the Netherlands, OEC controls Otis B.V., with its two subsidiaries AKB Liftservice B.V. and Liftservice Nederland B.V. Otis B.V. sells, installs, services and modernizes elevators and escalators in the Netherlands, while AKB Liftservice B.V. and Liftservice Nederland B.V. service and modernize elevators in the Netherlands. Otis' turnover in the Netherlands amounted to approximately EUR [**] million in 2003.

3.1.3. Schindler Holding Ltd.

- (27) The Schindler Group has two major business divisions: Elevators & Escalators (E&E), and IT distribution and is legally structured under the umbrella of Schindler Holding Ltd. ("SH"), based in Switzerland. Schindler is one of the world's leading suppliers of escalators and moving walkways. On a worldwide scale, Schindler claims to be the second-largest supplier in the elevator and escalator industry. Schindler is present in almost all Member States.⁹
- (28) The group's consolidated turnover amounted to approximately EUR 5 730 million in 2005.¹⁰ Turnover of the E&E division amounted to approximately EUR [**] million in 2005.¹¹
- (29) SH operates in the elevator and escalator sectors in Belgium through Schindler S.A./N.V., Westlift express S.A., Cosmolift S.A. and Oktopus S.A. The turnover of Schindler in Belgium was approximately EUR [**] million in 2003.
- (30) In Germany, SH operates through Schindler Deutschland Holding GmbH. Schindler Deutschland Holding GmbH [**], C. Haushahn GmbH & Co. KG (including Haushahn Aufzüge GmbH), Aufzugbau Grams as well as Haushahn Aufzüge GmbH & Co. KG. The turnover Schindler achieved from the sales and installation of new escalators in Germany was approximately EUR [**] million in 2000.

⁷ See Untited Technologies Corporation's ("UTC") 2005 Annual Report, page 4 [**]. All currency conversions are made following the official reference exchange rate of the European Central Bank (ECB) for 2005: EUR/USD 1.2441 and EUR/CHF 1.5483.

⁸ See UTC's Annual Report 2005 page 42. [**]

⁹ See Schindler Holding Ltd's ("SH") Annual Report 2003 [**]

¹⁰ See SH's Activity Report 2005, page 53 [**] .

¹¹ See SH's Activity Report 2005, page 59 [**] .

- (31) SH operates in Luxembourg through its subsidiary Schindler S.à.r.l. The turnover of Schindler in Luxembourg was approximately EUR [**] million in 2003.
- (32) In the Netherlands, SH operates through Schindler Liften B.V. Möhringer Liften B.V. is a 100% subsidiary of Schindler Liften B.V. Its main activities include the sale and installations of new elevators, service, repairs, modernization and replacement of existing elevators. The turnover of Schindler in the Netherlands amounted to approximately EUR [**] million in 2003.

3.1.4. ThyssenKrupp AG and ThyssenKrupp Elevator AG

- (33) The three main areas of business of ThyssenKrupp AG (“TKAG”) are steel, capital goods and services. These business areas can be broken down into five segments: steel, automotive, elevator, technologies and services.¹² TKAG’s consolidated sales amounted to approximately EUR 47 100 million in 2005/2006.¹³ Its headquarters are in Germany.
- (34) ThyssenKrupp Elevator AG (“TKE”) is the main company for the group’s elevator activities. Total revenues realized from sales in the elevator segment amounted to approximately EUR [**] million in 2005/2006.¹⁴ TKE claims to be the third largest elevator undertaking in the world, represented in more than 60 countries.¹⁵ TKE is [**]% owned and controlled by TKAG.¹⁶
- (35) ThyssenKrupp Liften Ascenseurs N.V./S.A. is TKE’s only subsidiary operating in the elevator and escalator industry in Belgium. Its turnover in Belgium was approximately [**].
- (36) In Germany, ThyssenKrupp Aufzüge GmbH and its many subsidiaries (including ThyssenKrupp Fahrtreppen GmbH) operate in the relevant sectors. Its turnover achieved from the sales and installation of new elevators and escalators in Germany was approximately [**].
- (37) ThyssenKrupp Ascenseurs Luxembourg S.à.r.l. is the only subsidiary of TKE operating in the elevator and escalator industry in Luxembourg. Its turnover in Luxembourg was approximately [**].
- (38) In the Netherlands, ThyssenKrupp Liften B.V. operates through Thyssen Liften B.V. The turnover of ThyssenKrupp Liften B.V amounted to approximately [**].

3.1.5. Mitsubishi Elevator Europe B.V.

- (39) Mitsubishi Electric Corporation (“Mitsubishi”) - with headquarters in Japan - is one of the global leaders in the manufacture, marketing and sales of electrical and electronic equipment for home products, commercial and industrial systems and equipment products. Its main business segments are energy and electric systems, electronic devices, industrial automation systems, home appliances and information and

¹² www.thyssenkrupp.com [**]

¹³ See ThyssenKrupp AG’s (“TKAG”) Annual Report 2005/2006 [**]

¹⁴ See TKAG’s Annual Report 2005/2006 [**]

¹⁵ www.thyssenkrupp-elevator.com [**]

¹⁶ See TKAG’s Annual Report 2002/2003 [**]

communication systems. Its worldwide consolidated net sales amounted to approximately EUR [**] million in 2006. The Elevator and Escalator division falls under the Energy and Electric Systems segment. Net sales in this segment amounted to EUR [**] million in 2006.¹⁷

- (40) The turnover of Mitsubishi Elevator Europe B.V. in the Netherlands in 2005 from the sale and installation of new elevators and escalators, as well as from maintenance and modernization was EUR [**] million.

3.1.6. [**]

- (41) [**]

3.1.7. [**]

- (42) [**]

3.2. Other Market Players

- (43) In 2003, the last year of the infringement, KONE, Otis, Schindler and ThyssenKrupp had an aggregate EU share of sales in the elevators and escalators sectors of approximately [**]% (by volume). The remaining approximately [**]% was divided among various small and medium-sized European manufacturers and Asian manufacturers operating in Europe such as Fujitech, Hitachi and Toshiba from Japan and Gold Star from Korea.
- (44) *Belgium.* According to the trade association Agoria, in addition to the four major elevator and escalator undertakings, there are a few smaller undertakings operating in the Belgian elevator and escalator sector, such as CNIM, which sell, install, service and modernize elevators and escalators.
- (45) *Germany.* A significant number of elevator undertakings operate in or sell to Germany, but only relatively few of them also manufacture, sell and install escalators. Some of the undertakings, mostly active in the elevator business, are for example Becker & Reinhardt KG, CNIM, FB Aufzüge GmbH & Co. KG, Lödige GmbH, Mahler & Paulus Aufzugsdienst GmbH, Rangger Aufzugbau GmbH and Röbling & Seiffert Aufzüge GmbH, just to name a few. Undertakings such as Geysel GmbH, Grädler GmbH and Vestner GmbH are medium-sized undertakings which do not manufacture escalators, but import unbranded escalators from the Far East to sell and install in Germany.
- (46) *Luxembourg.* KONE, Otis, Schindler and ThyssenKrupp have a local presence in Luxembourg. In addition, other undertakings offer only elevators in Luxembourg, for example Beil, Luxlift, Liftlux, Elgetec and Bouvy S.A. The German undertaking Trier Aufzugbau also sells and services elevators in Luxembourg but has no local presence.
- (47) *Netherlands.* According to Otis, there are a number of smaller undertakings in the Netherlands which sell, install, service and modernize elevators and escalators. They

¹⁷ See Mitsubishi Electric Corporation's Annual Report 2006, "at a glance" (exchange rate of November 28 2006). [**] The financial year ended on March 31 2006.

include Axiom Liften BV, Compact Liften B.V., Van Deelen Liften B.V., Eurotrapliften B.V., G&G Lift Service B.V., Hali B.V., Liften en Machinefabriek Lakeman B.V., Lift Service Netherlands B.V. and Technovice B.V.

4. Description of the Industry

4.1. Supply

4.1.1. The Sale and Installation of Elevators and Escalators¹⁸

- (48) As described in Section 2 (“The Products and Services”), escalators and elevators have different product characteristics and uses. [**]. [**]. [**]. [**] seems to imply that the overall levels of production have a European dimension even if the distribution is organized nationally.
- (49) As will be shown in Section 5 (“Industry Figures and Market Shares”), the elevator and escalator sectors in Europe are highly concentrated. KONE, Otis, Schindler and ThyssenKrupp are international manufacturers of elevators and escalators and are the most important manufacturers operating in Europe. Their aggregate European share of sales in the elevators and escalators sectors amounted to approximately 77% in (by volume) in 2003.
- (50) In Belgium, the four undertakings accounted for approximately 83% of sales (by value) in the relevant sectors (elevators and escalators combined) in 2003.
- (51) In Germany, the four undertakings accounted for approximately 63% of sales in elevators (by value) and close to 100% of all escalator sales (by value) in 2003.
- (52) In Luxembourg, [**] accounted for approximately 97% of sales in elevators and escalators combined (by value) in 2003. The local subsidiaries of KONE, Otis, Schindler and ThyssenKrupp are the only suppliers established in Luxembourg which supply escalators.
- (53) In the Netherlands, KONE, Otis, Schindler, ThyssenKrupp and Mitsubishi accounted for close to 88% of sales in elevators and escalators combined (by volume) in 2003.

4.1.2. Maintenance Services¹⁹

- (54) Generally, there are more undertakings active in the maintenance business than in the manufacturing business. However, the vast majority of elevators and escalators installed by [**], KONE, [**], Otis, Mitsubishi, Schindler and ThyssenKrupp in the Member States affected by the infringement are serviced by the undertaking responsible for the installation.
- (55) Maintenance services, according to information available to the Commission, generate the majority of profits in the elevator and escalator sector. The size of an undertaking’s

¹⁸ Sources for the estimated figures provided in this section are set out in Section 5 (“Industry Figures and Market Shares”).

¹⁹ Sources for the estimated figures provided in this section are set out below in Section 5 (“Industry Figures and Market Shares”).

installed base thus correlates with the profitability of its business - an increase in the installed base brings in more maintenance opportunities.

- (56) In Belgium, KONE, Otis, Schindler and ThyssenKrupp accounted for approximately 71% (by volume) of maintenance services of elevators and escalators in 2003.
- (57) In Germany, KONE, Otis, Schindler and ThyssenKrupp accounted for approximately 53% (by volume) of maintenance services of elevators and escalators in 2003.
- (58) In Luxembourg, [**] accounted for approximately 95% (by volume) of maintenance services of elevators and escalators.
- (59) In the Netherlands, KONE, Otis, Mitsubishi, Schindler and ThyssenKrupp accounted for approximately 83% (by volume) of services of elevators and escalators in 2003.

4.1.3. Modernization Services²⁰

- (60) Modernization may prolong the life of an existing elevator and many times offers a cost effective alternative to installing a new elevator. As for maintenance, the size of an undertaking's installed base correlates with the profitability of the modernization business; an increase in the installed base brings in more modernization opportunities. As for maintenance services, it appears that the majority of elevators and escalators are modernised by the undertaking which had installed the equipment.
- (61) In Belgium, KONE, Otis, Schindler and ThyssenKrupp accounted for approximately 75% (by value) of modernization services in 2003.
- (62) In Germany, KONE, Otis, Schindler and ThyssenKrupp accounted for approximately 82% (by value) of modernization services in 2003.
- (63) In Luxembourg, [**] accounted for approximately 94% (by value) of modernization services in 2003.
- (64) In the Netherlands, KONE, Otis, Mitsubishi, Schindler and ThyssenKrupp accounted for approximately 97% (by value) of modernization services in 2003.

4.2. Demand

4.2.1. Sale and Installation of Elevators and Escalators

- (65) Elevator customers comprise a large number of different purchasers and end customers including public and state controlled entities and private customers. This also applies to escalators.
- (66) [**]. The market conditions in the elevator and escalator industry depend mainly on the general economy and, in particular, on the state of the construction and building sector. It is noted that with growth rates in the construction sector remaining flat in most of the EU, there is no expected to be any rapid growth of demand in the foreseeable future.

²⁰ Sources for the estimated figures provided in this section are set out below in Section 5 ("Industry Figures and Market Shares")

4.2.2. Maintenance Services

- (67) Most public entities, but also some private customers, ask participants in new equipment bids to provide an estimate of service costs as part of the technical specifications. Sometimes they issue tenders requesting prices for both the new equipment and the services (sometimes for a period of up to ten years) and make the combined price of both new equipment and service the decisive criterion for the award of the tender. For most customers, service contracts are awarded separately after the purchase of the elevator and/or escalator.
- (68) The sector for services for elevators and escalators has in recent years seen more so-called “framework/cluster agreements” whereby large, sophisticated customers consolidate their units under one single contract with a view to obtaining lower prices.²¹
- (69) Examples of maintenance customers are public or state controlled entities, building owners and tenants. There may be more and other types of maintenance customers and customers could be further segmented.

4.2.3. Modernization Services

- (70) The implementation of safety regulations for elevators and escalators generally triggered an acceleration of modernization growth. For example, in Belgium a Royal Decree implementing safety norms for elevators and escalators was introduced in 2003.
- (71) Modernization customers include building owners, building managers and tenants.

4.3. The Geographic Scope of the Industry

4.3.1. The Sale and Installation of Elevators and Escalators

- (72) [**].
- (73) [**]. [**]
- (74) [**]. [**].
- (75) This does not have an impact on the fact that cross-border trade in those products and cross-border tenders involving bidders from various Member States do actually take place (*see* Section 6 on Inter-State Trade) and that trade between Member States is affected by the sales activities of the major elevator and escalator manufacturers (*see* Section 13.2.5 on Effect upon Trade between Member States).
- (76) [**].

4.3.2. Maintenance and Modernization

²¹ [**] In the Netherlands these contracts are generally referred to as “cluster” contracts. [**]

(77) [**]. As for sale and installation, [**].²²

(78) Customers source within the national boundaries. There is some limited foreign participation in national tenders and an increase in supply agreements covering several Member States can be observed (*see* recital (88)): [**].[**].

5. Industry Figures and Market Shares

5.1. The Value of the Sectors Concerned²³

(79) The value of the worldwide elevator and escalator industry, including sale and installation of new elevators and escalators (“new equipment”) and the maintenance and modernization of existing installations amounted to approximately EUR 30 000 million in 2003. Approximately 40% related to new equipment sales (EUR 12 000 million) and approximately 60% to maintenance and modernization of existing installations (EUR 18 000 million).²⁴

(80) The value of the EU elevator and escalator industry, including new equipment sales and installation, maintenance and modernization, amounted to approximately EUR [**] million in 2003.²⁵ New elevator sales accounted for over EUR [**] million, while the value of the new escalators sales was approximately EUR [**] million. The value of the service business was approximately EUR [**] million.²⁶

(81) The estimated aggregate turnover in 2003 of the new equipment, maintenance and modernization businesses in each of the relevant countries in 2003 is displayed in Figure 1

Figure 1: Estimated Aggregate Turnover of the New Equipment, Maintenance and Modernization Sectors in 2003

2003	Total market
Belgium	Approximately EUR [**] million ²⁷
Germany	Approximately EUR [**] million ²⁸
Luxembourg	Approximately EUR [**] million
Netherlands	Approximately EUR [**] million to EUR [**] million

²² See recital 73 and further references therein.

²³ In Section 5 the Commission is basing itself on 2003 sales data because the Commission’s 2004 requests for information asked for sales data concerning the year 2003. Note that all figures are estimates.

²⁴ See KC’s Annual Report 2003 [**].

²⁵ European Union of 15 Member States. *See* Figure 1.

²⁶ *See* Figure 2.

²⁷ [**] with regard to the total industry value of modernization work, it appears that the main elevator manufacturers make up approximately 75% of elevator sales in Belgium.

²⁸ This estimate is based on figures provided by [**].

EU-15	Approximately EUR [**] million ²⁹
-------	--

- (82) The best estimates of the turnover made in the new equipment, maintenance and modernization businesses (when available, both in volume and value) in Belgium, Germany, Luxembourg and the Netherlands as well as in the EU as a whole are set out in Figure 2.

Figure 2: Estimated Turnover in the New Equipment, Maintenance and Modernization Sectors by product/service in 2003

2003	NEW EQUIPMENT				MAINT		MOD
	Elevators		Escalators		Volume (units)	Value (million Euro)	Value (million Euro)
Countries	Volume (units)	Value (million Euro)	Volume (units)	Value (million Euro)			
Belgium ³⁰	1.820	79	135	20	94.520	115	40
Germany ³¹	11.615	506	570	70	614.000	863	221
Luxembourg ³²	New equipment combined: 16				7.504	12	4
Netherlands ³³	2.409	111	174	17	82.734	177	58
EU-15	84.994	2.126	3.343	309	3.204.706	3.924	688

5.2. The Undertakings' Position in the Various Sectors

- (83) In Europe, KONE, Otis, Schindler and ThyssenKrupp together accounted for approximately [**]% of all elevator and escalators sales (by volume) in 2004. The remaining [**]% is divided among various smaller undertakings, including Mitsubishi.³⁴
- (84) Individual 2004 European shares of elevator and escalator sales (by volume) were approximately: Otis [**]%, Schindler [**]%, KONE [**]%, ThyssenKrupp [**]% and other undertakings, including Mitsubishi [**]%.³⁵

²⁹ This figure is based on the average of industry estimates provided by the four main manufacturers for the European Union of 15 Member States.

³⁰ [**] As regards individual figures, all information comes from the undertakings' responses to the Commission's request for information concerning Belgium.

³¹ Most industry figures come from the VDMA, whose members represent approximately 80% of all elevator sales and 100% of all escalator sales in Germany[**] The figures provided by the VDMA have been extrapolated accordingly. [**]

³² The Commission bases itself on the information available from the undertakings' responses to the Commission's request for information concerning Belgium [**]

³³ The Commission has based itself on industry estimates provided by [**] With regard to the value of all new elevators and escalators sold, the average of the estimates provided by all four major manufacturers has been used. [**]

³⁴ See GIA 2004 Report.

³⁵ See GIA 2004 Report.

- (85) Based on KONE's, Otis', Schindler's and ThyssenKrupp's own submissions, the Commission has calculated estimates of their respective market shares in the national new equipment, maintenance and modernization sectors.³⁶ These are set out in Figure 3.

Figure 3: Estimated 2003 Shares of Total Turnover of the New Equipment, Maintenance and Modernization Sectors in Belgium

2003	NEW EQUIPMENT (value)	MAINTENANCE	MODERNIZATION
Belgium	Elevators & Escalators ³⁷	Volume	Value
KONE	[**]%	[**]%	[**]%
Otis	[**]%	[**]%	[**]%
Schindler	[**]%	[**]%	[**]%
ThyssenKrupp	[**]%	[**]%	[**]%

Figure 4: Estimated 2003 Shares of Total Turnover of the New Equipment, Maintenance and Modernization Sectors in Germany

2003	NEW EQUIPMENT (value)			MAINTENANCE	MODERNIZATION
Germany	Elevators	Escalators	Elevators & Escalators	Volume	Value
KONE	[**]%	[**]%	[**]%	[**]%	[**]%
Otis	[**]%	[**]%	[**]%	[**]%	[**]%
Schindler	[**]%	[**]%	[**]%	[**]%	[**]%
ThyssenKrupp	[**]%	[**]%	[**]%	[**]%	[**]%

Figure 5: Estimated 2003 Shares of Total Turnover of the New Equipment, Maintenance and Modernization Sectors in Luxembourg

2003	NEW EQUIPMENT (value)	MAINTENANCE		MODERNIZATION
Luxembourg	Elevators & Escalators ³⁸	Volume	Value	Value
KONE	[**]%	[**]%	[**]%	[**]%
Otis	[**]%	[**]%		[**]%
Schindler	[**]%	[**]%	[**]%	[**]%
ThyssenKrupp	[**]%	[**]%	[**]%	[**]%

³⁶ For source material, see previous references in Section 5 [**]. [**]

³⁷ Escalator sales are highly volatile and therefore only combined elevators and escalators market shares have been calculated.

³⁸ Escalator sales are highly volatile and therefore only combined elevators and escalators shares have been calculated.

[**]	[**]%	[**]%	[**]%	
[**]	[**]%	[**]%	[**]%	[**]%

Figure 6: Estimated 2003 Shares of Total Turnover of the New Equipment, Maintenance and Modernization Sectors in the Netherlands³⁹

2003	NEW EQUIPMENT (volume)			MAINTENANCE	MODERNIZATION
Netherlands	Elevators	Escalators	Elevators & Escalators	Volume	Value
KONE	[**]%	[**]%	[**]%	[**]%	[**]%
Otis	[**]%	[**]%	[**]%	[**]%	[**]%
Schindler	[**]%	[**]%	[**]%	[**]%	[**]%
ThyssenKrupp	[**]%	[**]%	[**]%	[**]%	[**]%
Mitsubishi	[**]%	[**]%	[**]%	[**]%	[**]%

6. Trade Between Member States

- (86) As mentioned in the description of the industry, some cross-border transactions involving the sale and installation of elevators and escalators and the provision of maintenance services and modernization services take place within the EU.⁴⁰
- (87) Part of this cross-border trade is carried out by small and medium-sized elevator and escalator manufacturers ("SMEs"). These SMEs operate directly in the various Member States, rather than through subsidiaries. The Commission's file contains several examples of actual cross-border trade involving essentially SMEs, but also at least one large undertaking, namely Mitsubishi. Mitsubishi also serves the Belgian market through its subsidiary in the Netherlands. In Mitsubishi's reply to the Commission's letter requesting information pursuant to Article 18 of Council Regulation (EC) No 1/2003 ("Article 18-letter") and in its reply to the Statement of Objections, it is stated that in 2003 Mitsubishi attempted to enter the Belgian market. Mitsubishi won only one project ([**]) at the time, despite numerous bids on other projects. In its reply to the Statement of Objections, TKE uses this example to illustrate that cross-border activities were merely an exception for which reason the effect on trade between Member States was not appreciable.
- (88) However, the four major manufacturers also occasionally respond to cross-border tenders within the EU. ThyssenKrupp Liften Ascenseurs states that it occasionally responds to cross-border tenders, for example concerning tender requests from customers located in Zeeuws-Vlaanderen, the southern part of the Netherlands. ThyssenKrupp Ascenseurs Luxembourg also occasionally carries out escalator projects in Belgium. [**]. Otis GmbH occasionally provides technical support for projects carried out by Otis companies outside Germany; and Schindler Deutschland

³⁹ The shares are based on each company's estimation of its own share in each of the segments.

⁴⁰ For an example of cross-border transactions see [**]

Holding GmbH has responded to a few tenders outside Germany during the period 2001 to 2004.

(89) Moreover, there appears to be a trend that large (multinational) undertakings and groups of undertakings with a presence in several Member States such as, for example, international hotel chains, prefer to conclude supply agreements covering several Member States. These contracts are concluded at the European headquarter level of the elevator and escalator undertakings, or by a group of subsidiaries working together.

(90) The number of cross-border transactions [**]. [**].

7. Procedure

7.1. The Commission's Investigation

(91) In the summer of 2003, an informant approached the Commission with information concerning the possible existence of a European-wide and/or national Belgian cartel among the four major manufacturers of elevators and escalators engaged in business activities throughout the EU.

7.1.1. Belgium

(92) Starting on January 28 2004, inspections under Article 14(3) of Regulation No. 17 took place, among others, at KONE's European Headquarters in Belgium.

(93) On the same date inspections started on the premises of the national subsidiaries of KONE, Otis, Schindler and ThyssenKrupp in Belgium, as well as on the premises of the European Elevator Association and the European Lift Association, both located in Belgium.

(94) [**] [**]

(95) Starting on March 9 2004, a second round of inspections under Article 14(3) of Regulation No. 17 took place in Belgium. The Commission inspected the premises of the national subsidiaries of Otis, Schindler and ThyssenKrupp.

(96) [**]

(97) On March 16 2004, the premises of Schindler in Belgium were again subject to a Commission inspection. This time the inspection was based on Article 14(2) of Regulation No. 17.

(98) [**] [**] **The deletions in recitals (94), (96) and (98) – (103) are summarised as follows:** Following the inspections the Commission addressed various requests for information to the companies, received leniency applications from KONE, Otis, TKE and Schindler and on June 29 2004 granted conditional immunity to KONE.

(99) [**]

(100) [**]

(101) [**]

(102) [**]

(103) [**]

7.1.2. Germany

(104) Starting on January 28 2004, inspections were carried out under Article 14(3) of Regulation No. 17 on the premises of ThyssenKrupp and some of its subsidiaries in Germany.

(105) [**]

(106) Starting on March 9 2004, a second round of inspections under Article 14(3) of Regulation No. 17 took place in Germany on the premises of the national subsidiary of OEC and on the premises of some of ThyssenKrupp's national subsidiaries.

(107) [**]**The deletions in recitals (107) – (114) are summarised as follows:** Following the inspections the Commission addressed various requests for information to the companies, received leniency applications from KONE, Otis Schindler and TKE, TKA and TKF. No conditional immunity was granted.

(108) [**]

(109) [**]

(110) [**]

(111) [**]

(112) [**]

(113) [**]

(114) [**]

7.1.3. Luxembourg

(115) [**]

(116) Starting on March 9 2004, inspections under Article 14(3) of Regulation No. 17 took place in Luxembourg. [**]

(117) [**] **The deletions in recitals (117) – (126) are summarised as follows:** Following the inspections the Commission addressed various requests for information to the companies, received leniency applications from Otis, TKE, KONE and Schindler and on June 29 2004 granted conditional immunity to Otis.

(118) [**] [**].

(119) [**] [**]

(120) [**]

(121) [**]

(122) [**]

(123) [**]

(124) [**]

(125) [**]

(126) [**]

7.1.4. The Netherlands

(127) [**] [**]

(128) Starting on April 28 2004, the Commission carried out an inspection under Article 14(3) of Regulation 17/62 in the Netherlands. The inspection took place on the premises of the national subsidiaries of ThyssenKrupp, Schindler, KONE and Mitsubishi and on the premises of the association Boschduin.

(129) [**] [**] **The deletions in recitals (127) and (129) – (134) are summarised as follows:** Following the inspections the Commission addressed various requests for information to the companies, received leniency applications from Otis, TKE/TKL and KONE and on July 27 2004 granted conditional immunity to Otis.

(130) [**] [**]

(131) [**]

(132) [**]

(133) [**]

(134) [**]

7.2. Statement of Objections

(135) On October 7 2005, the Commission initiated proceedings in this case and adopted a Statement of Objections against [**], KONE Belgium S.A., KONE GmbH, KONE Luxembourg S.à.r.l., KONE B.V. Liften en Roltrappen, KONE Corporation, [**], Mitsubishi Elevator Europe B.V., N.V. OTIS S.A., Otis GmbH & Co. OHG, General Technic-Otis S.à.r.l., General Technic S.à.r.l., Otis B.V., Otis Elevator Company, United Technologies Corporation, Schindler S.A./N.V., Schindler Deutschland Holding GmbH, Schindler S.à.r.l., Schindler Liften B.V., Schindler Holding Ltd., ThyssenKrupp Liften Ascenseurs N.V./S.A., ThyssenKrupp Aufzüge GmbH, ThyssenKrupp Fahrtreppen GmbH, ThyssenKrupp Ascenseurs Luxembourg S.à.r.l., ThyssenKrupp Liften B.V., ThyssenKrupp Elevator AG and ThyssenKrupp AG.

(136) The undertakings had access to the Commission's investigation file in the form of a copy on DVD. With the DVD, the undertakings received a list specifying the documents contained in the investigation file (with consecutive numbering) and indicating the degree of accessibility of each document. In addition, the undertakings

were informed that the DVD gave the parties full access to all the documents obtained by the Commission during the investigation, except for business secrets and other confidential information. Access to oral statements was given at the Commission premises.

(137) All the parties to which the Statement of Objections had been addressed submitted written comments in response to the objections raised by the Commission.

(138) Since none of the addressees of the Statement of Objections requested an Oral Hearing, no such hearing took place in the present case.

8. Description of the events

(139) In Sections 9 to 12, each cartel will be individually discussed. Notwithstanding the undertakings' sometimes varying degree of involvement, the following common elements can be identified:

- KONE, Otis, Schindler and ThyssenKrupp were involved in the infringements in each of the four Member States;
- The cartels covered the same products and services in each Member State at issue with the exception of Germany where - to the knowledge of the Commission - services were not part of the cartel agreements;
- [**];
- The time periods investigated by the Commission overlapped, even though they were not always of exactly the same overall duration;
- The *modus operandi* for the allocation of projects concerning the sale and installation of elevators and escalators was very similar, sometimes identical, in at least some if not all Member States concerned (for example, the principles governing market and customer sharing, the maintenance of “status quo” in shares, the structure of the meetings, compensation schemes);
- The *method* for the allocation of projects for the sale and installation of elevators and escalators through the use of so-called project lists was similar, if not identical, in all Member States except the Netherlands where the Commission is not aware of any use of project lists;
- The *modus operandi* for the allocation of projects concerning maintenance and modernization was very similar, sometimes identical, in Belgium, Luxembourg and the Netherlands (for example, the principles governing customer sharing, establishment and maintenance of contacts, communication methods between the undertakings and compensation schemes).

9. The Cartel in Belgium

(140) In recitals (141) to (207), reference to the participants in the cartel will be made as follows (specific references to other entities within the respective groups are made explicitly):

- “KONE”: KC and/or KONE Belgium S.A.;
- “Otis”: UTC, OEC and/or N.V. OTIS S.A.;
- “Schindler”: SH and/or Schindler S.A./N.V.;
- “ThyssenKrupp”: TKAG, TKE and/or ThyssenKrupp Liften Ascenseurs N.V./S.A..

(141) The facts set out in Sections 9.1 and 9.2 are based on the information gathered by the Commission during the inspections carried out in Belgium in January and March 2004 and by means of Article 18(2) requests for information to each of the undertakings concerned as well as to customers of these undertakings. In addition, the facts are based on the submissions made by KONE, Otis, Schindler and ThyssenKrupp under the Leniency Notice concerning participation in anti-competitive practices in Belgium.

(142) Apart from this, reference is made to the parties’ replies to the Statement of Objections to the extent that the information provided in these replies further clarified or corroborated the facts found by the Commission. The participants in the Belgian cartel were addressees of the Statement of Objections. In their respective replies to it, all the undertakings stated that they did not contest the facts substantiating the infringements of Article 81 of the Treaty. The facts in this Decision are therefore essentially identical to those in the Statement of Objections, except for certain minor clarifications based on submissions from the undertakings themselves.

9.1. The Basic Scheme of the Cartel

(143) The Commission’s investigation revealed that KONE, Otis, Schindler and ThyssenKrupp participated in meetings and discussions with each other to allocate contracts for:

- the sale and installation of new elevators and escalators (“New Equipment Business” or “NEB”) and;
- the maintenance and modernization of elevators and escalators (“Service Equipment Business” or “SEB”).

(144) This was subsequently confirmed by KONE, Otis, Schindler and ThyssenKrupp.

(145) According to [**]: [**] participated in meetings with competitors [**] to discuss the allocation of contracts for the provision of new elevators and escalators (“New Elevator Business” or “NEB”) in Belgium.” [...] “Similar meetings have also been arranged between [**] and the three competitors noted above to discuss the allocation of contracts for the provision of maintenance and modernization services for elevators already in service...” [...] “Sales personnel of KONE Belgium, OTIS, Schindler and Thyssen also discussed orders and contracts for the servicing of elevators and escalators.”

(146) According to [**]: “[**] confirmed that infringing behaviour did happen in Belgium with respect to two types of activities; first new equipment and second services.” [...] “So the first area of infringement was with respect to new equipment.” [...] “In this case, the meetings took place between the managing directors of Otis, KONE, Schindler and Thyssen.” [...] “With respect to services and maintenance, [**] again

confirmed that the “gentlemanly way of life” had been followed between 1993 and 2001 and again he told us that there were approximately 3 to 4 meetings a year, at least, this time between the managers in charge of the service areas – so one level down – of the four major undertakings and that the principle followed was that each participant would get the service and maintenance contracts for his own elevators.” [...] “The group discussed both security and modernization issues...” [...] “...each supplier would in principle keep the service contract for its own equipment. This applied for both elevators and escalators.”

(147) [**] [...] [**]

(148) [**]: “...representatives of the undertakings Otis, Thyssen, KONE and Schindler met 10 to 12 times a year. The participants allocated projects and discussed project lists as the ones enclosed in Annexes 1, 2, 3 and 4. Each participant added new projects to the list which had come to its knowledge since the last meeting. Thereafter, the projects were allocated based on their value in order to meet the pre-agreed market shares.”

(149) [**] of [**] admits that he met other cartel participants and discussed, among other matters, how to allocate projects among them. Importantly, [**] assumes full responsibility for its employees’ participation in the NEB discussions.

(150) It is concluded from the evidence in the Commission's file that meetings and discussions took place between cartel participants at least from May 9 1996 to January 29 2004, when the first round of the Commission’s inspections ended. KONE, Otis and ThyssenKrupp either expressly confirm or at least do not contest this duration. Schindler maintains that SEB arrangements began in 1998 and continued until some time in November 2003, whereas the NEB arrangements terminated in September 2003.

(151) KONE, Otis, Schindler and ThyssenKrupp admitted that the NEB and SEB meetings and discussions had been on-going between at least 1993 and some time in 2003. However, as set out in Section 9.2 in greater detail, there are no indications that the NEB and SEB arrangements had been terminated when the Commission carried out its inspection on January 28 and 29 2004. KONE, Otis and ThyssenKrupp do not contest this. Schindler admits its participation only until September 18 2003.

9.1.1. The New Equipment Business (NEB)

9.1.1.1. The Structure of the NEB Meetings and Discussions

(152) On the basis of documents in the Commission’s file, there had been contacts among KONE, Otis, Schindler and ThyssenKrupp (collectively called “the four undertakings”) between May 9 1996 and January 29 2004 (see recital (208)). With regard to the NEB, the four undertakings initially met within the context of the elevators and escalators branch of the Belgian trade association Fabrimetal (now called “Agoria”).⁴¹ However, at one point, meetings were relocated and subsequently held mainly in hotels and restaurants. The person who called the meeting generally also paid for the lunch or sometimes the dinner that was held at the same time.

⁴¹ At the Extraordinary General Assembly held on October 16 2000, it was decided that Fabrimetal would change name to “Agoria” as of November 9 2000. [**]

- (153) Representatives of the four undertakings met on a regular basis (monthly or quarterly) and sometimes meetings were also organized on a per project basis to discuss orders and tenders for the installation of new elevators and escalators.⁴² Contacts among the four undertakings would also take place over the telephone. In order to conceal their telephone contacts, employees of the four undertakings used private or separate telephones and, sometimes, where mobile telephones were used, pre-paid cards to avoid tracking. Telephone calls took place on a regular basis as well as for specific projects. Together, current and former employees of the Belgian subsidiaries of [**] have reported on some 31 NEB meetings that took place during the period from December 2 1999 until September 18 2003.
- (154) According to [**], [**] was the overall market leader and [**] was the most interested in persuading the other cartel members to enter into the discussions. [**] had been active for many years and was considered the “authority” in the industry. He therefore conducted the meetings.

9.1.1.2. The Participants in the NEB Meetings and Discussions

- (155) At least the local [**], or equivalent, participated in the NEB meetings and discussions during the period under investigation. This has been confirmed by the parties:
- According to [**], [**] as well as [**] participated in the NEB meetings and discussions throughout the period under investigation.
 - According to [**], [**] participated in the NEB meetings and discussions throughout the period under investigation.
 - According to [**], [**] as well as [**] participated in the NEB meetings and discussions throughout the period under investigation.
 - Finally, according to [**], [**] participated in the NEB meetings and discussions throughout the period under investigation.
- (156) The NEB arrangements were coordinated at the highest level within each of the four undertakings.
- (157) For an outline of the individual participants in the NEB meetings and discussions *see* Table 1. Each undertaking names all the other undertakings as participants in the NEB meetings and discussions. Moreover, all four undertakings agree that [**] participated in NEB meetings during 2002 and 2003.⁴³

Table 1

(the term "table" is used for lists of names and projects)

Participants in the NEB Meetings and Discussions in Belgium

⁴² [**] [**] states that meetings often took place in Sofitel Zaventem and Sofitel Diegem. [**] states that meetings were held at least once a quarter; [**]

⁴³ There is no perfect consistency with regard to all names of meeting participants during the period 1999 to 2003 since over the years employees have retired or left the undertakings concerned, have joined or changed position within the company. [**]

	KONE	Otis	ThyssenKrupp	Schindler
1996	[**]	[**]	[**]	[**]
1997	[**]	[**]	[**]	[**]
1998	[**]	[**]	[**]	[**]
1999	[**]	[**]	[**]	[**]
2000	[**]	[**]	[**]	[**]
2001	[**]	[**]	[**]	[**]
2002	[**]	[**]	[**]	[**]
2003	[**]	[**]	[**]	[**]

9.1.1.3. The NEB Arrangements

(158) The Commission concludes from the documentary evidence in its possession that the arrangements between the four undertakings concerning NEB consisted mainly of the following: **agreeing to share the Belgian elevator and escalator sales and installation sectors.** In 2003, the four undertakings accounted for approximately [%] of the Belgian elevator sector and approximately [%] of the Belgian escalator sector in value. In addition, the undertakings' arrangements consisted of **agreeing on the allocation of public and private tenders, as well as of other contracts, for the sale and installation of elevators and escalators in accordance with each undertaking's pre-agreed share of the Belgian elevator and escalator sectors.**

The Sharing of the Belgian Elevator and Escalator Sales and Installation Sectors

(159) The four undertakings initially allocated shares of the Belgian elevator and escalator sales among them in accordance with market shares provided by the Belgian trade association Agoria (previously Fabrimetal).

The Allocation of Public and Private Tenders, as well as of Other Contracts, for the Sale and Installation of Elevators and Escalators

(160) The arrangements described in recital (158) were discussed during the regular meetings among the four undertakings. During these meetings, representatives of the four undertakings exchanged information about all new and up-coming elevator and escalator projects (that is, all public and private tenders and other offers) that were known to them and they agreed which undertaking should receive each final order for new elevators and escalators and submit the best bid/offer. Undertakings tried to put forward as many new projects as possible because the undertaking which brought the project forward would often get to choose that project for its own allocation.

- (161) The agreed “winner” would inform the other three of its price and the others would regularly submit complementary bids/offers. The agreement was that the complementary bids/offers would be too high to be accepted. [**].
- (162) In the case of differences between agreed and actual market shares an adjustment mechanism was in place to realign the overall value of projects awarded with the respective undertaking’s allocated share. This adjustment appears to have been achieved by the undertakings concerned agreeing not to bid or to submit a losing bid. In addition, from details on specific NEB projects provided by the undertakings it seems that the four undertakings compensated each other to some extent by offering each other sub-contracts for subsequent maintenance projects, that is, a sort of cross-business compensation mechanism.

9.1.1.4. Implementation of the NEB Arrangements

- (163) The documentary evidence on the Commission’s file shows that information about elevator and escalator projects was exchanged during the meetings, and that the suggested allocation of the projects was reported on lists (“project lists”). As a general rule, the project lists were regularly updated. It was not always the same undertaking that updated and was responsible for the project lists. In the later part of the period under investigation, however, [**] was responsible for updating the project lists. The project lists were circulated among all participants before and/or during the meetings. This is confirmed by KONE, ThyssenKrupp, Otis and Schindler.
- (164) [**] have also provided the Commission with examples of some of the elevator and escalator project lists circulated in 2000, 2001, 2002 and 2003 (the most recent list in the Commission’s possession dates from [**]). These lists contain several projects that were entered onto the list as early as 1996. The earliest entry on any of the lists in the Commission’s possession is [**].⁴⁴ Because it was not always the same undertaking updating the project lists they were not always identical. However, a project list consisted basically of three parts: one part concerned open tenders/offers, another part concerned the tenders/offers executed and a last part concerned future tenders/offers. On the project lists, a system of code names for the undertakings was worked out to cover their real identities and to identify the undertaking that was allocated a project. Generally, 1 stood for KONE, 2 for Otis, 3 for Schindler and 4 for ThyssenKrupp (“KOST” stood for **K**ONE, **O**tis, **S**chindler and **T**hyssen”). The Commission understands that, for the code, the abbreviation “STOK” was sometimes also used (Schindler, Thyssen, Otis and **K**ONE).
- (165) In June 2002, [**] specifically asked the other undertakings to include new elevator projects for the cartel only if the value was above EUR 300,000.⁴⁵ According to [**] this was because of its Belgian subsidiary’s strength in the low end segment. According to [**], the other cartel members accepted this suggestion in September

⁴⁴ [**] Concerning all the lists submitted by the undertakings, the Commission understands that these project lists constitute only a fraction of all project lists that were established and circulated among the four undertakings.

⁴⁵ According to [**], the four undertakings added new projects above a certain level of value on the project list. It cannot recall the figure but states that it may have been EUR 250,000 for elevators; [**]

2002. However, it is clear from the project lists submitted by [**] that projects of a lower value were continuously put on the project lists after September 2002.

- (166) The information on the project lists facilitated negotiations between the four undertakings. It also served as a monitoring tool; the project lists provided a means for the four undertakings to continuously check and ensure that everyone followed the arrangements and to make adjustments in the event of too large deviations from what had been previously agreed.
- (167) Moreover, until around mid-1998, Fabrimetal (later Agoria) provided very detailed sales data broken down per individual elevator and escalator supplier. This provided the undertakings with an overview of the sectors and segments and the four undertakings that operated within those sectors and segments, which likely facilitated the operation of the NEB arrangements even after Agoria stopped providing data in individual format. Detailed sales data was circulated since 1998 with the same frequency as prior to 1998, but in aggregate format.
- (168) According to the four undertakings, the allocation of NEB projects was based on a pre-agreed share of the elevator and escalator sectors in Belgium. Figure 7 sets out an estimate of the four undertakings' respective shares of their total combined elevator and escalator sales ("relative shares") in value for the period 1997 to 2003.⁴⁶

Figure 7: Relative Shares of Elevator and Escalator Sales - Belgium (Value)

[**]

- (169) Figure 8 sets out an estimate of the four undertakings' relative shares of combined elevator and escalator sales in units for the period 1997 to 2003.⁴⁷

Figure 8: Relative Shares of Elevator and Escalator Sales - Belgium (Units)

[**]

- (170) The four undertakings' estimated aggregate share of total escalator sales in Belgium is in the range of [**]% (by value).⁴⁸

9.1.1.5. Examples of NEB Allocation

⁴⁶ These market shares are estimates. The data used in the calculation are the undertakings' own sales data submitted by the undertakings in response to the Commission's request for information concerning Belgium. The market shares have not been contested by the addressees.

⁴⁷ These market shares are estimates. The data used in the calculation are the undertakings' own sales data submitted by the undertakings in response to the Commission's request for information concerning Belgium. Moreover, because the chart only provides figures for a relatively short period it may be that the highly fluctuating sales in escalators have affected the shares to look less stable than in reality. The shares have not been contested by the addressees and in their replies to the Statement of Objections.

⁴⁸ For escalators, the Commission relies on [**] that the four undertakings constitute approximately [**]% of total sales in Belgium. Because escalator sales fluctuate substantially and because [**] has not been able to provide figures for the installed escalator base in Belgium, no chart has been produced to show the undertakings' aggregate share of the Belgian escalator sector. The market shares have not been contested by the addressees in their replies to the Statement of Objections.

(171) [**]

(172) [**]

(173) [**] is clearly indicative of the existence of the cartel in Belgium. In addition, all four undertakings have explicitly admitted their participation.

(174) During the time period 2000 to 2004 a number of tenders and contracts were awarded according to the agreed allocation, which confirms the submissions made by the four undertakings concerning the NEB arrangements, as well as the project lists. For a list of examples of contracts which were awarded in accordance with what had been agreed between the four undertakings, *see* Table 2.

Table 2
Examples of Projects Awarded in Accordance with the Agreed Allocation - Belgium

<u>Project name on list</u>	<u>First time on list in Commission's possession (if possible, also first date as "orders intake" on the list in the Commission's possession)</u>	<u>Allocated winner according to lists in Commission's possession</u>	<u>Winner according to undertakings' data</u>
[**]	[**]	[**]]	
[**]			
[**]			
[**]			
[**]			
[**]	[**]		
[**]			
[**]			
[**]	[**]	[**]	[**]
[**]	[**]		
[**]	[**]	[**]	[**]
[**]	[**]		
[**]	[**]		
[**]	[**]	[**]	[**]
[**]	[**]		
[**]	[**]	[**]	[**]
[**]	[**]		

[**]	[**]	[**]
[**]	[**]	
[**]	[**]	
[**]		
[**]		[**]
[**]		
[**]		
[**]	[**]	[**]
[**]		[**]
[**]		

(175) According to [**] there were some deviations from the agreed allocation set out in the project lists. It estimates that approximately [**]% to [**]% of the elevator projects were not allocated in accordance with what had been agreed among the four undertakings. Concerning escalators, [**] states that it is difficult to provide an estimate of the number of projects that were not allocated according to the project lists because the number of escalator projects was very volatile. Nonetheless, the Commission observes that project allocation took place and was respected to a very significant extent. Market effects were significant considering that the four undertakings make up a very considerable part of the Belgian elevator and escalator sectors and discussed and allocated all new and up-coming elevator and escalator projects known to them. Importantly, as explained by [**], in the event of differences between agreed and actual market shares, an adjustment mechanism was used to realign the overall value of projects awarded with the respective undertaking's allocated share.

(176) Finally, to provide additional examples of the implementation of the NEB arrangements, [**] submitted [**]. [**]. [**] According to information submitted by [**] concerning their subsidiaries' successful offers, it appears that most of the contracts were awarded according to the suggested allocation (*see* Table 3).

Table 3
Escalator Projects from KONE Internal List - Belgium

Project Name	Awarded To
[**]	[**]
[**]	[**]
[**]	[**]

[**]	[**]
[**]	[**]
[**]	[**]
[**]	[**]
[**]	[**]
[**]	[**]
[**]	[**]
[**]	[**]
[**]	[**]

9.1.2. The Service Equipment Business

9.1.2.1. The Structure of the SEB Meetings

(177) KONE, Otis, Schindler and ThyssenKrupp also admit contacts to discuss SEB.

(178) [**] confirmed that meetings were initially held in the context of Fabrimetal (later Agoria). At one point meetings stopped being held at Fabrimetal and were organized in rotation at different locations at the invitation of one of the participants in the SEB discussions. The representatives of the four undertakings met mainly in hotels, restaurants and sometimes also at the undertakings' premises. According to [**], the undertakings called the "club" "STOK" because **S**chindler, **T**hyssenKrupp, **O**tis and **K**ONE would take turns to organize the meetings.

(179) The representatives from the four undertakings met around six times a year to discuss orders and tenders for service, maintenance and modernization of elevators and escalators, as confirmed by [**]. The participants have reported some 20 SEB meetings and/or other contacts in which current or former employees participated (or that current or former employees recall took place) during the period between June 5 2001 and December 9 2003.

(180) The four undertakings also contacted each other frequently over the telephone. These telephone contacts served to organize meetings and, in between meetings, to exchange price information on particular SEB contracts. As for NEB, the representatives of the four undertakings used mobile telephones with rechargeable cards to avoid being tracked. [**] state that on some occasions the four undertakings also communicated via fax. [**]

9.1.2.2. The Participants of the SEB Meetings and Discussions

(181) [**] participated in the SEB meetings and discussions at least between May 9 1996 and January 29 2004 (see recitals (204) to (208)). This has been confirmed by KONE, Otis, Schindler and ThyssenKrupp.

(182) [**].

(183) [**]

Table 4
Participants in the SEB Meetings and Discussions in Belgium

	KONE	Otis	ThyssenKrupp	Schindler
1996	[**]	[**]	[**]	
1997	[**]	[**]	[**]	
1998	[**]	[**]	[**]	
1999	[**]	[**]	[**]	[**]
2000	[**]	[**]	[**]	[**]
2001	[**]	[**]	[**]	[**]
2002	[**]	[**]	[**]	[**]
2003	[**]	[**]	[**]	[**]

9.1.2.3. The SEB Arrangements

(184) From the submissions of [**] it is clear that the arrangements between the four undertakings concerning SEB consisted mainly of the following: **agreeing not to compete with each other for maintenance contracts for elevators and escalators already in function and agreeing on how to bid for those contracts; each undertaking was to retain the maintenance contract with those customers with whom it already had concluded a contract.** In addition, the undertakings' arrangements consisted of **agreeing not to compete with each other for maintenance contracts for new elevators and escalators and agreeing on how to bid for those contracts;** with regard to maintenance contracts for new elevators and escalators it was agreed that each undertaking was to service its own elevators and escalators.

(185) [**] [...] [**]

(186) Similarly, [**] explains that: “The main principle was that each participant would get the service contracts for his own elevators...” and “... each group kept the service and maintenance contracts which related to each supplier’s installed base...” “This applied for both elevators and escalators.”

(187) From the submissions of [**] it is clear that the arrangements between the four undertakings also included: **agreeing not to compete with each other for**

modernization contracts; each undertaking modernized the equipment contained in its maintenance portfolio.

Maintenance Contracts

- (188) The evidence in the Commission's possession shows that the cartel covered maintenance contracts. New maintenance contracts were generally allocated among the four undertakings on the basis of the brand of the products to be serviced so that each undertaking would service its own products. The undertakings, therefore, did not compete for new maintenance contracts. If a customer requested several undertakings to offer a price quote, the four undertakings proceeded for existing maintenance contracts as described in recitals (189) to (196).
- (189) In particular, the documents obtained by the Commission during the inspection it carried out in January provide the Commission with examples of price calculations for maintenance contracts. These documents specify for each competitor the equipment involved, the number of points required for the type of intervention, the value for each point and the final price. Recitals (193) to (196) explain in greater detail how the point system worked in the cartel in Belgium. If the undertakings failed to respect the agreed prices or a client chose an undertaking that was not supposed to win the project, a scheme was in place which would compensate those who had lost the contracts, as explained in recital (192).
- (190) The Commission has evidence that the SEB arrangements were discussed and agreed on during the meetings as well as by telephone. The undertakings informed each other of customers who had requested a new price quote for maintenance contracts. If an undertaking was approached by a customer for whom that undertaking was not carrying out maintenance services, that undertaking would find out which manufacturer already had contractual relations with the customer and would inform it of the request. If the customer had asked the other three undertakings for a price quote, the four undertakings would discuss and agree on the price each one should offer (or would agree not to participate in the bid/offer at all).
- (191) If the undertakings which were not supposed to win the contract chose to participate in the bid, they would submit complementary bids/offers that would be too high to be accepted. [**]. This ensured that contracts remained with the undertaking that had already provided the maintenance in the past.
- (192) If an undertaking lost a contract intended for it that undertaking would retaliate, for example by making sure that it took over a contract from the undertaking that had won a prior contract. However, sometimes the four undertakings also agreed on a compensation mechanism by way of sub-contracting. An undertaking that had secured a maintenance contract from customers previously serviced by one of the other three undertakings would sometimes compensate the former incumbent by including it as a subcontractor.
- (193) One way the four undertakings agreed on the price for offers was through the use of a schedule originally elaborated within the context of Fabrimetal but subsequently used for other purposes by the four undertakings. The schedule is a list of components/technical elements of an installation. Each element equals a number of points and the four undertakings attributed monetary value to each point. The schedule

facilitated the calculation and establishment of uniform prices for maintenance work based on the components/elements and maintenance required for a specific contract.

- (194) According to [**]: "...the group discussed [...] the level of prices based on a tariff schedule that had been elaborated in the context of Agoria called 'AgreeAgoria'. We [**] understand that this schedule did not include explicit prices but did include price levels that were marked as one, two or three stars – if I [**] understand well. The Agoria schedule allocated a number of points according to the complexity of the task and this served as a basis for the big discussion within the group."
- (195) [**]
- (196) One very illustrative example of the price schedule and its use are the documents relating to the [**] which the Commission copied at [**] and [**] premises during the inspection in January. These documents specify for each competitor the elevators involved, the number of points required for the type of intervention, the value for each point and the final price. In addition, the document seized during the inspections at [**] provides details of how the calculations were made. [**]"

Modernization Contracts

- (197) KONE, Otis, Schindler and ThyssenKrupp also allocated modernization contracts among themselves. The understanding among the four was that each undertaking won the modernization contracts relating to installations contained in their own service/maintenance portfolio.⁴⁹ As with maintenance, the incumbent would communicate its price to the other three undertakings. The other undertakings then chose whether or not to participate in the bid.

9.1.2.4. Implementation of the SEB Arrangements

- (198) The SEB arrangements were implemented during meetings as well as over the telephone and by fax. [**] stated that it was not difficult to follow the arrangement worked out among the four undertakings. The sales persons of the four undertakings knew their own portfolios; if they received a request for a price quote, they would know whether this concerned an entirely new customer/contract or whether the customer/contract already belonged to one of the other undertakings concerned. It was therefore sufficient to communicate the new price quote of the incumbent to the competitors by telephone to establish the lower limit for their respective bids/offers. As long as the other undertakings remained well above the price quote of the incumbent, the proposed prices of the other three undertakings were of no significant interest. In addition, any undertaking would immediately find out whether they had lost a contract to any of the others. Therefore, the exchange between the four undertakings was easily handled over the telephone.
- (199) [**] explained that when he received a price indication the incumbent relating to a project, he directly communicated [**] price to the relevant sales person or sales

⁴⁹ The Commission's file indicates practical examples of anticompetitive agreements concerning modernization that were entered into based also on other terms; [**] These documents provide an example of how the intended winner could react when one of the cartel members did not respect an agreement. [**]

manager within [**]. He made sure that [**]'s price was higher than the price indicated by the other undertaking that wanted to win the project, so that the latter could "*secure the order*". After communicating the price, he did not keep any documents for long because they were no longer of use. The same applied to those situations where [**] communicated a price to one of the other concerned undertakings. In such cases, the other undertakings were supposed to set a price higher than [**]'s price, so that [**] could win the project.

- (200) To provide a further example on how the implementation of the SEB arrangements took place, [**]. [**] showed the different types of elevators, a price estimate for maintenance contract including the number of points to be allocated amongst the four undertakings according to the calculation method described in recitals (193) to (196). The purpose of this fax was primarily to ensure that each competitor won the maintenance contract for its own installations. [**] explained that on the basis of this information, the four undertakings could try to price their offers to win the maintenance contracts for their own installations. In other words, the party that was due to win the contract would price at the lower end of this pricing spectrum and the others at the higher end or they would not make an offer for the elevators other than their own at all.
- (201) Another indication of the implementation of the SEB arrangements is provided by the following illustrative figures provided by each of the four undertakings.
- (a) In October 2004, of [**]'s entire maintenance portfolio (elevators and escalators), approximately [**]% concerned its own installations; in 2003 [**]% of modernizations in its entire maintenance portfolio concerned its own installations;
 - (b) In 2004, of [**]'s entire elevator maintenance portfolio, approximately [**]% concerned its own installations; out of its entire escalator maintenance portfolio approximately [**]% concerned its own installations. With regard to its entire modernization portfolio, [**] estimates that approximately [**]% concerned elevators serviced by itself. [**] confirmed that the 2004 figures are also similar for 2003;
 - (c) In 2003, of [**]'s entire elevator maintenance portfolio, approximately [**]% concerned its own installations; of its entire escalator maintenance portfolio approximately [**]% concerned its own installations. With regard to its modernization portfolio, [**] estimates that approximately [**]% concerned its own installations;⁵⁰
 - (d) In 2003, of [**] entire maintenance portfolio (elevators and escalators), approximately [**]% concerned its own installations; out of its entire modernization portfolio approximately [**]% concerned its own installations.

9.1.2.5. Examples of SEB Allocation

⁵⁰

The estimates concerning maintenance are based on the Commission's own calculations using information provided by [**]. [**]

(202) To corroborate their submissions, [**] have each reported on some specific SEB projects which current or former employees still recall and which these employees admit were subject to discussions and allocation among all four undertakings or among just some of the undertakings. The projects extend over the period 1998 to 2004.⁵¹

(203) [**].

9.2. Degree and Duration of Involvement in the Cartel

(204) The four undertakings were all active members of the cartel throughout the period under investigation (May 9 1996 until January 29 2004); each participating in the NEB and SEB arrangements described in recitals (152) to (203). The Commission considers that NEB and SEB are part of the same practice. The same undertakings participated in both NEB and SEB meetings and discussions. Most of the time it was also the same persons participating in both NEB and SEB meetings and discussions [**].

(205) As for the period of involvement of these four undertakings in the cartel, there are a number of indications that the cartel was active long before May 9 1996, indeed that it very probably started as early as some time during the 1980's. The Commission has, however, precise admissions from each of the undertakings and other evidence that a cartel covering NEB and SEB, in which all undertakings regularly participated, was ongoing during the period between May 9 1996 and the last months of 2003. There are, however, no indications that the anti-competitive arrangements had already been terminated when the Commission finalized the first round of its inspections on January 29 2004.

(206) The leniency submissions made by each of the four undertakings corroborate each other as to the fact that they were involved in the NEB arrangements at least from May 1996 until sometime towards the end of 2003. [**] admit that they participated in the NEB arrangement until September 18 2003. The project lists in the Commission's possession illustrate that the four undertakings were involved in the NEB arrangements from at least May 9 1996 until at least November 6 2003.[**]. There are no indications that the NEB arrangements were terminated before the Commission's inspections. In addition, given the evidence of contacts in the final months of 2003 and the fact that the first round of Commission inspections commenced very soon after these contacts, it must be concluded that the infringements were ongoing until at least January 29 2004.

(207) The leniency submissions by [**] also corroborate each other with regard to their involvement in SEB meetings and discussions.[**]. [**]. [**].

(208) In the light of the above, it is concluded that the four undertakings participated in the cartel in Belgium from May 9 1996 to January 29 2004, that is, for a period of approximately seven years and eight months.

10. The Cartel in Germany

⁵¹ See Annex 6 of the Statement of Objections

- (209) In recitals (210) to (288), reference to participants in the cartel will be made as follows (specific references to other entities within the respective groups are made explicit where appropriate):
- “KONE”: KC and/or KONE GmbH;
 - “Otis”: UTC, OEC and/or Otis GmbH & Co. OHG;
 - “Schindler”: SH and/or Schindler Deutschland Holding GmbH;
 - “ThyssenKrupp”: TKAG, TKE and/or ThyssenKrupp Aufzüge GmbH (“TKA”) and/or ThyssenKrupp Fahrtreppen GmbH (“TKF”).
- (210) The facts are based on information collected during the inspections carried out in Germany in January and March 2004 and by means of Article 18(2) requests for information to the participants in the German cartel and to their customers. In addition, they are based on submissions made [**] within the context of the Leniency Notice concerning their participation in anticompetitive practices in Germany, as well as on the parties’ replies to the Statement of Objections.
- (211) The entities referred to in recital (209) were addressees of the Statement of Objections and, in their respective replies to it all of them stated that they did not contest the facts substantiating the infringements of Article 81 of the Treaty. The facts in this Decision therefore are essentially identical to those described in the Statement of Objections, except for certain minor clarifications and limited supplementary information provided by the undertakings themselves, in part in their replies to the Statement of Objections, to the extent that the information provided further clarified or supplemented the facts found by the Commission.
- (212) It is concluded from the evidence on file that the German cartel operated from at least August 1 1995. This is the earliest date for which [**] admit the existence of the infringement. The cartel was brought to an end on December 5 2003, when the last cartel meeting of which the Commission is aware took place.
- (213) Since Schindler left the cartel in 2000 and the scope of the original discussions extended to include elevator projects at around this time,⁵² the cartel will be described in two parts in the interest of clarity: the first part until December 2000 including Schindler, and the second part after December 2000 excluding Schindler but including high value elevator projects.
- 10.1. The Basic Scheme of the Cartel – Escalators August 1995 to December 2000
- (214) KONE, Otis and Schindler all admit, and ThyssenKrupp does not contest, that from August 1995 to December 2000 their representatives participated in meetings and discussions with each other to directly and indirectly allocate contracts for the sale and installation of new escalators.

⁵² Note that certain elevator projects were part of the cartel discussions at least as of 1999. The Commission has no evidence that Schindler Deutschland Holding GmbH was part of those discussions. [**]

- (215) The Commission has decided to concentrate its investigation of the first part of the cartel to the period August 1 1995 to December 6 2000, which according to the Commission's evidence is the date of the last meeting Schindler attended.⁵³

10.1.1. The Escalator Business

10.1.1.1. Structure of the Escalator Meetings

- (216) On the basis of the facts available in the Commission's file, the Commission has sufficient evidence that projects for the sale and installation of new escalators were discussed and allocated among KONE, Otis, Schindler and ThyssenKrupp (the "four undertakings") during meetings. According to the evidence on file and according to all four undertakings, the escalator meetings were originally organized in the Netherlands - often in the area of Heerlen and Kerkrade - near the German border. [**] the meeting participants usually took a flight to an arranged location, often Cologne or Düsseldorf, and then rented a car and drove to the final destination in the Netherlands.
- (217) There were regular escalator meetings, on average at least three a year. In the years 1996 to 1998 six to seven meetings were held every year. The meetings were organized and paid for in rotation and typically two participants per undertaking were present at the meetings. Normally, the meetings started in the morning with a breakfast meeting in a conference room in a hotel, followed by a lunch and lasted until early afternoon. [**] have reported 26 meetings and trips to the Netherlands between October 5 1995 and December 6 2000.
- (218) Four cartel meetings that took place on [**] are confirmed [**].

Measures to Conceal Meetings and Contacts

- (219) The four participants took measures to conceal their meetings. According to [**], the four undertakings chose to meet in the Netherlands in order to avoid the meetings being traced.
- (220) They made sure that no written trace of meetings or projects discussed would remain and therefore no meeting notes were taken. In addition, neither statistics nor records were kept.
- (221) Moreover, when requesting reimbursement for expenses incurred during meetings, some meeting participants indicated fake names on the expense report: "[**] confirmed that [...] the names that he put on the expense reports were fake."

10.1.1.2. Participants in the Escalator Meetings and Discussions

- (222) [**] participated in the escalator meetings and discussions throughout the period August 1 1995 to December 6 2000.

⁵³ Schindler Deutschland Holding GmbH exceptionally attended one meeting on July 25 2002. However, according to the evidence on the Commission's file, Schindler Deutschland Holding GmbH did not engage in any cartel activities following that meeting.

- (223) KONE attended the escalator meetings during the entire period (August 1 1995 to December 6 2000) at [**]. Schindler was represented by [**]. According to KONE, Otis and Schindler, ThyssenKrupp was represented at the escalator meetings by [**].
- (224) The names and roles of the participants in the escalator meetings during the first phase of the cartel are set out in Table 5.

Table 5

Meeting participants in the German cartel August 1995 – December 2000

KONE	Positions held within the undertaking	Meetings
[**]	[**]	Attended meetings in this period
[**]	[**]	Attended meetings in this period
Otis	Positions held within the undertaking	Meetings
[**]	[**]	Occasionally attended meetings as of 1999
[**]	[**]	Attended meetings in this period
[**]	[**]	Attended meetings until 1999
[**]	[**]	Attended meetings as of 1999
Schindler	Positions held within the undertaking	Meetings
[**]	[**]	Attended meetings in this period
[**]	[**]	Attended meetings in this period
ThyssenKrupp	Positions held within the undertaking	Meetings
[**]	[**].	Attended meetings in this period
[**]	[**]	Attended meetings in this period

10.1.1.3. The Escalator Arrangements

- (225) It follows from information provided by [**] that the arrangements between the four undertakings concerning escalators consisted of the following: **agreeing on the allocation of projects for the sale and installation of new escalators in accordance with the principle that existing customer relationships should be respected.**

- (226) According to [**]: “The first principle was that the allocation of new projects should respect existing customer relations.” [...] “...the company that had a long-standing or good relationship with a particular customer should preferably secure most of the contracts with this customer.”
- (227) According to [**]: “...the principle of these discussions was that each competitor would keep its own portfolio of customers and that the others would not try to steal any of these customers.” [...] “...the competitors agree that whenever there was a new project the company who was the usual supplier to that customer would get the project...”
- (228) According to [**]: “Each participating firm indicated projects where it already had an existing customer relationship or some other special relationship and the understanding was that for the projects indicated by the undertakings themselves, these undertakings were in a preferential position; however, there was no real allocation of these projects.”
- (229) According to [**], the escalator arrangements also consisted of the following, either in a second step or when projects were not allocated according to the arrangement described in recitals (225) to (228): **agreeing on the allocation of projects for the sale and installation of new escalators in accordance with previously agreed shares of escalator sales (volume).**
- (230) According to [**]: “...the projects were allocated on the basis of previously agreed market shares.”
- (231) According to [**]: “Each company made an individual calculation of the unit based market share it sought and tried to apply this in seeking to be awarded the project in question.” “The undertakings’ assigned market shares formed the basis for allocating projects.”
- (232) Based on evidence on the Commission’s file, the four cartel members’ aggregate share of total escalator sales (in units) in Germany amounted to approximately [**]%.
- (233) According to the Commission’s file, the four undertakings agreed to freeze the respective market shares at around [**]% for KONE, [**] for ThyssenKrupp, [**]% for Schindler and [**]% for Otis.”
- (234) According to [**], the escalator arrangements were discussed during the meetings among the four undertakings. According to [**], during these meetings, the four undertakings reported on the development of previously allocated projects, identifying which projects had been secured as final contracts, lost to another competitor or had not materialized at all. This information allowed the participants to estimate actual shares of sales. *“On the basis of the existing customer relations and the difference between actual and agreed market shares, new projects were discussed and allocated among the members.”*
- (235) In practice, this meant that during the meetings, the undertaking which had a particular interest in a project would expressly announce its interest and its price to the other three undertakings. According to [**], each undertaking made its calculations in accordance with a specified formula. In return, the other three undertakings agreed not to undercut the “winner” and instead set their prices higher. They would, for example,

“refuse to give any or any substantial discount,” and would “only offer list prices to the customer”, or “make an offer with slightly higher prices than that of the agreed winner of the project.”

(236) [**]

10.1.1.4.Implementation of the Escalator Arrangements

(237) The information about escalator projects discussed during the meetings was subsequently reported on lists. According to[**], each of the four undertakings created its own list of new escalator projects which was amended on the basis of common discussions that took place during the meetings. According to [**], no common lists or documents were circulated. [**] specifies that its own lists were regularly updated *“after each meeting, by eliminating allocated projects that had turned into final contracts or were abandoned by the potential customer and by adding new projects according to the agreed allocation at the bottom of each page of the lists.”* According to [**], each undertaking would subsequently have four lists drawn up based on all undertakings’ individual lists.

(238) [**].

(239) An estimate of the four undertakings’ respective shares with regard to their combined total escalator sales (in units) (“relative shares”) during the period 1996 to 2000 is presented in Figure 10.⁵⁴

Figure 10: Relative Shares of Escalator Sales - Germany (units)

[**]

10.2. The Basic Scheme of the Cartel – Elevators and Escalators December 2000 to December 2003

(240) According to[**], their representatives met to discuss and allocate projects for the sale and installation of certain elevator projects and for the sale and installation of new escalators. [**]

(241) With regard to elevators, [**] asserts that discussions concerned elevator projects with a value of above EUR 1 million. What mattered, thus, was the overall value of a project regardless of the number and type of elevators. After having received the Statement of Objections and after having had access to the Commission’s file, [**] also admitted that elevator projects with a value of more than EUR 1 million were discussed. According to [**]’s own estimate, the aggregate value of these projects would amount to around 20% of the total elevator market value. [**] added that on isolated occasions smaller projects were also discussed.

⁵⁴

For the purpose of this exercise, only the market shares of each of the four major manufacturers have been compared. This calculation was based on responses from the four undertakings to the Commission’s request for information concerning Belgium. In their replies, the undertakings also provided information for Germany. Since data was only available for the time period after 1995, it was not possible to verify market shares prior to this date.

- (242) Various types of elevators were covered by the arrangements. Discussions covered not only the so-called “prestige elevators” – in particular the so-called “high-rise elevators” - but also mixed projects which also included elevators other than “high-rise elevators” and projects which did not include “high-rise elevators”. This is supported by evidence relating to, for example, the [**] project which concerned different types of elevators (and not only “high-rise elevators”) which were of [**] (for more information about this project, see Section 10.2.1.5) According to Otis, the inclusion of high-speed (that is, high-rise) elevators was capable of significantly reducing the number of potential bidders for a certain project.⁵⁵
- (243) The Commission has decided to consider December 5 2003 as the end date of the investigation period because the cartel meeting of December 5 2003 is the last cartel meeting the Commission is aware of.

10.2.1. The Elevator and Escalator Business

10.2.1.1. Structure of the Elevator and the Escalator Meetings

- (244) According to [**], meetings were held among the employees directly responsible for elevators on the one hand and the employees directly responsible for escalators, on the other. In addition, at some meetings both the elevator and escalator businesses were discussed. This is confirmed by [**]. These meetings served to discuss mixed projects where both elevators and escalators had to be delivered. After access to the file, [**] also partially admitted that every fourth or fifth meeting was a joint elevator-escalator meeting discussing projects which contained both elevators and escalators. [**] qualified its admission by stating that during such joint elevator-escalator meetings strictly separate discussions were held according to the product concerned and that little coordination occurred between the cartel discussions on escalators and those on elevators.
- (245) The elevator meetings were typically held in Germany or Switzerland, while the escalator meetings, as already mentioned in recital (219), were originally organized in the Netherlands. The participants took a flight to an agreed location in Germany, rented a car and drove to the final destination. On some occasions, especially in the last two years, the escalator meetings also took place in Germany.
- (246) Meetings were organized and paid for in rotation between the participants. Each participant generally paid his own costs for travel to and from the meetings, while the expenses for meeting premises and lunches were paid by the undertaking organizing the meeting. Informal contacts were maintained by telephone between the meetings; for example to set a date and the place for the next meeting but also to inform each other of prices of bids. [**] have reported on 34 dates of meetings and meeting related travel that employees could recall as having taken place during the period February 1 2001 to December 5 2003. In its [**] submission [**] confirmed, while not providing specific information on meeting dates, that in the beginning of 2002 meetings were held monthly, thereafter around six times a year.

⁵⁵

[**]. For standard elevator projects, up to 250 elevator undertakings were capable of bidding [**]. The inclusion of escalators (mixed projects) also significantly reduced the number of potential bidders in view of the very limited number of escalator manufacturers on the market (as opposed to manufacturers of standard elevators).

(247) [**]:

[**]

Date	Comments
[**]	[**].
[**]	[**].
[**]	[**]
[**]	[**]
[**]	[**]

Measures to Conceal Meetings and Contacts

(248) Measures to conceal meetings and contacts during the second phase of the cartel were similar to those indicated for the first phase (*see* Section 10.1.1.1).

10.2.1.2. Participants in the Elevator and Escalator Meetings and Discussions

(249) It can be deduced from the documents obtained during the inspection and other information available on the Commission's file that meetings and discussions relating to elevators and escalators continued during the period December 2000 to December 2003 and that Schindler left the cartel in December 2000. KONE, Otis and ThyssenKrupp do not contest these facts and confirm that representatives of all three undertakings participated in the meetings and discussions.

(250) Schindler claims that: "For the period after December 6, 2000 we have no indication that representatives of Schindler participated in further meetings..." Although Schindler attended a meeting on July 25 2002, the Commission's file contains no evidence that Schindler resumed cartel activities after December 6 2000. The fact that Schindler did not participate in the cartel after that date is confirmed by KONE, Otis and ThyssenKrupp.

(251) [**] participated in the elevator meetings, in the combined elevator and escalator meetings as well as in the escalator meetings. [**] participated in the escalator meetings. Until 2002, [**] was also represented at the escalator meetings by [**].

(252) [**] participated in the elevator meetings, the combined elevator and escalator meetings and in the escalator meetings. Also [**] attended escalator and combined escalator and elevator meetings.

(253) [**] was represented at the elevator meetings, the combined escalator and elevator meetings, and the escalator meetings by [**]. In addition, [**] participated in the

escalator meetings. [**] participated in the escalator meetings and in the combined escalator and elevator meetings until at least 2002.

- (254) The names and roles of the participants in the elevator and escalator meetings are set out in Table 7.

Table 7

Meeting participants in the German cartel December 2000 – December 2003

KONE	Positions held within the undertaking	Meetings
[**]	[**]	Elevator, combined elevator and escalator and occasionally escalator meetings
[**]	[**]	Escalator meetings until 2002
[**]	[**]	Escalator meetings in this period
Otis	Positions held within the undertaking	Meetings
[**]	[**]	Elevator, combined elevator and escalator meetings and escalator meetings

[**]	[**]	Escalator meetings and combined escalator and elevator meetings
ThyssenKrupp	Positions held within the undertaking	Meetings
[**]	[**].	Attended meetings until at least January 1 2001
[**]	[**]	Escalator meetings and combined escalator and elevator meetings
[**]	[**]	Elevator, escalator and combined elevator and escalator meetings
[**]	[**]	Escalator meetings after December 2002

10.2.1.3. The Elevator and Escalator Arrangements

- (255) According to the Commission's file and according to [**], the elevator and escalator arrangements among the three undertakings consisted of: **agreeing on the allocation of certain projects for the sale and installation of new elevators and of escalators in accordance with the principle that existing customer relationships should be respected.**
- (256) According to [**]: “Allocation of [elevator] projects took place not so much on the basis of pre-established market shares but rather on the basis of the quality of the connections a vendor had with a particular customer and a general sense of reasonableness in view of the known relative size of each of the competitors.” “...the allocation should respect existing customer relations. In other words, the company that had a longstanding or good relationship with a particular customer should preferably secure most of the [escalator] contracts coming from this customer.”
- (257) According to [**]: “...the purpose of these discussions [concerning elevator projects] was to try to ensure that prices and the undertakings’ respective interests in these [elevator] projects were protected.” [...] “...the principle of these discussions [concerning escalators] was that each competitor would keep its own portfolio of customers.” [...] “...the competitors agree that whenever there was a new project, the company who was the usual supplier to that customer would get the project and that the others would make an offer with slightly higher prices.”
- (258) These observations were not contested by [**].
- (259) According to the Commission’s file and [**], at least the escalator arrangements also consisted in **agreeing on the allocation of projects for the sale and installation of new escalators in accordance with previously agreed shares of escalator sales (by volume)**, either in a second step or when projects were not allocated according to the arrangement described in recitals (255) to (257). According to [**], once Schindler left the meetings, the aggregate share of the remaining three undertakings amounted to

[**]% of the German escalator market and they allocated their contracts among them to ensure that each undertaking would secure around one third each.

- (260) According to [**], the agreements described in recitals (255) and (259) were implemented by way of discussion during the meetings among the three undertakings with the objective of freezing market shares. The participants reported on the development of previously allocated elevator and escalator projects, as well as expected new projects. With regard, specifically, to escalators, the identification of projects that had been secured as final contracts, had been lost to another competitor or not materialized at all, allowed the participants to estimate their “market shares” based on sales. Based on existing customer relationships and the difference between actual and agreed market share, new projects were then discussed and allocated among the members.
- (261) Concerning elevators, [**] specified that the undertaking that had been allocated a project for a particular customer would inform the competitors of the price below which they should not bid, so that the undertaking which had been allocated the project could be certain to win the project. Similarly for escalators: once an undertaking had been allocated the project, or announced its interest in a particular project, the agreement was that the other undertakings would not undercut the “winner” – for example by only offering list prices and refusing any important discounts. In its reply to the Statement of Objections, [**] added that the effectiveness of the cartel was impaired by Schindler’s departure which increased competitive bidding on the market, so that allocations were not always respected. Moreover, [**] alleges that agreements were reached on only half of the elevator projects discussed. However, the fact that the meetings and discussions continued during a period of three years and the fact that their scope was actually enlarged to also include elevators suggests that they had the desired market partitioning effect.

10.2.1.4. Implementation of the Elevator and Escalator Arrangements

- (262) According to [**] the information about elevator projects and escalator projects and the suggested allocation of the projects was reported on internal lists which were not circulated among the three undertakings. This information was confirmed by [**] after having had access to the file. According to [**], these lists were not circulated or exchanged among the three undertakings but instead served to prepare the meetings and to provide a basis for discussions.
- (263) Similar to [**]’s description for the first phase of the cartel (that is, from August 1995 to December 2000), [**] specifies that its escalator list contained four separate lists: one for each undertaking indicating the projects allocated to it. [**] alleges that, as from 2002, in parallel to the separate lists, [**] prepared common computer-based lists, circulating them during the meetings and updating them in preparation for the next meetings.
- (264) [**] explains that its escalator lists were continuously updated after each meeting by eliminating allocated projects that had turned into final contracts or had been abandoned by the potential customer and by adding new projects according to the agreed allocation at the bottom of each page of the list.

- (265) To corroborate their statements, [**] provided the Commission with examples of their internal escalator project lists as well as information on some of the elevator and escalator projects that were discussed and allocated among competitors during the period 1999 to 2003.
- (266) The information reported on the project lists helped the three undertakings to continuously monitor each other and the developments in the elevator and escalator sector.
- (267) An estimate of the three undertakings' relative shares with regard to their total combined escalator sales (in units) after 2000 is presented in Figure 11.⁵⁶

Figure 11: Relative Shares of Escalator Sales - Germany (units)

[**]

10.2.1.5.Examples of Elevator and Escalator Allocation

- (268) The express admissions made by [**] concerning their participation in the cartel in Germany as well as [**] coherent submissions concerning the involvement of [**] in the German cartel, all of which were made prior to the Statement of Objections, were already sufficient to establish the participation of the three undertakings in the second phase of the cartel. Moreover, [**], after having received the Statement of Objections and after having had access to the file, did not contest the facts set out in the Statement of Objections in its reply and expressly admitted the violations as set out in the Statement of Objections in its [**] submission. Therefore, the Commission is of the opinion that the factual basis of the infringements is sufficiently substantiated in this Decision. [**]
- (269) [**]
- [**]
- [**] [**] [**]
- [**]
- [**]
- (270) [**]
- (271) [**] [**] [**]
- (272) [**] [**] [**]
- (273) [**] [**] [**] [**] [**].

⁵⁶ Market share calculations are between the cartel members. The figures used were those submitted by the undertakings in response to the Commission's request for information concerning Belgium. In their replies, the undertakings also provided information for Germany.

- (274) According to [**], there were often deviations from the agreed allocation set out in the project lists. Also, [**] endeavoured to highlight this lack of effect. However, such deviations cannot detract from the fact that the three undertakings met to discuss and exchange information about projects and that project allocations were agreed with some success.

10.3. Dimension of the Infringement

- (275) As indicated in Figure 1 in recital (81), the total turnover of the German elevator and escalator sector, including new equipment, maintenance and modernization, amounted to EUR 1 660 million in 2003. The total turnover of new equipment in elevators and escalators combined amounted to EUR 576 million in 2003 (*see* Figure 2, recital (82)).
- (276) As demonstrated, the Commission has evidence that escalators were subject to arrangements among KONE, Otis, Schindler and ThyssenKrupp during the period from August 1995 to December 2000, and among KONE, Otis and ThyssenKrupp until December 2003.
- (277) According to [**], the four undertakings accounted for approximately [**]% of escalator sales (by volume) in Germany during the first phase of the cartel. In addition, [**] states that approximately [**] escalators per year were subject to discussion and allocation, that is a large majority of all new escalators in Germany.⁵⁷ The fact that most new escalators in Germany were subject to allocation is also supported by [**]: *"Each firm drew up a list of all projects that were not yet on the market."* [**] seems to question this by arguing that only 30% of all new escalator projects were subject to allocation among the four undertakings (one project may contain several escalators). However elsewhere it indirectly confirms that most escalators were subject to allocation: *"... the competitors agreed that whenever there was a new project, the company that was the usual supplier to that customer would get the project..."* In its reply to the Statement of Objections, [**] even explicitly conceded that the entire escalator market was affected and subject to allocation and should be taken into account when determining the starting amount of the fine. Based on this evidence the Commission therefore considers it sufficiently substantiated that most new escalators in Germany were subject to the cartel arrangements during the first phase of the cartel.
- (278) During the second phase of the cartel, the three remaining cartel members accounted for approximately [**]% of escalators sales according to the Commission's file. The three undertakings allocated their contracts so that each would secure around one third of the [**]% of sales. According to the Commission file, the three undertakings' aggregate share (by volume) fluctuated between approximately [**]% and [**]% during the period 2000 to 2003. [**][**] The Commission therefore concludes that at least [**]%, but most likely more, of all new escalators were subject to the cartel arrangement during the period December 2000 to December 2003.
- (279) With regard to elevators, it has been demonstrated that at least elevator projects of a value above EUR 1 million were subject to discussion and allocation among the three undertakings during at least the second phase of the cartel.

⁵⁷

This figure is based on the undertakings' own data supplied in response to the Commission's request for information concerning Germany. [**]

- (280) The total value of all elevator sales in Germany amounted to approximately EUR 687 million in 2001, approximately EUR 571 million in 2002 and approximately EUR 506 million in 2003.⁵⁸ Estimated aggregate sales realized by the three undertakings for the same period amounted to approximately EUR [**] million in 2001, approximately EUR [**] million in 2002 and approximately EUR [**] million in 2003. [**]
- (281) [**] [**] [**] [**] It is clear from the Commission's file that many of the elevator projects reported are of a value much higher than EUR 1 million. Moreover, considering the sales data in recital (280), the parties' estimates of the affected market appear to be an understatement of the overall market effects.

10.4. Degree and Duration of Involvement in the Cartel

- (282) The Commission considers that the agreements and collusion covering Germany are part of the same project allocation practice. The undertakings participating in the elevator and escalator meetings and discussions were the same (except for Schindler, who left the cartel in 2000 and did not participate in any elevator discussions). The participants were also often the same for the elevator and escalator meetings, especially in later years, and the participants were [**]. The elevator and escalator businesses were often discussed during the same meetings with the participation of the aforementioned managers. Although originally operating with four members, Schindler left the cartel in December 2000 and the cartel continued with three members: KONE, Otis and ThyssenKrupp. While escalator projects were discussed through the entire period of the cartel, the high value elevator projects were discussed at least since 1999 and throughout the second phase of the cartel. For the three remaining cartel members these modifications constitute an enlargement of the scope of their continued infringement and do not contradict the assessment regarding the German cartel as a single infringement. [**] claims [**] that elevators were also subject to agreements during the period 1995 to 2000. This, however, remains uncorroborated by the other parties.
- (283) On the basis of the information available to the Commission, it is concluded that each of the undertakings was an active member of the cartel during the period of time when each of them participated in the meetings and discussions.
- (284) The Commission has decided to concentrate its investigation on the period from August 1 1995 to December 5 2003. Evidence on the Commission's file supports the allegation that the cartel operated during at least this period.
- (285) On the basis of the facts set out in recitals (214) to (274), it is concluded that KONE participated in the German cartel between August 1 1995 and December 5 2003, that is, for a period of approximately eight years and four months. [**] [**]
- (286) On the basis of the facts as set out in recitals (214) to (274), it is concluded that Otis participated in the German cartel between August 1 1995 and December 5 2003 that is a period of approximately eight years and four months. Although Otis refers to August

⁵⁸ Most industry figures come from the VDMA, whose members represent approximately 80% of all elevator sales and 100% of all escalator sales in Germany. The figures provided by the VDMA for elevators have been extrapolated accordingly.

5 1999 as the date of the first meeting among the competitors, several statements made by various former Otis employees support the fact that Otis was participating in discussions with competitors even before the period under investigation but certainly since August 1995. Otis continued its involvement in the cartel until at least December 5 2003, which Otis acknowledges was the date on which it last attended a meeting.

(287) The facts set out in recitals (214) to (274) support the conclusion that Schindler participated in the German cartel from August 1 1995 until December 6 2000, that is, a period of approximately five years and four months. [**]. Schindler also confirms its participation throughout the entire period until December 6 2000. [**] confirm that Schindler left the cartel in December 2000, and that the last meeting it attended was on December 6 2000.

(288) The facts set out in recitals (214) to (274) support the conclusion that ThyssenKrupp participated in the German cartel from August 1 1995 until December 5 2003, that is, a period of approximately eight years and four months. [**] [**].

11. The Cartel in Luxembourg

(289) In recitals (290) to (369), reference to the participants in the cartel will be made as follows (specific references to other entities within the respective group are made explicit where necessary):

- [**];
- “KONE” : KC and/or KONE Luxembourg S.à.r.l.;
- [**];
- “Otis”: UTC, OEC and/or General Technic-Otis S.à.r.l. (GTO);
- “Schindler”: SH and/or Schindler S.à.r.l. (“Schindler”);
- “ThyssenKrupp”: TKAG and/or ThyssenKrupp Ascenseurs Luxembourg S.à.r.l.

(290) The facts are based on information collected during the inspections carried out in Luxembourg in March 2004 and by means of Article 18(2) requests for information to the participants in the Luxembourg cartel and to their customers. In addition, they are based on submissions made by KONE, GTO, ThyssenKrupp, Schindler [**] within the context of the Commission’s leniency programme concerning their participation in anti-competitive practices in Luxembourg, as well as on the parties’ replies to the Statement of Objections.

(291) The entities referred to in recital (289) were addressees of the Statement of Objections and, in their respective replies to it all of them stated that they did not contest the facts substantiating the infringements of Article 81 of the Treaty. The facts in this Decision are therefore essentially identical to those in the Statement of Objections, except for certain minor clarifications based on submissions from the undertakings themselves.

11.1. The Basic Scheme of the Cartel

- (292) The Commission's investigation revealed that the representatives of KONE, GTO, ThyssenKrupp, Schindler, [**] participated in a cartel in the elevators and escalators sector in Luxembourg. This remains uncontested after the parties' replies to the Statement of Objections [**]
- (293) KONE [**], ThyssenKrupp, Schindler [**] and GTO all participated in meetings and/or discussions with each other to allocate contracts for:
- the sale and installation of new elevators and escalators (“New Equipment Business” or “NEB”) and;
 - the service/maintenance and modernization of elevators and escalators (“Service Equipment Business” or “SEB”).
- (294) This has been confirmed by KONE, Otis, Schindler, ThyssenKrupp, [**].
- (295) None of the submissions made by the undertakings that participated in the cartel in Luxembourg mentioned the exact starting date of the cartel covering NEB and SEB. [**], however, states that on December 7 1995 a meeting took place between [**] “*to find an agreement to share the Luxembourg market*”. All undertakings except [**] mention that meetings and discussions have been going on since at least the beginning of the 1990s or even before.
- (296) According to [**], the NEB arrangements broke down after a meeting [**] on December 18 2003. The reason for the break-down, according to [**], was that [**] could not agree on the allocation of [**], which was discussed among the four undertakings at least during 2002 and 2003. [**] has confirmed its involvement in the cartel between December 7 1995 and March 9 2004.
- (297) With regard to a possible earlier termination, [**] stated: “[**] has insisted, however, that competition is now vigorous but it is impossible to say when the collusion stopped, if it has stopped.” (Emphasis added).
- (298) [**]. [**] does not specify when its involvement in the NEB arrangement was terminated, but states that the last NEB meeting it attended occurred in September/October 2003. [**] claims that, on the basis of [**]'s submissions, “*it has to be concluded that the anti-competitive arrangements were terminated – at least with regard to [**] – on October 23, 2003.*”
- (299) With regard to SEB, [**]'s submission states that there were contacts among competitors concerning modernization until February 2004. There are no indications that contacts had been interrupted when the Commission carried out its inspection on March 9 2004.
- (300) In view of the uncertainties among the parties as to the termination of the cartel and the fact that none of them claims to have explicitly withdrawn from it, the Commission considers that the Luxembourg cartel covering NEB and SEB existed from December 7 1995, which is the first meeting reported on by [**], until March 9 2004, which is the date of the Commission's unannounced inspections in Luxembourg.

11.1.1. The New Equipment Business (NEB)

11.1.1.1.The Structure of the NEB Meetings and Discussions

- (301) Anti-competitive arrangements existed among [**], KONE, [**], GTO, Schindler and ThyssenKrupp ([**]). This has been admitted by the parties. With regard to NEB, the meetings often took place at *Cercle Munster* or *Chambre des Métiers* but also in restaurants and at [**]. As of around 2001/2002, meetings were mainly held at the *Chambre des Métiers*. However, also during this period meetings were held at [**].
- (302) Representatives [**] met regularly during some periods, usually once a month (meetings were sometimes also organized on a per project basis), to discuss orders and tenders for the installation of new elevators and escalators. This has been confirmed by [**]. However, there were also periods where meetings and discussions took place more irregularly or in a less organized form. Especially when there was much deviation from the intended allocation, or disagreement, negotiations could stall or the undertakings take recourse to bilateral discussions. Employees of [**] have reported on some 39 meetings that took place during the period from December 7 1995 until December 18 2003. Most importantly, documents copied during the Commission's inspection at the premises of [**] confirm more than thirty meetings among the six undertakings.
- (303) According to [**] meetings were mainly initiated and organized by [**]. [**] adds, however, that as of 1998 the invitations to the meetings came from [**] and were from person to person, that is to say, they were not made via the secretariats. [**] states in its reply to the Statement of Objections that the leading role in organizing the meetings is to be attributed to [**].

Measures to Conceal Meetings and Contacts

- (304) In order to conceal their contacts, the [**] undertakings often convened under the cover of the *Fédération luxembourgeoise des ascensoristes*, that is to say, the Luxembourg Elevator Federation (the "Federation"). The Federation was established in 1990 by [**]. [**]. Moreover, as of around 2002, the meetings were disguised as official meetings of the Federation. Federation meetings would sometimes take place in [**].
- (305) As the undertakings started meeting at the *Chambre des Métiers* under the pretext of official Federation meetings, they also adapted documents and the lists used to allocate projects among them ("project lists") to look more like official market analysis documents issued by the Federation. As [**] put it: "...they were altered so as to avoid easy identification as cartel documents."
- (306) The project lists were consequently marked as official documents of the Federation and, for example, the headings of the project lists were changed to "*Analyse de Marché, Statistique et Ascensoristes*." [**].
- (307) Further steps to conceal contacts were taken by [**] who used a second mobile telephone with pre-paid cards to contact the other undertakings concerned and to avoid tracking. The second mobile telephone was a channel for organizing discussions and for passing on prices. [**].

11.1.1.2.The Participants in the NEB Meetings and Discussions

(308) [**]:

— [**];

— [**];

— [**];

— [**];

— [**].

(309) [**]. [**].

(310) For an outline of the individuals that participated in the NEB meetings and discussions during the relevant period, *see* Table 8.[**].

(311) [**]

Table 8
Participants in the NEB Meetings and Discussions in Luxembourg

	KONE	GTO	ThyssenKrupp	Schindler	[**]	[**]
1995	[**]	[**]	[**]	[**]	[**]	[**]
1996	[**]	[**]	[**]	[**]	[**]	[**]
1997	[**]	[**]	[**]	[**]	[**]	[**]
1998	[**]	[**]	[**]	[**]	[**]	[**]
1999	[**]	[**]	[**]	[**]		
2000	[**]	[**]	[**]	[**]		
2001	[**]	[**]	[**]	[**]		
2002	[**]	[**]	[**]	[**]		
2003	[**]	[**]	[**]	[**]		

11.1.1.3.The NEB Arrangements

(312) The arrangements [**] consisted mainly of the following: **agreeing on sharing the Luxembourg elevator and escalator sales and installation sectors**. It is estimated that [**] together make up approximately [**]% of all elevator and escalator sales in Luxembourg (by value). In addition, the undertakings' arrangements consisted of

agreeing on the allocation of public and private tenders, as well as of other contracts, for the sale and installation of elevators and escalators in accordance with each undertaking's pre-agreed share of the Luxembourg elevator and escalator sectors.

The Division of the Luxembourg Elevator and Escalator Sales and Installation Sectors

- (313) [**] Each member was allocated a share of the Luxembourg market; [**]. [**]
- (314) Because of deviations from the intended project allocation [**] undertakings' actual shares of the Luxembourg elevator and escalator sectors sometimes fluctuated. As set out in recitals (318) and (323), when these deviations were too large, the undertakings intervened through the allocation of projects in order to re-establish the share balance.

The Allocation of Public and Private Tenders, as well as of Other Contracts, for the Sale and Installation of Elevators and Escalators

- (315) The arrangements were discussed during meetings among [**]. This has been admitted by [**]. The arrangements were also discussed during telephone calls and sometimes among only some of the undertakings. During these meetings and telephone calls, representatives [**] exchanged information about all new and up-coming elevator and escalator projects that were known to them. Thereafter, they agreed which undertaking should receive each final order for new elevators and escalators in accordance with the pre-agreed shares and agreed what price the "winning" bid/offer would contain. The [**] undertakings would focus on projects with a value above LUF [**] million but also smaller projects were included. If the other undertakings chose to submit complementary bids/offers, those prices would also be discussed among the other undertakings participating in the cartel to make sure that they would be too high to be accepted.
- (316) According to [**], from 2001 onwards, only the undertaking who was supposed to win a project cited its offer price. The remaining undertakings would make sure that the complementary bids/offers were calculated at prices that were usually around [**]% to [**]% higher than that of the winning one.
- (317) In case there were differences between agreed and actual market shares there was an adjustment mechanism in place to realign the overall value of projects awarded with the respective undertaking's agreed market share. This adjustment was achieved by re-allocating projects among the undertakings concerned. If there were losses to third party competitors, the lost projects were still, for purposes of the project list, attributed to the member of the discussion to whom the bid had been allocated (that is, the lost projects were not compensated for but nevertheless were counted towards that member's allocated share).

11.1.1.4.Implementation of the NEB Arrangements

- (318) The information about elevator and escalator projects exchanged during the meetings, and the suggested allocation of the projects, were reported on the project lists. [**]. [**]. [**]
- (319) [**]

(320) [**]

(321) [**]

(322) [**]

(323) [**]

(324) In addition, under the cover of the Federation, [**] collected detailed sales data from each of the undertakings which he subsequently circulated broken down per individual undertaking and segment to all members of the Federation. [**] [**] Such information gathering facilitated the running and monitoring of the NEB arrangements.

Figure 12

**Shares Elevator & Escalator Sales for KONE, GTO, Schindler and ThyssenKrupp
(Value)**

YEAR	KONE	GTO	Schindler	ThyssenKrupp
1999	[**]	[**]	[**]	[**]
2000	[**]	[**]	[**]	[**]
2001	[**]	[**]	[**]	[**]
2002	[**]	[**]	[**]	[**]
2003	[**]	[**]	[**]	[**]

(325) The parties' submissions show that the allocation of NEB projects was based on a previously agreed share of sales made in the Luxembourg elevator and escalator sectors. Figure 13 sets out estimates of the [**] undertakings' respective shares of their total combined elevator and escalator sales ("relative shares") for the period 1998 to 2000 (by value). Figure 13 is based on the [**] undertakings' own sales figures.

**Figure 13: Relative Shares of Elevator & Escalator Sales
Luxembourg (Value)**

[**]

(326) Figure 14 sets out estimates of the four undertakings' relative shares of combined elevator and escalator sales for the period 2000 to 2003. Figure 14 is based on the four undertakings' own sales figures.

**Figure 14: Relative Shares of Elevator & Escalator Sales
Luxembourg (Value)**

[**]

Projects were awarded throughout the Entire Period under Investigation

(327) During the periods when meetings were more irregular the undertakings would instead communicate orally or on a bilateral basis.

(328) [**] projects were allocated and awarded throughout the period from August 28 1996 until November 6 2003. [**]

(329) [**]

(330) [**]

(331) [**]

(332) [**]

(333) [**]

11.1.1.5. Examples of the NEB Arrangements

(334) [**]

(335) [**]

Table 9

[**]

[**]

(336) According to [**] there were deviations from the agreed allocation. Even assuming that this is accurate, this does not detract from the fact that the undertakings concerned by this proceeding met to discuss and allocate projects and that this allocation was mostly respected and this was not called into question by any of the addressees of this Decision. Importantly, as explained by [**], if there were differences between agreed and actual market shares an adjustment mechanism was used to realign the overall value of projects awarded with the respective undertaking's allocated share.

(337) [**]

(338) [**]

(339) [**]

(340) [**]

11.1.2. The Service Equipment Business (SEB)

11.1.2.1. The Structure of the SEB Contacts

(341) The existence of contacts [**] concerning SEB is confirmed by [**]. [**] SEB was discussed mainly by telephone but also through faxes, e-mails and, sometimes, meetings and bilateral contacts. According to [**], there were no regular meetings like there were for the NEB arrangements.

11.1.2.2. The Participants in the SEB Contacts

(342) [**]

(343) [**]

(344) [**]

(345) [**]

(346) [**]

(347) For an outline of the individual participants in the SEB meetings and discussions, *see* Table 10. Table 10 demonstrates that the persons involved in the SEB contacts were the same as those participating in the NEB meetings and discussions. The arrangements covering NEB and SEB were therefore fully coordinated at the highest level within each of the undertakings concerned.

TABLE 10

Participants in the SEB Meetings and Discussions in Luxembourg

[**]

11.1.2.3. The SEB Arrangements

(348) The SEB arrangements between the undertakings consisted mainly of the following: **agreeing not to compete with each other for maintenance contracts for elevators and escalators already in function and agreeing on how to bid for those contracts;** each undertaking was to retain the maintenance contract with those customers with whom it already had the contract. In addition, the undertakings' arrangements consisted of **agreeing not to compete with each other for modernization contracts;** each undertaking had priority to modernise the equipment contained in its maintenance portfolio.

Maintenance Contracts

(349) [**] informed each other of customers who had requested a new price quote for a maintenance contract. If the customer asked not only the incumbent but also the other [**] to provide a price quote, the latter would submit complementary bids/offers that were too high to be accepted (or agree not to participate in the bid/offer at all). This ensured that contracts remained with the undertaking that had already provided the maintenance in the past. Because it was sufficient for an undertaking to communicate the new price quote to the other undertakings by telephone to establish the lower limit for the other undertakings' respective bids/offers, the exchange between the undertakings was easily handled orally over the telephone.

(350) [**]

Modernization Contracts

(351) [**] undertakings also allocated modernization contracts among them. [**]

(352) The understanding [**] was that each undertaking won the modernization contracts relating to installations contained in its own maintenance portfolio.⁵⁹ Similar to the system for maintenance contracts, the incumbent informed the others of its price to ensure that the other undertakings would not undercut it.

⁵⁹ According to [**], consultations among the concerned undertakings concerning modernization were held for the same reasons as there were consultations concerning service/maintenance. The same customer pressure also applied.

(353) [**]

11.1.2.4. Implementation of the SEB Arrangements

(354) The SEB arrangements were implemented mainly by telephone but also through faxes, e-mails and, sometimes, meetings and bilateral contacts. [**]

11.1.2.5. Examples of SEB Allocation

(355) [**]

(356) [**]

(357) [**]

11.2. Degree and Duration of Involvement in the Cartel

(358) [**] were all active members of the cartel, each participating in both NEB and SEB arrangements described in recitals (292) to (357). The same persons participated in NEB and SEB meetings and discussions [**] [**]

(359) As set out in recital (295), [**] indicated that the cartel in Luxembourg might have started in the early 1990's or even before; [**]

(360) [**] On the basis of the foregoing, the Commission considers it justified to take as the starting point of the cartel in Luxembourg, for the purposes of this Decision, and in relation to all participants, the date of December 7 1995.

(361) [**]

(362) [**]

(363) [**]

(364) [**] ThyssenKrupp did not specify an exact date when it terminated its involvement in the NEB and SEB arrangements and no evidence on the file suggests that ThyssenKrupp left the cartel before the Commission's inspections commenced on March 9 2004. ThyssenKrupp does not contest the Commission's finding in the Statement of Objections that ThyssenKrupp participated in the cartel until March 9 2004.

(365) [**]. [**] [**] There is no evidence that Schindler had left the cartel before the Commission's inspections.

(366) [**]

(367) [**]

(368) From the foregoing, it can be concluded that the cartel in Luxembourg was in place from December 7 1995. [**] The remaining participants [**] were involved in at least the SEB arrangements until March 9 2004, when the Commission inspections were carried out in Luxembourg.

(369) Consequently, it is concluded that KONE participated in the cartel in Luxembourg from December 7 1995 to January 29 2004, that is, for a period of approximately eight years and one and a half months. GTO, ThyssenKrupp and Schindler participated in the cartel in Luxembourg from December 7 1995 to March 9 2004, that is, for a period of approximately eight years and three months. [**]

12. The Cartel in the Netherlands

(370) In recitals (371) to (541) the following description of the cartel reference to the participants in the cartel will be made as follows (specific reference to other entities within the respective group are made explicit):

- “KONE”: KC and/or KONE B.V. Liften en Roltrappen;
- “Mitsubishi”: Mitsubishi Elevator Europe B.V.;
- “Otis”: UTC, OEC and/or Otis B.V.;
- “Schindler”: SH and/or Schindler Liften B.V.;
- “ThyssenKrupp”: TKAG and/or ThyssenKrupp Liften B.V. (TKL).

(371) KONE, Otis, Schindler, ThyssenKrupp and Mitsubishi (the “Big 5” or the “five undertakings”) were addressees of the Statement of Objections in respect of the cartel agreement on the market for elevators and escalators in the Netherlands. All five undertakings admitted that they had been directly participating in the illegal arrangements concerning both new elevators and escalators (NEB) and maintenance and modernization of elevators and escalators (SEB) in the Netherlands. Otis, Schindler, Mitsubishi and ThyssenKrupp do not contest the facts in the Statement of Objections.

(372) [**]

12.1. The Commission's Investigation of the Period 1998 to 2004

(373) [**]

(374) Reference is also made to the parties’ replies to the Statement of Objections to the extent that the information provided in these replies further clarifies or corroborated the facts found by the Commission. The facts in this Decision therefore are essentially identical to those described in the Statement of Objections, except for certain minor clarifications and additions provided by the undertakings themselves.

12.2. The Basic Scheme of the Cartel

12.2.1. General Introduction

(375) On the basis of the evidence gathered during its investigation, the Commission has found that the anticompetitive practices at issue concern the allocation of projects for new elevators and escalators, as well as service and modernization projects by and between KONE, Otis, ThyssenKrupp, Schindler and Mitsubishi. [**] The following quotes are illustrative.

- (376) [**] “[**] had a joint intention to allocate projects for new elevators and escalators and for services and modernization contracts. It accepts without reservation that these activities amount to a single and continuous infringement and that they were a part of an overall plan in pursuit of that common unlawful object.”
- (377) [**] [**]
- (378) In spite of the differences between the products and services concerned it is concluded that the aforementioned allocation of projects for new elevators and escalators, as well as for service and modernization projects in the Netherlands (see recitals (376) to (377)) is part of one and the same infringement. As will follow from the descriptions in recitals (411) to (471) the allocation processes for each of these products and services, despite certain specificities with regard to aspects of the allocation mechanisms (*see* Sections 12.2.3.3-12.2.3.5), were characterized by structural similarities, for example with regard to the overall method of allocation (*see* Section 12.2.3), the level of participation (*see* Section 12.2.2.1) or the existence of rules determining the right to participate in allocation discussions (*see* Section 12.2.2.4)
- (379) According to [**], the allocation of projects between the participants took place on an *ad hoc* basis and did not follow an established plan or strategy.
- (380) According to [**]: “The collusion appears to have been ad-hoc and not to have been part of a systematic and comprehensive scheme to influence prices, or allocate market or other conduct.”
- (381) [**] [**]
- (382) It is evident from the documents obtained during the Commission's inspections and the further descriptions of the collusion provided by all undertakings concerned, that the allocation of projects took place on a more organized basis than [**] would suggest.
- (383) As will be described in more detail, there were procedures in place determining the organization and location of meetings (see recitals (390) to (410)). Meetings took place on a regular basis. There were rules in place determining the right to participate in the allocation discussions and specific allocation mechanisms that had been developed for different types of projects (new installation, service or modernization). Furthermore, the parties pursued the common objectives of project allocation and stabilization of the price level.
- (384) In addition, the fact that the parties did not allocate each and every project tendered should not be misinterpreted as evidence that there was no link, or common denominator, between the individual instances in which project allocation took place. In fact there was no need to allocate each and every project in the Netherlands because the undertakings concerned needed to discuss only those projects which had not been automatically allocated to one of them by virtue of an established relationship with an existing customer. If an undertaking was convinced that it would obtain a project contract, allocation discussions were superfluous. However, in case of uncertainty as to the relationship with the customer, discussions among the Big 5 were considered useful.

12.2.2. General Structure of the Cartel

12.2.2.1.Participants in the Allocation

(385) Participants in the meetings were [**]. [**].

(386) [**].

(387) [**].

(388) [**].

(389) [**].

12.2.2.2.Location of Meetings

(390) Most of the meetings concerning the allocation of projects for new elevators and escalators, and for service and modernization projects took place in [**]. Most of the time, these meetings [**] were unrelated to meetings of [**].⁶⁰ [**]

(391) [**] refer to a certain number of meetings between the Big 5 as meetings of the “General Committee” (“Commissie Algemeen”). These meetings had a secret character [**].

(392) [**]

(393) [**]

(394) Apart from meeting at [**], the parties sometimes also met all together or bilaterally in restaurants spread across the Netherlands.

(395) Joint meetings were held frequently for projects concerning the new installation of elevators and escalators. Although the mechanisms and procedures for the allocation of the projects concerned have many similarities, projects for new equipment and projects for service were often discussed during separate meetings. This can partly be explained by the fact that in several of the undertakings (especially the bigger ones) services and new installation were covered by different managers within the undertaking.

(396) Telephone contacts played a more important role for services than for new equipment. In cases where the parties relied on telephone contacts, the allocation was arranged through a series of bilateral telephone conversations rather than through joint conference calls. According to [**] the sharing of the prices and the allocation of SEB projects sometimes took place by phone.

12.2.2.3.Frequency of Meetings

(397) As explained in recitals (390) to (395) the Big 5 met and were in contact on a regular basis [**].

⁶⁰ [**], discussions concerning new equipment projects almost always took place during specially organized meetings. [**] With regard to services, discussion always took place during specially organized meetings. [**]

- (398) [**] from April 1998 to February 2001 there were at least 23 meetings of the Commissie Algemeen/Commissie 5. [**] sometimes [**] discussions covered specific projects [**] and certain categories of projects (projects with a value above [**] guilders).
- (399) [**] states that the meetings and contacts between competitors continued from February 2001 to October 1 2002. For this period [**] refers to monthly meetings in [**]. [**] refers to individual, less frequent, meetings for the period from spring 2003 until February 23 2004.
- (400) [**] confirms that for the entire period under investigation (1998 to 2004) the meetings among the Big 5, or among some of them, had a “regular” character.
- (401) For the period from January 2002 until March 5 2004, [**] has mentioned 30 meetings and contacts among the Big 5 or among some of them. The topics discussed during these meetings included specific projects ([**]).

12.2.2.4.Organisation of the Meetings

- (402) If one of the Big 5 had a specific interest in a project and considered it useful to agree upon its allocation with the others, it then tried to set up a meeting to discuss the allocation. [**]
- (403) According to [**]: “...a competitor would contact the others and set up a meeting [**], usually all competitors, that is, Otis, Schindler, Thyssen, KONE and Mitsubishi were contacted.”
- (404) [**]
- (405) [**]
- (406) The Big 5 did not consider it necessary to include the other elevator and escalator manufacturers in the Netherlands [**] in their allocation discussions.
- (407) [**] explains that: “With regard to new equipment, the small elevator undertakings did not form any real threat for the agreements made between the five, and the agreements always concerned projects which small elevator undertakings were not capable to carry out and for which they did not receive an invitation to submit a bid...”
- (408) The members of the Big 5 were not always sure that they would be invited by the customer to make a bid. The rule was that only those undertakings of the Big 5 which had previously received an invitation from the customer would have a say in the allocation.
- (409) According to [**]: “It should be noted that in new equipment, collusion only happened between the undertakings that had received an invitation to bid. For larger projects all five undertakings usually received an invitation to submit a bid. From time to time, [**] would not receive an invitation to submit a bid.”
- (410) [**]

12.2.3. The Allocation Process

- (411) In the allocation process the Commission has identified the steps described in recitals (412) to (436). These steps are essentially the same for both NEB and SEB. To the extent that differences existed these will be identified out in recitals (438) to (445).

12.2.3.1. Identification of Projects of Special Interest

- (412) According to the Commission's information, the allocation process normally started with one of the members of the Big 5 having a specific interest in a particular project. Such interest could be based on several scenarios. First, it could be based on a long pre-existing relationship between one of the members of the Big 5 and a specific customer, which the member wished to continue. Secondly, a specific project could have been technically best-suited for a particular undertaking. This was, for example, the case if the manufacturer had been involved in the project at an early stage when the designs were made and the technical requirements were set, despite a possible customer invitation to several suppliers to submit bids in order to see which manufacturer would be best-suited for the job. Thirdly, in case of prestigious projects, a manufacturer could have a particular interest in a project because it would enhance its image and reputation. Finally, a manufacturer would also have a particular interest to win a project if it were in need of instant success following a number of unsuccessful previous bids in order to meet sales objectives.
- (413) As regards the first scenario, [**] confirms: "There may have been a number of smaller projects where one manufacturer had a long-lasting established business relationship with the property developer (or its consultant) or the construction company, for example [**] has [**] as its 'preferred supplier'."
- (414) [**]
- (415) According to [**]: "With regard to new equipment, [...] very often the projects allocated were projects where one competitor had an advantage either due to the technical specifications or due to a prior customer relationship, but for which the customer explicitly wanted to receive an offer from all the major suppliers."
- (416) It is clear that even if there was a certain predisposition on the side of the customer, for one reason or another, in favour of one of the Big 5, the customer might still have wanted to play one against the other for price reasons.
- (417) Under these circumstances a cartel member would inform the others that it was interested in a project and defend its relationship with attractive conditions. This may have caused the other undertakings to seriously consider submitting a bid or being particularly price-aggressive.

12.2.3.2. Decision Whether Allocation is Useful

- (418) After identifying a project of interest, the interested undertaking would decide whether it was necessary, or at least useful, to discuss the allocation of this project among the Big 5.
- (419) It appears there were no fixed rules on the selection of projects which would be subject to allocation among the Big 5.

- (420) According to [**]: “No exact criterion was used to determine which projects would be discussed and allocated and which not. There was thus no predetermined group of projects which would be subject to allocation. Whether a project would be subject to allocation was decided on an ad hoc basis by each of the undertakings concerned.”
- (421) [**]
- (422) It is noteworthy that the interest of the Big 5 during their cartel activities was not limited to the bigger projects. This is confirmed by the projects which the Commission has set out in this Decision as examples of implementation of the cartel. It is also confirmed by the parties themselves. [**] (Emphasis added)

12.2.3.3. Decision on the Applicable Allocation Mechanism

- (423) The next step was to determine the allocation mechanism applicable in the particular case. The main allocation mechanism for new equipment as well as for service and modernization projects was to exchange bidding prices between the Big 5 with an understanding that the undertaking with the lowest bid price would secure the project and that the other cartel members would not undercut such offers.
- (424) It should be noted that the exchange of bid prices could take place at different moments during a tender procedure. The members of the Big 5 either organized a meeting before they had issued a formal bid or immediately thereafter. In the latter case, it was the common understanding that the undertaking that had issued the lowest formal bid was protected from subsequent lower bids by the other members of the Big 5. This was relevant in cases where the customer tried to negotiate for lower prices after the first bidding round.
- (425) According to [**]: “Undertakings would share price information and only if the company that took the initiative for the meeting had the lowest price it would be allocated the project.”
- (426) [**]
- (427) According to [**]: “[**] stated that in order to prevent price wars started by the customer for these projects, competitors would usually share prices before, or after submission of their bids, allocate the project to the competitor submitting the lowest price and agree not to undercut this price even if the customer so requested.”
- (428) According to [**]: “Coordination after submission of bids: in some instances, competitors agreed on the allocation of certain projects after the submission of the official bids and shared the contents of the submitted bids, in particular prices...” [...] “The competitor with the lowest official bid price would be allocated the bid and others would agree not to offer a lower price to the customer if that customer would ask for a subsequent bid.”
- (429) [**] essentially describes the same process. At the same time, it confirms the other concern of the Big 5, already touched upon in the statement of [**], namely the maintenance of price stability on the market.
- (430) According to [**]: “Again, on occasion, it happened that the initial winner would inform the other bidders that he was prepared to defend his position obtained in the

first round and the other bidders would understand that as a signal that any attempt to undercut prices would ultimately not lead to them being awarded the project. The only result would be that the price dropped further and contractors would then use this experience in order to drive prices even further down in the next project. Thus it became clear to the other manufacturers that fierce competition in such a case would only lead to non-profitable business and a knock-on effect on prices in future.”

- (431) The allocation of projects took place without a formal system for compensating those who agreed to the allocation. However, there was at least an implicit understanding among the Big 5 that one party could not claim all the successive projects which appeared in the Netherlands.
- (432) According to [**]: “There has never been any compensation mechanism or any system tracking how many projects each company had been allocated. However, when deciding whether to participate in a meeting requested by a company, undertakings did take into account the number of instances at which that company had requested a meeting and had been allocated a project. If these instances were too numerous, undertakings would not agree to meet and allocate the project.”
- (433) [**]
- (434) It is concluded that, although there was no formal compensation system, there was a clear situation of *de facto* compensation.
- (435) It happened from time to time that agreements entered into between the Big 5 concerning the allocation of projects were not respected. This led to tension among the cartelists, which exerted social pressure on the cheating undertaking to change its behaviour.
- (436) [**] illustrated this tension with regard to [**] where it was excluded from the allocation discussions. It undercut the agreed bids of the other four cartel participants and finally won the tender: “*At subsequent [...] meetings, participants from the Big Four attacked [**] for this behaviour.*” [**]

12.2.3.4. Specificities of the Allocation Mechanism for NEB and SEB

- (437) There were some differences between the allocation mechanisms applied for, on the one hand, projects for new elevators and escalators and, on the other hand, service projects and modernization projects. These differences in general can be characterized as set out in recitals (438) to (444).
- (438) According to [**]: “...with regard to new equipment, in most cases the company requesting the meeting would be granted the project and other undertakings would take into account the request of that company when calculating their prices to be submitted in the meeting. With regard to services, the company requesting the meeting would virtually always get the project and it was offered the possibility to lower its price in case it was not the lowest bidding company.”
- (439) The specificities of the allocation mechanism for new elevators and escalators are the following. In order to determine the lowest price a specific procedure was often followed, in which [**] played a facilitating role.

- (440) According to [**]: "...Competitors present at the meeting would write down their proposed bidding price on a piece of paper and the prices would then be read out loud either by the competitors themselves, or by [**], in case he was present."
- (441) [**]
- (442) [**].
- (443) Another characteristic of the mechanism developed for the allocation of projects for new elevator and escalator installations was that the outcome of the allocation process was less predictable than in the case of service and modernization projects. The party that had initiated the meeting of the Big 5 and had expressed a special interest in a project had a significant chance, but no certainty, of being allocated the project by the others. Nonetheless, during the exchange of bid prices, the other parties normally took the interest expressed by one of them into account by submitting less aggressive bids.
- (444) According to [**]: "With regard to new equipment, in approximately 60% of the cases the company that had taken the initiative for a meeting and had made it clear to the other undertakings that it wanted a project was also de facto allocated the project. According to [**], when a company made clear to the others that it wanted a project, others took that into account when determining their prices to be submitted at the meeting."

12.2.3.5.Allocation of Service and Modernization Projects

Service and Repair Projects

- (445) With respect to **service and repair** agreements for elevators and escalators, the project allocation procedure was as follows: the party that had a specific interest in a project normally took the initiative to discuss the project. This party was usually the current service provider. The discussions either took place during a meeting of the Big 5 or during telephone calls. During the discussions, the parties exchanged their proposed bidding prices in order to determine the lowest bid.
- (446) [**]
- (447) This practice is essentially confirmed by [**], adding details on the applied mechanism: "In services, undertakings would always make price estimates before the meeting. During the meeting, the company that was supposed to get the project would share its price with the others. If this price was deemed too high, the company that would in principle get the project would get a chance to lower its price further. When that company would reach the lowest price, others agreed not to undercut this price in their bids and to ensure there was not an insignificant difference in their prices and the price of the lowest bidding company. Although no exact price difference percentage was agreed, usually a difference of one percent or more would be taken into account by the undertakings as sometimes the tender documents allowed the customer to freely decide which company to grant the project in case the difference between the prices was lower than 1%."
- (448) The party which had expressed an interest in the project - in most cases the existing service provider – was usually granted the opportunity to adapt its price during the allocation meeting, so as to submit the lowest price and win the project.

- (449) According to [**]: “With regard to services, the company that had taken the initiative for the meeting would in virtually all cases be allocated the project. If the company who had taken the initiative for the meeting did not have the lowest price at the meeting it would usually be granted the opportunity to lower its price and thus to obtain the project.”
- (450) [**] position with respect to services as follows: “*Maintenance and repair: we do not take over maintenance packages of our competitors.*”
- (451) [**] the understanding that elevator and escalator undertakings should stick to servicing and modernizing their own brands was strongly advocated. There seems to be strong consensus among the [**] as to the line to be followed:
- (452) [**] “Everybody confirms: [**] [...] Do not actively take over service contracts. If such a situation would occur then contact at board level. Similarly, with respect to modernization and modernization transformation. Careful communication within the undertakings. Also inform new members and new participants during an introduction discussion about the Style and Status within the association. [**].”
- (453) [**]
- (454) [**]
- (455) The understanding consisting in the allocation of service contracts to the existing service provider (usually the supplier of the original equipment) applied in particular in relation to customers that used a single brand of equipment only.
- (456) In cases where the customer owned elevators and escalators of different brands the allocation mechanism was not always applied. However, sometimes the customer split the tender up in individual lots, each comprising elevators and escalators of primarily a single brand. At least in these situations it was still possible for the Big 5 to agree to an allocation of the lots in such a manner that each member got the lot comprising its own brand of equipment.
- (457) A recent development in the Netherlands is that more and more customers are interested in finding one single service provider for all their different brands of elevators and escalators. These contracts are generally referred to as “cluster” contracts. In these cases, the allocation mechanism could not be applied and consequently the Big 5 reverted to a different allocation mechanism.
- (458) [**]
- (459) That quote confirms that also in these situations the project was regularly allocated to the existing service provider. Generally, only the party that had a significant number of its own brand of elevators and escalators covered by the tender asked for the allocation of the entire project. This was, however, only possible if that party at the same time had the necessary staff and logistics to take care of the entire contract.[**].
- (460) [**] explains the efforts undertaken by [**] to convince the other members of the Big 5 not to agree to such cluster contracts: “At the moment clustering of projects leads to extremely low prices. Our attempts to persuade the other bidders not to play this game have failed.”

- (461) [**] acknowledges that meetings between the Big 5 with respect to clustering contracts took place.
- (462) As regards cluster contracts the parties not only discussed the allocation of the project itself, but also the issue of subcontracting. The party to which the cluster contract had been allocated often wanted to subcontract all or part of the service work on elevators and escalators of other brands. Subcontracting was in particular an issue when the elevators of other brands included either very old or technically very complicated equipment.
- (463) In conclusion, due to the allocation mechanisms the existing service provider/original supplier was by far the most likely party to be allocated a specific service project. Industry data for 2004 confirm this (see Figure 16 below). Otis seems to be the only exception to the rule, which may be in part explained by Otis having won a significant number of cluster contracts (and thus servicing contracts for other brands).

Figure 16: Elevator and Escalator Units in Service 2004

Units in service in 2004				
	Elevators		Escalators	
	Own brand	Third party	Own brand	Third party
KONE	[**]	[**]	[**]	[**]
Otis	[**]	[**]	[**]	[**]
Schindler	[**]	[**]	[**]	[**]
TKL	[**]	[**]	[**]	[**]
Mitsubishi	[**]	[**]	[**]	[**]
Average	[**]	[**]	[**]	[**]

Modernization projects

- (464) The allocation mechanism applied by the Big 5 with respect to tenders and contracts for **modernization projects** aimed primarily at protecting the vested interests of the original supplier/existing service providers.
- (465) [**]
- (466) [**]. Furthermore, [**] figures concerning modernization provide additional support that it was agreed that the large majority of modernization projects was to be performed by the existing supplier/service provider.
- (467) Even in situations where the customer might already have a preference for the existing service provider/original supplier to also carry out the modernization project, the Big 5 would still discuss the allocation. This was in particular the case where the existing service provider/original supplier feared that the customer would also issue an

invitation to bid to other competitors in order to bring down the price.⁶¹ In such situations the main purpose of the meeting of the Big 5 was to make sure that nobody would undercut the incumbent's offer. The normal reaction of the other members was to either decide to issue a higher bid, or not to issue a bid at all.

- (468) According to [**]: "With regard to modernization, [**] only participated in collusion if it concerned a project which could de facto only be carried out by one company, but for which the customer nevertheless requested a price from other undertakings."
- (469) In its reply to the Statement of Objections, [**] admits that there was an understanding between the Big 5 not to maintain or modernize third party equipment. However, [**] states that this merely reflected what would have been an undertaking's independent commercial policy and that any discussion or understanding between the parties was based on a natural policy to focus on the maintenance and modernization of own equipment. [**] argues that this strategy cannot have had any anti-competitive object or effect.
- (470) Furthermore, the use of the contemporaneous documents by the Commission to establish the allocation of maintenance and modernization projects is questioned by [**] due to their lack of probative value. [**] claims that these documents merely illustrate the undertakings' own commercial strategy and that none of the documents refer to any collusive behaviour.

(471) [**]

12.2.4. Examples of Project Allocation

(472) [**]

(473) [**]

(474) [**]

(475) [**]. It was agreed that the lowest bidder would get the project.

(476) [**]

(477) [**]

(478) [**]

(479) [**]

(480) [**]

(481) [**]

(482) [**]

⁶¹ [**] stresses the fact that a bid for a modernization project is usually requested from the original supplier of the elevator/escalator, as well as from two other undertakings to allow a proper comparison of competitive bids. [**]

(483) [**]

(484) [**]

(485) [**]

(486) [**]

(487) [**]

(488) [**]

(489) [**]

(490) [**]

(491) [**]

12.2.5. Dimension of the Anti-competitive Behaviour

(492) [**] claim that the total number of projects for which allocation discussions took place only amounted to a limited proportion of all projects in the Netherlands.

(493) According to [**]: “Otis would like to point out that the employees’ concerned estimate that the total number of projects discussed and/or allocated in the NL only represented a small portion of the total markets for escalators and elevators in the Netherlands.”

(494) [**]

(495) [**] supports its claim with a table which sets out the total value of new elevators, escalators, service and modernization projects for the calendar years 1999 to 2003, takes the estimated value of all allocated projects per year and on the basis of this arrives at a certain percentage (ranging between 0.8% or 0.9% and 8.5% or 11.2% of the total value of the market, depending on the year).

(496) [**] supports its estimate that the allocation concerns less than 10% of total turnover in the sectors on the basis of a calculation for the year 2003. According to [**], a total of nine projects were discussed in 2003. It considers that total market turnover in 2003 amounted to EUR 420 million and that the value of the allocated projects for that year amounted to EUR 25 million. This represents 6% of the total value of the projects. [**] therefore concludes that the value of the discussed projects was less than 10% of the total value of the market.

(497) The estimates [**] are based solely on the number of projects for which they expressly admit a cartel. [**] emphasizes that the estimates are based on projects in 2003 and that projects in other years were not included in the calculation. [**] has not included the year 2004 in its calculations. [**] further argues that it used the year 2003 as a reference year mainly because the largest number of projects were discussed then, implying that the estimated percentages of projects discussed in other years would be lower than those in 2003. In its reply to the Statement of Objections, [**] argues that even if the estimates [**] were considered cumulatively, only 11% to 25% of the

market would be concerned by the arrangements. Therefore, the impact of the arrangements on the relevant markets would be limited.

- (498) Likewise, [**] claims that the collusion has had very little impact on the market. It argues that the Commission's file only contains sufficient evidence of collusive behaviour in respect of eight projects during the period 1999 to 2004.
- (499) [**]. In any event, the value of these projects, compared to the overall market turnover for 2003, represents only 2%.⁶² [**] further requests the Commission to take into account that [**] have stated that the scope of the collusion was limited. In addition, [**] argues that *“even if the parties allocated a project, this did not have an effect on the market”* and *“often the outcome would have been the same in absence of the contact between the parties”*.
- (500) [**]⁶³ ignore the point that these figures understate the relative importance of the allocation practices in the sectors concerned. Even more importantly, they leave aside the services market which is by far the most profitable segment covered by the cartel. The undertakings' arguments will be addressed in the Legal Assessment in Section 13.
- (501) Not all new elevators and escalators, service and modernization contracts were necessarily subject to tendering procedures involving more than one party, especially if they were low value projects.⁶⁴

12.3. Degree and Duration of Involvement in the Cartel

- (502) The Commission's investigation in the Netherlands concerns the period from 1998 until 2004. It can be established from the facts described in recitals (375) to (501) that during this period anti-competitive behaviour took place in the Netherlands.
- (503) April 15 1998 will be taken as the starting point for the cartel. This is the first meeting of the Commissie Algemeen/Commissie 5 that the Commission is aware of. [**]
- (504) March 5 2004 will be taken as the end date of the cartel. This is the date of the last meeting between the members of the Big 5 in respect of which the Commission possesses corroborating evidence that the meeting took place [**]
- (505) Based on the above, it is concluded that the Commission considers that the anti-competitive behaviour in the Netherlands covered a period of at least 5 years and 10 months.
- (506) [**] state that the individual members of the Big 5 did not necessarily participate in each and every allocation meeting. One reason for this is that even if they had wanted to participate, it was understood that cartel participants could only participate in the allocation discussions if they had received an invitation to make a bid [**]. Other

⁶² It seems from Figure 2 in the Statement of Objections that the total turnover for NEB and SEB in 2003 amounted to EUR 363 million. [**]

⁶³ [**] did not contest the facts as described in the Statement of Objections regarding the dimension of the collusion.

⁶⁴ [**] in particular new installation and large service and modernization contracts are negotiated through a tender procedure with more bidders. In the case of low value (service and modernization) projects often no tendering takes place.

reasons for not participating in an allocation meeting could be a lack of interest in a specific project, technical reasons, inconvenient meeting dates etc.

- (507) [**] identifies meetings among some or all of the members of the Big 5 [**].
- (508) [**] claims it did not participate in any meetings with competitors during the period mid-2002 to April/May 2003. [**] qualifies this argument by stating that [**]'s possible absence from some meetings did not reflect a withdrawal from the cartel, but rather is to be seen in the context of a generally perceived reduced need among cartel participants for regular meetings during the period mid-2002 to April/May 2003, partly due to [**]'s disrespect for the outcome of a specific project allocation previously agreed among the Big 5.
- (509) According to [**]: “[**] there was not a particular company that was more reluctant than others to participate in the meetings. [**]. As a result, the participants to the collusive *behaviour in general felt less need for meetings and agreements.*”

12.3.1. Otis

- (510) According to Otis' [**] participated in discussions with competitors concerning certain projects “*in the course of 1998.*” Otis also states that it ended its participation in the collusion on March 5 2004. In addition, the Commission has corroborating evidence that during the period [**] Otis participated in allocation discussions concerning at least [**]. Furthermore, for the same period, Otis confirmed its participation in collusive discussions concerning a number of additional projects, as set out in recital (490). It is therefore concluded that Otis' participation in the collusion in the Netherlands lasted five years and ten months.

12.3.2. TKL

- (511) According to the Commission's evidence, ThyssenKrupp participated in the collusion since at least April 15 1998. This is the date of the first of a number of “Commissie Algemeen” meetings [**] that took place in 1998 [**].
- (512) In its reply to the Statement of Objections, ThyssenKrupp argues that point 23(b) of the Leniency Notice must apply if the Commission imposes a fine on it, that is the Commission should not take into account, when setting the fine, the period between the start date indicated only by ThyssenKrupp itself (April 15 1998) and June 1999. ThyssenKrupp argues that prior to its leniency application of April 28 2004, Otis (who submitted its leniency application on March 17 2004) did not provide any information on a start date for ThyssenKrupp's participation in the infringement. Otis only claimed that ThyssenKrupp was present at a meeting some time in 2001 in an addition to its leniency application. According to the statements by the other parties, the first date on which a meeting took place at which it was claimed that ThyssenKrupp was present was June 1999.
- (513) Therefore, ThyssenKrupp claims that prior to its application, the Commission was not aware of the fact that it started participating in the infringement on April 15 1998. Consequently, the Commission should take the start date provided by the statements of the other parties (June 1999) which would considerably shorten the duration of participation by ThyssenKrupp in the infringement established in the Statement of Objections to 4 years and 4 months.

- (514) The Commission, however, did have prior knowledge of the start date of April 15 1998. [**]. [**] until March 2004 before ThyssenKrupp submitted its leniency application.
- (515) ThyssenKrupp also argued that in the period mid 2002 to April/May 2003 it did not participate in meetings among competitors.⁶⁵ The information provided by [**] contradicts this. [**] ThyssenKrupp itself acknowledges that the Big 5 met in early 2003 [**]. Therefore at most, it may be that ThyssenKrupp was not present at meetings during the second half of 2002. There is, however, no indication that it explicitly left the cartel. Since ThyssenKrupp did not openly disassociate itself and withdraw from the cartel and publicly distance itself from what occurred at the meetings, this partial absence from meetings does not fulfil the qualification required for definitively ceasing to belong to a cartel.⁶⁶ In particular, given the structure of the meetings (i.e. the understanding that an undertaking could only attend if it had been invited to participate by the customer) it is entirely rational that a smaller player in the cartel would not be present at all the meetings.
- (516) According to the Commission's evidence, ThyssenKrupp participated in the collusion until at least March 5 2004. [**]. Although ThyssenKrupp does not recall the exact date on which the meeting took place, it does confirm its participation in the meeting [**]. The exact date of the meeting has been confirmed by KONE and Otis.
- (517) The Commission has corroborating evidence that ThyssenKrupp participated in allocation discussions [**]. Furthermore, for the period from April 1998 until March 5 2004, it has confirmed its participation in collusive discussions concerning a number of additional projects, *see* recital (491).
- (518) It is therefore concluded that ThyssenKrupp participated in the collusion in the Netherlands from at least the period April 15 1998 to at least March 5 2004 that is, a period of five years and ten months.

12.3.3. KONE

- (519) KONE participated in the collusion in the Netherlands from at least June 1 1999.⁶⁷ This is the date on which KONE confirms having participated in a meeting [**].
- (520) According to the Commission's evidence KONE participated in the collusion until at least March 5 2004. KONE confirms [**] participated in the meeting [**] on that date.
- (521) The Commission also has corroborating evidence that from June 1 1999 until March 5 2004 KONE participated in allocation discussions [**]. Furthermore, in the period between June 1999 and March 2004, KONE also participated in the VLR meeting at which the policy on service and modernization contracts was determined.

⁶⁵ It should be noted that TKL does not claim that during this period no collusion took place between the other members of the Big 5.

⁶⁶ *See* CFI in case T-329/01, *ADM*, judgment of 27 September 2006, paragraph 246 (with further references in paragraph 242).

⁶⁷ The Commission only has information that KONE B.V. was part of the cartel as of at least June 1999. The Commission has decided to take June 1 as starting date.

- (522) KONE's participation in the collusion in the Netherlands is therefore considered to have lasted at least four years and nine months.

12.3.4. Schindler

- (523) Schindler participated in the collusion in the Netherlands from at least June 1 1999.⁶⁸ The Commission possesses corroborating evidence that [**] participated in a meeting on that date [**].
- (524) According to the Commission's evidence, Schindler participated in the collusion until at least March 5 2004. On that date, [**] participated in a meeting [**].
- (525) In addition, the Commission has corroborating evidence that from June 1 1999 until March 5 2004 Schindler participated in allocation discussions [**].
- (526) Schindler's participation in the collusion in the Netherlands is therefore considered to have lasted at least four years and nine months.⁶⁹

12.3.5. Mitsubishi

- (527) Mitsubishi participated in the collusion in the Netherlands from at least January 11 2000. [**]
- (528) According to the Commission's evidence, Mitsubishi's participation in the collusion lasted until at least March 5 2004. [**] there is also no clear evidence suggesting it may have left the cartel by then.
- (529) The Commission has corroborating evidence that from January 11 2000 until March 5 2004 Mitsubishi participated in allocation discussions [**]. Furthermore, during this period, Mitsubishi also participated in the VLR meeting at which the policy on service and modernization contracts was determined. Despite the termination of its participation in one aspect of the infringement, namely meetings on new installations of new equipment, in September 2001, Mitsubishi continued its participation in the meetings on maintenance, servicing and modernization of previously installed equipment.
- (530) Mitsubishi's participation in the collusion in the Netherlands is therefore considered to have lasted at least four years and one month.

12.4. Standard of Proof – KONE's Submission for the Netherlands

12.4.1. KONE's reply to the Statement of Objections

- (531) In its reply to the Statement of Objections, KONE discusses in length the standard of proof to be applied to evidence relied upon by the Commission with regard to the cartel in the Netherlands.

⁶⁸ The Commission only has information that Schindler started its participation in June 1999. The Commission has decided to take June 1 as starting date.

⁶⁹ Schindler Liften B.V. does not contest the start and end date given by the Commission in the Statement of Objections. [**]

- (532) KONE generally questions the probative value of leniency statements and denies any probative value of oral leniency statements invoking arguments of due process (referring to U.S. practice), and insists that such statements would at least require a “*high degree of corroborative evidence*.” More specifically, KONE argues that the Commission’s “*heavy reliance*” on the oral and written statements submitted by Otis and ThyssenKrupp is insufficient to prove the infringements, and casts doubt on their accuracy and credibility. KONE submits that despite the fact that ThyssenKrupp’s written statements “*do not lack probative value at all*”, they are “*not credible*.”
- (533) While recognizing the high probative value of contemporaneous documents as such, KONE puts into question the probative value of [**], claiming the Commission had insufficiently established the infringement by relying too strongly on these allegedly conflicting and uncorroborated documents. KONE also alleges that these documents provide insufficient evidence to reach the conclusion that there was anticompetitive behaviour with regard to maintenance and modernization practices since these could rather be explained by the parties’ independent commercial policies. The documents should, therefore, “*be ignored*.” [**].
- (534) KONE further puts into question the probative value of statements [**] with reference to case law according to which a written admission by a cartel participant which is contested by one or more other alleged parties to the cartel cannot be regarded as constituting adequate proof of an infringement committed by the latter unless it is supported by other evidence.⁷⁰

12.4.2. Commission assessment

- (535) In principle, the Commission bears the burden of proving infringements of competition law with sufficiently precise and consistent evidence.⁷¹ However, if the Commission has established an infringement on the basis of documentary evidence the burden of proof is on the applicant contesting the Commission findings not only to put forward a plausible alternative to the Commission’s view but also to demonstrate that the evidence relied on is insufficient to establish the existence of the infringement.⁷²
- (536) In this case, the Commission can rely on a sufficient body of contemporaneous documentary evidence and corroborated corporate statements to prove the infringement. The evidence must be assessed in its entirety, taking into account all relevant circumstances of fact. The statements [**] which were made without full knowledge of the evidence in the Commission’s possession are credible and consistent, and are not contradicted by other evidence or statements made by other parties. Even if caution is generally required considering that main participants in an unlawful agreement might tend to play down the importance of their contribution to the infringement and maximise that of others, there is no incentive to submit distorted evidence since any attempt to mislead the Commission could call into question the

⁷⁰ [**], with reference to *JFE Engineering*, paragraph 219 and Case T-337/94, *Enso-Gutzeit Oy v Commission*, paragraph 91.

⁷¹ See Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others v Commission*, Judgment of July 8 2004, paragraph 179.

⁷² Cf. *JFE Engineering*, paragraph 187.

sincerity of cooperation of the potential leniency beneficiaries.⁷³ The information [**] must be considered credible and sufficient, because they are largely mutually corroborating, were made on behalf of the undertaking and were based on information provided by persons who had been personally involved in the anticompetitive behaviour. KONE has been unable to dispute specifically, with supporting evidence, those indicia in such a way as to cast doubt on their probative value, or to provide a convincing alternative explanation.

- (537) KONE is the only of five parties contesting the admissibility of oral statements [**] and of the written corporate statements made by [**] and disputing their authenticity and probative value. However, the fact that a statement is made orally has no bearing on its probative value. It is further immaterial whether oral leniency submissions are made before an “*investigation has been opened*”, since it is the very nature of leniency statements to themselves trigger an administrative procedure in the context of which they are to be assessed.
- (538) Since the anticompetitive object of the arrangements has been established and is not contested by KONE, the agreements cannot be justified by unsubstantiated economic allegations according to which the same behaviour would have occurred on the market in the absence of the agreements.⁷⁴ Moreover, KONE’s arguments relating to US procedural rules of due process are misplaced since these proceedings are being entirely brought in the Community.
- (539) Sufficiently mutually corroborated corporate statements may be used as direct evidence and the Commission can prove an infringement solely on the basis of such statements.⁷⁵ Depending on the circumstances, a statement by *one* undertaking accused of participation in a cartel, the accuracy of which is explicitly contested by *several other* alleged participants, would in general not be regarded as constituting adequate proof of a violation unless supported by other evidence.⁷⁶ However in this case four out of five undertakings have explicitly not contested the accuracy of the statements made by [**]. The challenge by a single undertaking is thus insufficient to put into question the probative value of such mutually corroborated statements.
- (540) With regard to KONE’s selective analysis of individual items of contemporaneous evidence in isolation, suffice it is to observe that evidence is always to be viewed in context and the body of evidence relied on by the Commission *viewed as a whole* has to satisfy the requirement of sufficient precision and consistency.⁷⁷
- (541) In conclusion, KONE’s submission is not capable of casting doubt on the body of evidence relied upon by the Commission in the Statement of Objections to prove infringements in the Netherlands.

13. Legal Assessment

⁷³ See case T-120/04 *Organic Peroxides*, judgment of 16 November 2006, paragraphs 70-71 and *JFE Engineering*, paragraphs 205-211

⁷⁴ See *JFE Engineering*, paragraph 184.

⁷⁵ See *Graphite Electrodes* judgment of April 29 2004

⁷⁶ See *JFE Engineering*, paragraph 219.

⁷⁷ See Joined cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering v Commission* at, paragraph 180

13.1. Jurisdiction

- (542) In this case, the Commission is the competent authority to apply Article 81 of the Treaty, since each cartel had an appreciable effect on trade between Member States.
- (543) ThyssenKrupp claims that according to the Commission Notice on cooperation within the Network of Competition Authorities (the “ECN Notice”),⁷⁸ the Commission does not have the power to deal with this case, which falls within the jurisdiction of the respective national authorities. The Commission does not accept this claim. Regulation EC No 1/2003 has maintained the Community system of parallel jurisdiction for the application of Article 81(1) of the Treaty. It has in particular not modified the Commission's power to investigate any suspected infringements and to adopt decisions under Article 81 of the Treaty, including infringements that have their main effects in one Member State. The ECN Notice sets out orientations for the sharing of work between the Commission and the Member States' competition authorities. Neither Regulation EC No 1/2003 nor this Commission Notice create rights or expectations for an undertaking to have its case dealt with by a specific competition authority, nor is the Commission precluded from acting on a suspected breach of Article 81 of the Treaty, including cases that are limited to the territory of a single Member State. Indeed, contrary to ThyssenKrupp's argument, the ECN Notice does not lend support to any argument calling into question the Commission's jurisdiction in this case.

13.2. Application of Article 81 of the Treaty

13.2.1. Article 81(1) of the Treaty

- (544) Article 81(1) of the Treaty prohibits as incompatible with the common market all agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which directly or indirectly fix purchase or selling prices or any other trading conditions, limit or control production and markets, or share markets or sources of supply.

13.2.2. The nature of the infringement

13.2.2.1. Principles concerning agreements and concerted practices

- (545) Article 81 of the Treaty prohibits *agreements* between undertakings, decisions by associations of undertakings and *concerted practices*, provided that the conditions of application of these provisions are met.
- (546) An *agreement* for the purposes of Article 81(1) of the Treaty can be said to exist when the parties, expressly or implicitly, jointly adopt a plan determining the lines of their respective action (or abstention) on the market. It does not have to be made in writing no formalities are necessary and no contractual sanctions or enforcement measures are required. The agreement may be express or implicit in the behaviour of the parties, since a line of conduct may be evidence of an agreement. Furthermore, it is not necessary, in order for there to be an infringement of Article 81 of the Treaty, for the

⁷⁸

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participants to have agreed in advance upon a comprehensive common plan. The concept of *agreement* in Article 81(1) of the Treaty may apply to the inchoate understandings and partial and conditional agreements in the bargaining process which result in the definitive agreement.

- (547) An agreement for the purposes of Article 81(1) of the Treaty does not require the same certainty as would be necessary for the enforcement of a commercial contract. Moreover, in the case of a complex cartel of long duration, the term “*agreement*” can properly be applied not only to any overall plan or agreement but also to the implementation of what has been agreed on the basis of the same mechanisms and in pursuance of the same common purpose, as well as the measures designed to facilitate the implementation of agreements.⁷⁹ As the Court of Justice has pointed out in *Commission v Anic Partecipazioni*⁸⁰ it follows from the express terms of Article 81(1) of the Treaty that an agreement may consist not only of an isolated act but also of a series of acts or continuous conduct.
- (548) If an undertaking is present at meetings in which the parties agree on certain behaviour on the market, it may be held liable for an infringement even where its own conduct on the market does not comply with the conduct agreed.⁸¹ It is settled case law that “*the fact that an undertaking does not abide by the outcome of meetings which have a manifestly anti-competitive purpose is not such as to relieve it of full responsibility for the fact that it participated in the cartel, if it has not publicly distanced itself from what was agreed in the meetings.*”⁸² Such distancing should have taken the form of withdrawal from the agreement and public distancing from what occurred at the meetings and the cartel activities, leaving the other parties in no doubt that it was distancing itself from the cartel.⁸³
- (549) Although Article 81 of the Treaty draws a distinction between “*concerted practice*” and “*agreements between undertakings*”, the object is also to bring within the prohibition of that Article a form of coordination between undertakings by which, without having reached the stage where an agreement properly so-called has been concluded, they knowingly substitute practical cooperation between them for the risks of competition.⁸⁴ Thus, conduct may fall under Article 81(1) of the Treaty as a *concerted practice* even where the parties have not explicitly subscribed to a common plan defining their action in the market but knowingly adopt or adhere to collusive devices which facilitate the co-ordination of their commercial behaviour.
- (550) The criteria of coordination and cooperation laid down by the case law of the Court, far from requiring the elaboration of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition, according

⁷⁹ See also Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, at paragraph 256.

⁸⁰ See Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I - 4125, at paragraph 81.

⁸¹ Case T-334/94 *Sarrío v Commission* [1998] ECR II-01439, paragraph 118.

⁸² See, inter alia, Case T-141/89 *Tréfileurope Sales v Commission* [1995] ECR II-791, paragraph 85; Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 232; Case T-25/95 *Cimenteries CBR / Commission* [2000] ECR II-491, paragraph 1389 and Case T-259/02 *Austrian Banks*, judgment of 16 December 2006, paragraph 486.

⁸³ See Case T-329/01, *ADM*, judgment of 27 September 2006, paragraph 246 (with further references in paragraph 242), Case T-303/02 *Westfalen Gassen Nederland BV v Commission*, paragraphs 77, 84 and 124.

⁸⁴ Case 48/69 *Imperial Chemical Industries v Commission* [1972] ECR 619, at paragraph 64.

to which each economic operator must determine independently the commercial policy which it intends to adopt on the common market. Although that requirement of independence does not deprive undertakings of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it strictly precludes any direct or indirect contact between such operators the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.⁸⁵

- (551) Moreover, it is established case law that the exchange, between undertakings in pursuance of a cartel, of information concerning their respective deliveries (such as project lists in the present case), which not only covers past deliveries but is intended to facilitate constant monitoring of current deliveries in order to ensure sufficient effectiveness of the cartel, constitutes a concerted practice within the meaning of Article 81 of the Treaty.⁸⁶
- (552) Although the concept of a concerted practice in Article 81(1) of the Treaty requires both concertation between undertakings as well as conduct on the market resulting from this concertation and having a causal connection with it, it may be presumed, subject to proof to the contrary, that undertakings taking part in such concertation will take account of the information exchanged with other cartel members in determining their own conduct on the market, all the more so when the concertation occurs on a regular basis and over a long period.
- (553) Even if it were true that no all-encompassing agreement was reached (for example in the Netherlands), some factual elements of the illicit arrangements, such as exchange of confidential information, the consultation mechanisms and the bargaining process resulting in concrete agreements, have the characteristics of concerted practices that facilitated the coordination of the parties' commercial behaviour. The contacts and discussions between the cartel participants improved predictability and reduced uncertainty as to the other members' conduct on the market. According to the case law, such a concerted practice is caught by Article 81 of the Treaty even in the absence of anticompetitive effects on the market.⁸⁷
- (554) Regardless of whether the different elements of behaviour qualify separately as agreements or concerted practices, it is not necessary for the Commission to characterise conduct as exclusively one or the other of these forms of illegal behaviour, particularly in the case of a complex infringement of long duration.⁸⁸ The concepts of agreement and concerted practice are fluid and may overlap. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct, while when considered in isolation some of its manifestations could accurately be described as one

⁸⁵ Joined Cases 40-48/73, etc. *Suiker Unie and others v Commission* [1975] ECR 1663, at paragraphs 173 and 174.

⁸⁶ See, Cases T-147/89, T-148/89 and T-151/89, *Société Métallurgique de Normandie v Commission*, *Trefilunion v Commission* and *Société des treillis et panneaux soudés v Commission*, respectively, [1995] ECR, p. II-1057, II-1063 and II-1191, at paragraph 72.

⁸⁷ Case C-199/92 P *Hüls v Commission*, [1999] ECR I-4287, at paragraphs 158-166.

⁸⁸ Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, *Limburgse Vinyl Maatschappij NV et al. v. Commission*, ECR [1999], p. II-00931, paragraph 696 ("PVC II").

rather than the other. It would indeed be artificial to split in each Member State into several different infringements the overall scheme having the objective to restrict competition in the respective Member State concerned.

13.2.2.2. Application in this case

- (555) Save for ThyssenKrupp, none of the parties disputes that their respective unlawful activities qualify as four separate infringements under Article 81 of the Treaty. As demonstrated in this Decision, in each of the Member States concerned undertakings, explicitly or implicitly, agreed to a common plan on how to conduct themselves in the relevant sectors. Such arrangements have all the characteristics of a full “*agreement*” within the meaning of Article 81(1) of the Treaty. The undertakings concerned clearly expressed their joint intention and/or reached a common understanding with the common objective to behave on the market in a specific way and monitored compliance with these agreements. The implementation of the agreements through negotiated and rigged bids, as well as discussions and meetings in which implementation was monitored and further allocation of projects discussed, all form part of the very similar, parallel illegal schemes in the four different Member States. The most important anticompetitive practices that violated Article 81 of the Treaty in the respective Member States are set out in recitals (140) to (530):
- (556) *Belgium*: As demonstrated in Section 9 of this Decision and acknowledged by KONE, Otis, Schindler and ThyssenKrupp, from May 9 1996 until January 29 2004 they:
- (a) Agreed to share among them the sales and installation of elevators and escalators in Belgium;
 - (b) Agreed to allocate public and private tenders, as well as other contracts, for the sale and installation of elevators and escalators in accordance with each undertaking’s pre-agreed share of the Belgian elevator and escalator sectors. This included agreeing on which undertaking should submit the best offer and receive the final order for new elevators and escalators. Moreover, the four undertakings agreed on a price mechanism to ensure that the agreed winner would not be undercut. This included the exchange of information on prices and agreement on prices. The allocation of tenders and other contracts also included agreeing on an adjustment mechanism to realign the overall value of projects awarded with each undertaking’s allocated market share. Any need for adjustment was monitored and spotted by means of the project lists on which the four undertakings reported their sales and allocated orders;
 - (c) Colluded not to compete with each other for service and maintenance contracts for elevators and escalators already in service as well as for maintenance contracts for new installations. This included exchanging information on customers and prices and agreeing on prices and bidding patterns for tenders and other contracts, amongst others by means of a price schedule. The collusion not to compete for existing and new maintenance customers also included agreeing on a compensation mechanism by way of sub-contracting arrangements, where accepted by the customer;

- (d) Colluded not to compete with each other for modernization contracts. This included the exchange of customer and price information and agreeing on prices and bidding patterns for modernization contracts.
- (557) *Germany*: As demonstrated in Section 10 of this Decision, and acknowledged by KONE, Otis, Schindler and ThyssenKrupp, from August 1 1995 until December 5 2003 (in the case of Schindler until December 6 2000) they:
- (a) Agreed to share among them the sales and installation of escalators in Germany. This included the exchange of information on sales data and on projects;
 - (b) Agreed not to compete for each others' customers when responding to public and private tenders, as well as other contracts, concerning the sale and installation of escalators and to allocate remaining customers on the basis of the difference between the actual and the pre-agreed share of the German escalator sector. This included the exchange of information on customers and agreeing on prices and bidding patterns for tenders and contracts and
 - (c) Agreed not to compete for each others' customers when responding to public and private tenders, as well as other contracts, concerning the sale and installation of elevators, where the value of the tender/contract exceeded EUR [**]. This included the exchange of information on customers and agreeing on prices and bidding patterns for tenders and contracts.
- (558) *Luxembourg*: As demonstrated in Section 11 of this Decision and acknowledged by KONE, GTO, Schindler and ThyssenKrupp, from December 7 1995 until March 9 2004 (in the case of Kone until January 29 2004) they:
- (a) Agreed to share among them the sales and installation of elevators and escalators in Luxembourg;
 - (b) Agreed to allocate public and private tenders, as well as other contracts, for the sale and installation of escalators and elevators in accordance with each undertaking's pre-agreed share of the Luxembourg elevator and escalator sectors. This included agreeing on which undertaking should submit the best offer and receive the final order for new elevators and escalators. Moreover, the undertakings agreed on a price mechanism to ensure that the agreed winner would not be undercut. This included the exchange of information on prices and agreement on prices. The allocation of tenders and projects also included agreeing on an adjustment mechanism to realign the overall value of projects awarded with each undertaking's allocated market share. Any need for adjustment was monitored because of the project lists on which the [**] undertakings [**] reported theoretic and actual sales and allocated orders;
 - (c) Colluded not to compete with each other for maintenance contracts for elevators and escalators already in service. This included exchanging information on customers and prices and agreeing on prices and how to bid for those contracts; and

- (d) Colluded not to compete with each other for modernization contracts. This included exchanging information on customers and prices and agreeing on prices and how to bid for those contracts.
- (559) *The Netherlands*: As demonstrated in Section 12 of the this Decision, and acknowledged by KONE, Mitsubishi, Otis, Schindler and TKL, from June 1 1999 (in the case of Otis and ThyssenKrupp from April 15 1998 and in the case of Mitsubishi from January 11 2000) until March 5 2004 they:
- (a) Colluded to allocate public and private tenders, as well as other contracts, concerning the sale and installation of elevators and escalators. This included exchanging information on prices and agreeing on how to bid for tenders and contracts;
 - (b) Colluded not to compete with each other for maintenance contracts for elevators and escalators already in service. This included exchanging information on customers and prices and agreeing on how to bid for tenders and contracts; and
 - (c) Colluded not to compete with each other for modernization contracts. This included exchanging information on customers and agreeing on prices and agreeing on how to bid on tenders and contracts.
- (560) To conclude, in line with the case law cited in Section 13.2.2.1, the behaviour of the undertakings concerned can be characterized for the NEB and/or SEB sectors in Belgium, Germany, Luxembourg and the Netherlands as complex infringements consisting of various actions which can either be classified as agreements or concerted practices, by virtue of which the cartel participants knowingly substituted practical cooperation between them for the risks of competition. Furthermore, the Commission considers, on the basis of the same case law, that the undertakings in such concertation must have taken into account the information exchanged between them in determining their own conduct on the market, all the more so because the concertation occurred on a regular basis and over a long period.
- (561) Based on the foregoing, the different elements of behaviour of the addressees of this Decision, as described in Sections 9 to 12, can be considered to form part of four overall schemes to share and regulate the market in Belgium, Germany, Luxembourg and the Netherlands, respectively. Under these circumstances, each series of agreements and/or concerted practices constitutes a complex infringement in the sense of Article 81(1) of the Treaty in the respective Member State.

13.2.2.3. Principles concerning single and continuous infringements

- (562) Complex national cartels, like the ones that are the subject of this Decision, may be viewed as *single and continuous infringements* for the time frame in which they existed. The intensity of the agreements may well vary from time to time, or its mechanisms be adapted to take account of new developments. The validity of this assessment is not affected by the possibility that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81 of the Treaty. As the Court stated in *Commission v Anic Partecipazioni*, the agreements and concerted practices referred to in Article 81(1) of the Treaty necessarily result from collaboration by several undertakings, who

are all co-perpetrators of the infringement but whose participation can take different forms according, in particular, to the characteristics of the market concerned and the position of each undertaking on that market, the aims pursued and the means of implementation chosen or envisaged. It follows that an infringement of that Article may result not only from an isolated act but also from a series of acts or from a continuous course of conduct.⁸⁹

- (563) Although a cartel is a joint enterprise, each participant may play its own particular role. Some participants may have a more dominant role than others. Internal conflicts and rivalries, or even cheating may occur, but that will not prevent the arrangement from constituting an agreement and/or concerted practice for the purposes of Article 81(1) of the Treaty where there is a single common and continuing objective.
- (564) The mere fact that each participant in a cartel may play the role which is appropriate to its own specific circumstances does not exclude its responsibility for the infringement as a whole, including acts committed by other participants, which had the same anti-competitive object or effect. An undertaking which takes part in the common unlawful enterprise by actions which contribute to the realization of the shared objective is equally responsible, for the whole period of its adherence to the common scheme, for the acts of the other participants committed as part of the same infringement. This is certainly the case where it is established that the undertaking in question was aware of the unlawful behaviour of the other participants or could have reasonably foreseen it and was prepared to take the risk.⁹⁰ In this regard, the Court of Justice and the Court of First Instance have consistently stated that “*an undertaking may be held responsible for an overall cartel even though it is shown that it participated directly only in one or some of the constituent elements of that cartel, if it is shown that it knew, or must have known, that the collusion in which it participated was part of an overall plan and that the overall plan included all the constituent elements of the cartel.*”⁹¹

13.2.2.4. Application in this case

- (565) The unlawful agreements and concerted practices found to exist in each Member State formed part of schemes to restrict the undertakings' individual commercial conduct with clear anticompetitive object. This object was to distort the normal movement of prices and services in each national elevator and escalator sector and to restrict competition with regard to the sale, installation, maintenance and modernization of elevators and escalators by allocating projects and customers. It would be artificial to split up such continuous conduct, characterized by a single purpose, by treating it as consisting of several separate infringements in each Member State. In each Member State a single, continuous infringement of Article 81 of the Treaty was committed, which manifested itself by way of unlawful agreements and concerted practices. The

⁸⁹ Case C-49/92 P *Commission v Anic Participazioni* [1999] ECR I-4325, paragraphs 78-81, 83-85 and 203.

⁹⁰ See Case C-49/92 P *Commission v Anic Participazioni* [1999] ECR I-4325, at paragraph 83.

⁹¹ Cases T-295/94, T-304/94, T-310/94, T-311/94, T-334/94, T-348/94, *Buchmann v Commission*, *Europa Carton v Commission*, *Gruber + Weber v Commission*, *Kartonfabriek de Eendracht v Commission*, *Sarrió v Commission* and *Enso Española v Commission*, at paragraphs 121, 76, 140, 237, 169 and 223, respectively. See also case T-9/99, *HFB Holding and others v Commission* [2002] ECR II-1487, paragraph 231.

main forms of such conduct in the four Member States concerned is set out in recitals (143) to (151), (225) to (229), (255) to (261), (292) to (300) and (375) to (384).

- (566) *In Belgium:* As was demonstrated throughout Section 9, KONE, Otis, Schindler and ThyssenKrupp participated in both NEB and SEB arrangements and coordinated their commercial behaviour during NEB and SEB meetings and discussions. The NEB and SEB arrangements which were subscribed to by all four undertakings were developed and implemented through a complex of collusive arrangements, specific agreements and/or concerted practices, pursuing the same common purpose of eliminating competition between them. In addition, the NEB and SEB agreements were in place during almost exactly the same period. [**]. The participants in these unlawful arrangements knew or should have known that they were part of an overall plan pursuing a common unlawful object. There was also a cross-business area compensation mechanism in place between NEB and SEB. The addressees do not contest the fact that the complex and collusive NEB and SEB arrangements constitute one single continuous infringement.
- (567) As the illegal NEB and SEB arrangements of the cartel constitute a single continuous and complex infringement, the fact that Schindler did not explicitly admit its participation in the SEB arrangements does not relieve Schindler of its responsibility for the infringement as a whole. The Commission has demonstrated in detail that Schindler did participate in the SEB arrangements. Those facts suffice to establish the responsibility of Schindler, and this is not challenged by Schindler itself in its reply to the Statement of Objections.
- (568) *In Germany:* As was demonstrated throughout Section 10, the escalator and elevator arrangements between KONE, Otis, Schindler and ThyssenKrupp pursued the same goals and had the same result: customer and project allocation for new elevators and escalators (NEB). It would therefore be artificial to split up such arrangements, characterized by a single purpose, and treat them as consisting of several separate infringements. [**]. Sometimes elevator and escalator meetings were also held jointly with the participation of both elevator and escalator managers.
- (569) The NEB agreements and concerted practices among the undertakings were part of an overall scheme. This scheme was developed and implemented over a period of at least eight years, pursuing the same common objective of restricting competition between the undertakings concerned. The undertakings adhered to common mechanisms and established practices to allocate projects and to limit their individual commercial conduct with respect to their bidding behaviour, by not undercutting the price of the undertaking that had been allocated a certain project. Meetings took place several times a year and the meeting dates submitted by the leniency applicants show sustained continuity, often with intervals of less than a month. The addressees do not contest the fact that the complex, collusive escalator and elevator arrangements constitute one single continuous infringement.
- (570) *In Luxembourg:* As was demonstrated throughout Section 11, [**] KONE, GTO, Schindler and ThyssenKrupp participated in both the NEB and SEB arrangements and coordinated their commercial behaviour during NEB and SEB meetings and/or discussions. They knowingly adopted arrangements which facilitated the coordination of their commercial behaviour. The NEB and SEB arrangements subscribed to by all undertakings participating in the cartel were developed and implemented through

complex, collusive arrangements, specific agreements and/or concerted practices, pursuing the same common objective of eliminating competition between them. The NEB and SEB arrangements were in place during the same period. [**]. The participants in these unlawful arrangements knew or should have known that they were part of an overall plan pursuing a common unlawful object. The addressees do not contest the fact that the complex, collusive NEB and SEB arrangements constitute one single and continuous infringement.

- (571) *In the Netherlands*: As was demonstrated throughout Section 12, KONE, Mitsubishi, Otis, Schindler and ThyssenKrupp had a joint intention to allocate projects for new elevators and escalators and for service and modernization contracts. During the infringement, the meeting participants were employees at high managerial level with responsibility over both elevator and escalator business. The parties adhered to a common plan to limit their individual commercial conduct with respect to their bidding behaviour for tenders for new elevators and escalators, as well as for maintenance and modernisation contracts, with a view to eliminating competition between them. These complex, collusive arrangements constitute one single and continuous infringement.
- (572) This conclusion is not affected by statements made by Otis and ThyssenKrupp that the collusion was of an *ad hoc* nature only. To the contrary, according to the Commission's findings, the instances in which allocation took place should not be seen in isolation but rather as forming part of a broader plan. Such a broader plan allowed employees of the undertakings to enter into discussions on the allocation of specific projects on a regular basis. It also allowed them to make sure that prices would not come under pressure through price competition on specific projects. Whether or not a particular undertaking was involved in the discussions concerning the allocation of a particular project depended on the individual circumstances of the undertaking and its position on the market. But the principle that such allocation could take place and the arrangements governing the allocation were known to all cartel members. In fact, the undertakings concerned entered into anticompetitive agreements with a view to sharing the market and fix prices, without publicly distancing themselves from the content of such agreements or reporting them to the administrative authorities. This effectively facilitated the continuation of the infringement and avoided its discovery by the administrative authorities. Therefore, all undertakings that participated in the cartel in the Netherlands must be held responsible for the overall cartel, in accordance with the principles of the case law cited in Section 13.2.2.3.
- (573) The plan, which was subscribed to by KONE, Mitsubishi, Otis, Schindler and ThyssenKrupp, was developed and implemented over a period of at least five years, through complex agreements and/or concerted practices, pursuing the same common objective of restricting competition between them. In order to facilitate the collusion on individual projects, there were mechanisms in place determining the organization and location of meetings. There were rules in place deciding who could participate in the discussions. Furthermore, specific rules and practices had been developed for the allocation of projects for the new installation of elevators and escalators on the one hand and service and modernization projects on the other hand. The collusion on individual projects was thus embedded in a system of established practices, explicit and implicit arrangements, and unwritten rules guiding the allocation process.

(574) To conclude, the single and continuous character of each infringement that took place in Belgium, Germany, Luxembourg and the Netherlands respectively is not affected by the fact that one or more elements of a series of actions or of a continuous course of conduct could individually and in themselves constitute a violation of Article 81 of the Treaty.⁹² Accordingly, in this case the Commission considers that there is ample evidence to prove that the addressees of this Decision committed single and continuous infringements of Article 81 of the Treaty in each of the following Member States: Belgium, Germany, Luxembourg and the Netherlands.

13.2.3. Restriction of competition

13.2.3.1. Object

(575) Article 81(1) of the Treaty expressly includes as examples of restrictive agreements and concerted practices those which:⁹³

- (a) Directly or indirectly fix selling prices or any other trading conditions;
- (b) Limit or control production, markets or technical development and;
- (c) Share markets or sources of supply.

(576) These are the essential characteristics of the horizontal arrangements under consideration in this case. Price being the main instrument of competition, the various collusive arrangements and mechanisms adopted by the suppliers were all ultimately aimed at inflating prices, to the benefit of the undertakings involved, and to a higher level than that which would have been determined by conditions of free competition. By dividing markets and customers, the undertakings did not compete for market shares and customers and succeeded in manipulating the market price and output as well as the structure of competition in the segments for sale and installation, maintenance and modernization of elevators and escalators. By their very nature sharing markets and customers and fixing prices restrict competition within the meaning of Article 81(1) of the Treaty.

(577) The principal aspects of the agreements and/or concerted practices which can be characterized as restrictions of competition in this case are:

(578) In Belgium:

- (a) Sharing the Belgian elevator and escalator sectors among the four undertakings;
- (b) Agreeing to allocate customers with regard to elevators and escalators;
- (c) Colluding not to compete for customers purchasing maintenance services for elevators and escalators and;
- (d) Colluding not to compete for customers purchasing modernization services for elevators and escalators.

⁹² See Case, C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4325, paragraph 81.

⁹³ The list is not exhaustive.

(579) In Germany:

- (a) Sharing the German escalator and at least the high value elevator sectors among the undertakings concerned;
- (b) Agreeing not to compete for existing customers with regard to the sale and installation of escalators;
- (c) Agreeing on the allocation of new customers concerning escalator sales and installation and;
- (d) Agreeing not to compete for existing customers with regard to sale and installation of elevator projects of a high value.

(580) In Luxembourg:

- (a) Sharing the Luxembourg elevator and escalator sectors among the undertakings concerned;
- (b) Agreeing to allocate customers with regard to elevators and escalators;
- (c) Colluding not to compete for customers purchasing maintenance services for elevators and escalators and;
- (d) Colluding not to compete for customers purchasing modernization services for elevators and escalators.

(581) The Netherlands:

- (a) Colluding to allocate customers with regard to elevators and escalators;
- (b) Colluding not to compete for customers purchasing maintenance services for elevators and escalators and;
- (c) Colluding not to compete for customers purchasing modernization services for elevators and escalators.

(582) The “*object or effect*” of preventing, restricting or distorting competition referred to in Article 81(1) of the Treaty must be read disjunctively, as it is apparent that these are alternative, as opposed to cumulative, criteria for a finding of a cartel. It is settled case law that first the object of an agreement is to be examined in its actual economic context, and only if it is not clear whether the object of an agreement is to harm competition is it necessary to consider its impact.⁹⁴

(583) In this case, it has been demonstrated that the parties’ behaviour served to attain the single objective of restricting price competition and enabled them to adapt their pricing strategy to the information received from other parties. It is also apparent that the aim of the parties was to ensure the stability of prices and market shares in all four Member States. The anticompetitive object of the agreements and/or concerted

⁹⁴ See Case 56/65 *Société Technique Minière v Maschinenbau Ulm* [1966] ECR 235, p 249, [1966] CMLR 357, p 375

practices among the parties was also demonstrated by the fact that most of them took explicit action to conceal their participation in meetings and to avoid detection of agreements and documents. For instance, in Belgium and Luxembourg employees used private or separate telephones and, sometimes, pre-paid cards for mobile telephones to avoid tracking. In the framework of the German cartel, meetings were held in other countries (Netherlands, Switzerland) to prevent investigations by national competition authorities. In addition, employees were generally instructed to destroy project lists after each meeting and not to keep written traces of meetings (for example in Germany). Moreover, cartel meetings in Belgium and Luxembourg were disguised as legitimate national trade association meetings. Hence, the infringements consisting of a complex of agreements and/or concerted practices, as described in Sections 9 to 12 of this Decision, had as their object the restriction of competition within the meaning of Article 81 of the Treaty.

13.2.3.2. Effect

- (584) It is settled case law that if the object of an agreement or concerted practice is to harm competition within the common market, then there is no need for the Commission to take into account the actual impact of such agreement or concerted practice in order to find an infringement of Article 81 of the Treaty.⁹⁵ In this case the seriousness of the infringements that took place in Belgium, Germany, Luxembourg and the Netherlands has been established, in line with settled case law,⁹⁶ by reference to the nature and object of the parties' anticompetitive behaviour as set out in recitals (577) to (581) and recitals (660) to (669).
- (585) According to well-established case law, factors relating to the aspects demonstrating the intention, and thus the object of the conduct, may be more significant than those relating to its effects, particularly when they relate to infringements which are very serious, such as price fixing and market sharing.⁹⁷ As was demonstrated throughout Sections 9 to 12 of this Decision, the parties' anticompetitive agreements in Belgium, Germany, Luxembourg and the Netherlands clearly aimed at sharing markets and fixing prices for NEB and/or SEB in the elevators and/or escalators sectors, and were sometimes coupled with exchanges of confidential business information so as to facilitate the conclusion and implementation of the parties' unlawful agreements. Restrictions which have such a clear anticompetitive object are, by their very nature, among the most serious violations of Article 81 of the Treaty regardless of their actual impact on the common market.
- (586) [**] argues, with regard to the Netherlands, that "even if the parties allocated a project, this did not have an effect on the market" and "often the outcome would have been the same in absence of the contact between the parties."

⁹⁵ See e.g., Cases T-25/95 *Cimenteries CBR SA v Commission* [2000] ECR II-491, [2000] 5 CMLR 204, paragraphs 837, 1531 and 2589, Case T-202/98 *Tate & Lyle v Commission* [2001] ECR II-2035, [2001] 5 CMLR 859, paragraphs 73-74

⁹⁶ See e.g., Case T-241/01 *Scandinavian Airlines Systems v Commission*, para 130.

⁹⁷ See Case T-141/94 *Thyssen Stahl v Commission* [1999] ECR II-347. The judgement has been confirmed by the Court of Justice on October 2 2003 in Case C-194/99 P *Thyssen Stahl v Commission*

- (587) In addition, [**] also claims that the allocation of maintenance and modernisation projects merely reflected what would have been a company's independent commercial policy (*see* recitals (469) and (533)).
- (588) These arguments must be rejected. It is settled case law that where an undertaking enters into anticompetitive agreements relating to certain products or services on a given market, it is practically impossible to determine how it would have behaved on the market in question in the absence of the anticompetitive agreement.⁹⁸ Indeed, it is demonstrated in recitals (391) to (397) and (403) to (471) that the competitors had prior contacts to agree on the winning bid, showing the clear anticompetitive object of the arrangements, which can be assumed to have had an impact on the behaviour of the undertakings in the tender procedures. In addition, although the mechanism in the Netherlands may have ensured that the most interested bidder would obtain the contract, it aimed precisely at pre-allocating the project without the cartel members having to engage in competitive bidding in the adjudication process, for example a second bidding round. In the circumstances of this case, [**] the [**] cartel participants themselves prevented an adequate assessment of the extent of the obstacles to trade and, therefore, it is not possible to take account of those obstacles when assessing the market impact of the infringement.
- (589) In general, whilst the anticompetitive object of the cartels is sufficient to support the conclusion that Article 81(1) of the Treaty applies in this case, there is a high likelihood that the parties' unlawful behaviour in Belgium, Germany, Luxembourg and the Netherlands actually have resulted in anticompetitive effects. This and the arguments the parties in relation to this are discussed in recitals (660) to (669).

13.2.4. Article 81(3)

- (590) The provisions of Article 81(1) of the Treaty may be declared inapplicable under Article 81(3) of the Treaty if an agreement or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, provided that it allows consumers a fair share of the resulting benefit, does not impose restrictions that are not indispensable to the attainment of those objectives and does not afford the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.
- (591) None of the parties has claimed that the conditions of Article 81(3) of the Treaty were met in this case. The parties did not notify any agreement, which would have been a precondition for the application of Article 81(3) of the Treaty, at any time during the infringement, under Article 4(1) of Regulation No. 17. In any event, there is no indication that the agreements and concerted practices between the parties promoted technical or economic progress or improved the production or distribution of goods.
- (592) Accordingly, Article 81(3) of the Treaty is not applicable in this case.

13.2.5. Effect upon trade between Member States

- (593) Save for ThyssenKrupp and Schindler, the addressees do not challenge the finding of the Commission that their agreements and/or concerted practices had in fact an

⁹⁸ See Case T-67/00 *JFE Engineering Corp. and others v Commission*, paragraph 546

appreciable effect upon trade between Member States and that Article 81 of the Treaty therefore applies.

- (594) In their respective replies to the Statement of Objections, ThyssenKrupp and Schindler argue that Article 81 of the Treaty does not apply to the cartels in Belgium, Germany, Luxembourg and the Netherlands due to the lack of appreciable effect upon trade between Member States resulting from the national scope of the agreements and/or concerted practices.
- (595) According to settled case law, Article 81 of the Treaty does not require that provisions have actually affected trade between Member States, rather, it requires that it be established that the agreements are capable of having that effect. More concretely, "*in order that an agreement between undertakings may affect trade between Member States, it must be possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States.*"⁹⁹ It is true that this case concerns complex national cartels in Belgium, Germany, Luxembourg and the Netherlands which, despite certain common elements, are viewed as four separate single and continuous infringements. Nonetheless, the fact that a horizontal cartel covers only one single Member State does not mean that the unlawful agreements are not capable of affecting trade between Member States. On the contrary, it is settled case law that agreements or concerted practices extending over the whole territory of a Member State, such as the ones in this case, by their very nature "*have the effect of reinforcing the partitioning of markets on a national basis, thereby holding up the economic interpenetration which the Treaty is designed to bring about.*"¹⁰⁰
- (596) The scale of the actual competition on the market at the time of the infringements, that is, the relatively limited cross-border trade in the products and services concerned, does not affect this finding. As demonstrated in Section 6 on Trade between Member States, there is cross-border trade within the Community. Despite the referral policy applied by the four major elevator and escalator manufacturers, elevator and escalator undertakings in general carry out international transactions. Part of that cross-border trade is even carried out by KONE, Otis, Schindler and ThyssenKrupp. It appears from recitals (78) and (88) that there is an increasing trend for customers to source outside the national borders. Furthermore, the cartel participants' referral policy is itself an indication that there is some interest from customers in approaching suppliers outside the national boundaries. It can be presumed that in the absence of the said referral policy, customers especially in the border area of countries neighbouring the Member States concerned, would seek to compare offers from undertakings located in the different Member States in order to choose the one that best suits their individual needs.
- (597) The Commission therefore rejects both Schindler's and ThyssenKrupp's arguments that Article 81 of the Treaty would not apply in this case because their unlawful agreements did not have an appreciable effect on trade between Member States.

⁹⁹ See C-306/96, *Javico International v Yves Saint Laurent Parfums* [1998] ECR I- 1983., paragraphs 16 and 17; see also the Judgment of the Court of First Instance of 15 September 1998 in Case T-374/94, *European Night Services* [1998] ECR II - 3141 paragraph 136.

¹⁰⁰ See Case C-309/99, *Wouters*, [2002] ECR I-1577, paragraph 95

- (598) Moreover, Schindler’s argument that there was no link between the “*national agreements*” and therefore trade between Member States could not have been affected, is groundless in the light of Schindler’s own statement that representatives of the Belgian ThyssenKrupp and KONE subsidiaries tried, on several occasions, to convince the Luxembourg undertakings “*to mix the interests of the Belgian market with those of the Luxembourg market.*”
- (599) In addition, it must be stressed that the application of Article 81 of the Treaty to a cartel is *not* restricted to that part of sales by the cartel members which actually involve a physical transfer of goods from one Member State to another, *nor* is it necessary to demonstrate that the individual participation of each cartel member, as opposed to the cartel as a whole, affected trade between Member States.¹⁰¹ According to settled case law the concept of “*trade*” also encompasses cases where agreements or practices affect the competitive structure of the market. Thus, for example, agreements and practices that eliminate or threaten to eliminate a competitor operating within the Community may be subject to the Community competition rules.¹⁰² In all likelihood the agreements, by tending to freeze the competitive situation, have discouraged attempts to obtain business in the Member States concerned, and sometimes concrete steps were taken to prevent market entry: for instance, in its reply to the Statement of Objections, Mitsubishi claims that its “*attempts to move into markets outside the Netherlands were not welcomed by the Big Four, who took steps against [Mitsubishi] to discourage such activity.*”
- (600) Leaving such individual examples aside, it is settled case law that “[t]he effect which an agreement might have on trade between Member States is to be appraised in particular by reference to the position and the importance of the parties on the market for the products concerned.”¹⁰³ Considering the four major elevator and escalator manufacturers’ very high share of turnover in elevators, escalators, maintenance and modernization, and considering the fact that they set up and implemented a system of project allocation which extended over the whole territory of Belgium, Luxembourg, Germany and the Netherlands, respectively, in combination with their referral policy, it is justified to assume that foreign undertakings were hampered in their ability to sell their products and services in the countries concerned, since in those countries they would have to act against a group of manufacturers, which jointly represented the vast majority of supplies.
- (601) ThyssenKrupp’s argument that special national laws or standards would make it more difficult for potential competitors to enter the national markets cannot effectively demonstrate that Article 81 of the Treaty would not apply, as it has been shown in recital (593) that such market penetration was possible.
- (602) Under such conditions, the application and implementation by the four major elevator and escalator manufacturers (in the case of the Netherlands also including Mitsubishi) of the system of project allocation, in each of the Member States concerned, against

¹⁰¹ See Case T-13/89 *Imperial Chemical Industries v Commission* [1992] ECR II-1021, paragraph 304

¹⁰² See Joined Cases T-24/93, T-25/93, T-26/93 and T-28/93 *Compagnie Maritime Belge Transports and Others v. Commission* [1996] ECR II-1439

¹⁰³ See Case C-306/96, *Javico*, [1998] ECR I-1983, paragraph 17.

the background of their referral policies was likely to result in the diversion of trade patterns from the course they would otherwise have followed.¹⁰⁴

13.3. Addressees

13.3.1. General principles

- (603) Measures enforcing the Community competition rules must be addressed to a legal entity. Despite the fact that Article 81 of the Treaty is applicable to undertakings and the concept of undertaking is an economic one, only entities with legal personality can be held liable for an infringement.¹⁰⁵ It is accordingly necessary to define the undertaking that is to be held accountable for the infringement of Article 81 of the Treaty by identifying one or more legal persons to represent the undertaking. Community competition law recognizes that “*different undertakings belonging to the same group form an economic unit and therefore an undertaking within the meaning of Article 81 EC if the undertakings concerned do not determine independently their own conduct on the market.*”¹⁰⁶ In particular, where a subsidiary has actively participated in a cartel, and the parent forms a single economic entity with the subsidiary, the parent may be held liable for an infringement on the ground that it forms part of the same undertaking. As the Court of First Instance has stated, the Commission’s task is to “*determine the undertaking within the meaning of Article 8[1] of the Treaty that ha[s] committed the infringement and to indicate the natural or legal person who, as the addressee of the decision, [is] to answer for the infringement committed by that undertaking.*”¹⁰⁷
- (604) When a subsidiary does not autonomously determine its behaviour on the market, parent and subsidiary belong to the same economic entity and therefore both of them constitute one “*undertaking*” for the purposes of competition law.¹⁰⁸ According to settled case law of the Court of Justice and the Court of First Instance, the Commission may generally assume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company and thus does not determine autonomously its commercial policy, without needing to verify whether the parent company has in fact exercised that power.¹⁰⁹

¹⁰⁴ See Joined Cases 209 to 215 and 218/78 *Van Landewyck and others v Commission* [1980] ECR 3125, at paragraph 170.

¹⁰⁵ Although an ‘undertaking’ within the meaning of Article 81(1) is not necessarily the same as a company having legal personality, it is necessary for the purposes of applying and enforcing decisions to identify an entity possessing legal or natural personality to be the addressee of the measure. Case T-305/94, *PVC*, [1999] ECR, p. II-0931, paragraph 978.

¹⁰⁶ See Case T-203/01, *Michelin v. Commission* [2003] ECR II-4071, paragraph 290.

¹⁰⁷ See Case T-31/99, *ABB Asea Brown Boveri Ltd v Commission*, [2002] ECR II-1881, paragraph 60.

¹⁰⁸ See Case 107/82 *AEG v Commission* [1983] ECR 3151, paragraph 50, and case T-65/89 *BPB Industries and British Gypsum v Commission* [1993] ECR II-389, paragraph 149

¹⁰⁹ See Case 107/82 *AEG v Commission* [1983] ECR 3151, at paragraph 50; Case C-310/93P, *BPB Industries & British Gypsum v. Commission* [1995] ECR I-865, at par. 11; Case T-354/94 *Stora Kopparbergs Bergslags AB v Commission*, [1998] ECR II-2111, at paragraph 80, confirmed by Case C-286/98 P [2000] ECR I-9925, paragraphs 27 to 29 ; Joined cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *LVM and others v. Commission* (PVC II), [1999] ECR II-931, at paragraphs 961 and 984; Case T-203/01 *Michelin v Commission*, [2003] ECR II-4371 at paragraph 290; Joined cases T-71, 74, 87 and 91/03 *Tokai Carbon Co. Ltd and others v Commission*, judgment of June 15 2005 at paragraphs 59-60).

- (605) Any presumption of decisive influence in cases of wholly-owned subsidiaries remains rebuttable. When, in the Statement of Objections, the Commission relies on that assumption and declares its intention to hold a parent company liable, it is for the parties concerned, when they consider that, despite the shareholdings at issue, the subsidiary determines its conduct independently on the market, to rebut that assumption by providing the Commission with sufficient evidence during the administrative procedure.¹¹⁰ General assertions unsupported by convincing evidence are not sufficient in this regard. To rebut the presumption, it must be shown either that under the special circumstances of the case the parent company was not in a position to exert a decisive influence on its wholly-owned subsidiary's commercial policy, or that the subsidiary nonetheless determined autonomously its commercial policy (that is, the parent company, despite its controlling rights, did not actually exercise a decisive influence as regards the basic orientations of the subsidiary's commercial strategy and operations on the market).

13.3.2. Liability in this case

- (606) The Statement of Objections was addressed to the relevant national subsidiaries of Otis, KONE, Schindler and ThyssenKrupp, all of which were directly involved in the respective anticompetitive practices in one of the four Member States at issue. Also, the Statement of Objections was addressed to Mitsubishi Elevator Europe B.V. and which was directly involved in the cartels in the Netherlands. In addition, the Commission decided to address the Statement of Objections to the relevant Otis, KONE, Schindler and ThyssenKrupp subsidiaries' *de jure* or *de facto* sole-owners and, where applicable, their ultimate parent companies.
- (607) In order to identify the appropriate addressees of this Decision and to establish the liability for the infringement within each undertaking, the following specifications must be made in respect of each undertaking responsible for the anticompetitive practices that are the subject of this Decision.

13.3.2.1. Addressee specific considerations

KONE

- (608) KONE Belgium S.A., KONE Luxembourg S.à.r.l., KONE GmbH and KONE B.V. Lifen en Roltrappen should be held liable for the respective infringements committed by KONE in Belgium, Germany, Luxembourg and the Netherlands as set out in this Decision. In addition, KONE Corporation (KC) should be held jointly and severally liable for the infringements of Article 81 of the Treaty, which were implemented at the level of its relevant subsidiaries in the said four Member States. Although KONE Belgium S.A., KONE Luxembourg S.à.r.l., KONE GmbH and KONE B.V. Lifen en Roltrappen were the legal entities whose staff directly participated in the cartels, as sole owner and ultimate parent company KC was able to exercise decisive influence on the commercial policy of each of the subsidiaries during the time of the infringement and, it is presumed, made use of this power.
- (609) KC contests the attribution of liability, submitting that KC was neither directly involved in nor aware of the behaviour of the subsidiaries which would “*independently*

¹¹⁰ See Case T-330/01, *Akzo Nobel NV*, paragraphs 78, 83-85, and the case law cited there.

take care of the day-to day business activity in the elevator and escalator sector,” and “[t]here is no involvement of KONE Corporation in this decision making process.”

- (610) As was indicated in recitals (603) to (605), for the purposes of attributing liability within a group of undertakings, a parent company can be presumed liable for the illegal conduct of its wholly-owned subsidiaries unless it rebuts the presumption that it actually made use of its possibility to exercise decisive influence over these subsidiaries. For this it is not enough to allege that the parent company was not aware of or did not encourage or impose the illegal behaviour upon its subsidiaries. A parent company forms an economic unit with its subsidiaries, and can therefore be held liable for the conduct of its subsidiaries, if it is in a position to exercise, and actually exercises, decisive influence over the general commercial policy of the latter (that is, if the parent company determines or is presumed to have determined the basic orientation of the commercial strategy and operations of the subsidiary). For the same reasons, when the said presumption applies, the company concerned cannot reverse it by simply stating that the parent company was not directly involved in or was not aware of the cartel. [**].
- (611) The contention that KC was not entrusted with the day-to-day business or the operational management of its subsidiaries is also not sufficient to rebut the presumption that it exercised decisive influence over these subsidiaries. [**].
- (612) In their reply to the Statement of Objections, KC and its relevant subsidiaries did not provide the Commission with any evidence clarifying their corporate relationship, the management structure and reporting requirements for the purposes of rebutting the presumption that KC exerted decisive influence over its subsidiaries preventing them from determining independently their own conduct on the market. [**].
- (613) Moreover, the Commission rejects KC’s conclusion that because the documents seized at KC’s premises during the Commission’s inspection in January 2004 were returned, the Commission “*considered that KONE Corporation was not involved in the contested infringement.*” Indeed, the fact that the Commission returns documents that were seized at the premises of a company does not prevent the Commission from finding that company liable for the infringement at issue on the basis of other evidence in the Commission’s possession.
- (614) [**]. Therefore, KC should be held jointly and severally liable with its relevant subsidiaries for the infringements of Article 81 of the Treaty which are the subject of this Decision.

Otis (in respect of the infringements in Belgium, Germany and the Netherlands)

- (615) N.V. OTIS S.A., Otis GmbH & Co OHG and Otis B.V. should be held liable for the infringements committed in Belgium, Germany and the Netherlands respectively, as described in this Decision. In addition, Otis Elevator Company (OEC) and United Technologies Corporation (UTC) should be held jointly and severally liable for the infringements which were implemented at the level of the national subsidiaries in Luxembourg, Germany and the Netherlands. Although N.V. OTIS S.A., Otis GmbH & Co OHG and Otis B.V. were the legal entities that directly participated in the cartels, their owner, OEC and its sole-owner and ultimate parent company, UTC, were able to

exercise decisive influence on the commercial policy of each of the subsidiaries during the period of the infringement and, it is presumed, made use of this power.¹¹¹

- (616) OEC and UTC contest the attribution of liability, submitting that they were neither directly involved in nor aware of the behaviour of the subsidiaries which “*made all relevant commercial decisions independently and without any instructions from OEC.*”
- (617) This argument, as well as OEC’s further argument that “day-to-day operations, including decisions on whether or not to participate in bids of a size below US\$ [**] were not subject to approval at OEC level” is insufficient to rebut the presumption that OEC and UTC’s subsidiaries did not determine independently their own conduct on the market. Thus, OEC and UTC should be held liable for the unlawful conduct of their subsidiaries, along the lines set out in recitals (603) to (605) and (610) to (612).
- (618) In addition, the Commission considers OEC’s and UTC’s arguments [**] insufficient for rebutting liability. [**]
- (619) In their replies to the Statement of Objections, OEC, UTC and their relevant subsidiaries did not provide the Commission with evidence clarifying their corporate relationships, the management structure and reporting requirements for the purposes of rebutting the presumption that OEC and UTC exerted decisive influence over the subsidiaries preventing them from determining independently their own conduct on the market. Under these circumstances, it is presumed that OEC and UTC, as sole-owners of these subsidiaries, exercised their controlling rights and made use of all other means to exercise decisive influence to which they were entitled.
- (620) OEC also claims that there would be no “*practical or policy reason why the Commission would need to address any final decision to OEC,*” as the Commission is bound by the principle of proportionality which implies that it “*should only address a decision to a legal entity where this is necessary and that it should not take unnecessary decisions, i.e., where addressing a decision to another party would achieve the same effect.*” The Commission cannot endorse this view. OEC is not to be held jointly and severally liable for the various infringements of Article 81 of the Treaty on the basis of “*practical or policy reasons.*” Rather, liability is exclusively based on the fact that OEC and UTC form part of an economic unit which has committed very serious infringements of Community competition law. The proportionality principle is taken into account when the Commission determines a penalty that is reasonable and appropriate in the circumstances.
- (621) In light of the foregoing, it is concluded that UTC and its wholly-owned subsidiary, OEC, have not rebutted the presumption of liability for the infringements committed in Belgium, Germany and the Netherlands. Therefore, UTC and OEC should be held jointly and severally liable with their relevant subsidiaries for the infringements of Article 81 of the Treaty, which are subject of this Decision.

Otis and General Technic S.à.r.l. (in respect of the infringement in Luxembourg)

¹¹¹ There are a number of intermediary undertakings between UTC and its relevant Otis subsidiaries that participated in the cartel. This does not however change the fact that UTC is the ultimate controlling parent company of the Otis Group.

- (622) With regard to General Technic-Otis S.à.r.l. (GTO) in Luxembourg, N.V. OTIS S.A. owns [%] of that undertaking and General Technic S.à.r.l. owns the remaining [%]. [%] Therefore, the Commission takes the view that during the infringement in Luxembourg, GTO operated under the joint control of N.V. OTIS S.A. and General Technic S.à.r.l. and the commercial policy of GTO was determined by the common understanding of its two shareholders. In addition, the parent companies are linked to GTO's operation in Luxemburg in the following ways: [%] Given these close personal, economic and legal links between GTO and its two parents, they are considered to form an economic unit as established by case law¹¹² and it appears that GTO has not decided independently upon its own conduct on the market but carried out, in all material respects, the instructions given to it by the parents. It is therefore justified to attribute GTO's anti-competitive conduct to its parents and, consequently, N.V. OTIS S.A. and General Technic S.à.r.l. should be addressees of this Decision. OEC and UTC should also be held liable, the latter being the 100% ultimate parent company of N.V. OTIS S.A. Via N.V. OTIS S.A., OEC and UTC were able to exercise decisive influence on the commercial policy of GTO throughout the period of the infringement and, it is presumed, made use of this power.
- (623) [%] [%] As was set out in recital (611) in greater detail, the fact that the day-to-day operations of a subsidiary are managed solely by the subsidiary's officers is not a decisive factor when imputing liability to the parent.
- (624) OEC goes on to argue that the allocation of voting rights among the shareholders on the GTO Board implies that any decision falling within the competence of the Board [%], consequently, every major decision adopted by GTO during the infringement necessarily reflected the will of both N.V. OTIS S.A. and General Technic S.à.r.l. and neither can claim that any decision was adopted against or contrary to its will.
- (625) In the same line of reasoning, the argument put forward by General Technic S.à.r.l. that it was not in a position to exert decisive influence over the development of GTO's commercial strategy, must be rejected. [%]. Similarly, the argument also brought forward by General Technic S.à.r.l., that due to [%], its influence would never have extended beyond [%], is groundless. In fact, the attribution of liability for a subsidiary's market behaviour does not require an overlap with the parent's business activities or a close connection with the subsidiary's business. It is only normal that different activities and specializations are assigned to different entities within a corporate group.
- (626) In conclusion, the close economic, legal and personal links between GTO and both parents provide sufficient grounds to conclude that they form part of the same economic unit. N.V. Otis S.A. and General Technic S.à.r.l. have not rebutted the evidence that they were in a position to exert decisive influence over the commercial policy of GTO, and that they have actually exercised their controlling rights and made use of all other means to exercise decisive influence to which they were entitled. Therefore, N.V. Otis S.A. and General Technic S.à.r.l. should be held jointly and severally liable with GTO for the infringement of Article 81 of the Treaty which took place in Luxembourg.

¹¹²

See Case T-314/01 *Avebe v Commission*, paragraph 141 and case law referred to therein

- (627) Schindler S.A./N.V., Schindler S.à.r.l., Schindler Deutschland Holding GmbH and Schindler Liften B.V. should be held liable for the respective infringements committed by Schindler in Belgium, Germany, Luxembourg and the Netherlands as set out in this Decision. In addition, Schindler Holding Ltd. (SH) should be held jointly and severally liable for these infringements which were implemented at the level of its relevant subsidiaries in the said four Member States. Although Schindler S.A./N.V., Schindler S.à.r.l., Schindler Deutschland Holding GmbH and Schindler Liften B.V. were the legal entities whose staff directly participated in the cartels, SH, as their sole-owner and ultimate parent company, was able to exercise decisive influence over the commercial policy of each of the subsidiaries during the period of the infringement and, it is presumed, made use of this power.¹¹³
- (628) SH contests the attribution of liability, submitting that it was neither involved in nor aware of the behaviour of the subsidiaries which would “*carry on their business on the market as autonomous legal entities which determine their commercial policy largely on their own.*”
- (629) This argument, as well as SH’s further argument that it did not have “*any influence on the day-to-day business of the individual subsidiaries*”, is insufficient for the purposes of rebutting the presumption that SH’s subsidiaries did not determine independently their own conduct on the market. SH should therefore be held liable for their unlawful conduct, as set out in recitals (603) to (605) and (610) to (612).
- (630) Furthermore, the argument put forward by SH to the effect that the Commission must prove that the subsidiary carried out the instructions given to it by the parent company, is not in line with case law providing that the “*Commission can generally assume that a wholly-owned subsidiary essentially follows the instructions given to it by its parent company without needing to check whether the parent company has in fact exercised that power.*”¹¹⁴ This assumption remains rebuttable and SH, during the administrative procedure, could have provided evidence that it did not exert decisive influence over its subsidiaries to prevent them from determining independently their own conduct on the market. SH and its subsidiaries, however, did not provide the Commission with evidence clarifying their corporate relationships, the management structure and reporting requirements for the purpose of rebutting this presumption. Under these circumstances, it is presumed that SH, as the sole owner of its subsidiaries which are addressees of this Decision, exercised its controlling rights and made use of all other means to exercise decisive influence to which it was entitled.
- (631) SH also argues that the measures taken to prevent cartel violations, such as antitrust compliance programmes, “*prove that Schindler Holding did not issue instructions regarding the infringements, but on the contrary did everything [...] to prevent breaches of the law and in particular infringements of competition law.*” In general, while the Commission welcomes measures taken by undertakings to avoid cartel infringements, such measures cannot change the reality that infringements did take

¹¹³

Schindler S.à.r.l. is a 100% subsidiary of Schindler S.A./N.V.

¹¹⁴

See Joined cases T-71, 74, 87 and 91/03 *Tokai Carbon Co. Ltd and others v Commission*, judgment of June 15 2005, paragraph 60.

place and the need to sanction them in this Decision.¹¹⁵ In fact, the mere existence of a compliance programme cannot lead to the conclusion that SH did or did not issue instructions regarding the infringement. The presumption remains that SH's wholly-owned subsidiary did not determine autonomously its commercial policy on the market. The Commission therefore cannot take this argument into consideration when establishing liability.

- (632) In these circumstances, the Commission considers that SH and its wholly-owned subsidiaries have not rebutted the presumption of liability for the infringements committed in Belgium, Germany, Luxembourg and the Netherlands. Therefore SH should be held jointly and severally liable with its relevant subsidiaries for the infringements of Article 81 of the Treaty, which are the subject of this Decision.

ThyssenKrupp

- (633) ThyssenKrupp Liften Ascenseurs N.V./S.A. and ThyssenKrupp Ascenseurs Luxembourg S.à.r.l. should be held liable for the respective infringements committed by ThyssenKrupp in Belgium and Luxembourg as set out in this Decision. In addition, ThyssenKrupp Elevator AG and ThyssenKrupp AG should be held jointly and severally liable for these infringements which were implemented at the level of their relevant subsidiaries in Belgium and Luxembourg.
- (634) ThyssenKrupp Liften Ascenseurs N.V./S.A. and ThyssenKrupp Ascenseurs Luxembourg S.à.r.l. should be held liable because their employees participated directly in the cartels. ThyssenKrupp Elevator AG should be held liable because it is the 100% intermediary parent company of ThyssenKrupp Liften Ascenseurs N.V./S.A. and ThyssenKrupp Ascenseurs Luxembourg S.à.r.l.¹¹⁶ and ThyssenKrupp AG should be held liable because it is their 100% ultimate parent company. As such, these parent companies were able to exercise decisive influence on the commercial policy of each of the subsidiaries during the period of the infringement and, they are presumed, in fact did so.¹¹⁷
- (635) The Commission holds ThyssenKrupp Aufzüge GmbH and ThyssenKrupp Fahrtreppen GmbH liable for the infringements committed by ThyssenKrupp in Germany. In addition, the Commission holds ThyssenKrupp Elevator AG and ThyssenKrupp AG jointly and severally liable for these infringements which were implemented at the level of their relevant subsidiaries in Germany.
- (636) ThyssenKrupp Aufzüge GmbH and ThyssenKrupp Fahrtreppen GmbH are held liable because their employees participated directly in the cartel (ThyssenKrupp Fahrtreppen GmbH's employees participated until at least 2001). ThyssenKrupp Elevator AG is held liable because it is the 100% intermediary parent company of ThyssenKrupp Aufzüge GmbH, and ThyssenKrupp AG is held liable because it is the 100% ultimate parent company of ThyssenKrupp Aufzüge GmbH and ThyssenKrupp Fahrtreppen

¹¹⁵ See Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01, *Tokai Carbon Co. Ltd and Others v Commission*, at paragraph 343.

¹¹⁶ The intermediary parent company of ThyssenKrupp Liften Ascenseurs N.V./S.A. (TKLA) is ThyssenKrupp Aufzüge GmbH (TKA) (99.96%).

¹¹⁷ There are a number of intermediary undertakings between TKAG and its relevant national subsidiaries that participated in the cartel. This does not however change the fact that TKAG is the ultimate controlling parent company of the ThyssenKrupp Group.

GmbH. As such, these parent companies were able to exercise decisive influence on the commercial policy of each of the subsidiaries during the period of the infringement and, it is presumed, made use of this power.

- (637) Finally, the Commission holds ThyssenKrupp Liften B.V. and ThyssenKrupp AG jointly and severally liable for the infringement ThyssenKrupp committed in the Netherlands. ThyssenKrupp Liften B.V. is held liable because its employees participated directly in the cartel. The Commission holds ThyssenKrupp AG liable because as the 100% ultimate parent company it was able to exercise decisive influence on the commercial policy of its subsidiary during the period of the infringement and, it is presumed, made use of this power.
- (638) ThyssenKrupp Elevator AG (TKE) contests liability, submitting that it was not involved in the anticompetitive practices that occurred “*exclusively at the level of national subsidiaries.*” TKE further states that the Commission had not established any facts to prove TKE’s participation in the infringements or its exertion of influence on the subsidiaries. These arguments are insufficient for the purposes of rebutting the presumption that TKE’s subsidiaries did not determine independently their own conduct on the market and, thus, TKE should therefore be held liable for their unlawful conduct along the lines set out in recitals (603) to (605) and (639).
- (639) Similarly, and along the lines set out in recital (619), the Commission considers TKE’s argument groundless that the absence of overlaps in the management boards of TKE and the subsidiaries during the period of the infringements would exclude TKE’s liability. Moreover, as was set out in greater detail in recital (626), the attribution of liability to a parent company does not require any overlap between the two undertakings’ businesses. The Commission therefore considers TKE’s argument that “*TKE is a pure intermediate holding company which does not run the day-to-day operative business of the companies it holds,*” and that therefore TKE was not able to exert influence on its subsidiaries, insufficient. Indeed, within a single economic entity it is presumed that the subsidiary essentially follows the parent’s instructions and there is no need for the parent to directly run the day-to-day operation of the subsidiary in order to exert a decisive influence over its commercial policy. [**] demonstrates that TKE made use of the possibility to exercise decisive influence over the business activities of its subsidiaries. This applies also to the other undertakings to the extent they have similar schemes in place requiring [**]
- (640) In their replies to the Statement of Objections, TKE and its relevant subsidiaries did not provide evidence clarifying their corporate relationships, the management structure and reporting requirements for the purposes of rebutting the presumption that the subsidiaries did not determine independently their own conduct on the market. Under these circumstances, it is presumed that ThyssenKrupp AG and TKE, [**] exercised their controlling rights and made use of all other means to exercise decisive influence to which they were entitled.
- (641) In the light of the foregoing, the Commission considers that ThyssenKrupp AG and its wholly-owned subsidiary, TKE, have not rebutted the presumption of liability for the infringements committed in Belgium, Germany, Luxembourg and the Netherlands. Therefore, ThyssenKrupp AG and TKE should be held jointly and severally liable with their relevant subsidiaries for the infringements of Article 81 of the Treaty, which are the subjects of this Decision.

Mitsubishi

- (642) Mitsubishi Elevator Europe B.V. should be held liable for the infringements that took place in the Netherlands, because its employees participated directly in the cartel.
- (643) Mitsubishi Elevator Europe B.V. is set up as a joint venture, 51% of which is controlled by Mitsubishi Electric Corporation Japan (MEC) and 49% by TBI Holdings established in the Netherlands. It could not be established that either MEC or TBI Holdings exercised decisive influence over the conduct of Mitsubishi Elevator Europe B.V. For this reason, neither of these two entities should be held jointly and severally liable for the conduct of Mitsubishi Elevator Europe B.V.

13.3.3. Addressees in this case

13.3.3.1. The addressees of this Decision with regard to the cartel in Belgium are as follows:

- (a) KONE Belgium S.A. and KONE Corporation, liable jointly and severally;
- (b) N.V. OTIS S.A., Otis Elevator Company and United Technologies Corporation, liable jointly and severally;
- (c) Schindler S.A./N.V. and Schindler Holding Ltd., liable jointly and severally; and
- (d) ThyssenKrupp Liften Ascenseurs N.V./S.A., ThyssenKrupp Elevator AG and ThyssenKrupp AG, liable jointly and severally.

13.3.3.2. The addressees of this Decision with regard to the cartel in Germany are as follows:

- (a) KONE GmbH and KONE Corporation, liable jointly and severally;
- (b) Otis GmbH & Co. OHG, Otis Elevator Company and United Technologies Corporation, liable jointly and severally;
- (c) Schindler Deutschland Holding GmbH and Schindler Holding Ltd., liable jointly and severally; and
- (d) ThyssenKrupp Aufzüge GmbH, ThyssenKrupp Fahrtreppen GmbH, ThyssenKrupp Elevator AG and ThyssenKrupp AG, liable jointly and severally.

13.3.3.3. The addressees of this Decision with regard to the cartel in Luxembourg are as follows:

- (a) General Technic-Otis S.à.r.l., N.V. OTIS S.A, General Technic S.A.R.L, Otis Elevator Company and United Technologies Corporation, liable jointly and severally;
- (b) KONE Luxembourg S.à.r.l. and KONE Corporation, liable jointly and severally;
- (c) Schindler S.à.r.l. and Schindler Holding Ltd., liable jointly and severally; and

- (d) ThyssenKrupp Ascenseurs Luxembourg S.à.r.l., ThyssenKrupp Elevator AG and ThyssenKrupp AG, liable jointly and severally.

13.3.3.4. The addressees of this Decision with regard to the cartel in Luxembourg are as follows:

- (a) KONE B.V. Liften en Roltrappen and KONE Corporation, liable jointly and severally;
- (b) Mitsubishi Elevator Europe B.V.;
- (c) Otis B.V., Otis Elevator Company and United Technologies Corporation, liable jointly and severally;
- (d) Schindler Liften B.V. and Schindler Holding Ltd., liable jointly and severally and;
- (e) ThyssenKrupp Liften B.V. and ThyssenKrupp AG, liable jointly and severally.

13.4. Limitation Periods and Duration of Infringements

13.4.1. Application of Limitation Periods

- (644) Pursuant to Article 25(1) (b) of Regulation (EC) No 1/2003, the power of the Commission to impose fines or penalties for infringements of the substantive rules relating to competition is subject to a limitation period of five years. For continuing infringements, the limitation period only begins to run on the day the infringement ceases.¹¹⁸ Any (preliminary) investigative action taken by the Commission or other administrative proceedings in respect of an infringement interrupts the limitation period and with each interruption time starts running afresh.¹¹⁹
- (645) In this case, the Commission's investigation started with the surprise inspections pursuant to Article 14(3) of Regulation No 17 on January 28 2004 for Belgium and Germany, on March 9 2004 for Luxembourg and on April 28 2004 for the Netherlands. Hence, no fines should be imposed for any illegal conduct that ceased prior to January 28 1999 in Belgium and Germany, prior to March 9 1999 in Luxembourg and prior to April 28 1999 in the Netherlands.
- (646) [**]

13.4.2. Duration of the Infringements

- (647) As set out in greater detail in Sections 9 to 12 of this Decision, each undertaking is held responsible for participating in the cartels for the following time periods:
 - (a) Belgium
 - KONE: from May 9 1996 to January 29 2004, a period of approximately seven years and eight months;

¹¹⁸ Article 25(2) of Regulation No 1/2003.

¹¹⁹ Article 25(3) to (5) of Regulation No 1/2003.

- Otis: from May 9 1996 to January 29 2004, a period of approximately seven years and eight months;
- Schindler: from May 9 1996 to January 29 2004, a period of approximately seven years and eight months and;
- ThyssenKrupp: from May 9 1996 to January 29 2004, a period of approximately seven years and eight months.

(b) Germany

- KONE: from August 1 1995 to December 5 2003, a period of approximately eight years and four months;
- Otis: from August 1 1995 to December 5 2003, a period of approximately eight years and four months;
- Schindler: from August 1 1995 to December 6 2000, a period of approximately five years and four months and;
- ThyssenKrupp: from August 1 1995 to December 5 2003, for a period of approximately eight years and four months.

(c) Luxembourg

- KONE: from December 7 1995 to January 29 2004, a period of approximately eight years and one month;
- Otis: from December 7 1995 to March 9 2004, a period of approximately eight years and three months;
- Schindler: from December 7 1995 to March 9 2004, a period of approximately eight years and three months and;
- ThyssenKrupp: from December 7 1995 to March 9 2004, a period of approximately eight years and three months.

(d) The Netherlands

- KONE: from June 1 1999 to March 5 2004, a period of approximately four years and nine months;
- Mitsubishi: from January 11 2000 to March 5 2004, a period of approximately four years and one month;
- Otis: from April 15 1998 to March 5 2004, a period of approximately five years and ten months;
- Schindler: June 1 1999 to March 5 2004, a period of approximately four years and nine months and;
- ThyssenKrupp: from April 15 1998 to March 5 2004, a period of approximately five years and ten months.

- Mitsubishi: from January 11 2000 to March 5 2004, a period of approximately four years and one month;

13.5. Remedies

13.5.1. Article 7 of Regulation (EC) No 1/2003

- (648) Where the Commission finds that there is an infringement of Article 81 of the Treaty it may require the undertakings concerned to bring such infringement to an end in accordance with Article 7 of Regulation (EC) No 1/2003.
- (649) While it appears from the facts that in all likelihood the infringements effectively ended on January 29 2004 in Belgium, December 5 2003 in Germany, March 9 2004 in Luxembourg and March 5 2004 in the Netherlands, it is necessary to ensure with absolute certainty that the infringements have ceased.
- (650) It is therefore necessary for the Commission to require the undertakings to which this Decision is addressed to bring the infringement to an end (if they have not already done so) and henceforth to refrain from any agreement, concerted practice or decision of an association which might have the same or a similar object or effect.

13.5.2. Article 15(2) of Regulation No 17 and Article 23(2) of Regulation (EC) No 1/2003

- (651) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by Decision impose fines on undertakings and associations of undertakings where, either intentionally or negligently, they infringe Article 81 of the Treaty. For each undertaking and association of undertakings participating in the infringement, the fine should not exceed 10% of its total turnover in the preceding business year.
- (652) In fixing the amount of any fine the Commission must take into consideration all relevant circumstances and particularly the gravity and duration of the infringement.
- (653) In relation to each undertaking, the fine imposed for each infringement should reflect any aggravating or attenuating circumstances.
- (654) The Commission considers it necessary to set fines at a level sufficient to ensure deterrence.

13.5.3. [**]

- (655) [**]

13.6. The Basic Amount of the Fines

- (656) The basic amount of the fine is determined according to the gravity and duration of the infringement.

13.6.1. Gravity

- (657) In assessing the gravity of the infringement, the Commission takes account of its nature, its actual impact on the market, where this can be measured, as well as the size of the relevant geographic market. Since the four different infringements present common features, the assessment of gravity will be made in parallel.

13.6.1.1.Nature of the infringements

- (658) The infringements that are the subject of this Decision consisted primarily of secret collusion between cartel participants to share markets or freeze market shares by allocating projects for the sale and installation of new elevators and/or escalators, as well as not to compete with each other for maintenance and modernization of elevators and escalators (except in Germany where the maintenance and modernisation business were not subject of discussions between the cartel members). Such horizontal restrictions are, by their very nature, among the most serious violations of Article 81 of the Treaty. The infringements in this case artificially nullified and denied customers the advantages they could expect to obtain from a process of competitive bidding. It is also noteworthy that some of the rigged projects were public tenders financed by taxes and carried out specifically with a view to receiving competitive and cost-effective bids.
- (659) For assessing the gravity of an infringement factors relating to its object are generally more significant than those relating to its effects, in particular where agreements, as in this case, relate to infringements which are very serious, such as price-fixing and market-sharing. The effects of an agreement are generally an inconclusive criterion in assessing the gravity of the infringement.¹²⁰

The actual impact of the infringements

- (660) In this case, the Commission did not attempt to demonstrate the precise effects of the infringement since it is impossible to determine with sufficient certainty the relevant competitive parameters (price, commercial terms, quality, innovation, and others) in the absence of the infringements. However it is obvious that the infringements did have an actual impact. The fact that the various anticompetitive arrangements were implemented by the cartel participants in itself suggests an impact on the market, even if the actual effect is difficult to measure,¹²¹ because it is, in particular, not known if and how many other projects were subject to bid-rigging, nor how many projects may have been subject to allocation between cartel members without there being a need for contacts between them. The high aggregate market shares of the cartel participants make anticompetitive effects appear likely and the relative stability of these market shares throughout the duration of the infringements would confirm these effects.
- (661) As regards Belgium, in its reply to the Statement of Objections, Schindler argued that the cartel arrangements were limited to the territory of Belgium and had only a minor impact on the market and that competition always remained between the cartel members despite the arrangements. In support of this argument, Schindler submitted that its market share experienced large fluctuations throughout the duration of the cartel and that the cartel members regularly deviated from the agreed course of conduct. Schindler further argued that Schindler, KONE, Otis and ThyssenKrupp

¹²⁰ See Case T-141/94 *Thyssen Stahl v Commission*, [1999] ECR II-347, paragraph 636 (confirmed by the Court of Justice on October 2 2003 in Case C-194/99 P: *Thyssen Stahl v Commission*), Joined cases T-45/98 and T-47/98 *Krupp Thyssen Stainless GmbH and Acciai speciali Terni SpA v Commission*, [2001] ECR II-3757, paragraph 199, Case T-203/01 *Michelin*, [2003] ECR II-04071, paragraph 259 and case T-279/02, *Degussa v Commission*, judgment of 5 April 2006, paragraphs 250-252

¹²¹ See Case T-241/01 *SAS v Commission*, at paragraph 122 and Case T-38/02 *Danone v Commission*, at paragraph 148

could not agree on higher than competitive prices because of competitive restraints exercised by smaller elevator and escalator companies. Schindler argued that these circumstances demonstrate that any project allocation according to pre-agreed market shares was ineffective and that the infringement in Belgium cannot be qualified as “very serious.”

- (662) In response to Schindler's arguments, the Commission observes that for a cartel to have effects on the market, it is not necessary that market shares remain unchanged, as market share fluctuations can be triggered by various economic factors independent from the parties' arrangements. Further, the fact that the cartel covered only the territory of Belgium is insufficient to show that the cartel had only a limited impact on the market. Even if some degree of competition remained between the undertakings participating in the cartel, this would not detract from the fact that the parties' agreements pursued anticompetitive objectives in their commercial activity covering the whole territory of Belgium. The parties' anticompetitive agreements covered the entire elevators and escalators market irrespective of project value.[**].[**] project lists in the Commission's possession show that projects of lower value were discussed and allocated even after 2002. Considering the four undertakings' high aggregate share on the elevators and escalators market, including the lower segment, the four undertakings were unlikely to face competitive constraints exercised by smaller elevator and escalator companies, which would prevent them from fixing supra-competitive prices having an impact on the market.
- (663) For Germany, in their respective replies to the Statement of Objections, KONE claimed that the cartel agreements were often not implemented and Schindler argued that the anti-competitive contacts had only a minor impact on the escalator market. In support of this, Schindler submitted that during the cartel the average price per escalator [**], while Schindler gained market shares. Otis and KONE argued that the illegal arrangements were essentially confined to two separate markets, that is, escalators and projects containing high-speed elevators with a value of more than EUR 1 million. They argue that the Commission's assessment of the impact of the unlawful arrangements must be limited to the turnover of the escalators market and the high-speed/high-value elevator market and that the sales volume affected by the elevator arrangements accounted only for a small fraction of overall elevator sales in Germany.
- (664) The Commission takes the view that, contrary to Otis' and KONE's respective arguments, the agreements in Germany were not confined to escalator and high-value (high-speed) elevators, since they covered projects which contained escalators, elevators and high-speed elevators in a variety of combinations. What mattered for the cartel members was the overall value of a project regardless of the number and the types of elevators. This is established in recital (241) and supported by [**]. The high-value projects can thus not be equated with the high-speed or high-value elevator segment. The Commission will, however, take the fact into account that the entire elevator market may not have been directly affected by the cartel activities, while at the same time considering that it was impossible to demonstrate the precise effects of the infringement. On the other hand, it is likely that the parties' illegal agreements concerning elevator projects with a value of more than EUR 1 million, which also included high-speed/high-value elevators, could influence the operation of the remainder of the elevator market, from which it cannot be separated since all product varieties (high- and low-speed elevators and others) were affected in varying degrees. It is clear from the facts that it was not the intention of the parties to exclude certain

product types, but to collude on those projects where competition could be most easily eliminated. On balance, this will be reflected in the starting amount for the calculation of the fines to be imposed on the participants in the German cartel.

- (665) As regards Luxembourg, Otis argued in its reply to the Statement of Objections that the illegal arrangements were rarely fully implemented and some degree of competition was in some instances still taking place. Similarly, GTO claimed that cartel members were often in disagreement and that their unlawful arrangements were not implemented. In its reply to the Statement of Objections, Schindler claimed that the cartel had a limited impact, because it covered only the territory of Luxembourg, Schindler's average prices for new elevators [**] between 1996 and 2003, project allocations were limited to "*large NEB projects*" (with values in excess of LUF 5 million or EUR 125.000) and because competition remained as the parties often deviated from the agreements. All these factors would prevent the infringement in Luxembourg from qualifying as "very serious."
- (666) As was stated in recital (663), for a cartel to have effects on the market, it is not necessary that market shares remain unchanged and such effects cannot be seen limited just because the cartel was limited to one Member State. Contrary to Schindler's argument, as was demonstrated in recital (316), discussions also included projects with a value of less than LUF 5 million. The size of the Luxembourg market in relation to other Member States is appropriately taken into account for the calculation of the fine (see recitals 680) to (683)).
- (667) As regards the Netherlands, Schindler argued that the illegal contacts between the competitors did not cause price increases on the market and only a limited proportion of the projects were allocated, whilst competition remained between the cartel members. ThyssenKrupp and Mitsubishi asserted that their actual economic power to restrict competition on the market was limited in view of their size. In its reply to the Statement of Objections, KONE argued that the illegal arrangements concerned only a few projects and had therefore very little impact on the market. [**] KONE also stated that the unlawful arrangements occurred on an ad-hoc basis, without a systematic and comprehensive scheme which could have influenced prices or customer allocation and neither coercion nor compensation mechanisms were in place. The exchange of bid prices and/or the allocation of a project occurred after the parties had submitted their individual bids to customers. KONE further suggested that "*the prices have been at a competitive level and that the collusion has therefore not had any impact on the market*". In addition, KONE claimed that its "*contribution to the collusion*" was limited because it did not participate in agreements relating to all the projects mentioned in the Statement of Objections. Therefore, the infringement in the Netherlands should be classified as "serious" rather than "very serious" for the purpose of calculating the fines.
- (668) The fact that the arrangements allegedly occurred on an ad hoc basis or that individual cartel members did not participate in certain projects (referred to by the Commission as mere examples based on information provided by undertakings under the Leniency Notice), does not affect the observation that the Dutch cartel was a complex, single and continuous infringement, nor that the overall infringement was very serious. In fact the circumstances of this case make it almost impossible to measure the extent of the obstacles to trade and, therefore, to take account of those obstacles in assessing the impact of the infringement on the market.

(669) In conclusion, the parties' arguments cannot serve to demonstrate that the cartels were ineffective in freezing market shares and fixing prices in the elevators and escalators market. It remains undisputed that the unlawful arrangements had market effects, which KONE and Otis implicitly admit by stating that these arrangements "*were often not implemented*", or "*were rarely fully implemented and some degree of competition was in some cases still taking place*". Furthermore, the fact that the results sought were on occasion not entirely achieved (for example, market shares or prices decreased or fluctuated), or that the unlawful agreements were not always honoured, may illustrate the difficulties encountered by the parties in allocating and freezing market shares, but it does not prove that the cartel had no effect on the market. As confirmed by case law, factors relating to the aspect demonstrating the intention and thus to the object of a course of conduct, may be more significant than those relating to its effects, in particular where they relate to infringements which are very serious, such as price-fixing and market-sharing.¹²²

13.6.1.2. The size of the relevant geographic market

(670) The cartels that are the subject of this Decision covered the whole territories of Belgium, Germany, Luxembourg or the Netherlands, respectively. It is clear from case law that a national geographic market extending to the whole of a Member State in itself already represents a substantial part of the common market.¹²³

13.6.1.3. Conclusion on the gravity of the infringement

(671) Taking into account the nature of the infringements and the fact that each of them covered the whole territory of a Member State (Belgium, Germany, Luxembourg or the Netherlands), the Commission considers that each addressee has committed one or several very serious infringements of Article 81 of the Treaty. In the Commission's view, these factors are such that the infringements must be regarded as very serious even if their actual impact cannot be measured.

13.6.2. Differential treatment

(672) Within the category of very serious infringements, it is possible to apply differential treatment to undertakings in order to take account of the effective economic capacity of the offenders to cause significant damage to competition. This is appropriate where, as in this case, there is considerable disparity as regards the turnover in the cartelized products of the undertakings participating in the infringement.¹²⁴

(673) To that end, the undertakings can be sub-divided into several categories according to their turnover in elevators and/or escalators, including, where applicable, maintenance

¹²² See Case T-141/94 *Thyssen Stahl v Commission* [1999] ECR II-347, paragraphs 635-636. The judgement of the Court of First Instance was confirmed by the Court of Justice on October 2 2003 in Case C-194/99 P *Thyssen Stahl v Commission*. See also cases T-241, *SAS v Commission*, July 18 2005, in particular paragraphs 84, 85, 130 and 131; T-49/02 to T-51/02, *Brasserie nationale a.o. v Commission*, July 27 2005, paragraphs 178 and 179; T-38/02, *Danone v Commission*, October 25 2005, in particular paragraphs 147, 148 and 152

¹²³ See Case T-38/02 *Danone v Commission*, paragraph 150 (with further reference).

¹²⁴ The Court of First Instance has accepted this approach where the distinction is justified: see *Tokai Carbon Co. Ltd and others v Commission*

and modernization services. The starting amounts will be fixed proportionally, albeit not arithmetically, having regard to the market shares.

- (674) With regard to the cartel in Belgium, it is appropriate to use the Belgium-wide turnover generated by the relevant subsidiaries of Otis, KONE, ThyssenKrupp and Schindler in 2003 for the application of differential treatment. For all undertakings, this concerns the sale and installation of new elevators and escalators as well as maintenance and modernization services. The Commission has chosen 2003 because it is the most recent year in which these undertakings were active in the cartel. [**] (Schindler S.A./N.V.: market share: [**] %) and EUR [**] (KONE Belgium S.A., market share [**] %) respectively, should be placed in the first category. Otis, with a Belgium-wide turnover of its Belgian subsidiary N.V. Otis S.A in 2003 of EUR [**] (market share: [**] %), should be placed in the second category. ThyssenKrupp should be placed in the third category, considering the Belgium-wide turnover of its subsidiary TKLA in 2003 of EUR [**] (market share: [**]%).
- (675) The appropriate starting amounts for the undertakings that participated in the cartel in Belgium, on which a fine is to be imposed in this proceeding are thus as follows:

First Category: KONE and Schindler	EUR 40 000 000
Second Category: Otis	EUR 27 000 000
Third Category: ThyssenKrupp	EUR 16 500 000

- (676) With regard to the cartel in Germany, it is appropriate to use the Germany-wide turnover generated by the relevant subsidiaries of Otis, KONE and ThyssenKrupp in 2003 and that of Schindler's subsidiary in 2000. For the first three undertakings this concerns the sale and installation of new elevators and escalators and for Schindler this concerns the sale and installation of new escalators only. The Commission has chosen 2003 because it is the most recent full year in which these undertakings were active in the cartel (except Schindler, for which 2000 was the last year of cartel activity). As regards Schindler, the Commission has chosen 2000 because it is the most recent full year in which it was active in the cartel. The Germany-wide 2003 turnover for new elevators and escalators of the relevant subsidiaries was EUR [**] for KONE (market share: [**]%), EUR [**] for Otis (market share: [**]%) and EUR [**] for ThyssenKrupp (market share: [**]%), respectively, and that of Schindler for new escalators in 2000 was EUR [**] (all turnover figures exclude maintenance and modernisation).
- (677) In its reply to the Statement of Objections, Otis argued that its German subsidiary should not be grouped together with that of ThyssenKrupp and KONE, the market leaders in the escalator market, for the purpose of calculating the starting amount of the fine, in view of its reduced turnover. The Commission notes that the cartel in Germany is a single and continuous infringement which manifested itself through agreements on the allocation of projects for the sale and installation of new escalators and at least new elevator projects of high value. As was demonstrated throughout Section 9, with their unlawful arrangements, the parties' pursued the same goal of customer and project allocation. It would therefore be artificial to split up such a cartel, characterized by a single purpose, and presume it consisted of separate infringements relating to escalators on the one hand and elevators on the other. This

should also be the case when calculating the fines. Moreover, the fact that Otis generated an aggregate new elevator and escalator turnover in 2003 in Germany similar to that of the other participants undermines the argument that Otis should be categorised as “second-tier” for the purposes of calculating the fine. Otis’ estimated share of the new equipment market (including escalators and elevators) in 2003 was [%]%, whereas for the relevant subsidiaries of KONE and ThyssenKrupp it was [%]% and [%]%, respectively. The Court of First Instance has held that “*although an undertaking’s market shares cannot be a decisive factor in concluding that an undertaking belongs to a powerful economic entity, they are nevertheless relevant in determining the influence which it may exert on the market.*”¹²⁵ In light of the above, Otis’ effective capacity to cause significant damage to the German elevators and escalators market is not inferior to that of the other cartel participants and, therefore, no differential treatment as requested by Otis would objectively be justified.

(678) In conclusion, in view of the similar market shares and economic capacity of KONE, Otis and ThyssenKrupp, it is not appropriate to apply any differential treatment to them for the purpose of calculating the fine. Therefore, KONE, Otis, and ThyssenKrupp should be placed in one category.¹²⁶ Schindler should be treated differently, given that its turnover in a different year and for a more limited market segment (escalators only) will be used for the calculation of the fine.

(679) The appropriate starting amounts of the fines to be imposed on the undertakings that participated in the cartel in Germany are thus as follows:

KONE, Otis and ThyssenKrupp	EUR 70 000 000
Schindler	EUR 17 000 000

(680) As regards the cartel in Luxembourg, it is appropriate to use the Luxembourg-wide turnover generated by the relevant subsidiaries of KONE, Schindler and ThyssenKrupp and by GTO. For all undertakings, this concerns the sale and installation of new elevators and escalators as well as maintenance and modernization services. The Commission has chosen 2003 because it is the most recent year in which these undertakings were active in the cartel. The Luxembourg-wide 2003 turnover of the relevant subsidiaries was EUR [%] (market share: [%] %) for KONE, EUR [%] (market share: [%] %) for Schindler and EUR [%] (market share: [%]%) for ThyssenKrupp. GTO’s 2003 turnover was EUR [%] (market share: [%] %).

(681) In its reply to the Statement of Objections, GTO claimed that throughout the duration of the infringement, but at least between 1999 and 2002, its market share was smaller than that of Schindler and, in terms of the “most sophisticated” products, its capacity to supply fell short of that of KONE and Schindler. This, coupled with GTO’s limited economic capacity stemming from its small size would, GTO argues, mean that it could not have caused significant damage to the market, and the Commission should take account of these circumstances when imposing fines on GTO. In response thereto, the Commission observes that market share fluctuations or fluctuations in the

¹²⁵ See Case T-230/00, *Daesang Corp. & Sewon v Commission* [2003] ECR II-2733, paragraph 49

¹²⁶ See judgment of July 14 2005 in case C-57/02 P, *Acerinox v Commission*, paragraphs 77 and 78

economic performance of cartel members during a certain period within a continuous infringement of long duration do not impact upon the cartel members' effective economic capacity to cause significant damage to the market, with a view to the infringement as a whole. This holds particularly true for cases where this recurring fluctuation takes place among the "first-tier" participants and does not result in considerable disparity in size or economic capacity between them. Indeed, GTO's 2003 turnover was the highest of the participants in the Luxembourg cartel and even if it fell insignificantly below Schindler's turnover during four years out of the entire cartel duration of eight years and three months as alleged by GTO, its effective economic capacity to distort competition and cause significant damage to the market would not have been appreciably reduced. In addition, GTO claimed it would not have been able to compete in the most sophisticated products segment. This argument is not relevant, considering that the cartel in Luxembourg is a complex and continuous infringement that related to all types of new elevators and escalators, as well as maintenance and modernization [**].

- (682) In the light of the above, GTO and Schindler should be placed in the first category while KONE and ThyssenKrupp should be placed in the second category.
- (683) The appropriate starting amounts for the fines to be imposed on the participants in the cartel in Luxembourg are thus as follows:

First Category: Otis, General Technic-Otis S.à.r.l. and General Technic S.à.r.l.: jointly and severally; and Schindler	EUR 10 000 000
Second Category: KONE and ThyssenKrupp	EUR 2 500 000

- (684) With respect to the cartel in the Netherlands, it is appropriate to use the Netherlands-wide turnover generated by the relevant subsidiaries of KONE, Otis, Schindler and ThyssenKrupp, as well as by Mitsubishi in 2003. For all undertakings, this concerns the sale and installation of new elevators and escalators as well as maintenance and modernization services. The Commission has chosen 2003 because it is the most recent year in which these undertakings were active in the cartel. KONE, with turnover in the Netherlands in 2003 of EUR [**] (market share: [**] %), should be placed in the first category. Otis, with turnover in the Netherlands in 2003 of EUR [**] (market share: [**] %), should be placed in the second category. Schindler with turnover in 2003 of EUR [**] (market share: [**]%) should be placed in the third category. ThyssenKrupp subsidiary and Mitsubishi Elevator Europe B.V. should be placed in the fourth category given that their turnover in the Netherlands in 2003 was EUR [**] (market share: [**]%) and EUR [**] (market share: [**] %), respectively.

- (685) The appropriate starting amounts for the fines to be imposed on the participants in the cartel in the Netherlands are thus as follows:

First Category: KONE	EUR 55 000 000
Second Category: Otis	EUR 41 000 000

Third Category: Schindler	EUR 24 500 000
Fourth Category: ThyssenKrupp and Mitsubishi Elevator Europe B.V.	EUR 8 500 000

13.6.3. Sufficient deterrence

- (686) Within the category of very serious infringements, the scale of likely fines also makes it possible to set the fines at a level which ensures that they have sufficient deterrent effect, taking into account the size of each undertaking.
- (687) In its reply to the Statement of Objections, Otis claims that there is no need to increase its fine for the purpose of deterrence, *inter alia* because it has already taken measures to prevent future cartel violations in all Member States concerned, such as antitrust compliance programmes and termination of the employment of key individuals involved in the respective elevators and escalators cartels.
- (688) While the Commission welcomes measures taken by undertakings to prevent future cartel infringements, the measures taken by Otis do not alter the fact that infringements were committed. Since the existence of the compliance programme did not prevent the infringement from being committed, the mere existence of the programme cannot be taken into consideration when establishing the fine to be imposed on Otis.¹²⁷ In general, the Commission considers that each separate infringement merits a separate fine, which should be proportionate to the size of the undertaking in order to be effective. Imposing a sufficiently high fine on large undertakings for each separate infringement they commit deters future violations. There is no reason to impose a lower fine on Otis than would be justified by its size.
- (689) In addition, a starting amount merely reflecting the economic capacity of the respective national subsidiaries would not be a sufficient deterrent in respect of KONE, Otis, ThyssenKrupp and Schindler. In fact, their relevant subsidiaries, which committed the infringements in the Belgian, German, Luxembourg and Dutch markets, belong to multinational groups of considerable economic and financial strength, representing the biggest elevators and escalators manufacturers in the world and operating at different levels of business in the elevators and escalators industry and in different geographic markets. In 2005, the most recent financial year preceding this Decision for which sufficient data was available, the consolidated worldwide turnover of KONE Corporation (ultimate parent company of the KONE subsidiaries) amounted to EUR 3 200 000 000. The consolidated worldwide turnover of UTC

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See Case T-15/02 *BASF v Commission*, paragraph 266: "As regards the internal measures adopted by the applicant in order to prevent any repetition after the infringements had come to an end (dismissal of the senior executives involved in the events giving rise to the infringements, the adoption of internal programmes for compliance with competition rules and to increase staff awareness in that regard), it should be noted that, whilst it is indeed important that an undertaking took measures to prevent further infringements of Community competition law from being committed in the future by its staff, that does not alter the fact that the infringement was committed. Merely because in certain previous decisions the Commission took account of a compliance programme as an attenuating circumstance does not mean that it is under a duty to do so in each case which comes before it." (*Hercules Chemicals v Commission*, paragraph 357; Case T-13/89 *ICI v Commission* [1992] ECR II-1021, paragraph 395; Case T-28/99 *Sigma Technologie v Commission* [2002] ECR II-1845, paragraph 127; and *Dansk Rørindustri and Others v Commission*, paragraph 373)

(ultimate parent company of the Otis subsidiaries) amounted, for the same year, to EUR 34 300 000 000. The consolidated worldwide turnover of ThyssenKrupp AG (ultimate parent company of the ThyssenKrupp subsidiaries) amounted to EUR 47 100 000 000, while the consolidated worldwide turnover of Schindler Holding Ltd. (ultimate parent company of the Schindler subsidiaries) amounted to EUR 5 730 000 000.

(690) With their respective worldwide turnovers of EUR 47 100 000 000 and EUR 34 300 000 000, ThyssenKrupp and UTC/Otis are much larger players than the other addressees. In this respect the Commission considers that the appropriate starting amount for a fine requires further upward adjustment to take account of the size and the overall resources of UTC/Otis and ThyssenKrupp. On this basis, the application of a multiplying factor of 2 (increase of 100%) in respect of the starting amount of the fine to be imposed on ThyssenKrupp and of 1.7 (increase of 70%) in respect of the starting amount of the fine to be imposed on UTC/Otis is appropriate.

(691) For these reasons, the starting amount of the fines in this case should be set as follows:

Belgium:

KONE	EUR 40 000 000
Otis	EUR 45 900 000
Schindler	EUR 40 000 000
ThyssenKrupp	EUR 33 000 000

Germany:

KONE	EUR 70 000 000
Otis	EUR 119 000 000
Schindler	EUR 17 000 000
ThyssenKrupp	EUR 140 000 000

Luxembourg:

KONE	EUR 2 500 000
Otis	EUR 17 000 000
Schindler	EUR 10 000 000
ThyssenKrupp	EUR 5 000 000

Netherlands:

KONE	EUR 55 000 000
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Otis	EUR 69 700 000
Schindler	EUR 24 500 000
ThyssenKrupp	EUR 17 000 000
Mitsubishi	EUR 8 500 000

13.6.4. Increase for duration

(692) As regards duration, each undertaking that participated in the cartel in Belgium committed an infringement of seven years and eight months, from May 9 1996 to January 29 2004. All of these undertakings committed an infringement of long duration. The starting amounts of the fines should consequently be increased by 10% for each full year of the infringement. They should be further increased by 5% for any remaining period of 6 months or more but less than a year. This leads to a percentage increase of the starting amount for each undertaking as follows:

- KONE (KONE Belgium S.A.): 75%
- Otis (N.V. OTIS S.A.): 75%
- Schindler (Schindler S.A./N.V.): 75%
- ThyssenKrupp (ThyssenKrupp Liften Ascenseurs N.V./S.A.): 75%

(693) As regards Germany, KONE, Otis and ThyssenKrupp committed an infringement of eight years and four months, from August 1 1995 to December 5 2003. Schindler committed an infringement of five years and four months, from August 1 1995 to December 6 2000. All of these undertakings committed an infringement of long duration. Consequently, this leads to a percentage increase of the starting amount for each undertaking as follows:

- KONE (KONE GmbH): 80%
- Otis (Otis GmbH & Co. OHG): 80%
- Schindler (Schindler Deutschland Holding GmbH): 50%
- ThyssenKrupp (ThyssenKrupp Aufzüge GmbH and ThyssenKrupp Fahrtreppen GmbH): 80%

(694) In Luxembourg, KONE, Otis, Schindler and ThyssenKrupp committed an infringement of eight years and three months, from December 7 1995 to March 9 2004. KONE, Otis, Schindler and ThyssenKrupp each committed an infringement of long duration. Consequently, this leads to a percentage increase of the starting amount for these undertakings as follows:

- Otis (General Technic-Otis S.à.r.l. and General Technic S.à.r.l.): 80%

- KONE (KONE Luxembourg S.à.r.l.): 80%
- Schindler (Schindler S.à.r.l.): 80%
- ThyssenKrupp (ThyssenKrupp Ascenseurs Luxembourg S.à.r.l.): 80%

(695) As regards the Netherlands, Otis and ThyssenKrupp committed an infringement of five years and ten months, from April 15 1998 to March 5 2004. KONE and Schindler committed an infringement of four years and nine months, from June 1 1999 to March 5 2004. Mitsubishi committed an infringement of four years and one month, from January 11 2000 to March 5 2004. Otis and ThyssenKrupp committed an infringement of long duration, while the other three undertakings committed an infringement of medium duration. This leads to a percentage increase of the starting amount for each undertaking as follows:

- KONE (KONE B.V. Liften en Roltrappen): 45 %
- Mitsubishi (Mitsubishi Elevator Europe B.V.): 40%.
- Otis (Otis B.V.): 55%
- Schindler (Schindler Liften B.V.): 45%
- ThyssenKrupp (ThyssenKrupp Liften B.V.): 55%

13.6.5. Conclusion on the basic amounts

(696) The basic amounts of the fines to be imposed on each undertaking are therefore as follows:

Belgium:

KONE (KONE Belgium S.A. and KONE Corporation, jointly and severally)	EUR 70 000 000
Otis (N.V. Otis S.A., Otis Elevator Company and United Technologies Corporation, jointly and severally)	EUR 80 325 000
Schindler (Schindler S.A./N.V. and Schindler Holding Ltd., jointly and severally)	EUR 70 000 000
ThyssenKrupp (ThyssenKrupp Liften Ascenseurs N.V./S.A., ThyssenKrupp Elevator AG and ThyssenKrupp AG, jointly and severally)	EUR 57 750 000

Germany:

KONE (KONE GmbH and KONE Corporation, jointly and severally)	EUR 126 000 000
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Otis (Otis GmbH & Co OHG, Otis Elevator Company and United Technologies Corporation, jointly and severally)	EUR 214 200 000
Schindler (Schindler Deutschland Holding GmbH and Schindler Holding Ltd., jointly and severally)	EUR 25 500 000
ThyssenKrupp (ThyssenKrupp Aufzüge GmbH, ThyssenKrupp Fahrtreppen GmbH, ThyssenKrupp Elevator AG and ThyssenKrupp AG, jointly and severally)	EUR 252 000 000

Luxembourg:

KONE (KONE Luxembourg S.à.r.l. and KONE Corporation, jointly and severally)	EUR 4 500 000
Otis (General Technic-Otis S.à.r.l., N.V. Otis S.A., General Technic S.A.R.L., Otis Elevator Company and United Technologies Corporation, jointly and severally)	EUR 30 600 000
Schindler (Schindler S.à.r.l. and Schindler Holding Ltd., jointly and severally)	EUR 18 000 000
ThyssenKrupp (ThyssenKrupp Ascenseurs Luxembourg S.à.r.l., ThyssenKrupp Elevator AG and ThyssenKrupp AG, jointly and severally)	EUR 9 000 000

Netherlands:

KONE (KONE B.V. Liften en Roltrappen and KONE Corporation, jointly and severally)	EUR 79 750 000
Otis (Otis B.V., Otis Elevator Company and United Technologies Corporation, jointly and severally)	EUR 108 035 000
Schindler (Schindler Liften B.V. and Schindler Holding Ltd., jointly and severally)	EUR 35 525 000
ThyssenKrupp (ThyssenKrupp Liften B.V. and ThyssenKrupp AG, jointly and severally)	EUR 26 350 000
Mitsubishi Elevator Europe B.V.	EUR 11 900 000

13.7. Aggravating and Attenuating Circumstance

13.7.1. Aggravating circumstances

13.7.1.1. Repeated Infringement

- (697) The Commission considers that a repeated infringement of the same type occurs when an undertaking which has been held liable for an infringement in a past Commission Decision is later found responsible for another infringement of the same type, even if it is committed in a different business sector or in respect of a different product. Section B.4 of the Guidelines on the method of setting the fines imposed pursuant to Article 15(2) of Regulation 17 and Article 65(5) of the ECSC Treaty¹²⁸ considers repeated infringements of the same type by the same undertaking(s) to constitute an aggravating circumstance. The notion of “*undertaking*” includes all legal entities within the same group not determining independently their own market conduct. In *Michelin* the Court of First Instance confirmed that recidivism could also apply to an entity which is fully-owned by a (parent) company in control of another entity which had been censured for a previous offence.¹²⁹
- (698) In 1998, in *Alloy Surcharge*, fines were imposed for a cartel having both the object and the effect of restricting and distorting competition.¹³⁰ Among others, a fine was imposed on ThyssenKrupp Stainless GmbH (TKS), an undertaking incorporated under German law and established on January 1 1995¹³¹ as a result of a merger of the stainless steel businesses of Krupp and Thyssen. A fine was also imposed on Acciai Speciali Terni SpA (AST), an undertaking incorporated under Italian law, set up on 1 January 1994, whose principal activities include the production of stainless steel flat products. In December 1994, a number of undertakings, including Krupp and Thyssen, jointly acquired AST. In December 1995, Krupp increased its share in AST from 50% to 75% and to 100% in May 1996. Krupp then transferred all its shares in AST to TKS. The anticompetitive activities in *Alloy Surcharge* lasted from December 16 1993 until January 21 1998, the date of adoption of the Commission Decision.

Germany

- (699) [**]
- (700) [**]
- (701) [**]
- (702) [**]
- (703) [**]
- (704) [**]

¹²⁸ OJ,C 9, 14.01.1998, page 4

¹²⁹ See Case T-203/01 *Michelin v Commission* [2003] ECR II 4071, paragraph 290

¹³⁰ See Joined Cases C-65/02 P and C-73/02 P, *ThyssenKrupp Stainless and ThyssenKrupp Acciai Speciali Terni v Commission*, judgment of July 14 2005

¹³¹ As KruppThyssen Nirosta GmbH and renamed in September 1997

(705) [**]

(706) [**]

(707) The basic amount of the fine to be imposed for ThyssenKrupp's anticompetitive conduct in Germany should therefore be increased by 50 % in order to direct conduct towards compliance with Community competition rules. This increase reflects the fact that the ThyssenKrupp subsidiaries were not prevented from continuing their anticompetitive behaviour for almost six years in one business sector (elevators) after having been investigated and eventually fined by the Commission in another (steel).

Belgium

(708) TKLA argues that there is no factual and/or legal basis for increasing any fine imposed on it on grounds of recidivism. [**]

(709) [**]

(710) The basic amount of the fine to be imposed for ThyssenKrupp's anticompetitive conduct in Belgium should be increased by 50 % in order to direct conduct towards compliance with Community competition rules. This increase reflects the fact that ThyssenKrupp subsidiaries were not prevented from continuing their anti-competitive behaviour in one business sector (elevators) although the undertaking had been found by the Commission to have participated in a similar infringement (and fined for this) in another sector (steel).

Luxembourg

(711) [**]

(712) [**]

(713) [**]

(714) The Commission therefore concludes that the basic amount of the fine to be imposed for ThyssenKrupp's anticompetitive conduct in Luxembourg should be increased by 50 % in order to direct conduct towards compliance with Community competition rules. This increase reflects the fact that ThyssenKrupp subsidiaries were not prevented from continuing their anti-competitive behaviour in one business sector (elevators) after being found to have committed an infringement by the Commission in another (steel).

The Netherlands

(715) [**]

(716) [**]

(717) [**]

(718) [**]

(719) [**]

- (720) It is therefore concluded that the basic amount of the fine to be imposed on ThyssenKrupp on account of anticompetitive conduct in the Netherlands should be increased by 50% in order to direct conduct towards compliance with Community competition rules.

13.7.1.2. Instigation / Leading role

- (721) While KONE and ThyssenKrupp claim that the meetings in Luxembourg were mainly initiated and organized by both Otis and Schindler, the latter claimed that meetings were mainly initiated and organized by Otis. The Commission does not have sufficiently convincing evidence to conclude that Otis and/or Schindler were instigators or assumed a leading role in the Luxembourg cartel in a way that would constitute an aggravating circumstance.
- (722) KONE claims that Schindler took a leading role in the cartel in Belgium. Since this allegation remains unsupported, Schindler's alleged leading role is not considered by the Commission as an aggravating circumstance.

13.7.1.3. Retaliatory measures

- (723) Mitsubishi has alleged that it was the object of retaliation measures by the other participants in Belgium. These allegations remain, however, unproved. Since no finding critical to the establishment of the essential facts of the infringement can be based on the unsupported assertions of a participant during the procedure, the Commission will not apply aggravating factors to the other participants based on these allegations.

13.7.2. Attenuating circumstances

13.7.2.1. Participation in a few elements of the cartel

The Netherlands

- (724) Mitsubishi and ThyssenKrupp claim that the fact that they did not participate in all the elements of the infringement constitutes an attenuating circumstance and should be taken into consideration when assessing the gravity of the infringement.
- (725) The fact that the undertakings concerned did not participate directly or actively in all the constituent elements of the cartel in the Netherlands cannot relieve them of responsibility for the infringement of Article 81 of the Treaty. It is settled case law that an undertaking may be held responsible for an overall cartel even though it participated only in some of the constituent elements of that cartel, if it is shown that it knew or should have known that the collusion in which it participated was part of an overall plan that included all the constituent elements of the cartel.¹³²

¹³²

See the judgments of the Court of First Instance in Cases T-147/89, T-295/94, T-304/94, T-310/94, T-311/94, T-334/94, T-348/94, *Buchmann v Commission*, *Europa Carton v Commission*, *Gruber + Weber v Commission*, *Kartonfabriek de Eendracht v Commission*, *Sarrió v Commission* and *Enso Española v Commission*, at paragraphs 121, 76, 140, 237, 169 and 223, respectively. See also the judgment of the Court of First Instance of 20 mars 2002, in case T-9/99, *HFB Holding and Isoplus Fernwärmetechnik v Commission*, paragraph 231

- (726) In this case, it is clear that both Mitsubishi and ThyssenKrupp knew, or should have known, that their own unlawful conduct was part of an overall plan to allocate projects between the major producers. The fact that Mitsubishi and ThyssenKrupp did not participate in all meetings does not affect the assessment of their participation in the cartel. Where they did not participate they either might not have been interested in the project concerned, or might have been excluded from the allocation discussions by the fact that they were not invited to bid for the tender, in accordance with a mechanism which they were fully aware of. Both undertakings however subscribed to the overall scheme, implemented it over a period of several years, employed the same mechanisms and pursued the same common purpose of eliminating competition. Therefore, the degree of participation by Mitsubishi and ThyssenKrupp in the infringement does not give rise to the application of an attenuating circumstance.

13.7.2.2. Non-implementation

Germany

- (727) KONE asserts that “*the cartel agreements were often not implemented*” which should be taken into account as an attenuating circumstance.
- (728) The Commission does not endorse this assertion as it is not required to recognise non-implementation of a cartel as an attenuating circumstance unless the undertaking is able to demonstrate that it clearly and substantially opposed the implementation of the cartel, to the point of disrupting the very functioning of it, and that it did not give the appearance of adhering to the agreement and thereby incite other undertakings to implement the cartel. The fact that an undertaking did not behave on the market in the manner agreed with its competitors is not an attenuating circumstance.¹³³
- (729) It follows that, in this case, an infringement of Article 81 of the Treaty occurred even when certain agreements between competitors did not prove successful or were not implemented and thus there is no reason to apply an attenuating circumstance. The fact that there had been illegal agreements in place is not contested by the addressees of this Decision.

Luxembourg

- (730) Otis claims in a similar way that throughout the period of the infringement, the illegal arrangements were rarely fully implemented and some degree of competition was still taking place. For the same reasons outlined above in respect of the German cartel, Otis’ observation cannot be taken into account when setting the fines.

The Netherlands

- (731) According to KONE, the non-implementation of part of the collusion is an attenuating circumstance entailing a reduction of the fine for KONE in the Netherlands. [**]. More generally, KONE claims that the evidence on the Commission’s file shows that not all the elements of this infringement have been implemented.

¹³³

See Case T-44/2000, *Mannesmannröhren-Werke AG v Commission* ECR 2004, p. 0000, paragraph 277; Case T-327/94 *SCA Holding v Commission* [1998] ECR II-1373, paragraph 142

(732) The Commission refers to the observations made for Germany and Luxembourg in recitals (727) to (729) and rejects these claims.

13.7.2.3. Absence of leadership/instigator of the cartel

Belgium

(733) Schindler claims that it was neither the leader of the arrangements nor the instigator which would constitute an attenuating circumstance.

(734) The absence of leadership cannot be equated with a passive or minor role in the infringement. The fact that an undertaking assumed a leadership role in a cartel may in certain circumstances be seen as an aggravating factor and thus may give rise to an increase of the fine. The absence of such factor however does not constitute an attenuating circumstance.

Germany

(735) Schindler points out that its share of total escalator sales in Germany of [**]% by the time the infringement began in 1995 means it could not have played any leadership role in the infringements. However, market shares themselves cannot serve to indicate the lack of instigation by an undertaking. Moreover, as was explained in greater detail in recitals (733) to (734), the fact that Schindler did not play a leading role cannot be seen as an attenuating circumstance and thus cannot trigger any reduction in fines.

(736) Furthermore, the Commission sees no value in the argument brought forward by Schindler that personnel taking part on its behalf in the meetings did not have the rank of a member of the management and therefore Schindler could not have been the leader of the German cartel. Indeed, whether or not Schindler was represented by an employee who “*was not a member of the first and second level of the hierarchy*” bears no relationship with the question of instigation, and Schindler adhered to the anticompetitive practices irrespective of the level of representation in the meetings.

The Netherlands

(737) In the same line of reasoning as was set out in recitals (735) and (736) in relation to Germany, the Commission rejects Schindler’s argument that its market shares in the Netherlands, which were relatively smaller than that of the other cartel members, would prove that it did not play a leading role in the Dutch cartel. As was stated in recitals (733) to (734), the absence of an instigator or leading role cannot be seen as an attenuating circumstance.

(738) Mitsubishi argues that the fact that it did not take any steps to require competitors to join, rejoin or continue attending the NEB and SEB meetings, and did not take any steps to retaliate against any participant in the cartel that Mitsubishi considered to be ignoring agreements reached in the meetings, should be a mitigating element when calculating Mitsubishi’s fines. As was stated in recitals (733) to (734), the absence of an instigator or leading role cannot be seen as an attenuating circumstance.

13.7.2.4. Passive role

The Netherlands

(739) [**]

- (740) In principle, an exclusively passive or “follow-my-leader” role may, if established, constitute an attenuating circumstance. All the relevant circumstances in each particular case have to be taken into account. The factors capable of revealing such a role within a cartel include the undertaking’s non-active participation in the anticompetitive agreements,¹³⁴ that it participated only sporadically in cartel meetings by comparison with other cartel members,¹³⁵ or that express declarations to that effect were made by representatives of other undertakings which participated in the infringement.¹³⁶
- (741) Given that the cartel lasted for several years and covered several projects, KONE cannot convincingly claim to have played only a passive role based on the allocation of only one project. Rather, the evidence on the Commission’s file shows that KONE was actively involved in the overall collusive behaviour including preparation, implementation and follow-up. Moreover, there is no evidence on the Commission’s file that the other members of the cartel considered KONE’s involvement to be passive or sporadic. Therefore, KONE’s role was not substantially different from that of the other cartel members and cannot be considered as an attenuating circumstance.

13.7.2.5.Termination of the infringement

Germany

- (742) Schindler left the German cartel in 2000. The fact that an undertaking voluntarily puts an end to the infringement before the Commission has opened its investigation is sufficiently taken into account in the calculation of the duration of the infringement period and does not constitute an attenuating circumstance.
- (743) KONE, while claiming to “refrain from discussing attenuating circumstances”, points out that it “immediately ended its involvement in the cartel as soon as the Commission intervened” and that it cooperated comprehensively.
- (744) It needs to be emphasized that the reduction of the fine on grounds of attenuating circumstances for immediate termination of the infringement upon the Commission’s intervention is particularly appropriate where the conduct in question is not manifestly anticompetitive. Conversely, its application will be less appropriate, as a general rule, where the conduct is clearly anticompetitive.¹³⁷ Also, an undertaking’s reaction to the opening of an investigation into its activities can be assessed only by taking account of the particular context of the case.¹³⁸ Horizontal market sharing is by its very nature a hard-core antitrust violation. There can thus be no doubt that the arrangements which are the subject of this Decision were anticompetitive. KONE knew or should have known that it was engaged in illegal activities. The immediate cessation of the illegal behaviour by KONE upon the Commission’s intervention cannot therefore be regarded

¹³⁴ See Case T-220/00 *Cheil Jedang v Commission* [2003] ECR II-02473, paragraph 167

¹³⁵ See Case T-311/94 *BPB de Eendracht v Commission* [1998] ECR II-1129, paragraph 343

¹³⁶ See Case T-317/94 *Weig v Commission* [1998] ECR II-1235, paragraph 264

¹³⁷ Case T-44/2000, *Mannesmannröhren-Werke AG v. Commission*, ECR 2004, p. 0000, paragraph 281.

¹³⁸ Case T-31/99, *Asea Brown Boveri v. Commission*, [2002] ECR II-018, at paragraph 213.

as an attenuating circumstance in this manifest and deliberate infringement of Article 81 of the Treaty.

The Netherlands

- (745) ThyssenKrupp claims that it terminated the cartel infringements well before the Commission's inspections and this constitutes an attenuating circumstance that the Commission should take into account when determining the level of fines with regard to the Netherlands.
- (746) For the same reasons as those set out above, this argument cannot be accepted (see recital (744)).

13.7.2.6. Absence of recidivism

Germany and the Netherlands

- (747) Schindler argues that it has adhered to anticompetitive agreements in all four Member States for the first time, which in its view should be taken into account as an attenuating circumstance.
- (748) The Commission does not consider that the lack of any previous violation of Community competition law would in any way constitute an attenuating circumstance. Rather, a repeated infringement is seen as an aggravating circumstance that may result in higher fines.

13.7.2.7. Absence of retaliatory measures

Belgium, Germany and Luxembourg

- (749) Schindler argues that it should be taken into account that there were no retaliatory measures in place against undertakings not honouring the agreements. If competitors did not comply with the arrangements, the balance was restored by reallocating subsequent projects. This system, according to Schindler, cannot be regarded as a form of enforcement or retaliation and this should be considered an attenuating circumstance.
- (750) The Commission does not concur with this view. As was pointed out in recital (749), the absence of an aggravating circumstance does not equal an attenuating circumstance. In addition, the readjustment of projects would have had an effect comparable to retaliatory measures against those undertakings not honouring the agreements. This will, therefore, not be considered as an attenuating factor when setting the fines.

The Netherlands

- (751) In the same line of reasoning, Schindler's argument that competitors did not agree on any mutual retaliatory measures with a view to enforcing compliance with the agreements, as well as Mitsubishi's argument that there had been no compensation or monitoring system, which according to these undertakings should be taken into account as an attenuating circumstance, should be rejected.

- (752) It should also be noted that Mitsubishi claims to have suffered limited retaliation in the Netherlands after its withdrawal from the NEB discussions in September 2001. The four major manufacturers allegedly had tried to block Mitsubishi from receiving invitations for certain projects in the Netherlands. In addition, Mitsubishi claims to have been the victim of other cartels, in particular in Belgium. In 2003, Mitsubishi wished to enter the Belgian market and was threatened by Schindler with the organization of a boycott of Mitsubishi in Belgium. When Mitsubishi continued to submit bids, Schindler requested that Mitsubishi submit a higher price than the one already submitted by Schindler in order for the latter to undercut and win. Mitsubishi refused and later understood from the customer that Schindler had undercut its bid.

13.7.2.8. Disciplinary measures and Compliance Programmes

- (753) Otis argues that it should be taken into consideration that it has taken disciplinary measures against employees involved in the infringements and re-issued and re-instituted its anti-trust compliance program.
- (754) While the Commission welcomes measures taken by undertakings to avoid cartel infringements in the future, such measures cannot change the reality of the infringements and the need to sanction them in this Decision.¹³⁹ The mere fact that in certain of its previous Decisions the Commission took such measures into consideration as attenuating circumstances does not mean that it is obliged to act in the same manner in every case.¹⁴⁰ Furthermore, in so far as Otis' internal investigation encouraged its cooperation with the Commission, this is taken into account in the application of the Leniency Notice.

13.7.3. Conclusion on aggravating and attenuating circumstances

- (755) As a result of aggravating and attenuating circumstances, the basic amount of the fine to be imposed on ThyssenKrupp should be increased with 50% to EUR 86 625 000 in Belgium, to EUR 378 000 000 in Germany, to EUR 13 500 000 in Luxembourg and to EUR 39 525 000 in the Netherlands.

13.7.4. Application of the 10% turnover limit

- (756) The amount of the fine after taking into account any attenuating or aggravating circumstances may not exceed 10% of the worldwide turnover of the undertaking concerned. According to settled case law, the Commission does not have to limit the maximum amount of the fine to 10% of the turnover in the relevant product and geographical market, but turnover is to be understood as meaning the total turnover of the undertaking concerned.¹⁴¹

¹³⁹ See Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-242/01, *Tokai Carbon Co. Ltd and Others v Commission*, paragraph 343

¹⁴⁰ See Case T-7/89 *Hercules Chemicals v Commission* [1991] ECR II-1711, paragraph 357, and Case T-352/94 *Mo och Domsjö v Commission* [1998] ECR II-1989, paragraphs 417 and 419

¹⁴¹ Case T-220/00, *Cheil Jedang Corp., vs. Commission*, paragraph 60; joined cases 100 to 103/80 *Musique diffusion française and Others v Commission*, [1983] ECR 1825, paragraph 119, Case T-43/92 *Dunlop Slazenger v Commission* [1994] ECR II-441, paragraph 160, and Case T-144/89 *Cockerill Sambre v Commission* [1995] ECR II-947, paragraph 98.

13.8. Application of the Leniency Notice and Rewards for Cooperation outside the Commission's Leniency Programme

- (757) KONE, Otis, Schindler and ThyssenKrupp co-operated with the Commission at different stages of the investigation with a view to receiving the favourable treatment provided for in the Leniency Notice. To the extent such cooperation merited a reduction under the Leniency Notice, a reduction should be granted.
- (758) In addition, the Commission announced in paragraph 614 of its Statement of Objections that it would consider whether to grant any reduction for cooperation outside the Leniency Notice, in particular where an undertaking does not contest, or where it provides further assistance in clarifying or supplementing, the facts found by the Commission. To the extent paragraph 614 of the Statement of Objections created expectations in this case, the Commission has decided to interpret this paragraph in favour of those undertakings relying on it and assisting in the establishment of the infringement in this Decision by not contesting the facts or by providing additional information or further clarifications. The Commission will grant a limited reduction of the fine in addition to reductions under the Leniency Notice, but much less significant, to undertakings which have provided active and expedient assistance after the Statement of Objections had been issued. The Commission will grant a lesser reduction to undertakings which merely stated that they did not contest the main factual allegations on which the Commission based its objections. The extent of the reduction should take into account that cooperation offered after the Statement of Objections, after the Commission has established all the elements of the infringement, at a time when the undertaking is aware of all the results of the investigation and has had access to the investigation file, can only assist the Commission marginally, if at all, in its investigation. In general, admission of the facts in these circumstances is at most corroborating evidence of facts that the Commission would regularly consider already sufficiently proven by other evidence in the file.
- (759) Paragraph 614 of the Statement of Objections also sets out that to the extent an applicant for immunity or reduction of fines has not benefited from the Leniency Notice its submissions might still be taken into account when calculating the fines. In view of the expectations generated by this provision, the Commission will grant limited reductions, much less significant than those available under the Leniency Notice, to undertakings that are not rewarded under the Leniency Notice and that fulfil the requirements set out in paragraph 614 of the Statement of Objections. As regards the extent of the reductions in this context, the same considerations as for leniency beneficiaries apply.

13.8.1. Belgium

13.8.1.1.KONE

- (760) KONE's submission significantly added to the information in the Commission's possession and enabled it to find an infringement of Article 81 of the Treaty. KONE's cooperation consisted of [**]. [**].
- (761) The evidence submitted by KONE confirmed the Commission's earlier suspicions that KONE, Otis, Schindler and ThyssenKrupp participated in illegal activities in the elevator and escalator sector in Belgium, and KONE acknowledged its participation in

such illegal activities. After KONE's submission, the Commission organised a second round of inspections at [**]. However, the information provided by KONE already enabled the Commission to find an infringement in Belgium. KONE was therefore granted conditional immunity under point 8(b) of the Leniency Notice in respect of the cartel in Belgium. In addition, KONE fulfilled and continued to fulfil all other relevant requirements under point 11 and 19 of the Leniency Notice. Hence, KONE qualifies for full immunity from fines in respect of the infringement in Belgium in this case.

- (762) Moreover, in its reply to the Statement of Objections, KONE did not contest the facts set out therein relating to Belgium. Since KONE already benefits from full immunity, there is no scope for any further reward outside the Leniency Notice.

13.8.1.2.Otis

- (763) Otis was second to submit information concerning Belgium shortly after the second round of inspections in Belgium. Otis' leniency application consists mainly of oral corporate statements and limited contemporaneous evidence. Otis also confirmed [**] and corroborated information already in the Commission's possession.

- (764) In its reply to the Statement of Objections, Otis claims that the cooperation and evidence it provided represented significant added value which would merit a 50% reduction of any fine. Otis further argues that it should benefit from immunity under point 23(b) of the Leniency Notice for enabling the Commission to prove the infringement for the period 1996-2002.

- (765) The Commission rejects the latter argument. KONE provided the Commission with documentary proof of implementation of cartel agreements earlier than Otis, and the Commission was already in possession of evidence concerning infringements committed since 1996. The information provided by Otis therefore merely corroborated facts already known to the Commission.

- (766) The reduction of the fine within the indicated band takes account of the time at which the evidence fulfilling the conditions of point 21 of the Leniency Notice was submitted, the extent to which it represents added value, as well as the extent and continuity of the undertaking's cooperation after its submissions. Otis completely fulfilled the conditions of point 21 [**]. The Commission also recognizes the value of Otis' cooperation in the investigation, which strengthened the Commission's ability to prove the infringement in particular due to contemporaneous documentary evidence submitted and which thus represented significant added value. Otis' cooperation with the Commission was continuous. However, the evidence submitted only provides very limited information on facts previously unknown to the Commission [**].

- (767) Based on the foregoing, it is appropriate to grant Otis a reduction of 40% within the band provided for in the first indent of point 23(b) of the Leniency Notice.

- (768) In addition, in its reply to the Statement of Objections, Otis stated not to contest the facts relating to Belgium. Apart from that, Otis did not provide any further assistance in clarifying or supplementing the facts in the Statement of Objections, other than providing facts already included in its leniency statements. Otis therefore should be granted a 1% reduction of the fine.

13.8.1.3.ThyssenKrupp

- (769) When ThyssenKrupp submitted its leniency application the Commission had already conducted three inspections in Belgium and received two corroborating leniency applications from KONE and Otis concerning cartel activities in Belgium. [**], ThyssenKrupp argued that the added value of its cooperation would merit a 30% reduction of any fine. In support of this argument, ThyssenKrupp indicated that many findings in the Statement of Objections were based on ThyssenKrupp's statements and that it also corroborated evidence in the Commission's possession.
- (770) The new information provided by ThyssenKrupp consisted mainly of oral explanations of [**]. Apart from this, its leniency application confirmed that [**].
- (771) ThyssenKrupp's leniency application represents significant added value because it provided additional information about [**]. Moreover, ThyssenKrupp's submission corroborated evidence already in the Commission's possession relating to [**].
- (772) The reduction of the fine within the indicated band takes account of the time at which the evidence fulfilling the condition in point 21 of the Leniency Notice was submitted, the extent to which it represents added value, as well as the extent and continuity of the undertaking's cooperation after its submissions. ThyssenKrupp completely fulfilled the conditions of point 21 [**] and provided significant added value that considerably strengthened the Commission's ability to prove the infringement. However, the evidence submitted does not relate to facts previously unknown to the Commission, nor does it contain any contemporaneous evidence.
- (773) Based on the foregoing, it is appropriate to grant ThyssenKrupp a reduction of 20% within the band provided for in the second indent of point 23(b) of the Leniency Notice.
- (774) In addition, in its reply to the Statement of Objections, ThyssenKrupp stated not to contest the facts relating to Belgium. Apart from that, ThyssenKrupp did not provide further assistance in clarifying or supplementing the facts in the Statement of Objections, limiting itself to repeating its leniency statements. ThyssenKrupp therefore should be granted a 1% reduction of the fine.

13.8.1.4.Schindler

- (775) In its reply to the Statement of Objections, Schindler, the fourth leniency applicant in Belgium, argued that its leniency submission represented significant added value and would merit a reduction of the fine.
- (776) Although Schindler submitted some contemporaneous evidence [**], this evidence did not strengthen the Commission's case [**]. Schindler submitted its leniency application on January 21 2005, that is, one year after the first inspection had taken place in Belgium, at a time when the Commission had already conducted two rounds of inspections in Belgium and had received three corroborating leniency applications. Moreover, the nature of the very limited information provided by Schindler [**] did not to any significant extent strengthen the Commission's ability to prove the facts in question. Consequently, the requirements of point 21 of the Leniency Notice are not satisfied. Subsequent to its leniency application, Schindler has continued to cooperate with the Commission; however, without providing any significant added value. It is therefore not appropriate to apply a reduction of the fine imposed on Schindler in respect of the infringement in Belgium under the Leniency Notice.

(777) Nonetheless, the Commission recognizes that, in its reply to the Statement of Objections, Schindler stated not to contest the facts substantiating the infringement in Belgium. Apart from that, Schindler did not provide any assistance in clarifying or supplementing the facts in the Statement of Objections. Schindler therefore should be granted a 1% reduction of the fine.

13.8.2. Germany

13.8.2.1.KONE

(778) KONE argues that its February 12 2004 submission enabled the Commission to carry out a successful (second) inspection in Germany in March 2004 and it should consequently have been granted full immunity under point 8(a) of the Leniency Notice.[**]. The fact that a first inspection had already taken place could not preclude the (renewed) availability of immunity under point 8(a) of the Leniency Notice in the event that the subject matter of the investigation changed as in the case at issue. KONE alleges that the second inspection was carried out exclusively on the basis of information submitted by KONE and that the Commission did not have, at the time of the submission, sufficient evidence to find an infringement. [**] KONE legitimately expected immunity under point 8(a) to be available when submitting its leniency application.

(779) According to KONE, any refusal to grant immunity under point 8(a) of the Leniency Notice would also be discriminatory: if ThyssenKrupp were headquartered outside Germany, the first inspection would not have covered Germany at all. Conversely, Otis received full immunity for the Netherlands only because, by coincidence, no party was headquartered there and hence the first inspection did not cover that territory. Such differential treatment would be unjustified [**].

(780) Alternatively, KONE claims immunity under point 8(b) of the Leniency Notice, arguing that it proved the gravity, duration and even existence of the cartel in Germany.

(781) In addition, KONE claims that it fulfilled the conditions of point 23(b) of the Leniency Notice and claims that exceptionally no fine could be imposed as KONE allegedly delivered “*virtually all evidence*” to prove the existence of the cartel.

(782) Finally, KONE rejects ThyssenKrupp’s statement in the latter’s December 18 2005 submission that KONE did not have cooperate fully with the Commission as required by point 11 of the Leniency Notice.

(783) At the outset, it is critical to point out that KONE was not the first to submit evidence which would have enabled the Commission to adopt a decision to carry out an inspection in Germany and therefore does not fulfil point 8(a) of the Leniency Notice. The information provided by [**]. [**] was sufficient to enable the Commission to adopt a first inspection decision [**] and to actually carry out a first inspection in Germany before KONE’s submission on January 28 2004. [**] the Commission did already possess a sufficient body of evidence by the time of KONE’s submission [**]. From these sources the Commission also learned that the alleged cartel members had extensive knowledge about each other and communicated extensively in a highly transparent market. What is more, this body of evidence already led the Commission to conclude that a second round of inspections should be carried out [**] before

KONE made its submission. KONE's application did provide additional information lending support to carrying out a second round of inspections, but to a lesser extent than the body of evidence already in the Commission's possession.[**].

(784) [**]. [**].

(785) Moreover, in its first and subsequently extended application for leniency, KONE requested immunity only under point 8(b) of the Leniency Notice. For this reason, and considering that information about the fact of the first inspection was in the public domain at the time of its submission, KONE must have assumed that immunity under point 8(a) of the Leniency Notice was no longer available.

(786) Because a first inspection in Germany [**] had already been carried out [**] and further considering that point 8(a) of the Leniency Notice aims at rewarding contributions to detect the existence of a cartel rather than at rewarding support for additional measures in an on-going investigation in form of a more focused second inspection, the availability of point 8(a) for information provided after such a first inspection is precluded. The precise scope of the cartel has to be determined in the course of the administrative proceeding when the facts and evidence collected during inspections and from other sources are being assessed. As demonstrated above, the existence of the cartel had already been detected [**].

(787) The Commission will grant immunity under point 8(b) of the Leniency Notice if the undertaking is the first to submit evidence which in the Commission's view may enable it to find an infringement of Article 81 of the Treaty in connection with an alleged cartel, which means the Commission did not have sufficient evidence before to find an infringement of Article 81 of the Treaty and no undertaking had been granted conditional immunity from fines under point 8(a).

(788) KONE's leniency submission is ambiguous and unsupported by incriminating evidence other than own written statements based on memory. It acknowledges that [**]. In this case, the Commission already possessed information on the suspected infringement from other sources [**]. This information determined the main orientation of the case in the context of an administrative procedure launched upon the Commission's own initiative. In such circumstances, therefore, an undertaking wishing to obtain immunity under point 8(b) of the Leniency Notice would have to provide the Commission with information which represents a very significant shortcut in its investigation.

(789) KONE's submission for Germany contains less precise descriptions of the cartel activities than its submissions for Belgium and Luxembourg and it is not supported by incriminating and documentary evidence (other than its own statements). Thus KONE cannot claim that its submissions for Belgium and Luxembourg on the one hand and Germany on the other hand were "*of the same quality*".

(790) In view of the above, KONE's submission does not qualify for immunity under points 8(a) or 8(b) of the Leniency Notice.

(791) With regard to KONE's request for a 100% reduction of its fine under point 23(b) of the Leniency Notice and, in particular, the last paragraph thereof, it should be noted that KONE did not provide factual evidence with a direct bearing on gravity or duration previously unknown to the Commission that the latter would be prevented

from using any of the facts in KONE's submission against it pursuant to point 23(b) last paragraph of the Leniency Notice. As stated above, the Commission already had evidence in its possession [**]. As a consequence, it is not appropriate to grant a full reduction of the fine.

- (792) However, the Commission recognizes the value of KONE's cooperation during the investigation. The evidence provided by KONE represented significant added value with respect to the evidence already in the Commission's possession and, by its nature and level of detail, strengthened the Commission's ability to prove the facts in question. In assessing the level of reduction, the Commission takes into account the time at which the evidence was submitted, whether it represents significant added value and the extent and continuity of cooperation after a leniency submission. KONE submitted statements of significant added value very early in the proceedings (within a month following the first Commission inspection), confirming the Commission's suspicion about a cartel among the companies under investigation and providing detailed information about [**] This information was partly new [**] and partly corroborated information which was already in the Commission's possession [**]. KONE's cooperation during the first phase of the administrative procedure was extensive and continuous.
- (793) Based on the foregoing, it is appropriate to grant KONE the maximum reduction of 50% within the band provided for in the first indent of point 23(b) of the Leniency Notice.
- (794) In addition, in its reply to the Statement of Objections, KONE stated not to contest the facts relating to Germany. Apart from that, KONE did not provide further assistance in clarifying or supplementing the facts in the Statement of Objections. KONE therefore should be granted a 1% reduction of the fine.

13.8.2.2.Otis

- (795) Otis claims immunity under point 8(b) of the Leniency Notice, arguing it was first to provide additional elements without which the Commission would not have been able to prove the existence of the cartel in Germany. [**]. Alternatively, Otis claims to qualify for a 50% reduction under point 23 (b) of the Notice [**]. Otis views its cooperation as exemplary and complete, constituting exceptional circumstances and thus justifying a greater reduction than 20-30%, even if it were only second in line, taking further into consideration the principles of proportionality, fairness and equality.
- (796) Considering the importance of the evidence submitted and the quality and timing of Otis' submission, it does indeed represent significant added value strengthening the Commission's ability to prove the facts in question. This, however, is the standard prerequisite for granting a reduction of fines according to points 21 and 22 of the Leniency Notice. Otis did not demonstrate in which way its cooperation would amount to exceptional circumstances. In addition, the wording of the Leniency Notice does not allow for a reduction other than within the band of 20-30% for the second undertaking submitting evidence.
- (797) Otis further claims an unspecified "*additional reward*" for supplying information not contained in the Statement of Objections. Such an additional reward, however, is not

foreseen under the Commission's leniency programme and thus cannot be granted thereunder. The fact however that Otis' did not contest the facts set out in the Statement of Objections has been taken into account as set forth in recital (801).

(798) [**]

(799) The reduction of the fine within the indicated band takes account of the time at which the evidence was submitted, the extent to which it represents added value, as well as the extent and continuity of the undertaking's cooperation after its submissions. Otis completely fulfilled the condition of point 21 [**]. Otis did provide significant added value that considerably strengthened the Commission's ability to prove the infringement. [**]. However, the evidence submitted does not contain contemporaneous evidence.

(800) Based on the foregoing, it is appropriate to grant Otis a reduction of 25% within the band provided for in the second indent of point 23(b) of the Leniency Notice.

(801) In addition, in its reply to the Statement of Objections, Otis stated not to contest the facts relating to Germany. Apart from that, Otis did not provide further assistance in clarifying or supplementing the facts in the Statement of Objections. Otis therefore should be granted a 1% reduction of the fine.

13.8.2.3.Schindler

(802) Schindler argues that [**] only Schindler's own submission provided sufficient evidence of cartel activities [**]. For this reason Schindler should qualify for immunity under point 8(b) of the Leniency Notice. Even if the Commission were of the opinion that immunity under point 8(b) was not available, no fine should be imposed on Schindler because, according to point 23(b) of the Leniency Notice, the Commission should not hold against Schindler the evidence provided by itself which allegedly was previously unknown to the Commission.

(803) The Commission, at the time of Schindler's submission, was already in possession of a body of evidence enabling it to find an infringement of Article 81 of the Treaty [**]. The application of point 8(b) of the Leniency Notice is thus precluded. Moreover, Schindler's first leniency application was submitted more than eight months after those filed by KONE and Otis. Since any reduction of a fine under the Leniency Notice must reflect the time when the evidence was submitted, the substantial delay in Schindler's submission prevents any reduction of the magnitude requested under point 23 of the Leniency Notice. With regard to Schindler's request for a 100% reduction of its fine under point 23(b) of the Leniency Notice, it should be noted that Schindler did not provide factual evidence with a direct bearing on gravity or duration previously unknown to the Commission the latter which would prevent from using any of the facts in Schindler's submission against it pursuant to point 23(b) last paragraph of the Leniency Notice. As stated above, the Commission already had evidence in its possession indicating that [**].

(804) The reduction of the fine within a band takes account of the time at which the evidence fulfilling the condition in point 21 of the Leniency Notice was submitted, the extent to which it represents added value and the extent and continuity of the undertaking's cooperation after its submissions. Since Schindler completely fulfilled the condition of point 21 only after [**], this delay is to be considered for the reduction within the

band. Schindler did provide some added value that strengthened the Commission's ability to prove the infringement. However, the added value of Schindler's leniency application remained limited given that it consisted mainly in own statements, contained no documentary evidence and mainly corroborated evidence already in the Commission's possession.

- (805) Based on the foregoing, it is appropriate to grant Schindler a reduction of 15% within the band provided for in the third indent of point 23(b) of the Leniency Notice.
- (806) In addition, in its reply to the Statement of Objections, Schindler stated not to contest the facts relating to Germany. Apart from that, Schindler did not provide further assistance in clarifying or supplementing the facts in the Statement of Objections. Schindler therefore should be granted a 1% reduction of the fine.

13.8.2.4. ThyssenKrupp

- (807) [**] did not transmit directly incriminating documentary evidence and limited itself to providing internal documents and own statements summarized by its external legal counsel.
- (808) ThyssenKrupp brings forward certain allegations [**]. These allegations are unsupported by any contemporaneous evidence and the Commission has found no evidence in support of them. The Commission cannot rely on a party's unsupported unilateral statement [**]. [**]. ThyssenKrupp's allegations remain thus unproven and the Commission will not draw any conclusions from them.
- (809) The remainder of the information provided by ThyssenKrupp [**] was mere corroboration of evidence in the Statement of Objections, which neither qualifies as a decisive contribution, nor represents significant added value.
- (810) For immunity under point 8(b) of the Leniency Notice the cumulative conditions under point 10 of the Notice need to be fulfilled. It is true that no immunity under point 8(a) of the Leniency Notice was granted to any other undertaking with respect to the violations in Germany. However, the Commission also enjoys a margin of discretion in assessing whether the cooperation in question was 'decisive' in establishing the existence of an infringement of Article 81 of the Treaty. ThyssenKrupp's submission was not decisive for the Commission to find such an infringement because it already had sufficient evidence available [**]. ThyssenKrupp has applied for a reduction of fines should their request for immunity be rejected. [**]. [**] the statements, [**], only corroborate evidence already in the Commissions' possession. As already stated in recital (808), the non-corroborated unilateral statements [**] remain unproved.
- (811) In view of the above, the information provided by ThyssenKrupp cannot be considered to constitute significant added value under the Leniency Notice. [**]. [**]. Even then, ThyssenKrupp limited its cooperation [**] to a mere confirmation of the statements already made by all other cartel members. [**].
- (812) In the light of the above, ThyssenKrupp should not be granted immunity from or reduction of the fines in respect of the infringement in Germany under the Leniency Notice.

- (813) In its reply to the Statement of Objections, ThyssenKrupp stated not to contest the facts relating to Germany. As indicated in recitals (807) to (809), ThyssenKrupp did not provide further assistance in clarifying or supplementing the facts in the Statement of Objections. ThyssenKrupp therefore should be granted a 1% reduction of the fine.

13.8.3. Luxembourg

13.8.3.1.KONE

- (814) KONE was first to submit information regarding infringements in the NEB and SEB sectors in Luxembourg. [**]. According to KONE, the cartel operated between KONE, Schindler, Otis and ThyssenKrupp. [**].
- (815) KONE's submission enabled the Commission to find a cartel consisting of consecutive agreements at least during the period [**]. KONE further supported this information by incriminating evidence. In addition, KONE fulfilled and continues to fulfil all other relevant requirements under point 11 and 19 of the Leniency Notice.
- (816) Based on the foregoing, it is appropriate to grant KONE full immunity from fines in respect of the infringement in Luxembourg provided for in point 8(b) of the Leniency Notice.
- (817) Moreover, in its reply to the Statement of Objections, KONE did not contest the facts set out therein relating to Luxembourg. Since KONE already benefits from full immunity, there is no scope for any further reward outside the Leniency Notice.

13.8.3.2.Otis

- (818) Otis was the second leniency applicant providing information concerning the cartel in Luxembourg. In its reply to the Statement of Objections, Otis requests that the fine to be imposed on it be reduced by 50% under the Leniency Notice considering the value of the information submitted.
- (819) Otis provided the Commission with new evidence [**]. This was further supported by documentary evidence [**]. [**]
- (820) In addition, Otis confirmed [**]. [**]
- (821) The Commission concludes that the combination of statements [**] with the contemporaneous evidence [**] provided by Otis constitutes significant added value. Also, the cartel lists assisted the Commission in verifying that the competitors followed the agreements. In addition, Otis corroborated information relating to NEB which was already in the Commission's possession.
- (822) In its assessment of the level of reduction within the relevant band the Commission takes into account the time at which the evidence of significant added value was submitted, the extent to which it represents such value, as well as the extent and continuity of the undertaking's cooperation after its submissions. Otis completely fulfilled the condition of point 21 [**], providing significant added value that considerably strengthened the Commission's ability to prove the infringement and explicitly confirming the start and end dates of the cartel. The new information contained in the submission, however, was limited [**]

- (823) Based on the foregoing, it is appropriate to grant Otis reduction of 40% within the band provided for in the first indent of point 23(b) of the Leniency Notice.
- (824) Moreover, in its reply to the Statement of Objections, Otis stated not to contest the facts set out therein relating to Luxembourg. Otis did not provide further assistance in clarifying or supplementing the facts in the Statement of Objections. Otis therefore should be granted a 1% reduction of the fine.

13.8.3.3.ThyssenKrupp

- (825) ThyssenKrupp claimed that it provided the Commission with all essential elements of the infringement in Luxembourg and also with considerable assistance in its investigations. In its [**], ThyssenKrupp additionally argued that it considerably facilitated the collection of evidence by supplementing and confirming the evidence already in the Commission's possession. In this respect, ThyssenKrupp claimed that each further piece of evidence corroborating the essential elements of the infringement would constitute added value. ThyssenKrupp should therefore be granted a reduction in the 20%-30% band.
- (826) On a related matter, ThyssenKrupp claims a Commission evaluation in paragraph 302 of the Statement of Objections was based on inaccurate translations of individual submissions which would be apt to discredit and belittle its cooperation. It is sufficient to observe that the contested paragraph was never considered a manifestation of lack of cooperation and, contrary to ThyssenKrupp's belief, has had no effect on the Commission's decision concerning leniency in Luxembourg.
- (827) The Commission observes that it had already conducted an inspection in Luxembourg and received two corroborating leniency applications [**] concerning cartel activities in Luxembourg before ThyssenKrupp submitted its leniency application. ThyssenKrupp's application consisted of one brief oral corporate statement and did not provide any contemporaneous evidence or new information of significance, [**]. Therefore, ThyssenKrupp did not provide new evidence of significant added value and did not, compared to the evidence in the Commission's possession at the time of the submission, to any significant extent strengthen the Commission's ability to prove the facts in question. Subsequent to its oral leniency application, ThyssenKrupp has not further cooperated except [**].
- (828) Based on the foregoing, ThyssenKrupp is not entitled to a reduction of the fine under the Leniency Notice.
- (829) At the same time, in its reply to the Statement of Objections, ThyssenKrupp stated not to contest the facts set out therein relating to Luxembourg. ThyssenKrupp did not provide further assistance in clarifying or supplementing the facts in the Statement of Objections and therefore should be granted a 1% reduction of the fine.

13.8.3.4.Schindler

- (830) Schindler was the fourth leniency applicant providing information concerning Luxembourg. In its reply to the Statement of Objections, Schindler argued it should be entitled to a reduction of the fine because it provided the Commission with evidence representing significant added value concerning the SEB arrangements. [**]. [**].

According to Schindler the Commission, therefore, had only limited evidence in its possession concerning the SEB arrangements at the time of Schindler's submission.

- (831) Schindler's leniency application consists mainly of a written corporate statement and some internal documents [**]. Schindler's leniency application did not provide the Commission with new evidence of significant added value. The new information consists of [**]. Otherwise, Schindler's leniency application mainly confirms information already known to the Commission.
- (832) Besides, Schindler claimed that [**]. The Commission has found no indications supporting this statement. The Commission cannot rely on a party's unsupported unilateral statement [**].
- (833) The Commission concludes that Schindler's submission did not contain new evidence of any appreciable value but mainly corroborated facts already known to the Commission. The information provided by Schindler, compared to the evidence in the Commission's possession at the time of Schindler's leniency application did not to any significant extent strengthen the Commission's ability to prove the facts in question. Consequently, the requirements of point 21 of the Leniency Notice are not satisfied. Subsequent to its leniency application, Schindler has not further cooperated other than providing information upon request of the Commission.
- (834) Based on the foregoing, it is not appropriate to apply a reduction of the fine under the Leniency Notice for Schindler's leniency submission.
- (835) In its reply to the Statement of Objections, Schindler stated not to contest the facts set out therein relating to Luxembourg. Schindler did not provide further assistance in clarifying or supplementing the facts in the Statement of Objections and therefore should be granted a 1% reduction of the fine.

13.8.4. The Netherlands

13.8.4.1. Otis

- (836) In its leniency application of March 11 2004, Otis admitted to having met and discussed with KONE, Mitsubishi, Schindler and ThyssenKrupp the sale, installation, service and maintenance of elevators and escalators in the Netherlands. According to Otis, [**]. Otis stated that the unlawful behaviour included the sharing of the contents, including prices, of bids submitted, and the entering into a number of explicit or tacit agreements not to undercut the bid with the lowest price. Otis also reported that on a number of occasions the cartel participants agreed on price, allocated customers, or decided not to submit bids for a project. [**].
- (837) The first round of Commission inspections did not cover the Netherlands. [**]. The information provided by Otis enabled the Commission to adopt such a decision and inspections took place in the Netherlands in April 2004. Accordingly, Otis was granted conditional immunity under point 8(a) of the Leniency Notice. Otis fulfilled and continues to fulfil all other relevant requirements under point 11 and 19 of the Leniency Notice. Therefore, Otis should qualify for full immunity from fines in the Netherlands.

- (838) Based on the foregoing, it is appropriate to grant Otis full immunity from fines provided for in point 8(a) of the Leniency Notice.
- (839) Moreover, in its reply to the Statement of Objections, Otis did not contest the facts set out therein relating to the Netherlands. Since Otis already benefits from full immunity, there is no scope for any further reward outside the Leniency Notice.

13.8.4.2. ThyssenKrupp

- (840) ThyssenKrupp was the second undertaking to submit a leniency application concerning the Netherlands, coincidentally filed the same day the Commission carried out inspections in the Netherlands. In its reply to the Statement of Objections, ThyssenKrupp argued at length why it would be eligible for a very considerable reduction of a fine within the band of 30-50%, claiming that it submitted completely new information [**]. In addition, ThyssenKrupp asserted that it has cooperated fully and on a continuous basis with the Commission.
- (841) The new information provided by ThyssenKrupp consisted mainly in [**] and the general functioning of the cartel, supported by limited documentary evidence [**].
- (842) The Commission concludes that ThyssenKrupp's leniency application provided significant added value. [**]. Furthermore, ThyssenKrupp confirmed information already in the Commission's possession.
- (843) The reduction of fine within the indicated band takes account of the time at which the evidence fulfilling the condition in point 21 of the Leniency Notice was submitted, the extent to which it represents added value, as well as the extent and continuity of the undertaking's cooperation after its submissions. ThyssenKrupp completely fulfilled the condition of point 21 after the [**] supplement and provided significant added value that considerably strengthened the Commission's ability to prove the infringement. However, ThyssenKrupp submitted only very limited contemporaneous documentary evidence and mainly corroborated evidence already in the Commission's possession.
- (844) Based on the foregoing, it is appropriate to grant ThyssenKrupp a reduction of 40% within the band provided for in the first indent of point 23(b) of the Leniency Notice.
- (845) In its reply to the Statement of Objections, ThyssenKrupp stated not to contest the facts set out therein relating to the Netherlands. ThyssenKrupp did not provide further assistance in clarifying or supplementing the facts in the Statement of Objections and therefore should be granted a 1% reduction of the fine.

13.8.4.3. KONE

- (846) KONE supplemented its leniency application of February 2 2004 in respect of Belgium with information concerning the Netherlands after the Commission had already conducted an inspection in the Netherlands and had received two other leniency applications from Otis and ThyssenKrupp.
- (847) In its reply to the Statement of Objections, KONE claimed to have met the conditions set forth in Section B of the Leniency Notice, and, therefore, to qualify for a reduction of the fine of 30-50% or, at least, 20-30%.

(848) [**].

(849) The character of KONE's leniency submission remains ambiguous as to the extent of its involvement in the cartel activities and the anticompetitive purpose of the discussions.[**]. KONE further insists that certain decisions were driven by legitimate business reasons. Considering this ambiguity and the fact that at the time of KONE's submission the Commission already possessed a solid body of evidence [**], KONE's submission concerning the Netherlands did not provide the Commission with any new substantial evidence, further details or information that would have generally strengthened the Commission's ability to prove the infringement. Consequently, the requirements of point 21 of the Leniency Notice are not satisfied.

(850) Based on the foregoing, it is not appropriate to apply a reduction of the fine under the Leniency Notice for KONE's leniency submission.

(851) In its reply to the statement of objections, KONE stated not to contest the facts relating to the Netherlands. Rather than providing further assistance in clarifying or supplementing the facts in the statement of objections, KONE aimed at systematically weakening the substance of the facts therein. The non-contestation therefore has to be characterised as purely formal and ambiguous and does not have any positive impact on the establishment of the facts. Since it is insufficient to state in general terms that the facts are not contested if that statement is not of any help to the Commission at all¹⁴² because it is qualified by a large number of reservations as in this case, KONE should not be granted any additional reduction of the fine.

(852) [**].

(853) [**].

13.8.4.4.Schindler

(854) Schindler did not apply for leniency in relation to the cartel in the Netherlands. Nevertheless, in its reply to the Statement of Objections, Schindler stated not to contest the facts therein. Schindler has not further contributed to the Commission's investigation and did not provide any further assistance in clarifying or supplementing the facts in the Statement of Objections. Based on the foregoing, Schindler should be granted a 1% reduction of the fine.

13.8.4.5.Mitsubishi

(855) Mitsubishi did not apply for leniency in relation to the cartel in the Netherlands. Nevertheless, in its reply to the Statement of Objections, Mitsubishi stated not to contest the facts and corroborated statements made by the other participants with regard to specific projects. Mitsubishi therefore should be granted a 1% reduction of the fine.

13.8.5. Conclusion on rewards for cooperation during the administrative procedure

¹⁴² Cf. case T-38/02 *Danone*, judgment of October 25 2005, paragraph 505.

(856) In conclusion, the following undertakings should be granted the following reductions of the fines that would have been imposed had there been no cooperation under the Leniency Notice or outside its scope during the administrative procedure:

- (a) KONE: immunity from fines for Belgium and Luxembourg and reduction of 50% for Germany for cooperation under the Leniency Notice. In addition KONE should be granted a further 1% reduction for cooperation outside the scope of the Leniency Notice in relation to the infringements that took place in Germany.
- (b) Otis: immunity from fines for the Netherlands and reduction of 40% for Belgium and Luxembourg, and 25% for Germany for cooperation under the Leniency Notice. In addition Otis should be granted a further 1% reduction for cooperation outside the scope of the Leniency Notice in relation to the infringements that took place in Belgium, Germany and Luxembourg, respectively.
- (c) Schindler: reduction of 15% for Germany for cooperation under the Leniency Notice. In addition Schindler should be granted a further 1% reduction for cooperation outside the scope of the Leniency Notice in relation to the infringements that took place in Belgium, Germany, Luxembourg and the Netherlands, respectively.
- (d) ThyssenKrupp: reduction of 25% for Belgium and 40% for the Netherlands for cooperation under the Leniency Notice. In addition ThyssenKrupp should be granted a further 1% reduction for cooperation outside the scope of the Leniency Notice in relation to the infringements that took place in Belgium, Germany, Luxembourg and the Netherlands, respectively.
- (e) Mitsubishi: reduction of 1% for cooperation outside the scope of the Leniency Notice in relation to the infringement that took place in the Netherlands.

14. The Amounts of the Fines in this Proceeding

(857)

Belgium:

KONE (KONE Belgium S.A. and KONE Corporation, jointly and severally)	EUR 0
Otis (N.V. Otis S.A., Otis Elevator Company and United Technologies Corporation, jointly and severally)	EUR 47 713 050
Schindler (Schindler S.A./N.V. and Schindler Holding Ltd., jointly and severally)	EUR 69 300 000
ThyssenKrupp (ThyssenKrupp Liften Ascenseurs N.V./S.A., ThyssenKrupp Elevator AG and ThyssenKrupp AG, jointly	EUR 68 607 000

and severally)	
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Germany:

KONE (KONE GmbH and KONE Corporation, jointly and severally)	EUR 62 370 000
Otis (Otis GmbH & Co OHG, Otis Elevator Company and United Technologies Corporation, jointly and severally)	EUR 159 043 500
Schindler (Schindler Deutschland Holding GmbH and Schindler Holding Ltd., jointly and severally)	EUR 21 458 250
ThyssenKrupp (ThyssenKrupp Aufzüge GmbH, ThyssenKrupp Fahrtreppen GmbH, ThyssenKrupp Elevator AG and ThyssenKrupp AG, jointly and severally)	EUR 374 220 000

Luxembourg:

KONE (KONE Luxembourg S.à.r.l. and KONE Corporation, jointly and severally)	EUR 0
Otis (General Technic-Otis S.à.r.l., N.V. Otis S.A., General Technic S.A.R.L., Otis Elevator Company and United Technologies Corporation, jointly and severally)	EUR 18 176 400
Schindler (Schindler S.à.r.l. and Schindler Holding Ltd., jointly and severally)	EUR 17 820 000
ThyssenKrupp (ThyssenKrupp Ascenseurs Luxembourg S.à.r.l., ThyssenKrupp Elevator AG and ThyssenKrupp AG, jointly and severally)	EUR 13 365 000

Netherlands:

KONE (KONE B.V. Liften en Roltrappen and KONE Corporation, jointly and severally)	EUR 79 750 000
Otis (Otis B.V., Otis Elevator Company and United Technologies Corporation, jointly and severally)	EUR 0
Schindler (Schindler Liften B.V. and Schindler Holding Ltd., jointly and severally)	EUR 35 169 750

ThyssenKrupp (ThyssenKrupp Liften B.V. and ThyssenKrupp AG, jointly and severally)	EUR 23 477 850
Mitsubishi Elevator Europe B.V.	EUR 1 841 400

(858) The measures provided for in this Decision are in accordance with the opinion of the Advisory Committee,

HAS ADOPTED THIS DECISION:

Article 1

- (1) In respect of Belgium, the following undertakings have infringed Article 81 of the Treaty by regularly agreeing collectively, for the periods indicated, in the context of related national agreements and concerted practices concerning elevators and escalators to share markets, allocate public and private tenders and other contracts in accordance with the pre-agreed shares for sale and installation and to refrain from competing with each other for maintenance and modernization contracts:
 - KONE: Kone Corporation and KONE Belgium S.A.: from May 9 1996 to January 29 2004;
 - Otis: United Technologies Corporation, Otis Elevator Company and N.V. OTIS S.A.: from May 9 1996 to January 29 2004;
 - Schindler: Schindler Holding Ltd and Schindler S.A./N.V.: from May 9 1996 to January 29 2004 and
 - ThyssenKrupp: ThyssenKrupp AG, ThyssenKrupp Elevator AG and ThyssenKrupp Liften Ascenseurs N.V./S.A.: from May 9 1996 to January 29 2004.
- (2) In respect of Germany, the following undertakings have infringed Article 81 of the Treaty by regularly agreeing collectively, for the periods indicated, in the context of related national agreements and concerted practices concerning elevators and escalators to share markets, allocate public and private tenders and other contracts in accordance with the pre-agreed shares for sale and installation:
 - KONE: Kone Corporation and KONE GmbH: from August 1 1995 to December 5 2003;
 - Otis: United Technologies Corporation, Otis Elevator Company and Otis GmbH & Co. OHG: from August 1 1995 to December 5 2003;
 - Schindler: Schindler Holding Ltd and Schindler Deutschland Holding GmbH: from August 1 1995 to December 6 2000 and
 - ThyssenKrupp: ThyssenKrupp AG, ThyssenKrupp Elevator AG, ThyssenKrupp Aufzüge GmbH and ThyssenKrupp Fahrtreppen GmbH: from August 1 1995 to December 5 2003.
- (3) In respect of Luxembourg, the following undertakings have infringed Article 81 of the Treaty by regularly agreeing collectively, for the periods indicated, in the context of related national agreements and concerted practices concerning elevators and escalators to share markets, allocate public and private tenders and other contracts in accordance with the pre-agreed shares for sale and installation and to refrain from competing with each other for maintenance and modernization contracts:
 - KONE: Kone Corporation and KONE Luxembourg S.à.r.l.: from December 7 1995 to January 29 2004;

- Otis: United Technologies Corporation, Otis Elevator Company, N.V. Otis S.A., General Technic-Otis S.à.r.l. and General Technic S.à.r.l.: from December 7 1995 to March 9 2004;
 - Schindler: Schindler Holding Ltd and Schindler S.à.r.l.: from December 7 1995 to March 9 2004 and
 - ThyssenKrupp: ThyssenKrupp AG, ThyssenKrupp Elevator AG and ThyssenKrupp Ascenseurs Luxembourg S.à.r.l.: from December 7 1995 to March 9 2004.
- (4) In respect of the Netherlands, the following undertakings have infringed Article 81 of the Treaty by regularly agreeing collectively, for the periods indicated, in the context of related national agreements and concerted practices concerning elevators and escalators to share markets, allocate public and private tenders and other contracts in accordance with the pre-agreed shares for the sale and installation and to refrain from competing with each other for maintenance and modernization contracts:
- KONE: Kone Corporation and KONE B.V. Liften en Roltrappen: from June 1 1999 to March 5 2004;
 - Otis: United Technologies Corporation, Otis Elevator Company and Otis B.V.: from April 15 1998 to March 5 2004;
 - Schindler: Schindler Holding Ltd and Schindler Liften B.V.: June 1 1999 to March 5 2004;
 - ThyssenKrupp: ThyssenKrupp AG and ThyssenKrupp Liften B.V.: from April 15 1998 to March 5 2004 and
 - Mitsubishi Elevator Europe B.V.: from January 11 2000 to March 5 2004.

Article 2

- (1) For the infringement in Belgium referred to in Article 1(1), the following fines are imposed:
- KONE: Kone Corporation and KONE Belgium S.A., jointly and severally: EUR 0
 - Otis: United Technologies Corporation, Otis Elevator Company and N.V. OTIS S.A., jointly and severally: EUR 47 713 050;
 - Schindler: Schindler Holding Ltd and Schindler S.A./N.V., jointly and severally: EUR 69 300 000 and
 - ThyssenKrupp: ThyssenKrupp AG, ThyssenKrupp Elevator AG and ThyssenKrupp Liften Ascenseurs N.V./S.A., jointly and severally: EUR 68 607 000.
- (2) For the infringement in Germany referred to in Article 1(2), the following fines are imposed:
- KONE: Kone Corporation and KONE GmbH, jointly and severally: EUR 62 370 000;

- Otis: United Technologies Corporation, Otis Elevator Company and Otis GmbH & Co. OHG, jointly and severally: EUR 159 043 500;
 - Schindler: Schindler Holding Ltd and Schindler Deutschland Holding GmbH, jointly and severally: EUR 21 458 250 and
 - ThyssenKrupp: ThyssenKrupp AG, ThyssenKrupp Elevator AG, ThyssenKrupp Aufzüge GmbH and ThyssenKrupp Fahrtreppen GmbH, jointly and severally: EUR 374 220 000.
- (3) For the infringement in Luxembourg referred to in Article 1(3), the following fines are imposed:
- KONE: Kone Corporation and KONE Luxembourg S.à.r.l., jointly and severally: EUR 0;
 - Otis: United Technologies Corporation, Otis Elevator Company, N.V. Otis S.A., General Technic-Otis S.à.r.l. and General Technic S.à.r.l., jointly and severally: EUR 18 176 400;
 - Schindler: Schindler Holding Ltd and Schindler S.à.r.l., jointly and severally: EUR 17 820 000 and
 - ThyssenKrupp: ThyssenKrupp AG, ThyssenKrupp Elevator AG and ThyssenKrupp Ascenseurs Luxembourg S.à.r.l., jointly and severally: EUR 13 365 000.
- (4) For the infringement in The Netherlands referred to in Article 1(4), the following fines are imposed:
- KONE: Kone Corporation Ltd and KONE B.V. Liften en Roltrappen, jointly and severally: EUR 79 750 000;
 - Otis: United Technologies Corporation, Otis Elevator Company and Otis B.V., jointly and severally: EUR 0;
 - Schindler: Schindler Holding Ltd and Schindler Liften B.V., jointly and severally: EUR 35 169 750;
 - ThyssenKrupp: ThyssenKrupp AG and ThyssenKrupp Liften B.V., jointly and severally: EUR 23 477 850 and
 - Mitsubishi Elevator Europe B.V.: EUR 1 841 400.

The fines shall be paid in euros, within three months of the date of the notification of this Decision to the following account:

Account N°

733-9061900-93 of the European Commission with:

KBC Bank, Rond Point Schuman 4, B-1040 Brussels

(Code SWIFT KREDBEBB – Code IBAN BE 98 7339 0619 0093

After expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, that is 3.50% as published in the Official Journal of the European Union N° C 024 of February 2 2007, plus 3.50 percentage points, being a total rate of 7.00 percentage points.

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article, insofar as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

Article 4

This Decision is addressed to:

KONE CORPORATION
Keilasatama 3
FI - Espoo 02150

KONE BELGIUM S.A.
Chaussée de Louvain, 1048
BE – 1140 Bruxelles

KONE GmbH
Südfeldstrasse 20
DE – 30453 Hannover

KONE LUXEMBOURG SARL
Route de Bettembourg Z.I.
LU – 3378 Livange

KONE B.V. LIFTEN EN ROLTRAPPEN
Ring 10
NL – 2491 BG Den Haag

UNITED TECHNOLOGIES CORPORATION
United Technologies Building
Hartford CT 06101
USA

OTIS ELEVATOR COMPANY
Ten Farm Springs Road
Farmington CT 06032-2568
USA

N.V. OTIS S.A.
Schepen A. Gossetlaan 17

BE – 1702 Groot-Bijgaarden

OTIS GmbH & Co. OHG
Otisstrasse 33
DE – 13507 Berlin

GENERAL TECHNIC– OTIS SARL
44, rue des Bruyères
LU – 1274 Howald

GENERAL TECHNIC SARL
44, rue des Bruyères
LU – 1274 Howald

OTIS B.V.
Terminalweg 27
NL-3800 BB Amersfoort

SCHINDLER HOLDING LTD
Seestrasse 55
CH – 6052 Hergiswil

S.A. SCHINDLER N.V.
Rue de la Source, 15
BE – 1060 Bruxelles

SCHINDLER DEUTSCHLAND HOLDING GMBH
Ringstrasse 54
DE – 12105 Berlin

SCHINDLER S.A.R.L
12, rue du Père Raphael
LU – 1018 Luxembourg

SCHINDLER LIFTEN B.V.
Verkeeskade 4
NL – 2521 BN Den Haag

THYSSENKRUPP AG
August-Thyssen-Straße 1
DE – 40211 Düsseldorf

THYSSENKRUPP ELEVATOR AG
August-Thyssen-Straße 1
DE – 40211 Düsseldorf

THYSSENKRUPP LIFTEN /ASCENSEURS N.V./S.A.
Rue du Dobbelenbergstraat 101-103
BE – 1130 Bruxelles

THYSSENKRUPP AUFZÜGE GMBH
Bernhauserstr. 45
DE - 73765 Neuhausen

THYSSENKRUPP FAHRTREPPEN GMBH
Kolumbusstraße 8
DE – 22113 Hamburg

THYSSENKRUPP ASCENSEURS LUXEMBOURG SARL
13, rue de Joncs
LU - 1818 Howald

THYSSENKRUPP LIFTEN BV
Van Utrechtweg 99
NL – 2921 LN Krimpen aan den IJssel

MITSUBISHI ELEVATOR EUROPE BV
Schietboom 20
NL – 3905 TD Veenendaal
Postbus 235, 3900 Veenendaal

This Decision shall be enforceable pursuant to Article 256 of the Treaty.

Done at Brussels,

For the Commission
Neelie KROES
Member of the Commission

