Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 19 September 2013 [1]

Joined Cases C-247/11 P and C-253/11 P

Areva SA (C-247/11 P),
Alstom SA,
T&D Holding SA, formerly Areva T&D Holding SA,
Alstom Grid SAS, formerly Areva T&D SA,
Alstom Grid AG, formerly Areva T&D AG (C-253/11 P)
v

European Commission

(Appeals — Competition — Agreements, decisions and concerted practices — Market for gas insulation switchgear projects — Obligation to state reasons — Breach of the rights of the defence — Imputability of the unlawful conduct — Joint and several liability for payment of the find — 'De facto' joint and several liability — Principles of proportionality and equal treatment — Right to an effective remedy)

1. The present joined cases concern two appeals brought, respectively, in Case C-247/11 P, by Areva SA ('Areva') and, in Case C-253/11 P, by Alstom SA ('Alstom') and its subsidiaries T&D Holding SA, formerly Areva T&D Holding SA, Alstom Grid SAS, formerly Areva T&D SA, and Alstom Grid AG, formerly Areva T&D AG (all of those companies will also be referred to jointly below as 'the appellants'). Both appeals are against the judgment of the General Court of the European Union of 3 March 2011 in *Areva and Others* v *Commission* ('the judgment under appeal'). [2] By that judgment, the General Court, first, annulled in part Decision C(2006) 6762 final ('the decision at issue'), [3] in which the European Commission, after finding the existence of an anti-competitive arrangement in the gas insulated switchgear ('GIS') sector, [4] imposed penalties on the participating undertakings, and, second, varied the fines imposed by the Commission on the companies that have brought the present appeals.

2. This Opinion is delivered at the same time as my Opinion in Joined Cases C-231/11 P, C-232/11 P and C-233/11 P *Commission* v *Siemens Österreich and Others*, [5] which relate to the same cartel and the same Commission decision. In so far as certain of the issues that arise in the present cases coincide, at least in part, with those examined in those cases, I shall, whenever appropriate, refer to the relevant points of my Opinion in those cases.

1 — Original language: French.

2 — Joined Cases T-117/07 and T-121/07 [2011] ECR II-633.

3 — Commission Decision of 24 January 2007 relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.899 – Gas Insulated Switchgear).

4 — GIS is used to control energy flow in electricity grids. It is heavy electrical equipment, used as a major component for turnkey power sub-stations. See paragraphs 2 to 5 of the judgment under appeal.

5 — The three appeals in these cases relate to the judgment of the General Court of 3 March 2011 in Joined Cases T-122/07 to T-124/07 *Siemens Österreich and Others* v *Commission* [2011] ECR II-793.

I – Facts

A – *The appellants*

3. Areva, the appellant in Case C-247/11 P, is the holding company of a group of companies operating in the nuclear sector.

4. Alstom, the first appellant in Case C-253/11 P, is the holding company of an industrial group active in various sectors, including the transmission and distribution of electricity ('the T&D sector').

5. All the Alstom group's activities in the T&D sector were transferred on 8 January 2004 to the group of which Areva is the holding company. For the period 9 January to 11 May 2004 (the date of the end of the infringement found by the Commission in the decision at issue) the GIS activities of the Areva group were carried out by Areva T&D SA and by Areva T&D AG,[6] wholly-owned subsidiaries of Areva T&D Holding SA, which was itself wholly owned by Areva (together 'the former Areva subsidiaries').

6. On 7 June 2010, after the definitive closure of the oral procedure before the Court, Areva sold its entire business in the T&D sector. In particular, Alstom re-acquired the transmission activities. Following that acquisition, Areva T&D Holding SA took the name T&D Holding SA – the second appellant in Case C-253/11 P –Areva T&D SA became Alstom Grid SAS – the third appellant in Case C-253/11 P – and Areva T&D AG became Alstom Grid AG – the fourth appellant in Case C-253/11 P. Alstom, and its present subsidiaries T&D Holding SA, Alstom Grid SAS and Alstom Grid AG, the appellants in case C-253/11 P, will also be called, together, 'the Alstom group companies'.

B – *The decision at issue and the judgment under appeal*

7. On 24 January 2007 the Commission adopted the decision at issue, in which it found the existence of an anti-competitive arrangement in the GIS sector, whereby the participating undertakings had agreed, inter alia, to allocate the markets worldwide,[7] fix prices and exchange sensitive information. The Commission also found that the cartel had been in operation over the period 5 April 1988 to 11 May 2004. In particular, it found that the appellants in the present case were liable[8] and, in consequence, imposed fines on them.[9]

6 — Areva T&D SA corresponds to Alstom T&D SA and, for the purposes of the present proceedings, Areva T&D AG corresponds to Alstom T&D AG (see recitals 21 and 23 to the decision at issue and paragraph 59 of the judgment under appeal). Before the Alstom group's activities in the T&D sector were sold on 8 January 2004, those two companies participated in the infringement found in the decision at issue within the Alstom group (see recital 331 to the contested decision).

7 — It is apparent, in particular, from paragraphs 29 to 32 of the judgment under appeal that the undertakings that participated in the infringement had, inter alia, coordinated the allocation of GIS projects on a global scale, apart from on certain markets, according to agreed rules, in order to maintain quotas largely reflecting their historical estimated market shares.

8 — In particular, it is apparent from Article 1(b), (c), (d) and (f) of the decision at issue that the Commission found that Alstom had participated in the infringement from 15 April 1988 to 8 January 2004, Areva and Areva T&D Holding SA (which became T&D Holding SA) from 9 January to 11 May 2004, Areva T&D AG from 22 December 2003 to 11 May 2004 and Areva T&D SA from 7 December 1992 to 11 May 2004.

9 — More specifically, in Article 2(b) of the decision at issue, an individual fine of EUR 11 475 000 is imposed on Alstom. Article 2(c) of that decision imposes a fine of EUR 53 550 000 on Alstom, for which it is jointly and severally liable with Areva T&D SA, and states that of the amount for which Areva T&D SA is liable, the amount of EUR 25 500 000 is to be paid jointly and severally with Areva, Areva T&D Holding SA and Areva T&D AG.

8. The appellants brought actions against the decision at issue before the General Court, which delivered the judgment under appeal on 3 March 2011. In the judgment under appeal, the General Court annulled the decision at issue in part [10] and then, in the exercise of its unlimited jurisdiction, imposed the following fines for the infringements found:

— Alstom: EUR 10 327 500;

— Alstom: EUR 48 195 000, jointly and severally with Areva T&D SA, EUR 20 400 000 of the amount owed by Areva T&D SA being payable jointly and severally by Areva T&D SA and Areva T&D AG, Areva and Areva T&D Holding SA. [11]

9. The General Court dismissed the actions as to the remainder.

II – Procedure before the Court of Justice and forms of order sought

10. By application lodged at the Court Registry on 24 May 2011, Areva brought the appeal in Case C-247/11 P. By application lodged at the Court Registry on 25 May 2011, the Alstom group companies brought the appeal in Case C-235/11 P. Both Areva and the Alstom group companies ask the Court to set aside the judgment under appeal. In the event that the Court should consider that the case is ready for final judgment, they request the Court, primarily, to annul, respectively, Articles 1(c) and 2(c) and Articles 1(b), (d), (e) and (f) and 2(b) and (c) of the decision at issue and, in the alternative, to reduce substantially the fines imposed on them and also to order the Commission to pay the costs. In the event that the Court should consider that the case is not ready for judgment, the appellants ask that the case be referred to a different Chamber of the General Court and to reserve the costs. The Commission claims that the Court should dismiss the appeals and order the appellants to pay the costs.

11. By order of 20 July 2011, the President of the Court ordered Cases C-247/11 P and C-253/11 P to be joined for the purposes of the written and oral procedures and the judgment.

12. Before the Court, the parties set out their positions in writing and made oral submissions at the hearing on 2 May 2003.

III – Analysis of the appeals

13. In support of the forms of order sought, Areva, in Case C-247/11 P, puts forward four pleas in law and the Alstom group companies, in Case C-253/11 P, put forward five pleas in law. It is appropriate to begin by examining the Alstom group companies' first plea.

10 — In the judgment under appeal, the General Court annulled Article 2(b) and (c) of the decision at issue and found that the Commission had breached the principle of proportionality and the principle of equal treatment or non-discrimination, in increasing the basic amount of the fines imposed in order to take into account the aggravating circumstance of having been a leader of the infringement. See, specifically, paragraph 317 of the judgment under appeal.

11 — See paragraph 323 of the judgment under appeal and paragraph 3 of the operative part.

A – *The Alstom group companies' first plea, alleging infringement of Article 296 TFEU*

14. In the context of their first plea, which may be subdivided into two parts, the Alstom group companies claim that the General Court, in holding that the decision at issue contained an adequate statement of reasons, infringed Article 296 TFEU.[12] The first part of this plea relates to the reasons stated in the decision at issue for imputing to Alstom liability for the infringement for the period 7 December 1992 to 8 January 2004 in its capacity as parent company of Alstom T&D SA and Alstom T&D AG.[13] The second part relates to the reasons stated in the decision at issue for imposing on Alstom and Areva T&D SA a fine for which they were jointly and severally liable.

1. First part of the first plea of the Alstom group companies

a) Arguments of the parties

15. In the first part of their first plea, which refers to paragraphs 90 to 99 of the judgment under appeal, the Alstom group companies maintain, essentially, that the General Court ought to have found that the decision at issue was vitiated by insufficient reasoning in that the Commission did not answer in that decision the arguments and evidence put forward by Alstom at paragraphs 90 to 150 of its reply to the statement of objections and seeking to show that, in spite of the presumption that it exercised decisive influence over its subsidiaries (also referred to below as 'the capital presumption'), at the time of the infringement the subsidiaries determined their conduct on the market independently of their parent company. The decision at issue states no reasons on which it might be understood why the evidence put forward by Alstom had no probative value, when the evidence in question was essential to the structure of that decision and its rejection required particularly detailed and careful reasoning.

16. The Alstom group companies maintain, moreover, that the General Court distorted the decision at issue, in particular at paragraph 95 of the judgment under appeal, because recitals 345 to 347 to the decision at issue do not summarise paragraphs 90 to 150 of the reply to the statement of objections. In addition, the General Court accepted the fact that the Commission rejected the evidence supplied by Alstom on the basis of evidence produced by a third party, namely Areva.

17. The Commission submits that the Alstom group companies' arguments should be rejected.

b) Analysis

18. It should be borne in mind, first of all, that the obligation to state reasons laid down in Article 296 TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the measure at issue.[14]

12 — It should be observed that although, in the present plea, the Alstom group companies put forward, in particular, a complaint alleging infringement of Article 296 TFEU, it is Article 253 EC that is applicable in the present case, as the decision at issue was adopted before the Treaty of Lisbon entered into force. That is irrelevant, however, as the statements of reasons for the European Union measures at issue in the present case were not subject, in the context of Article 253 EC, to different legal requirements from those applicable in the context of the second paragraph of Article 296 TFEU. This complaint should therefore be understood as also alleging, in particular, an infringement of Article 253 EC. See, in that regard, Case C-439/11 P *Ziegler* v *Commission* [2013] ECR, paragraph 113. However, in so far as that has no consequence in the present case, I shall refer in the Opinion to the new numbering of the Treaty, namely to Article 296 TFEU.

13 — Which became, respectively, Areva T&D SA (which then became Alstom Grid SAS) and Areva T&D AG (which then became Alstom Grid AG). See point 6 of, and also footnote 6 to, this Opinion.

14 — See, in particular, Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947, paragraph 146 and the case-law cited, and *Ziegler* v *Commission*, paragraph 114 and the case-law cited.

19. From that aspect, first, the statement of reasons required by Article 296 TFEU must be appropriate to the nature of the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted it in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Court to exercise its power of review. As regards, in particular, the reasons given for individual decisions, the purpose of the obligation to state the reasons on which an individual decision is based is, therefore, in addition to permitting review by the Courts, to provide the person concerned with sufficient information to know whether the decision may be vitiated by an error enabling its validity to be challenged. [15]

20. Second, the requirement to state reasons must be assessed by reference to the circumstances of the case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. [16]

21. Thus, although the Commission is required under Article 296 TFEU to set out all the circumstances of fact and law justifying the adoption of a decision and the legal considerations which led the Commission to adopt it, that article does not require the Commission to discuss all the matters of fact and of law which may have been dealt with during the administrative proceedings. [17]

22. In particular, where, as in the present case, a decision taken in application of the EU competition law rules relates to several addressees and raises a problem with regard to the imputability of the infringement, it must include an adequate statement of reasons with respect to each of its addressees, in particular those of them who, according to the decision, must bear the liability for the infringement. Accordingly, with regard to a parent company held to be responsible for the unlawful conduct of its subsidiary, such a decision must, as a general rule, contain a detailed statement of reasons capable of justifying the imputation of liability for that infringement to the parent company. [18]

23. As regards, more specifically, a Commission decision which relies *exclusively*, with respect to certain addressees, on the presumption that they actually exercised decisive influence, the Commission is in any event required to explain adequately to those addressees the reasons why the elements of fact and of law put forward did not suffice to rebut that presumption, if it is not to render that presumption in reality irrebuttable. [19]

24. In the present case, it should first of all be observed that, as explicitly stated at recital 349 to the contested decision and paragraph 91 of the judgment under appeal, the Commission, in order to find Alstom liable, relied on the presumption that it exercised decisive influence, but did not fail to consider as well certain other relevant factors which it set out at recitals 350 to 356 to that decision. In order to find Alstom liable, the Commission therefore did not rely *exclusively* on the presumption that it exercised decisive influence, but used, rather, a combination of that presumption and other evidence. [20]

15 — See, in particular, *Ziegler* v *Commission*, paragraph 115 and the case-law cited.

16 — See, in particular, *Elf Aquitaine* v *Commission*, paragraph 150 and the case-law cited, and also *Ziegler* v *Commission*, paragraph 116.

17 — Case C-338/00 P *Volkswagen* v *Commission* [2003] ECR I-9189, paragraph 127 and the case-law cited.

18 — See *Elf Aquitaine* v *Commission*, paragraphs 151 and 152, and Joined Cases C-628/10 P and C-14/11 P *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others* [2012] ECR, paragraph 75.

19 — See *Elf Aquitaine* v *Commission*, paragraph 153, and order of 13 September 2012 in Case C-495/11 P *Total and Elf Aquitaine* v *Commission*, paragraph 49. Emphasis added. The Commission's duty to state reasons for its findings on that point flows primarily from the fact that that presumption is open to rebuttal, and in order to rebut it those concerned must produce evidence relating to the economic, organisational and legal links between the companies concerned.

20 — See *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, paragraph 49, and Opinion of Advocate General Sharpston in Case C-50/12 P *Kendrion* v *Commission*, pending before the Court.

25. More specifically, in those recitals to the decision at issue, the Commission explained, inter alia, that the structure of the functioning of the group of which Alstom was the parent company was organised in such a way that the management exercising decisive influence over the subsidiaries' GIS activities reported to Alstom.[21] It also explained that a number of individuals simultaneously held senior positions in the parent company and the subsidiaries, as in the case of the 'top manager' of the T&D sector, who had certainly exercised decisive influence over the group's GIS activities and was a member of Alstom's executive committee.[22] Next, the Commission observed that the file contained evidence that the individuals identified in connection with the cartel as representatives of the Alstom group had regularly been able to commit the parent company.[23] In addition, the Commission considered that, in the light of the significant fine which had been imposed on Alstom by the French Competition Council in 1988, it was unlikely that liability for infringement of the competition rules was not identified as a substantial risk by the management of the parent company.[24] The Commission also observed that the parent company approved the proposed bids relating to GIS substations that exceeded a certain threshold or involved substantial risks for the group.[25]

26. In the light of those explicit considerations in the decision at issue, I am unable to see how it would be possible to maintain, as the Alstom group companies do, that the General Court ought to have reprimanded the Commission for not having supplied detailed reasoning in accordance with the requirements of the case-law referred to at points 18 to 23 with respect to the attribution to Alstom of liability for the infringement in question.

27. Before the Commission, Alstom put forward a series of arguments seeking to demonstrate that it did not exercise decisive influence over its subsidiaries.[26] In that regard, it is true, as the Alstom group companies claim, and as the General Court acknowledges at paragraph 98 of the judgment under appeal, that it is not clear from the decision at issue that the Commission addressed all the argument which Alstom put forward before it.

21 — Recital 353 to the decision at issue.

22 — Recital 355 to the decision at issue.

23 — Recital 355 to the decision at issue.

24 — Recital 351 to the decision at issue.

25 — Recital 350 to the decision at issue.

26 — At paragraphs 90 to 150 of its reply to the statement of objections, Alstom raised, in particular, arguments relating to: (i) the decentralised structure of the group and the autonomy of the T&D sector; (ii) the internal functioning and taking of decisions within the T&D sector; (iii) the limited object of Alstom; (iv) Alstom's lack of commercial influence over the bids of the legal entities in the T&D sector; (v) the absence of any discussion of the commercial policy of the T&D sector within Alstom's executive committee; and, finally, (vi) the fact that the infringements had continued to be the subject of proceedings after the T&D activities had been sold to Areva.

28. However, it is apparent from the decision at issue that, far from ignoring those arguments, the Commission in essence carried out a global assessment,[27] providing, as may be inferred from point 25 above, detailed reasons which, in combination with the capitalistic presumption, led it to conclude that Alstom did in fact exercise decisive influence over its subsidiaries.

29. In that regard, I have already observed at points 19 to 21 above that, according to the case-law, in order to satisfy its obligation to state reasons, the Commission is not required to mention specifically all the arguments raised by the parties during the administrative procedure provided that the reasoning is sufficient to enable those concerned to know the reasons for the measure adopted and, particularly in the case of a parent company held liable for the unlawful conduct of its subsidiary, that it contains a detailed account of the grounds that justify the infringement being imputed to the parent company.

30. Admittedly, it is generally desirable that the Commission should mention in a structured and detailed manner the arguments and elements of fact and of law supplied by the parties during the administrative procedure, in particular those supplied in order to demonstrate that the parent company did not exercise decisive influence over the subsidiary. However, in a case such as this, where, in order to attribute liability for the infringement to the parent company, the Commission did not rely *exclusively* on the capitalistic presumption, but explicitly considered other relevant factors, I consider that it is entitled to examine and evaluate globally the arguments and elements put forward – as it did in the present case – provided that the reasoning on which the measure is based sufficiently enables the party concerned, namely the parent company, to ascertain the reasons for the decision eventually adopted, in this instance the decision to impute to it liability for the infringement.

31. For the remainder, I would point out that the Alstom group companies have not explained how what they allege to be the flawed reasons stated for the decision at issue prevented them from properly defending their rights before the General Court or prevented that Court from exercising its power of review. On the contrary, the detailed examination carried out by the General Court, at paragraphs 93 to 97 of the judgment under appeal, of the arguments put forward in order to rebut the presumption of decisive influence demonstrates, rather, that Alstom was able properly to defend its rights before the General Court and that that Court was able to exercise its power to review the decision at issue.[28]

27 — Thus, without there being any need, in the light of the case-law cited above, to undertake at this point a detailed comparative analysis of the arguments put forward in the statement of objections (see preceding footnote) and the decision at issue, it will be noted that the argument based on the organisational structure of the group and the autonomy of the T&D sector is mentioned at recital 347 to the contested decision and rejected at recitals 353 and 355. References to the issue relating to the internal functioning and decision-taking within the T&D sector are to be found at recital 346 (approval of envisaged bids) and at recital 347 (maintenance of certain decisions under the control of the parent company). As for the argument that, in view of the fact that Alstom's object was limited to the holding and administration of shareholdings, Alstom could not be active in the GIS sector, it is, in the circumstances of the present case, irrelevant and could therefore be implicitly rejected by the Commission since, on the one hand, the fact that the parent company is not active in the market affected by the infringement is not decisive for the purposes of the exercise of decisive influence (see, to that effect, judgment of 30 September 2009 in Case T-168/05 *Arkema* v *Commission*) and since, on the other hand, an infringement committed by a subsidiary may be imputed to the person exercising decisive influence over that subsidiary even if that person does not carry out an economic activity of its own (Case C-440/11 P *Commission* v *Stichting Administratiekantoor Portielje* [2013] ECR, paragraphs 43 and 44). Likewise, as regards the arguments based on the alleged lack of influence on (and discussion of) the commercial policy of the subsidiaries, it should be observed, first, that the question whether, in the light of its conduct on the market, a subsidiary is under the decisive influence of its parent company depends not only on who determines its commercial policy in the narrow sense (see, in that regard, point 109 and the case-law cited, of the Opinion of Advocate General Kokott in Case C-501/11 P *Schindler Holding and Others* v *Commission* [2013] ECR, in which judgment was delivered on 18 July 2013), and, second, that the Commission considered in the present case that all the elements relating to the economic, organisational and legal links between the parent company and its subsidiaries were sufficient to demonstrate its influence over their conduct on the market.

28 — Orders of 7 February 2012 in Case C-412/11 P *Total and Elf Aquitaine* v *Commission*, paragraph 57, and of 13 September 2012 in *Total and Elf Aquitaine* v *Commission*, paragraph 50.

32. In the light of the foregoing, I consider that the General Court did not fail to have regard to the scope of the Commission's obligation to state reasons, as recognised in the case-law, and did not err in law in considering that the decision at issue was sufficiently reasoned as regards the attribution to Alstom of liability for the infringement for the period from 7 December 1992 until 8 January 2004. That conclusion cannot be called into question by the other arguments put forward by the Alstom group companies.

33. As regards the judgment in *Elf Aquitaine* v *Commission*, to which the Alstom group companies refer, in which the Court of Justice set aside the judgment of the General Court on the ground that it had disregarded the Commission's obligation to state reasons, it is sufficient to observe that, unlike the situation in that case, the Alstom group companies were not, in the present case, faced with the first Commission decision in which the Commission altered its usual approach and relied solely on the presumption that the parent company had exercised decisive influence over the subsidiary in order to impute the infringement to the parent company. Accordingly, they cannot rely in this case on the solution adopted in that judgment.

34. As regards the complaint that, in asserting at paragraph 95 of the judgment under appeal that recitals 345 to 347 of the decision at issue constituted a summary of the arguments put forward by Alstom at paragraphs 90 to 150 of its reply to the statement of objections, the General Court distorted the decision at issue, it is in my view ineffective and, in any event, unfounded. It is ineffective because, even if the General Court had made an error in that respect, that would not in any way detract from the assertion made in the preceding points, namely that the Commission stated to the requisite legal standard its reasons for imputing liability to Alstom; and it is unfounded because, as I have already stated, in reality the Commission did deal with the substance of the arguments put forward before it by Alstom.[29]

35. As regards the argument that the Commission relied on evidence supplied by a third party, there is no rule of EU law that would prevent the Commission from using – clearly, while respecting the rights of the defence – such evidence in so far as it is relevant. It seems clear to me that, in so far as it had purchased from Alstom the subsidiaries that had participated in the infringement, Areva could have relevant information about the functioning of those subsidiaries during the period before the sale. For the remainder, the Alstom group companies do not specify what evidence they challenge, let alone claim that that evidence was distorted.

36. It follows from all the foregoing that, to my mind, the first part of the first plea should be rejected.

2. The second part of the Alstom group companies' first plea

37. In the second part of their first plea, which relates to paragraph 200 of the judgment under appeal, the Alstom group companies take issue with the General Court for having held that the Commission was entitled not to state the reasons why two companies that did not form an economic entity on the date on which a decision was adopted could be given a fine for which they were jointly and severally liable. In particular, they take issue with the General Court for not having criticised the Commission, at paragraph 200 of the judgment under appeal, for not having given specific reasons for the fact that it had imposed a fine jointly and severally on Alstom and Areva T&D SA (which became Alstom Grid SAS) when they no longer formed an undertaking at the time of adoption of the decision at issue.

38. In that regard, I consider that, in the present case, the General Court was able, without making an error of law, not to find fault with the Commission for not having stated specific reasons for the decision to impose a fine jointly and severally on Alstom and Areva T&D SA for the period during which they formed a single undertaking.

29 — See footnotes 26 and 27 above.

39. I have already observed, at points 20 and 21 above, that, according to the case-law, Article 296 TFEU does not require that the Commission discuss all the matters of fact and of law dealt with during the administrative procedure. [30] Furthermore, according to the case-law, a decision of the Commission which fits into a well-established line of decisions may be reasoned in a summary manner and it is only if it goes appreciably further than the previous decisions that the Commission must give a fuller account of its reasoning. [31]

40. Contrary to the Alstom group companies' contention, the imposition of a fine jointly and severally on a subsidiary which participated in the infringement and the former parent company for the infringement period during which the two companies constituted a single undertaking for the purposes of competition law is not distinguished from the Commission's previous practice and has not been called into question in the case-law. [32]

41. That practice is based on the idea that, in so far as, over a certain period, certain companies constituted an undertaking for the purposes of competition law that committed an infringement of the competition rules, the Commission may impose on them jointly and severally a fine for the infringement committed during that period. [33] Without prejudice to the considerations which I shall set out at point 155 et seq. below, when I examine the Alstom group companies' fourth plea, I observe that the fact that, when the Commission's decision was adopted, those companies no longer constituted a single economic entity, is not a fact which, in itself alone, [34] precludes the imposition on them, jointly and severally, of a fine in their capacity as persons who may be considered jointly and severally liable for the actions of the undertaking of which they formed part. [35]

42. In those circumstances, as the Commission stated to the requisite legal standard, as is apparent from the analysis of the first part of the first plea, its reasons for attributing to the parent company liability for the infringement, I consider that, in this case, the Commission is not to be criticised for not having supplied specific reasons for ordering the parent company and the subsidiary which participated directly in the infringement jointly and severally to pay the fine, even though the companies concerned no longer constituted a single economic entity at the time when the decision at issue was adopted. [36]

30 — See *Volkswagen* v *Commission*, paragraph 127 and the case-law cited.

31 — See *Elf Aquitaine* v *Commission*, paragraph 155.

32 — In many cases the General Court has upheld a fine imposed jointly and severally on the parent company and its former subsidiary even though they were no longer a unitary economic entity at the time of the adoption of the decision. See, in particular, judgment of 15 June 2005 in Joined Cases T-71/03, T-74/03, T-87/03 and T-91/03 *Tokai Carbon and Others* v *Commission*, paragraphs 58 to 82, 387, 391 to 393 and paragraph 3 of the operative part, as regards the joint and several liability of the subsidiary Intech EDM BV with its former parent company Intech EDM AG; Case T-40/06 *Trioplast Industrier* v *Commission* [2010] ECR II-4893, paragraphs 2, 74, 173 and operative part, as regards the joint and several liability of the subsidiary Trioplast Witenheim with the successive parent companies FLS and Trioplast Industrier ('*Trioplast*'); Case T-384/06 *IBP and International Building Products France* v *Commission* [2011] ECR II-1177, paragraph 13 and operative part, as regards the joint and several liability of IBP France with its former parent companies Delta and AFC; judgment of 24 March 2011 in Case T-378/06 *IMI and Others* v *Commission*, paragraphs 4, and 14 and operative part, as regards the joint and several liability of the subsidiaries Aquatis and Simplex with their parent company IMI; and Case T-382/06 *Tomkins* v *Commission* [2011] ECR II-1157, paragraphs 3 and 55 to 59 and paragraph 2 of the operative part, as regards the joint and several liability of Pegler with its former parent company Tomkins.

33 — For an explanation of the reasons relating to the effectiveness of the enforcement of the fine that justify the imposition of a joint and several fine in such cases, I refer to my Opinion in *Commission* v *Siemens Österreich and Others*, points 52, 82 and 84 *in fine*.

34 — Admittedly, as will be examined in greater detail at points 160 to 162 below, and as I observed at point 83 et seq. of my Opinion in *Commission* v *Siemens Österreich and Others*, that circumstance does have an impact on the Commission's power to impose a fine for which the recipients are jointly and severally liable, since, if it wishes to impose such a fine, it will be required, on grounds of legal certainty, to specify the share which the persons jointly and severally liable will have to bear in their internal relationship.

35 — See my Opinion in *Commission* v *Siemens Österreich and Others*, point 80.

36 — In their reply, the Alstom group companies appear to wish to extend their argument by taking issue with the General Court for not having criticised the Commission for having failed to state its reasons for imposing a fine jointly and severally on legal entities which have *never* formed together a common economic entity, namely Alstom and Areva. In that regard, without there being any need to address the question of the admissibility of such a complaint – which was not raised either at first instance, or on appeal – I observe that the Commission did not impose a fine jointly and severally on Areva and Alstom in the decision at issue, so that it is not possible to criticise it for not having stated reasons in that regard. The question of the establishment of 'de facto jointly and severally liable' between Areva and Alstom forms, in any event, the subject-matter of the Alstom group companies' fourth plea and is analysed at point 101 et seq. below.

43. It follows that, to my mind, the second part of the Alstom group companies' first plea and, accordingly, the first plea in its entirety, should be rejected.

B – *The Alstom group companies' second plea, alleging breach by the General Court of its obligation to state reasons and infringement of Article 263 TFEU, and Areva's first plea, alleging breach by the General Court of its obligation to state reasons and also breach of the rights of the defence*

44. By their second plea, which is subdivided into four parts, the Alstom group companies maintain that the General Court breached the obligation to state reasons for its judgment arising from Articles 36 and 53 of the Statute of the Court of Justice of the European Union and also infringed Article 263 TFEU. More particularly, by the first three parts of their second plea, the Alstom group companies claim that the General Court breached its duty to state reasons and infringed Article 263 TFEU in that on a number of occasions it substituted its own reasoning for the Commission's by adding a posteriori to the decision at issue grounds which were not to be found in that decision. The first and second parts refer to the reasons stated for the judgment under appeal in connection with the attribution of liability for the infringement, respectively, to Alstom and to T&D Holding SA (formerly Areva T&D Holding SA) as parent companies. The third part refers to the General Court's reasoning at paragraphs 214 to 216 of the judgment under appeal, relating to the contribution in equal parts to payment of a fine for which they were jointly and severally liable. That part is closely linked to the questions discussed in the context of the Alstom group companies' fourth plea and will therefore be examined together with that plea at point 155 et seq. In the fourth part of their second plea, the Alstom group companies dispute the reasoning stated in the judgment under appeal in that the General Court held that companies that do not form an economic unit at the date of adoption of the decision at issue may have a fine imposed on them jointly and severally.

45. By its first plea, Areva claims that the General Court breached its obligation to state reasons and the rights of the defence in the context of the analysis of the actual exercise of decisive influence over Areva's former subsidiaries during the period 9 January to 11 May 2004.

46. In so far as, in the context of these pleas, the appellants claim that there has been a breach by the General Court of its obligation to state reasons, I consider it necessary first of all to recall the scope of that obligation as defined in the case-law, making reference in particular to the limits placed on the General Court in the context of its review of legality in relation to the extent of the reasoning stated in the contested measure.

1. The scope of the General Court's obligation to state reasons and the prohibition on the substitution of its own reasoning for that set out in the contested measure

47. The obligation of the General Court to state the reasons on which its judgments are based follows from Article 36, in conjunction with the first paragraph of Article 53, of the Statute of the Court of Justice.

48. It is settled case-law that a judgment must disclose in a clear and unequivocal fashion the reasoning followed by the General Court, in such a way as to enable the persons concerned to ascertain the reasons for the decision adopted and the Court of Justice to exercise its power of review. [37]

37 — See, in particular, *Ziegler* v *Commission*, paragraph 81 and the case-law cited.

49. However, the obligation to state reasons does not require the General Court to provide an account which follows exhaustively and one by one all the arguments put forward by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review. [38]

50. Next, in an action for annulment, the Court of Justice and the General Court cannot in any circumstances substitute their own reasoning for that of the institution that adopted the contested measure. [39] It follows that the Courts of the European Union may not provide an EU legal measure based on incorrect, or even unlawful, or insufficient grounds with completely different grounds and then uphold it. Outside the scope of their unlimited jurisdiction (Article 261 TFEU), the Courts of the European Union may not amend the contested measure, but must declare it to be void if and in so far as the action for annulment is well founded (first paragraph of Article 264 TFEU). [40]

51. However, that being so, first, there is nothing to prevent the Courts of the European Union from comprehensively reviewing the pleas in law and arguments put forward by the applicants in order to ascertain whether they are well founded and from considering them in detail. [41] Second, it follows from the case-law that although in annulment proceedings the General Court may be led to interpret the reasoning of the contested measure in a manner which differs from that of the institution that adopted it, and even, in certain circumstances, to reject the latter's formal statement of reasons, it cannot do so where there is no material factor to justify such a course of action. [42]

52. It is therefore in the light of those principles expressed in the case-law that it must, in my view, be determined whether the General Court unlawfully substituted its own reasoning for that contained in the decision at issue. To that end, it will be necessary to ascertain whether, in the judgment under appeal, the General Court confined itself to examining, even in detail, the pleas and arguments raised before it by the appellants in order to determine whether they were well founded or whether, on the contrary, it provided the decision with completely different grounds in order to uphold it.

53. In that regard, it should further be added that, while it is true, as the Alstom group companies assert, that European proceedings for review of the legality of the acts of the institutions are 'proceedings applied to an act', so that, as already stated, it is not possible to add new and different reasons to that act in order to 'salvage' it, that does not alter the fact that, in order to exercise to the full their power of review, the Courts of the European Union must be able to answer in full the arguments raised by the applicants before them. To that end, the Courts may be required to analyse arguments or evidence put forward during the administrative procedure, even in greater detail than that applied in the contested measure. [43] Provided that the reasoning on which the measure is based is

38 — Ibid., paragraph 82 and the case-law cited.

39 — Case C-164/98 P *DIR International Film and Others* v *Commission* [2000] ECR I-447, paragraphs 38 and 49; Joined Cases C-442/03 P and C-471/03 P *P&O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* [2006] ECR I-4845, paragraphs 60 and 67; and Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 141. That amounts to an expression of the 'quashing' nature of an action for annulment, which is based on the principle of institutional balance that characterises the structure and functioning of the European Union. The maintenance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. In that regard, see point 92 of the Opinion of Advocate General Kokott in Case C-73/11 P *Frucona Košice* v *Commission* [2013] ECR.

40 — See the Opinion of Advocate General Kokott in *Frucona Košice* v *Commission*, point 93 and the case-law cited.

41 — See, to that effect, Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, paragraph 68, and *Alliance One International and Standard Commercial Tobacco* v *Commission* and *Commission* v *Alliance One International and Others*, paragraphs 121 and 122, and also the orders of 7 February and 13 September 2012 in *Total Elf Aquitaine* v *Commission*, paragraph 65 and paragraphs 59 and 60 respectively.

42 — *DIR International Film and Others* v *Commission*, paragraph 42, and *British Aggregates* v *Commission*, paragraph 142, and also my Opinion in the latter case, delivered on 17 July 2008, point 107.

43 — In that regard, see my Opinion of 17 February 2011 in *Elf Aquitaine* v *Commission*, point 54. See also, to the same effect, the Opinion of Advocate General Kokott in *Frucona Košice* v *Commission*, point 94.

sufficient in itself and not vitiated by an error, there is nothing to prevent the General Court from providing reasoning which contains, in answer to the arguments put forward before it by the parties to the dispute, an analysis or reasoning with respect to the arguments or evidence presented before the Commission that is more detailed than that contained in the contested measure.

2. The first part of the Alstom group companies' second plea

54. By the first part of their second plea, which refers to paragraphs 101 to 110 of the judgment under appeal, the Alstom group companies take issue with the General Court for having substituted its own reasoning for the Commission's and for having introduced substantial grounds serving as an a posteriori basis for the decision as regards the examination of the evidence intended to rebut the presumption that Alstom exercised decisive influence over its subsidiaries during the period 7 December 1992 to 8 January 2004. In particular, paragraphs 102 to 110 of the judgment under appeal contain an analysis of certain of the arguments developed by Alstom at paragraphs 90 to 150 of its reply to the statement of objections. The General Court adopts a position on that evidence and evaluates it, whereas such evaluations do not appear in the decision at issue and were therefore added to the wording of that decision.

55. In that regard, I have already observed when analysing the first part of the first plea[44] put forward by the Alstom group companies that the General Court did not err in holding that the Commission had provided sufficient reasoning in the decision at issue when imputing to Alstom liability for the infringement committed during the period 7 December 1992 to 8 January 2004.

56. In that context, the judgment under appeal does not provide the decision at issue with reasoning completely different from that on which the Commission relied in order to hold Alstom liable. The reasoning stated in the judgment under appeal is consistent with the grounds on which the decision at issue is based. Admittedly, in answer to the arguments raised before it by Alstom, the General Court, at paragraphs 102 to 109 of the judgment under appeal, carried out a very precise analysis of a series of documents that Alstom had supplied during the administrative procedure. Such a detailed analysis is not to be found in the decision at issue, but that does not mean that the General Court unlawfully substituted its own reasoning for the reasoning set out in that decision.

57. In accordance with what I stated at point 53 above, I consider that, in so far as the reasoning on which the decision at issue is based, as regards the imputation to Alstom of the infringement committed during the period in question, is sufficient in itself and not vitiated by an error, there was nothing to prevent the General Court, in order to answer the arguments raised before it by Alstom, from carrying out a detailed analysis of the arguments and evidence presented before the Commission that is more detailed than the analysis in the decision at issue. On the contrary, such an approach seems to me to be proof of the diligence displayed by the General Court in its analysis of the arguments put forward before it by Alstom.

58. It follows from those considerations that the first part of the Alstom group companies' second plea must be rejected.

44 — See point 24 et seq. of this Opinion.

3. Areva's first plea and the second part of the Alstom group companies' second plea

a) Arguments of the parties

59. In the context of its first plea, which refers to paragraphs 144 to 152 of the judgment under appeal, Areva claims that there has been a breach by the General Court of the obligation to state reasons and of the rights of the defence. Areva maintains that, at paragraph 150 of the judgment under appeal, the General Court substituted its own reasoning for the Commission's by adding a posteriori to the decision at issue two new factors in order to reject the claims that, for the period from 9 January to 11 May 2004, Areva and Areva T&D holding SA did not have sufficient experience of the T&D sector to be able actually to exercise decisive influence over the conduct of their subsidiaries. Areva disputes, first, the assertion that it could have acquired knowledge of the T&D sector between the conclusion of the agreement on the transfer of Alstom's T&D subsidiaries in September 2003 and the effective transfer of those subsidiaries on 8 January 2004 and, second, the assertion that it could not be ruled out that the recruitment of a new director for those subsidiaries from outside the group enabled Areva to equip itself with expertise in the T&D sector.

60. First, Areva maintains that those two factors were not first put forward by the Commission and thus constitute, on the part of the General Court, an addition to or a substitution for the grounds on which the decision at issue was based. Second, the General Court's arguments do not enable its reasons for not upholding Areva's arguments to be understood and the judgment under appeal is thus vitiated by defective reasoning. Third, the General Court also breached Areva's rights of defence: by relying on factors which in reality were assumptions, it made the capitalistic presumption irrebuttable and imposed a *probatio diabolica* on Areva in the context of the demonstration of the absence of the actual exercise of decisive influence over its former subsidiaries by requiring it to adduce negative proof of its non-interference with their conduct; and, in addition, the General Court did not give Areva the opportunity to comment on the abovementioned new factors which were added to the decision at issue.

61. In its reply, Areva claims that the General Court made an error of law in failing to censure the Commission for having breached its obligation to state reasons in the context of the analysis of Areva's actual exercise of decisive influence over its former subsidiaries. Areva maintains, in particular, that the Commission failed to respond to certain arguments raised by Areva and did not adopt a detailed position on other arguments which it had raised.

62. In the context of the second part of their second plea, the Alstom group companies, and in particular T&D Holding SA, raise in essence the same complaint as Areva's, alleging breach by the General Court of its obligation to state reasons. Thus, they submit that the General Court did not confine itself to adjudicating on the points in the decision at issue as regards T&D Holding SA's acquisition of knowledge of the T&D sector, but added two new factors, namely those referred to by Areva and described at point 59 above. Those two new factors were not discussed during the administrative procedure and the General Court therefore amended and supplemented the reasoning in the decision at issue by unlawfully substituting grounds for those stated in that decision.

63. The Commission disputes those arguments. In particular, it claims that Areva's complaint, alleging defective reasoning, is inadmissible, since in reality Areva does not challenge the reasoning set out in the judgment but the General Court's appraisal of the evidence, which is inadmissible in an appeal.

b) Analysis

64. It is appropriate, first of all, to ascertain, in the light of the criteria mentioned at points 47 to 53 above, whether, in the judgment under appeal, the General Court substituted its own grounds, as Areva and the Alstom group companies claim. Their arguments refer in particular to two factors – mentioned at point 59 above – which the General Court, at paragraph 150 of the judgment under appeal, is alleged to have added to the reasoning in the decision at issue.[45] For that purpose, I consider it necessary to begin with a detailed analysis of the judgment under appeal.

65. At paragraphs 144 to 152 of the judgment under appeal, the General Court rejected the plea whereby Areva and T&D Holding alleged that the Commission had breached the rules on the imputation of infringements in that it had attributed to them liability for the infringement for the period from 9 January to 11 May 2004, in their capacity as the parent companies holding the entire capital of Areva T&D SA and Areva T&D AG. Areva and T&D Holding maintained that the factors which they had set out during the administrative procedure were sufficiently probative to rebut the presumption of liability arising from the fact that the entire capital of the subsidiaries was held by their parent companies.

66. In order to reject that plea, the General Court, in the judgment under appeal, first of all analysed the decision at issue and referred to the relevant principles established in the case-law (paragraphs 144 and 145). Next, it considered that it was for Areva and T&D Holding to rebut the abovementioned presumption of liability (paragraph 146) and that it was thus necessary to consider whether the factual evidence submitted during the administrative procedure, which had again been raised before it, was of sufficient probative value to rebut the presumption of liability (paragraph 147). The General Court therefore recited the arguments put forward by Areva and T&D Holding during the administrative procedure and, in particular, the arguments relating to their lack of experience in the T&D sector (paragraph 148) and then concluded, at paragraph 149, for the reasons stated at paragraph 150, that those factors, taken individually, or even as a whole, were not such as to show that the subsidiaries determined their course of action on the market in a genuinely independent manner vis-à-vis Areva and T&D Holding and that, accordingly, the Commission had not vitiated the decision at issue with an error of assessment by rejecting that evidence as having no probative value.

67. More specifically, in order to reach that conclusion, the General Court relied, at paragraph 150 of the judgment under appeal, first, on the finding that the assertions of Areva and T&D Holding – according to which they did not have sufficient experience to exercise decisive influence over their subsidiaries – were unsupported and, second, on the consideration that it could not be inferred from those assertions that the two parent companies had necessarily refrained from exercising such influence. Those findings are not challenged in the parties' arguments.

68. It is in that context and, in particular, in order to strengthen its argument that the General Court relied on the first argument to which Areva and T&D Holding refer, asserting that it was not ruled out that they could have acquired, or at least developed, their knowledge of the T&D sector during the negotiation initiated for the transfer of Alstom's T&D activity. That additional consideration, which was undertaken by the General Court on the basis of information contained in the file,[46] and for the sole purpose of answering the argument raised before it by Areva and T&D Holding, seems to me, moreover, to be perfectly reasonable. It is clear that a group such as Areva will not undertake an operation of such a scale and importance without having acquired very precise information about the sector in question in order to assess the risks of such an operation.

45 — In the decision at issue, the reasons for the rejection of the arguments put forward by Areva (and Areva T&D Holding) to rebut the presumption that they had exercised decisive influence over their subsidiaries are set out at recital 370, which refers to recital 364 for a summary of those arguments.

46 — At paragraph 150 of the judgment under appeal, the General Court refers to the written pleadings of the Areva group companies in the application in Case T-117/07, to their reply to the statement of objections, annexed to that application, and also to documents produced by those companies in reply to the Commission's request for information of 20 September 2006.

69. Next, the General Court referred to the second argument put forward by Areva and T&D Holding, namely the question, already addressed at recital 370 to the decision at issue, relating to the appointment of the new member of Areva's board of directors, who was also appointed chief executive of Areva T&D Holding, and also president of the T&D division and a member of Areva's executive committee. In the light of that appointment, which, according to recital 370 to the decision at issue, was made 10 days after Areva's acquisition of the subsidiaries in question, the General Court, in line with that recital to the decision at issue, considered at paragraph 150 of the judgment under appeal that, '[f]ar from showing the independence of [the subsidiaries] within the Areva group, the external recruitment of that new director proves, on the contrary, that, at the beginning of the period in question, Areva and Areva T&D Holding equipped themselves with an organisation which enabled them to exercise effective control over their wholly-owned subsidiaries which were active in the T&D sector and to influence, in a decisive manner, the conduct of those subsidiaries on the market'. The phrase to which Areva and T&D Holding refer, relating to the fact that it could not be ruled out that 'that external recruitment allowed Areva and Areva T&D Holding to equip [themselves] with the expertise which had been lacking in the sector in question' is merely a parenthetical observation designed to reinforce the rejection of the argument relating to the lack of experience in the T&D sector. That phrase cannot therefore in my view be regarded as a factor that is essential to supporting the reasoning of the judgment under appeal.

70. It follows from that detailed analysis of the judgment under appeal that, contrary to the contention of Areva and the Alstom group companies, in examining, at paragraphs 144 to 152 of the judgment under appeal, the factors relating to the alleged independence of the subsidiaries invoked before it, the General Court merely answered in detail the arguments raised before it and therefore exercised its power of review of the legality of the decision at issue without substituting its own reasoning for that applied by the Commission in that decision.[47] The complaint alleging unlawful substitution of the grounds must therefore, in my view, be rejected.

71. Areva further claims that there has been a breach of the obligation to state reasons, on the ground that the General Court's reasoning concerning the alleged two new factors added to the decision at issue do not enable it to understand how those factors might justify the finding of actual exercise of decisive influence.

72. In that regard, and without there being any need to take a view on the question, raised by the Commission, of the admissibility of certain of Areva's arguments, it is to my mind sufficient to observe that it follows from the analysis of paragraphs 144 to 152 of the judgment under appeal which I have just carried out at points 65 to 69 above that the two factors to which Areva refers do not constitute new factors introduced by the General Court to the basis of the decision at issue, but merely constitute additional reasoning in answer to the argument put forward by Areva both before the Commission and before the General Court, that Areva was not in a position actually to exercise decisive influence over its subsidiaries owing to its lack of experience in the T&D sector. Those arguments therefore do not serve as the basis of the finding of the actual exercise of decisive influence, as Areva claims.

73. Areva further claims that there has been a breach of its rights of defence. First, as regards the complaint that it was not given the opportunity to comment on the two alleged new arguments in question, it should be observed that, in so far as those arguments are merely additional to the reasoning developed in the judgment under appeal in response to the arguments raised by Areva itself, Areva cannot claim that the General Court was necessarily required to give it the opportunity to comment in that respect.

47 — See orders of 7 February and 13 September 2012 in *Total and Elf Aquitaine* v *Commission*, paragraph 65 and paragraphs 59 and 60 respectively.

74. Second, as for the complaint which Areva derives from the fact that the General Court breached its rights of defence by imposing a *probatio diabolica* on it, I have already had occasion to observe that, given the nature of the presumption, which, by logical inference, makes it possible to infer proof of an unknown fact from a known fact, it seems logical that the person against whom it operates must, in principle, adduce negative proof of the presumed fact. The mere fact that such proof is required does not permit the conclusion that the presumption is irrebuttable, in particular where, as in our case, that proof must be sought in the sphere of activities of the person against whom the presumption operates. [48] It follows that Areva cannot claim that there has been a breach of its rights of defence in that the General Court required it to prove that it did not exercise decisive influence over its subsidiaries.

75. Third, as regards the criticism raised by Areva in its reply and referred to at point 61 above, it should be recalled that it follows from Articles 42(2) and 118 of the Rules of Procedure [49] that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. It must be stated that it was only at the stage of the reply that Areva raised this plea [50] and that the plea is not based on matters which came to light after the appeal was lodged. [51] Such a new plea, raised for the first time during the present procedure, is to my mind manifestly out of time and therefore inadmissible. [52]

76. In the light of all of the foregoing, I consider that Areva's first plea and the second part of the Alstom group companies' second plea should be rejected.

4. The fourth part of the Alstom group companies' second plea

77. In the fourth part of their second plea, the Alstom group companies claim that there is a failure to state reasons in the judgment under appeal in that paragraph 206 does not enable it to be understood, first, why the Commission was able, without stating reasons in the decision at issue in that regard, to impose fines on persons who no longer constitute an economic unit at the time of adoption of the decision at issue and, second, why the case-law which they had cited was not relevant.

78. In that regard, I have already explained in the context of the analysis of the second part of the Alstom group companies' first plea, at points 40 to 42 above, the reasons why I consider that the Commission must not be criticised in the present case for not having provided specific reasons relating to the fact that the parent company and its subsidiary that had participated directly in the infringement were jointly and severally liable for payment of the fine, even though they no longer constituted an economic unit at the time of adoption of the decision at issue.

48 — See my Opinion in *Elf Aquitaine* v *Commission*, point 64. The Court confirmed that approach at paragraph 70 of its judgment in that case. In that regard, see also Case T-25/06 *Alliance One International* v *Commission* [2011] ECR II-5741, paragraph 200.

49 — As the appeals were lodged before 1 November 2012, the date of the entry into force of the Court's new Rules of Procedure, in accordance with the maxim *tempus regit actum*, their admissibility must be examined by reference to the Court's Rules of Procedure of 19 June 1991. In that regard, see order in Case T-532/08 *Norilsk Nickel Harjavalta and Umicore* v *Commission* [2010] ECR II-3959, paragraph 70 and the case-law cited, and also footnote 90 to the Opinion of Advocate General Kokott in *Ziegler* v *Commission*. In the Court's new Rules of Procedure, the articles referred to have become Articles 127(1) and 190(1) respectively.

50 — There was no reference to this plea in the application lodging the appeal. It should also be observed that although, before the General Court, Areva had put forward a plea alleging breach by the Commission of its obligation to state reasons, the complaints that Areva had raised at first instance did not in any way relate to the actual exercise by Areva of decisive influence over its former subsidiaries.

51 — See Case C-413/08 P *Lafarge* v *Commission* [2010] ECR I-5361, paragraph 43 and the case-law cited. The judgments in *Elf Aquitaine* v *Commission*, Case T-185/06 *Air Liquide* v *Commission* [2011] ECR II-2809 and Case T-196/06 *Edison* v *Commission* [2011] ECR II-3149, to which Areva refers, cannot in my view be regarded as matters of law or of fact which came to light in the course of the procedure and would justify the introduction of a new plea in law in the course of the proceedings. First, those judgments concern points of law, in particular the obligation borne by the Commission to state reasons, thus formed the subject-matter of judgments of the Courts of the European Union well before the appeal was lodged. Second, it must be stated that the Alstom group companies were able to raise an equivalent plea (see the analysis of the first plea at points 14 to 43 above) before any of those judgments was delivered.

52 — See order of 6 October 2011 in Joined Cases C-448/10 P to C-450/10 P *ThyssenKrupp Acciai Speciali Terni and Others* v *Commission*, paragraph 68 and the case-law cited.

79. However, at paragraph 206 of the judgment under appeal the General Court did indeed explain that the Commission was able to impose a fine jointly and severally on companies which, at the date of adoption of the decision, no longer belonged to the same group, provided that joint and several liability for payment of the fine covered only the infringement period during which the companies formed an economic unit and therefore an undertaking for the purposes of competition law. The General Court also explained that it did not follow from the case-law – irrespective of whether that case-law was or was not cited by the parties – that only those companies which formed an economic unit on the date when the decision imposing the fine was adopted could have a fine imposed on them for which they were jointly and severally liable.

80. In those circumstances, the General Court did not breach its obligation to state reasons, and the fourth part of the second plea must in my view therefore also be rejected.

81. It follows from all of the foregoing that, to my mind, apart from the third part of the Alstom group companies' second plea, which, as stated, will be analysed subsequently, that plea and Areva's first plea should be rejected.

C – The Alstom group companies' third plea, alleging infringement of Article 101 TFEU, and in particular of the rules governing the imputability of the infringement, and breach of the principles of the right to a fair trial and the presumption of innocence

82. In the context of their third plea, which is subdivided into two parts, the Alstom group companies claim that there has been an infringement of Article 101 TFEU and, in particular, of the rules governing the imputability to a parent company of the practices of its subsidiary, and also a breach of the principles of the right to a fair trial and the presumption of innocence enshrined in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union and guaranteed by Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

1. First part, relating to the imposition of a *probatio diabolica* vis-à-vis Alstom

83. In the context of the first part of this plea, which relates to paragraphs 84 to 110 of the judgment under appeal, the Alstom group companies, in an attempt to call into question the Court's case-law on the imputation to the parent company of the infringements committed by its subsidiary, and in particular the presumption based on the ownership of the capital, take issue with the General Court for having applied that presumption in a way that rendered it irrebuttable by requiring the parent company to establish a *probatio diabolica* in order to rebut it. To infer, as the General Court did at paragraph 110 of the judgment under appeal, the actual exercise of decisive influence from the mere existence of organisational, economic and legal links between the parent company and one of its subsidiaries and not from specific facts linked to particular actual conduct on the relevant market exceeds the limits of what is reasonable by making the presumption based on the ownership of the capital irrebuttable and thus imposing a *probatio diabolica*. According to the Court's case-law, the Commission cannot merely refer to links inherent in the existence of a group, but must establish the actual interference of the parent company on the relevant market. It is necessary, in that regard, to show that the structural links were actually used to influence the subsidiary's conduct on the market. The right to a fair trial and the presumption of innocence are seriously affected by such an application of the presumption based on the ownership of the capital.

84. This part of the Alstom group companies' third plea is in my view based on a misreading of the judgment under appeal.

85. It is apparent from paragraph 103 of the judgment under appeal that the General Court found that the documents produced by Alstom during the administrative procedure proved that 'the management of the Alstom group, under the responsibility of Alstom, took part in defining the course of action on the market in relation to the Alstom Group's "T&D division" and its various branches of activity, and that it permanently supervised compliance with that course of action by that division and its different branches of activity'.

86. The Alstom group companies cannot therefore claim that the General Court 'merely' had regard solely to the organisational, economic and legal links, and did not consider the parent company's actual interference on the relevant market, in order to infer that the parent company exercised decisive influence over the subsidiaries in question.

87. In that regard, it should also be observed that, according to settled case-law, the organisational, economic and legal links between the parent company and its subsidiary have a central role in determining the subsidiary's independence of its parent company and whether the parent company has adduced sufficient evidence to rebut the presumption based on the ownership of the capital. [53]

88. While it is clear that the exercise of decisive influence refers to the conduct of the subsidiary on the market affected by the infringement, it does not follow from the case-law that the Commission is required to prove, as the Alstom group companies claim, that the structural links were actually used to influence that conduct in order to be able to impute, on the basis of the presumption based on ownership of the capital, the subsidiary's conduct to the parent company. To recognise such an obligation would be tantamount to depriving the presumption of its utility. Rather, it is for the parent company to prove that, in spite of the organisational, economic and legal links between it and its subsidiary, the latter independently determined its conduct on the market.

89. As for the Alstom group companies' argument that the presumption of the actual exercise of decisive influence runs counter to the principles of the right to a fair trial and the presumption of innocence, it is sufficient to recall that it has consistently been held that that presumption is specifically intended to strike a balance between the importance, on the one hand, of the objective consisting in punishing conduct contrary to the competition rules and, on the other, the requirements of certain general principles of Union law, such as, inter alia, the principle of the presumption of innocence. It is for that reason that it is rebuttable. [54] Furthermore, the mere fact that an entity does not, in a given case, produce evidence capable of rebutting the presumption of actual exercise of decisive influence does not mean that that presumption cannot be rebutted in any circumstances. [55]

90. It follows from all of the foregoing that, in my view, the first part of the Alstom group companies' third plea must be rejected.

53 — See Case C-97/08 P *Akzo Nobel and Others* v *Commission* [2009] ECR I-8237, paragraphs 65 and 74; *Elf Aquitaine* v *Commission*, paragraphs 58 and 153; in the latter paragraph, reproduced in footnote 19 to this Opinion, the Court explicitly held that in order to rebut the presumption it was 'necessary for those concerned to produce evidence relating to the economic, organisational and legal links between the companies concerned'; Case C-90/09 P *General Química and Others* v *Commission* [2011] ECR I-1, paragraph 37; Joined Cases C-201/09 P and C-216/09 P *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others* [2011] ECR I-2239, paragraph 96, and also order of 13 December 2012 in Case C-654/11 P *Transcatab* v *Commission*, paragraph 31.

54 — See *Elf Aquitaine* v *Commission*, paragraph 59, and Case C-508/11 P *ENI* v *Commission* [2013] ECR, paragraph 50.

55 — See *Elf Aquitaine* v *Commission*, paragraph 66, and order in *Transcatab* v *Commission*, paragraph 32.

2. Second part, relating to an error of law in the determination of the actual exercise of decisive influence by Areva T&D Holding over Areva T&D SA and Areva T&D AG during the period from 9 January to 11 May 2004

91. By the second part of its third plea, T&D Holding takes issue with the General Court, 'on the basis of the same principles as those developed in the first part', for having erred in law in upholding, at paragraphs 144 to 152 of the judgment under appeal, the decision at issue in that it found that Areva T&D Holding did in fact exercise decisive influence over Areva T&D SA and Areva T&D AG during the period from 9 January to 11 May 2004. T&D Holding maintains that, in order to justify the Commission's finding, the General Court relied on the two factors put forward by Areva, in the context of its first plea and mentioned at point 59 above. In particular, the conclusion which the General Court draws from Areva's appointment of a new director of Areva T&D Holding, who was also a manager of Areva T&D SA and Areva T&D AG, namely that it cannot be ruled out that the external recruitment of that new director enabled Areva to equip itself with expertise in the sector under consideration, is a hypothetical scenario without legal basis. That conclusion disregards the facts submitted before the General Court, as it is common ground that that new director had no previous links with the Areva group and, in particular, that he had no knowledge of the sector concerned. It follows that the General Court considered that Areva T&D Holding was required to adduce negative proof of non-interference in the conduct of its subsidiaries, which is tantamount to a *probatio diabolica* and rendered the presumption based on the ownership of the capital irrebuttable.

92. In fact, this second part of the Alstom group companies' third plea merely reiterates certain of the arguments put forward by Areva in the context of its first plea, which was analysed – and rejected – at points 59 to 76 above.

93. In particular, as regards the developments relating to the probatio diabolica, I refer to the considerations which I set out at point 74 above.

94. As for the fact that the General Court, at paragraph 150 of the judgment under appeal, referred to the fact that the Areva group could have equipped itself with the necessary expertise in the T&D sector by recruiting a new director, I have already observed, at point 69, that this was an additional reason designed solely to reinforce the argument that, without knowledge of the sector, Areva T&D Holding could not in fact exercise decisive influence over its subsidiaries after 9 January 2004, a finding which was based on other evidence.

95. It follows that the General Court did not err in law in upholding, at paragraphs 144 to 152 of the judgment under appeal, the decision at issue in that it found that Areva T&D Holding actually exercised decisive influence over Areva T&D SA and Areva T&D AG during the period from 9 January to 11 May 2004 and that, accordingly, the second part of the Alstom group companies' third plea, and thus that plea in its entirety, must be rejected.

D – *The fourth plea and the third part of the second plea of the Alstom group companies and Areva's second and third pleas, alleging errors of law and breaches of law and also breaches of the obligation to state reasons concerning the application of the rules on joint and several liability for payment of the fine*

96. The fourth plea and the third part of the second plea of the Alstom group companies, and Areva's second and third pleas, alleging a number of errors of law, breaches of law and breaches of the obligation to state reasons by the General Court, all have in common the fact that they relate, even from different aspects, to the application and interpretation of the rules on joint and several liability for payment of the fine imposed for the infringement. In the context of these pleas, the Commission has, moreover, raised objections of inadmissibility and requests for substitution of grounds which are largely similar. In the light of those considerations, I consider it appropriate to analyse these complaints and pleas together.

97. The complaints which the parties raise against the judgment under appeal may be subdivided, essentially, into two groups. In the first group of complaints, the appellants take issue with the General Court for having made a number of errors and breaches of law in establishing 'de facto joint and several liability' between the two successive parent companies, Areva and Alstom. In particular, they maintain that the establishment of that de facto joint and several liability entails a breach of the principle of legal certainty and the principle that the penalty must be specific to the offender and the offence. In a second group of complaints, the appellants ask that the General Court be censured for having made a number of errors of law in the interpretation and application of the rules on joint and several liability that entail a breach of the principles referred to above, an infringement of Article 7 EC[56] and also a breach of the obligation to state reasons.

1. The judgment under appeal

98. The General Court rejected the pleas and complaints alleging breach of the principle of legal certainty at paragraphs 209 to 218 of the judgment under appeal, the pleas and complaints alleging breach of the principle that the penalty must be specific to the offender and the offence at paragraphs 219 to 222 of that judgment and the pleas and complaints relating to the unlawful delegation of power contrary to Article 7 EC at paragraphs 232 to 237 of the judgment under appeal. The General Court thus concluded that the Commission had not breached the rules on joint and several liability for payment of fines. Next, when varying the fine in the exercise of its unlimited jurisdiction, the General Court, at paragraphs 318 to 323 of the judgment under appeal, upheld the model of joint and several liability for payment of the fine used by the Commission.[57]

99. In particular, at paragraphs 213 to 216 of the judgment under appeal, the General Court rejected the plea alleging breach of the principle of legal certainty interpreted as an objection of illegality against the rules on joint and several liability for payment of the fines in that those rules were the source of uncertainty as to payment of the fine, the determination of the person responsible for payment and the legal situation of those jointly and severally liable. To that end, the General Court first of all observed that a decision by which the Commission imposes a fine for which a number of companies are jointly and severally liable necessarily produces all the effects which, as a matter of law, apply to the legal rules for the payment of fines in competition law, and does so both in the relationship between the creditor and those jointly and severally liable and in the relationships between the jointly and severally liable persons themselves.

100. Next, the General Court considered that, in the absence of a contrary indication in the decision by which the Commission has imposed a fine jointly and severally on a number of companies for an infringement by an undertaking, that decision attributes that infringement to them in equal measure. It follows, according to the General Court, that companies which are jointly and severally liable to pay a fine and which, unless otherwise specified in the decision imposing the fine, incur liability in equal measure for the infringement must, in principle, contribute in equal amounts to the payment of the fine imposed on account of that infringement ('the equal liability rule'). Consequently, the company from which the Commission recovers the entire amount of the fine may, according to the General Court, on the actual basis of the Commission decision, make a claim for recovery against each of the other jointly and severally liable undertakings in respect of its share. On the basis of that equal liability rule, the General Court concluded that, even if the decision by which a number of companies are held jointly and severally liable for payment of a fine does not enable it to be determined from the outset which of those companies will actually be required to pay the fine to the Commission, it does not prevent each of those companies from knowing, unambiguously, the share of the fine which will be its own share, or from bringing an action against the other jointly and severally liable companies for recovery from them of the amounts which it has paid in excess of its share.

56 — Now Article 13 TFEU.

57 — See also the second indent of paragraph 3 of the operative part of the judgment under appeal.

2. The establishment of joint and several liability between Areva and Alstom

a) Arguments of the parties

i) Arguments of Areva and the Alstom group companies

101. In the context of its second and – in part – its third pleas, Areva claims that the General Court made an error of law in the application of the rules on joint and several liability for payment of the fines, first, by not having penalised the Commission for having established de facto joint and several liability between Areva and Alstom, two companies which have never formed together a common economic unit, and, second, by itself imposing, in the exercise of its unlimited jurisdiction, fines having the effect of establishing such joint and several liability. That error of law has as its consequence a breach of the principle of legal certainty and the principle that a penalty must be specific to the offender and the offence.

102. In the second part of their fourth plea, the Alstom group companies also claim that the General Court breached the principle of legal certainty and the principle that a penalty must be specific to the offender and the offence in that it did not challenge the application of joint and several liability as made by the Commission, which gave rise to the establishment of de facto joint and several liability between Alstom and Areva, two companies which have never constituted an economic unit between them. That de facto joint and several liability follows, first, from the fact that the amount of EUR 25 500 000 (reduced to EUR 20 400 000 by the General Court) imposed jointly and severally on Areva and its former subsidiaries forms part of the amount of EUR 53 550 000 (reduced to EUR 48 195 000 by the General Court) imposed jointly and severally on Alstom and Areva T&D SA and, second, from the fact that the sum of the maximum amounts for which the successive parent companies are held liable exceeds the amount payable by the subsidiary. In those circumstances, irrespective of what interpretation is put on the decision at issue, payment of the fine by one of the groups has a direct impact on the debt of the companies in the other group although those groups have never formed the same economic unit.

103. However, as the General Court held in *Trioplast*,[58] the imposition of joint and several liability, even if it is only 'de facto' joint and several liability, between companies which have never belonged to the same undertaking is contrary to both the principle that a penalty must be specific to the offender and the offence, since, in such a situation, an undertaking would be penalised for facts of which it is not individually accused, and the principle of legal certainty, since the parent companies could not know, unambiguously, the precise amount that each of them must pay in respect of the period during which it was held jointly and severally liable with its subsidiary for the infringement. In addition, the equal liability rule advocated by the General Court,[59] even if it did exist, which the appellants dispute, could not explain the solution reached by the General Court in the judgment under appeal. Even if the fine were shared in equal parts between the undertakings jointly and severally liable, the amount actually recovered from one of the parent companies would still depend on the amount recovered from the other companies.

104. Last, the appellants challenge the objection of inadmissibility raised by the Commission. Areva maintains that it has added no new matter to the complaints raised before the General Court and that, quod non, it would only have put forward new arguments (and not new pleas in law) to support the plea alleging breach of the rules on joint and several liability submitted at first instance. In any event, between the action before the General Court and the appeal before this Court, new matters

58 — Cited in footnote 32.

59 — Paragraph 215 of the judgment under appeal.

both of fact and of law have come to light,[60] which in themselves are sufficient to explain why these arguments were raised only during the proceedings. The Alstom group companies maintain that, although the expression 'de facto joint and several liability' was not used at first instance, that joint and several liability was mentioned on a number of occasions in Alstom's pleadings and was discussed before the General Court. They refer to the first and second pleas put forward before the General Court, to the Commission's pleadings and to the oral submissions of Alstom's representatives at the hearing. The argument relating to de facto joint and several liability is therefore not a new plea, but merely expands on a plea already raised before the General Court.

ii) Arguments of the Commission

105. The Commission contends that both Areva's second plea and the second part of the Alstom group companies' fourth plea are inadmissible, as new pleas which alter the subject-matter of the dispute before the General Court. It is apparent from paragraphs 192 and 195 of the judgment under appeal and from Areva's and Alstom's pleadings before the General Court that their arguments related to different questions, which made no reference to any de facto joint and several liability between the parent companies Alstom and Areva. The arguments submitted to the General Court related only to the de jure and not de facto joint and several liability between Areva T&D SA and the successive parent companies, so far as Areva was concerned, and the joint and several liability between Areva T&D SA and the earlier parent company Alstom, so far as the Alstom group companies were concerned.

106. As regards the substance, the Commission contends that the fact that a fine was imposed jointly and severally on Areva T&D SA and the other companies of the Areva group although that company was also held jointly and severally liable with Alstom may be explained by the simple fact that the company in question was a subsidiary which had participated in an infringement under the control of two successive parent companies. The transfer of that subsidiary led to a situation of double joint and several liability, the subsidiary being jointly and severally liable with each of its parent companies. It does not follow, however, that Areva and Alstom are held jointly and severally liable. Furthermore, the approach of ascribing to a parent company the same starting amount as that attributed to a subsidiary participating directly in a cartel, without dividing up that starting amount where there are several successive parent companies, cannot in itself be considered inappropriate.[61]

107. The Commission submits that it follows that, in the present situation, where the subsidiary Areva T&D SA is held jointly and severally liable with its two successive parent companies, a full starting amount identical to the starting amount of the subsidiary could be imposed on each of those two companies, and that amount was subsequently multiplied by the individual duration of the infringement each of the addressees and the aggravating circumstance based on the role of leader of the infringement. That resulted in three different amounts of the fine for the companies in question. Although there are a number of possible methods of defining joint and several liability, the Commission, in the exercise of its discretion, chose to require a single starting amount for which the three companies were jointly and severally liable, and in doing so applied what was the most advantageous of the available methods for the parent companies in question.

108. Next, although in its view the General Court's conclusion that there was no breach of the principle of legal certainty or the principle that a penalty must be specific to the offender and the offence should be upheld, the Commission none the less asks the Court to substitute other reasons for the reasons stated by the General Court at paragraphs 213 to 215 of the judgment under appeal in order to arrive at that conclusion. The Commission maintains that, contrary to the General Court's

60 — Areva specifically mentions as a new matter of fact the sale in 2010 of Areva T&D SA to the Alstom group (see point 6 of this Opinion) and as a new matter of law the judgment of the General Court in *Trioplast*.

61 — The Commission refers to *Trioplast* (paragraph 74).

finding, it is not competent to decide on the respective contributions to payment of a fine in the relationship between the different jointly and severally liable undertakings. Although the method of organising joint and several liability applied in the present case entails an overlap of the amounts payable by Areva and Alstom, that does not make those companies directly and strictly jointly and severally liable with each other. What matters in law is the joint and several liability of each parent company with the transferred subsidiary. The fact that the number the subsidiary's joint and several links is increased where it is sold during the infringement period does not alter the legal nature of the individual relationship between that subsidiary and each of its parent companies. In such a situation of 'de facto' joint and several liability between a subsidiary's successive parent companies, the same considerations which, according to the case-law, form the basis of joint and several liability by agreement between a parent company and a subsidiary is applicable.

b) Analysis

i) Admissibility

109. It is appropriate, first of all, to analyse the objection of inadmissibility raised by the Commission against the complaints relating to the establishment of de facto joint and several liability between Areva and Alstom. The Commission contends, in essence, that those complaints were put forward only at the stage of the appeal and thus constitute new pleas in law that change the subject-matter of the proceedings before the General Court and are thus inadmissible.

110. In that regard, it should first of all be borne in mind that, under the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal to the Court of Justice is to be limited to points of law and may lie on grounds of, inter alia, infringement of European Union law by the General Court.

111. Furthermore, Article 113(2) of the Rules of Procedure of the Court of Justice [62] provides that the subject-matter of the proceedings before the General Court may not be changed in the appeal.

112. It follows from a consistent line of decisions that the jurisdiction of the Court of Justice is in principle confined to review of the findings of law on the pleas argued before the General Court. [63] Therefore, a party cannot in principle put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court because that would amount to allowing the Court of Justice to review the legality of the findings of the General Court, in the light of pleas of which the latter did not have occasion to hear and determine. [64]

113. However, a new argument which merely develops or expands on the argument presented before the General Court is not a new plea, but must be regarded as the lawful extension of a plea already raised at an earlier stage in the proceedings. [65] Such an argument is therefore admissible. [66]

62 — Now Article 170 of the new Rules of Procedure of the Court (see footnote 50).

63 — See, in particular, Case C-295/07 P *Commission* v *Département du Loiret* [2008] ECR I-9363, paragraph 95 and the case-law cited; *Elf Aquitaine*, paragraph 35 and the case-law cited; and also *Schindler Holding and Others* v *Commission*, paragraph 55 and the case-law cited.

64 — See point 20 of my Opinion in Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, and the case-law cited.

65 — See point 28 of the Opinion of Advocate General Kokott in *Akzo Nobel and Others* v *Commission* and paragraph 39 of the judgment in that case. See also judgments of 4 October 2007 in Case C-311/05 P *Naipes Heraclio Fournier* v *OHIM*, paragraph 59, and of 12 November 2009 in Case C-564/08 P *SGL Carbon* v *Commission*, paragraph 24.

66 — See *Akzo Nobel* v *Commission*, paragraph 39, and *SGL Carbon* v *Commission*, paragraph 24. See also Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 178; Case C-229/05 P *PKK and KNK* v *Council* [2007] ECR I-439, paragraphs 64 to 66; and *Commission* v *Département du Loiret*, paragraph 99.

114. In this case, I must first of all state that, before the General Court, neither Areva nor the Alstom group companies expressly raised a complaint alleging that the establishment of de facto joint and several liability between Areva and Alstom breached the principle of legal certainty and the principle that a penalty must be specific to the offender and the offence, as they have done in their appeals. In their applications at first instance they put forward pleas alleging breach of the rules on joint and several liability, but did so exclusively in relation to the establishment of de jure joint and several liability between the parent companies (Alstom and Areva, respectively) and the subsidiary (Areva T&D SA) and not in relation to the creation of de facto joint and several liability between the two successive parent companies. Thus, although they attempt to show that these complaints do not constitute new matters, to my mind it is clear that, on the contrary, they do.

115. The fundamental question to arise here is, therefore, whether these new complaints must be characterised as a new plea that changes the subject-matter of the proceedings, as the Commission maintains, or whether they develop or expand on pleas put forward before the General Court, as Areva and the Alstom group companies maintain.

116. I have already had occasion to observe that the distinction between an (admissible) new argument and an (inadmissible) new plea is a delicate question on which the approaches taken in the case-law are not always consistent.[67] Likewise, I have also observed that a complaint which is raised on a legal basis other than the pleas put forward before the General Court must be regarded as a new plea which must be declared inadmissible, whereas a complaint put forward in support of a plea already raised before the General Court may, depending on the case, constitute an admissible argument.[68]

117. In this case, as regards, in the first place, Alstom, it should be observed that, before the General Court, it had raised a plea, the second, alleging, as in its appeal, breach of the rules on joint and several liability entailing a breach of the principle of legal certainty and the principle that a penalty must be specific to the offender and the offence. It is true that, before the General Court, in the context of that plea, Alstom did not refer expressly to the establishment of de facto joint and several liability between the successive parent companies, but asked that Court to censure the imposition of a relationship of joint and several liability between it and Areva T&D SA, companies which no longer constituted an economic unit at the time of the adoption of the decision. However, it must be stated that, in the context of the complaint alleging breach of the principle that a penalty must be specific to the offender and the offence, Alstom *expressly* disputed the fact that the amount of EUR 25 500 000 of the fine imposed on Areva and its former subsidiaries formed an integral part of the amount of EUR 53 550 000 of the fine imposed jointly and severally on Alstom and Areva T&D SA, maintaining that such a joint and several apportionment of the debt between those jointly and severally liable for the fine entailed a breach of the principle that a penalty must be specific to the offender and to the offence.[69] That specific question was then also raised at the hearing before the General Court, as is apparent from Alstom's assertions, which are not disputed by the Commission.

118. It is precisely that linking of the fine imposed jointly and severally on Areva and its former subsidiaries with the fine imposed jointly and severally on Alstom and Areva T&D SA that gives rise to the 'de facto' joint and several liability between Areva and Alstom that is challenged in the appeals. Furthermore, in the context of the complaint alleging breach of the principle of legal certainty raised in the same plea at first instance, Alstom expressly relied on the uncertainty as to the enforcement of the penalty involved in the Commission's application of the rules on joint and several liability.[70]

67 — See my Opinion in *Prym and Prym Consumer* v *Commission*, point 26, where I had observed that to my mind it is questionable to apply the rule as to the admissibility of new pleas to any new argument put forward by the appellants in support of a plea and to declare that argument to be inadmissible (see the case-law cited).

68 — See, in particular, my Opinion in *Prym and Prym Consumer* v *Commission*, point 27, and judgment of 25 October 2007 in Case C-167/06 P *Komninou and Others* v *Commission*, paragraph 24.

69 — See paragraphs 80 to 85 of Alstom's application at first instance and, in particular, paragraph 83.

70 — Ibid., paragraph 77.

119. It must therefore be stated that, even though Alstom did not specifically raise before the General Court, as it did on appeal, a complaint that the establishment of de facto joint and several liability,[71] described in those terms, between Alstom and Areva, entailed a breach of the principle that a penalty must be specific to the offender and the offence and the principle of legal certainty, it had, none the less, expressly claimed, in the context of a plea raised on exactly the same basis as the plea raised on appeal, that the premiss from which that de facto joint and several liability arises, namely the linking of the two fines imposed jointly and severally between the subsidiary and the successive parent companies, entailed such a breach of those principles.

120. In those circumstances, I consider that the complaints put forward by Alstom in its appeal cannot be regarded as changing the subject-matter of the proceedings in such a way that they must be deemed inadmissible. Rather, those complaints develop the complaints raised before the General Court. To my mind, therefore, they must be considered to be admissible so far as Alstom is concerned.

121. So far as Areva is concerned, on the other hand, the situation is somewhat different. At first instance, it, like Alstom, raised a plea (the fourth) alleging breach of the rules on joint and several liability, which referred expressly only to the fact that a penalty was imposed on Areva T&D SA jointly and severally with Alstom and not to the establishment of joint and several liability between the successive parent companies. In the context of that plea, Areva claimed that the misapplication of the rules on joint and several liability had entailed a breach of the principle of legal certainty,[72] but it did not raise, in that context, a complaint alleging breach of the principle that a penalty must be specific to the offender and the offence. Unlike in Alstom's case, moreover, it does not follow from Areva's written pleadings that before the General Court Areva *expressly* challenged in the context of that plea the fact that its fine formed an integral part of the fine imposed jointly and severally on Alstom and Areva T&D SA. In Areva's case, therefore, the link between the plea raised at first instance and the new complaint put forward on appeal is weaker than in Alstom's case.

122. In the present case, however, first, Areva raised at first instance a plea resting, at least in part, on the same legal basis as that raised in its appeal, namely a plea alleging breach of the principle of legal certainty in the application of the rules on joint and several liability. Second, in the context of its argument alleging breach of the rules on joint and several liability,[73] it referred to questions relating to the link established between it and Alstom for the purpose of imposing a penalty for which, first, it and Areva T&D SA and, second, Alstom and Areva T&D SA, were jointly and severally liable. Third, as is apparent from point 101 above, Areva, unlike Alstom, expressly asked this Court to condemn the application of the rules on joint and several liability by the General Court itself, in that they had the effect of establishing 'de facto' joint and several liability. In that regard, it follows from the case-law that an applicant may lodge an appeal relying, before the Court of Justice, on pleas arising from the judgment under appeal itself and seeking to criticise, in law, its merits.[74] Fourth, it should further be observed that the question of the linking of two fines imposed jointly and severally was, as I stated at points 117 and 118 above, relied on by Alstom before the General Court, so that that question was therefore not wholly alien to the dispute before that Court, and, furthermore, that the General Court joined the two cases and delivered a single judgment which addresses all the pleas raised by the parties before it.[75]

71 — The parties seem to have been inspired by the use of the expression 'de facto joint and several liability', as used in *Trioplast*, to which they refer on many occasions.

72 — Notably in the fifth part of the fourth plea.

73 — Notably in the context of the third, fourth and sixth parts of its fourth plea.

74 — See my Opinion in *Commission* v *Siemens Österreich and Others*, points 139 and 140, and also the judgment of 29 November 2007 in Case C-176/06 P *Stadtwerke Schwäbisch Hall and Others* v *Commission*, paragraph 17.

75 — Although the cases have been joined they are two separate cases, each having its own subject-matter that does not necessarily coincide with that of the other case. However, it is apparent from the case-law that where the General Court has joined two cases and delivered a single judgment which deals with all the pleas in law submitted by the parties to the proceedings before it, a certain connection between the pleas and arguments raised by the different parties before the General Court may be recognised in an appeal. See, to that effect, judgment of 11 July 2013 in Case C-444/11 P *Team Relocations and Others* v *Commission*, paragraph 34, and in Case C-369/09 P *ISD Polska and Others* v *Commission* [2011] ECR I-2011, paragraph 85 and the case-law cited.

123. In those special conditions, I consider that the complaint alleging that the establishment of de facto joint and several liability between Areva and Alstom constitutes a breach of the principle of legal certainty may be regarded as not being capable of changing the subject-matter of the proceedings as defined before the General Court. Conversely, as it was not raised at first instance by Areva or by its former subsidiaries that were also applicants before the General Court (now subsidiaries of Alstom and joint appellants with Alstom in Case C-253/11 P), the complaint alleging breach of the principle that a penalty must be specific to the offender and the offence must to my mind be considered inadmissible in their case.

ii) Substance

124. Both Areva and the Alstom group companies take issue with the General Court, in essence, for having breached the principle of legal certainty and the principle that a penalty must be specific to the offender and the offence in upholding the Commission's application of the rules on joint and several liability, which gave rise to the establishment of de facto joint and several liability between Areva and Alstom, two companies which have never constituted a unitary economic entity.

125. In that regard, it should be borne in mind, first of all, that the principle of legal certainty is a general principle of European Union law which requires, in particular, that any act of the EU institutions be clear and precise and enable those concerned to ascertain precisely what their rights and obligations are and to take steps accordingly.[76] That principle must be observed all the more strictly in the case of an act liable to have financial consequences, in order that the person concerned can ascertain precisely the extent of the obligations which it imposes on him.[77]

126. It should also be borne in mind that the principle that a penalty must be specific to the offender and the offence, which is a corollary of the principle of personal responsibility applicable in any administrative procedure in which penalties may be imposed under competition law,[78] requires that a person is penalised only in respect of acts of which he is individually accused. Thus, under that principle, only the perpetrator can be charged in respect of unlawful conduct[79] and, consequently, a penalty cannot be incurred by anyone other than the offender.[80]

– The establishment of de facto joint and several liability

127. In the present case, the Commission and, following the variation of the fine, the General Court, imposed on Alstom a fine of EUR 53 550 000 (reduced by the General Court to EUR 48 195 000) and held Areva T&D SA liable for payment of the entire amount of that fine. Of the amount imposed on Areva T&D SA, Areva and its two other former subsidiaries are held jointly liable with Areva T&D SA for the amount of EUR 25 500 000 (reduced to EUR 20 400 000 after the fine was varied by the General Court). The transferred subsidiary, Areva T&D SA, is therefore held jointly and severally liable for payment of its fine with both its former and its new parent company.

76 — See, to that effect, Case C-352/09 P *ThyssenKrupp Nirosta* v *Commission* [2011] ECR I-2359, paragraph 81, and *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, paragraph 68.

77 — See the Opinion of Advocate General Bot in Case C-408/04 P *Commission* v *Salzgitter* [2008] ECR I-2767, point 298 and the case-law cited.

78 — For a more detailed consideration of the principles of personal liability and the principle that penalties must be appropriate to the offender, I refer to my Opinion in *Commission* v *Siemens Österreich and Others*, point 74 et seq.

79 — See point 63 of the Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123.

80 — See the Opinion of Advocate General Bot in *ArcelorMittal Luxembourg* v *Commission* and *Commission* v *ArcelorMittal Luxembourg and Others*, point 181.

128. In that regard, it should be observed that it is common ground that Areva and Alstom have never constituted a unitary economic entity and therefore, together, an undertaking for the purposes of competition law. In this instance, it is the subsidiary, namely Areva T&D SA, that constituted a unitary economic entity with, successively, Alstom, during the period from 7 December 1992 to 8 January 2004, and Areva and its former subsidiaries, from 9 January to 11 May 2004. It is for that reason that the Commission and subsequently the General Court imposed a penalty for which the subsidiary was *de jure* jointly and severally liable with its successive parent companies. The Commission and the General Court did not establish *de jure* joint and several liability between the parent companies themselves.

129. In accordance with the specific objective of joint and several liability, [81] the Commission is free to recover the fine from either of the legal persons concerned according to their capacity to pay. Thus, according to the model of joint and several liability as referred to at point 127 above, the Commission is free to demand payment of all or part of the fine from the subsidiary or from one or other of the parent companies that successively controlled it, until the fine has been paid in full.

130. However, it is clear that, in such a model of joint and several liability, recovery of the fine from one of the parent companies necessarily has an impact on recovery from the other. Thus, if the Commission obtains from Alstom payment of the entire fine, the subsidiary (Areva T&D SA, now Alstom Grid SAS) will be entirely released from the obligation to pay its fine vis-à-vis the Commission and, consequently, Areva and its other former subsidiaries, jointly and severally liable for the debt with Areva T&D SA, will also be released from their obligation vis-à-vis the Commission. Conversely, if the Commission obtains payment of the fine from Areva, the subsidiary and the person with whom it is jointly and severally liable, Alstom, will be released up to the amount paid to the Commission by Areva.

131. It is to such 'de facto' joint and several liability that Alstom and Areva refer.

– Breach of the principle that a penalty must be specific to the offender and the offence and the principle of legal certainty

132. Does such a model of the relationship of joint and several liability between the legal persons found to have infringed the competition rules, which entails the establishment of de facto joint and several liability between parent companies, which have never constituted a unitary economic unit, amount to a breach of the principle of legal certainty and the principle that a penalty must be specific to the offender and the offence?

133. In this instance, first, the application of the rules on joint and several liability made by the Commission and upheld by the General Court would entail a breach of the principle that a penalty must be specific to the offender and the offence, as referred to at point 126 above, if, in the abovementioned model of joint and several liability, the legal person from whom the Commission recovers the fine were required to pay a fine for punishable acts which are not imputable to the undertaking for which it is required to answer for the infringement and, in particular in the present case, for punishable acts committed during a period for which the legal person in question could no longer (or could not yet) be required to answer for the unlawful conduct, because it was no longer (or was not yet) part of the unitary economic entity responsible for that conduct.

81 — See, in that regard, point 52 of my Opinion in *Commission* v *Siemens Österreich and Others*.

134. Second, a breach of the principle of legal certainty would arise if the model of joint and several liability chosen in the decision at issue and upheld in the judgment under appeal had the consequence that those concerned, namely the legal persons penalised for the unlawful conduct imputed to the economic unit to which they belonged, could not ascertain accurately and unambiguously the extent of the obligations which the acts of the institutions, namely the decision at issue and, in that it upholds the model of joint and several liability, the judgment under appeal, imposed on them.

135. In the present case, as I observed at point 128, Areva and Alstom have constituted a unitary economic entity and therefore never constituted together an undertaking for the purposes of competition law. On the other hand, the successively formed, with the subsidiary Areva T&D SA, two distinct economic entities, each of which is individually liable for the cartel during different periods and on different conditions.

136. In addition, it must be stated that, in this case, the liability of each of the parent companies arises wholly from that of the subsidiary, so that, in so far as the Commission chose in the exercise of its discretion [82] to order the parent company to pay the fine jointly and severally with the subsidiary, the parent company's liability cannot exceed that of the subsidiary. [83] In those circumstances, the amounts established by the Commission as against the parent companies constitute maximum amounts at which the respective joint and several liability of each of the successive parent companies with the subsidiary is determined. [84]

137. Admittedly, as the General Court observed at paragraph 220 of the judgment under appeal for Alstom, the decision at issue held the parent companies personally liable for the infringement.

138. However, in a case such as this, where the two parent companies never formed together an economic entity and the Commission decided to hold them jointly and severally liable with the subsidiary, the principle that a penalty must be specific to the offender and the offence requires that the fine payable by each of them does not exceed the share of its joint and several liability. That share corresponds to the proportion attributed to each of the parent companies of the total amount which the subsidiary is ordered to pay jointly and severally with the successive parent companies. [85]

139. In this case, the model of joint and several liability as chosen by the Commission and upheld by the General Court is problematic in that respect. In the absence of correspondence between the amount of the fine which the subsidiary, Areva T&D SA, is ordered to pay and the amounts of the fines which the successive parent companies are ordered to pay jointly and severally with the subsidiary, it is impossible to determine what amount corresponds to the individual liability of each of the distinct economic entities, referred to at point 135. On the contrary, it follows from that situation, on the one hand, that the first of those entities (consisting of Alstom and Areva T&D SA) must answer for the whole fine, even though it did not commit the infringement throughout the entire period in respect of which the fine is imposed (namely the period between 7 December 1992 and 11 May 2004) and, on the other, that the liability of the second entity (composed of Areva T&D SA, Areva and the other former subsidiaries of Areva) significantly exceeds the share of the amount of the fine imposed for the entire infringement during the period in question. To my mind, such a situation is not compatible with the principle that a penalty must be specific to the offender and the offence.

82 — See, in that regard, Joined Cases C-125/07 P, C-133/07 P, C-135/07 P and C-137/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraphs 81 to 84, and also my Opinion in *Commission* v *Siemens Österreich and Others*, point 81.

83 — See, in that regard, Case C-286/11 P *Commission* v *Tomkins* [2013] ECR, paragraph 43, which upheld the judgment in *Tomkins* v *Commission*, in particular paragraph 38.

84 — See, to that effect, *Trioplast*, paragraph 168.

85 — Ibid., paragraph 169.

140. Furthermore, in so far as the parent companies are not in a position to determine unambiguously the precise amount of the fine which they must pay for the period in respect of which they are held jointly and severally liable with their subsidiary, a breach of the principle of legal certainty must also be found.

141. In reality, the problems seem to me to be the consequence of the fact that, in the decision at issue, the Commission treated the Areva group and the Alstom group as a unitary entity when it began to calculate the fine.[86] In that regard, and without there being any need to adopt a position specifically on that point, I observed that the fact, put forward by the Commission, that the General Court, in *Trioplast*, considered that the approach consisting in attributing to a parent company the same starting amount as that taken for the subsidiary that had participated directly in the cartel without that amount being apportioned where there has been a succession of parent companies over time, cannot be regarded as inappropriate is in itself immaterial. First, it is not the method used in calculating the fine that is at issue in the present appeals, but the application of the rules on joint and several liability. Second, that argument is ineffective, since even if that method were not incorrect in itself, that would not alter the fact that in this case the model of joint and several liability chosen by the Commission and upheld by the General Court entails a breach of the principle that a penalty must be specific to the offender and the offence and the principle of legal certainty.

142. It should also be observed that the uncertainty cannot be dispelled by the rule of liability in equal measure established by the General Court at paragraph 215 of the judgment under appeal and referred to at point 100 above.

143. First, as I stated at points 88 and 89 of my Opinion in *Commission* v *Siemens Österreich and Others*, and as I shall describe at point 155 et seq., it is not established that such a rule exists in EU competition law.

144. Second, and in any event, even if that rule did exist, it would not be capable of dispelling the uncertainty resulting from the model of joint and several liability adopted in the present case. Its application in the present case seems to me to entail the risk that the total amount of the fine for which a legal person is actually liable would depend on the Commission's discretionary choice as to the debtor in respect of which it intends to recover the fine. That amount could vary depending on whether the Commission chose to recover the fine from one[87] or the other[88] persons held liable, which seems to me to be unacceptable in general and, in particular, in a situation in which the undertakings held jointly and severally liable for the fine have never belonged to a unitary economic entity.

86 — See recital 486 to the decision at issue.

87 — Thus, applying the 'equal liability' rule, my understanding of the situation is as follows: if the Commission decided to recover the entire fine in the amount (following the judgment of the General Court) of EUR 48 195 000 from Alstom, Alstom would be able to obtain payment of half of that amount from Areva T&D SA by means of an action for recovery. Alstom would therefore actually pay half of the amount of the fine, namely EUR 24 097 500, and Areva T&D SA would have to bear the other half. Of that amount, however, Areva and its two other former subsidiaries are jointly and severally liable with Areva T&D SA for the amount of EUR 20 400 000, with the consequence that Areva T&D SA could ask the other three jointly and severally liable companies for their share of that amount (corresponding to an amount of EUR 5 100 000 each), while Areva T&D SA would remain solely liable for the difference, equal to EUR 3 697 500, between the amount shared with Alstom and the fine for which Areva and the other former subsidiaries are jointly and severally liable. In that case, the actual fine payable by Alstom would be equal to EUR 24 097 500, that payable by Areva T&D SA would be equal to EUR 8 797 500 (the remaining EUR 3 697 500 + EUR 5 100 000) and that payable by Areva and its two other former subsidiaries would be equal to EUR 5 100 000 each.

88 — If, on the other hand, the Commission decided to recover first of all the fine from Areva, in the amount for which it is jointly and severally liable with Areva T&D SA and the other two former subsidiaries, my understanding of the situation is as follows: Areva would be required to pay the fine amounting to EUR 20 400 000, since it would be able to obtain from the jointly and severally liable companies payment of their share (namely EUR 5 100 000 each), possibly by means of an action for recovery. The remaining part of the fine, namely EUR 27 795 000, would still be payable to the Commission. Next, Alstom and Areva T&D SA would share that amount equally, plus, possibly, the EUR 5 100 000 paid by Areva T&D SA to Areva. In that case, Alstom's actual fine would be equal to EUR 13 897 500 (half of EUR 27 795 000) or possibly EUR 16 447 500 (if it had to share the amount of EUR 5 100 000 of Areva T&D), Areva T&D SA's fine would be equal to EUR 18 997 500 (EUR 13 897 500 + EUR 5 100 000) or, possibly EUR 16 447 500, and the fines payable by Areva and by each of its other two former subsidiaries would be equal to EUR 5 100 000 each.

145. As for the Commission's request that the Court should substitute grounds, in so far as it seeks to challenge the Commission's competence to determine the internal relationship between those jointly and severally liable for the fine, I consider that it should be rejected, for the reasons set out at points 160 to 163, 169 and 173 below, and also, in greater detail, in the analysis of the Commission's first and second pleas in law in *Commission* v *Siemens Österreich and Others*, set out at points 42 to 91 of my Opinion in that case. For the remainder, more than a true request for the substitution of grounds, the Commission seems to me to put forward arguments designed to challenge the complaints raised by the appellants. In the light of the foregoing considerations, those arguments must, however, be rejected.

146. It follows from all of the foregoing that, in my view, the complaints alleging an error of law in the application of the rules on joint and several liability, entailing a breach of the principle of legal certainty and a breach of the principle that a penalty must be specific to the offender and the offence, in relation to the establishment of de facto joint and several liability between Areva and Alstom must be upheld, on the understanding that the complaint alleging breach of the principle that a penalty must be specific to the offender and the offence is, as stated at point 123 above, inadmissible in Areva's case.

3. The misapplication of the rules on joint and several liability entailing a breach of the principle of legal certainty and the principle that a penalty must be specific to the offender and the offence, an infringement of Article 7 EC and a breach of the obligation to state reasons

a) Arguments of the parties

i) Arguments of Areva and of the Alstom group companies

147. In the context of Areva's third plea and the first part of the fourth plea, the last complaint in the second part of the fourth plea and the third part of the second plea of the Alstom group companies, the appellants claim that there are a number of errors in the interpretation and application of the concept of joint and several liability for payment of the fine, which entail a breach of the principle of legal certainty and the principle that a penalty must be specific to the offender and the offence, an infringement of Article 7 EC and also a breach of the obligation to state reasons on the part of the General Court.

148. First, both Areva and the Alstom group companies dispute the 'equal liability' rule established at paragraph 215 of the judgment under appeal.[89] First, they maintain that that rule is new and lacking in any legal basis, while the General Court can find no such rule in *Aristrain* v *Commission*,[90] to which it refers, since that case is irrelevant. Second, in Alstom's submission, that rule is also incorrect in law, since the mechanism of joint and several liability governs only the relationship between a creditor and those jointly and severally liable for the fine and not also the internal relationship between those jointly and severally liable persons.[91] Thus, in relying on the 'equal liability' rule when such a rule is contrary to the concept of joint and several liability in European Union law, the General Court made an error of law in that it concluded that each of the companies on which the penalty was imposed could infer from the decision at issue the share that it must bear in the relationship with the other jointly and

89 — See point 100 of this Opinion.

90 — Case C-196/99 P [2003] ECR I-11005.

91 — Areva states, on the contrary, that it supports the position of the General Court set out at paragraph 214 of the judgment under appeal, according to which joint and several liability governs not only the relationship between the creditor and those jointly and severally liable for payment but also the relationship between the latter.

severally liable companies.[92] In addition, since the decision at issue did not allow the companies in question to know unambiguously how to apportion the fine, the General Court failed in its judgment to observe the principle of legal certainty and the principle that a penalty must be specific to the offender and the offence.

149. Second, Alstom also maintains that, in relying on the 'liability in equal measure' rule, the General Court made an error of law in finding that the Commission did not delegate to the national courts or the arbitrator the power to determine their respective contributions to payment of the fine.[93] It was for the Commission, taking into account the facts of the case and the specific characteristics of the undertaking, to determine the share payable by each undertaking held jointly and severally liable for the fine. Where, as in the present case, the Commission refrains from making that determination, it implicitly delegates the power to do so to a third party, namely a national court or an arbitrator, contrary to Article 7 EC, whereas those authorities have no jurisdiction in that respect.

150. Third, the appellants maintain that, in not properly stating the reasons, on the basis of such a rule, for rejecting the arguments relating to breach of the principle of legal certainty and the unlawful delegation of the Commission's powers,[94] the General Court altered the content of the decision at issue in a sense contrary to the Commission's intention and, accordingly, breached its obligation to state reasons by substituting its own assessment for the Commission's. The decision at issue makes no mention of such a rule. On the contrary, before the General Court, the Commission supported the contrary interpretation of the decision at issue.

151. In addition, the Alstom group companies contest the objection to the admissibility of the plea alleging an unlawful delegation of the Commission's powers. That is not a new plea, since Alstom raised that argument before the General Court. In any event, that plea is intrinsically linked with the plea alleging breach of the principle that a penalty must be specific to the offender and the offence. The Alstom group companies also object to the substitution of grounds requested by the Commission in seeking to have the judgment under appeal set aside.

ii) Arguments of the Commission

152. Although it maintains that the complaints raised by Areva and the Alstom group companies must be rejected, the Commission none the less agrees with certain points which they raise and in that regard requests the Court to substitute grounds. In particular, the Commission shares the view that *Aristrain* v *Commission* is not relevant in the present case. On the contrary, the Commission contends that the argument whereby Alstom alleges that there was an unlawful delegation of the Commission's power to impose penalties is inadmissible, since it is a new argument that Alstom did not raise before the General Court.

153. As regards the substance, the Commission contends that the appellants' argument is based on the incorrect premiss that the Commission unlawfully delegated its powers by not regulating in the decision at issue the internal relationship between those jointly and severally liable for the fine and in particular the share of their joint and several liability. It submits that that argument is, first of all, incoherent. If Areva and Alstom considered that the Commission alone was competent to regulate the relationship between those jointly and severally liable for the fine, it would be impossible to understand why they themselves regulated that matter contractually. In addition, in their appeals, Areva and the Alstom group companies agreed that the question of the contribution might be regulated by national courts or arbitrators, which would preclude any unlawful delegation of what they allege to be the Commission's exclusive power. In any event, contrary to the impression given by the General Court in

92 — Paragraph 226 of the judgment under appeal.

93 — Ibid.

94 — Ibid., paragraphs 210 to 218 and 236.

the judgment under appeal,[95] the Commission has no power to determine the respective shares of those held jointly and severally liable, so that there can have been no unlawful delegation of such a power, nor can it be inferred from the fact that a decision imposing a fine for which the recipients are jointly and severally liable is silent that those jointly and severally liable are responsible in equal measure.

154. Last, as concerns paragraphs 213 to 215 and also paragraphs 222, 236 and 257 of the judgment under appeal, which refer to the concept of shares of joint and several liability, the Commission maintains that they are vitiated by a number of errors of law and that the Court should substitute new reasoning for the reasoning set out in the judgment under appeal. The Commission submits that the General Court fails to have regard to the limits placed on the powers and obligations which Article 23 of Regulation No 1/2003 confers and imposes, respectively, on the Commission and thus undermines the legal orders of the Member States and the contractual freedom of the parties. The Commission's power to impose fines concerns only the external relationship, namely the relationship between the Commission and the undertaking to which the decision is addressed and which is required to pay the fine. The mere fact that the determination, in their external relationship, of the undertakings held jointly and severally liable produces certain legal effects cannot give rise to an obligation on the Commission's part to apportion their liability in their internal relationship.

b) Analysis

155. As regards, first, the 'equal liability' rule, to which the General Court refers at paragraph 215 of the judgment under appeal and as I mentioned at point 100 above, I have expressed at points 88 and 89 of my Opinion in *Commission* v *Siemens Österreich and Others* my doubts as to the relevance of such a rule created by the General Court.

156. That rule, which the General Court seems to have borrowed from the legal regime on private-law joint and several obligation in the legal systems of some Member States,[96] is not in my view compatible with the principle of personal liability or the principle that a penalty must be specific to the offender and the offence, in so far as it lays down a kind of presumption of equal liability between those jointly and severally liable for payment of the fine for participating in unitary conduct of the undertaking which is not necessarily the same for all the persons concerned.

157. Second, the rule in question is to my mind without legal basis, or at least without an appropriate established basis. At point 88 of my Opinion in *Commission* v *Siemens Österreich and Others*, I observed that, in my view, in order to found a rule such as the equal liability rule established by the General Court, it is not sufficient to refer generically to the private-law legal regime of obligation in the absence of any other explanation of the reasons why a principle derived from such a regime would be applicable in competition law, when the nature of the obligation to pay borne by the persons on whom the Commission has imposed fines for which they are jointly and severally liable, owing to an infringement of competition law which is quasi criminal in nature,[97] differs from that borne by those jointly and severally liable under a private-law obligation.

158. In that Opinion, I also admitted to having some difficulty in recognising the relevance of the reference, also at paragraph 215 of the judgment under appeal, to paragraphs 100 and 101 of *Aristrain* v *Commission*. In that judgment, the Court of Justice did not recognise the principle established by the General Court in the judgment under appeal, but, rather, it criticised the General Court for not having

95 — Notably at paragraphs 215 and 229.

96 — See, in that regard, more specifically, paragraph 155 of *Siemens Österreich and Others* v *Commission*. That judgment, which relates to the same decision at issue and which was delivered on the same date as the judgment under appeal, is under appeal in *Commission* v *Siemens Österreich and Others*. As stated at point 2, I am delivering my Opinion in that case at the same time as this Opinion.

97 — See point 40 and the case-law cited of the Opinion of Advocate General Kokott in Case C-681/11 *Schenker & Co. and Others* [2013] ECR.

censured the lack of reasoning in the Commission decision which had imposed a fine on a company and imputed to it the conduct of another company linked to it, without demonstrating the existance of an economic unit between the two companies. That case therefore did not even relate to a fine imposed jointly and severally on a number of parties. [98]

159. It follows that, in order to reject the pleas and complaints alleging breach of the principle of legal certainty, the General Court was not entitled to rely on that rule and to consider, at paragraph 215 of the judgment under appeal, that each of the companies on which a fine is imposed for which they are jointly and severally liable is able to know unambiguously its share of the amount of the fine.

160. In that regard, it should further be observed that, as I stated at points 85 and 86 of my Opinion in *Commission* v *Siemens Österreich and Others*, where, at the time when the Commission's decision is adopted, the unitary economic entity no longer exists in the form in which it existed when the infringement was committed, if the Commission decides, in the exercise of its discretion, to impose a penalty jointly and severally on legal persons which no longer constitute together such a unitary economic entity, the principle that a penalty must be specific to the offender and the offence imposes requirements of legal certainty in connection with the determination of the penalty for those persons in their internal relationship.

161. Although those persons continue to be liable externally vis-à-vis the Commission for payment of the whole fine for the infringement committed by the undertaking, in so far as they no longer constitute a unitary economic entity at the time when the decision is adopted, those persons must be able to ascertain the share which they will have to bear, internally, in the relationship with the jointly and severally liable undertakings with which they no longer have a sufficient economic, organisational and legal link to justify their inclusion in an economic unit.

162. It follows that where, in the exercise of its discretion, [99] the Commission decides to establish joint and several liability between persons which constituted an economic unit at the time when the infringement was committed but which, at the time when the decision is adopted, no longer form part of that economic unit, it cannot avoid its obligation to determine the share of the fine which the person which no longer has links justifying its inclusion in the economic unit will have to bear in its internal relationship with the other jointly and severally liable undertakings.

163. In that regard, it should also be observed that, while the parties are indeed free in the context of their contractual freedom to establish in their private-law relationship which person will bear which part of the fine, they are not, on the other hand, free to determine the share of liability of each legal person found to have committed the infringement and therefore to fix the respective shares of the fine, which, being in the nature of a penalty, come within competition law. It is in that sense that, sharing the views of the General Court in that regard, I read paragraph 214 of the judgment under appeal, where the General Court asserted that the parties cannot freely arrange how they divide, among themselves, the amount of the fine imposed on them. Accordingly, as for the fact, on which the Commission relies, that the jointly and severally liable undertakings are free to allocate among themselves the amount of a fine, while that is true in the context of their private-law relationship, it cannot dispel the need arising under the principle of legal certainty that each of the persons concerned should know precisely and unambiguously the extent of the obligations which the Commission decision imposes on it.

164. In the light of those considerations, I consider that it must be concluded that the General Court made an error of law at paragraphs 214 to 218, 222 and 236 of the judgment under appeal in relying on the equal liability rule to reject the arguments raised before it by the appellants.

98 — See my Opinion in *Commission* v *Siemens Österreich and Others*, points 89 and 93. The fact that it was not a matter of joint and several liability is confirmed, moreover, in Case T-156/94 *Aristrain* v *Commission* [1999] ECR II-645, paragraph 67.

99 — See the case-law referred to at point 81 of this Opinion.

165. As regards, second, Alstom's complaint, alleging that the General Court made an error of law in finding that the Commission did not delegate to the national courts or the arbitrator the power to determine the respective contributions of the undertakings held jointly and severally liable for payment of the fine, first of all, the objection of inadmissibility raised by the Commission, which claims that this is a new plea, must be rejected.

166. In that regard, it follows from the case-law that, given that a party must challenge all the grounds of a judgment that adversely affects it, each party may, where the General Court has joined two cases and delivered a single judgment which addresses all the pleas submitted by the parties to the procedure before it, criticise the reasoning relating to pleas which, before the General Court, were raised only by the applicant in the other joined case, provided that that reasoning adversely affects it. [100]

167. It is common ground that Areva and its former subsidiaries raised such a plea before the General Court, which answered it at paragraphs 232 to 237 of the judgment under appeal. In those circumstances, as regards the three former subsidiaries of Areva that were transferred to Alstom, this plea is not a new plea. As regards Alstom, since there is no doubt that the General Court's reasoning adversely affects it, it is appropriate to consider that it too is entitled to challenge it on appeal.

168. As for the substance, it should be borne in mind that, under the principle of conferral, [101] the European Union is to act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties are to remain with the Member States. Furthermore, in the words of the first sentence of Article 13(2) TEU (formerly the second sentence of Article 7(1) EC), each institution is to act within the limit of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them.

169. As I have explained in detail at point 48 et seq. of my Opinion in *Commission* v *Siemens Österreich and Others*, to which I refer, I consider that it is not possible to deny the Commission's competence, in the context of its power to impose penalties for infringements of the competition rules, to determine the internal apportionment of the fine between jointly and severally liable parties in so far as that is necessary to attain the objective specific to that power, namely to ensure respect for the prohibitions set out in those rules. In certain cases, on the other hand, such as that which I have just mentioned at points 160 to 162 above, the determination by the Commission of the shares of undertakings ordered jointly and severally to pay a fine becomes necessary.

170. In the present case, as the Commission decided to order two companies which no longer constituted an economic unit at the time when the decision was adopted, namely Alstom and Areva T&D SA, to pay a fine jointly and severally, it was in my view required to establish their respective shares of that fine.

171. It follows that the General Court made an error of law in rejecting, at paragraphs 236 and 237 of the judgment under appeal, the pleas and complaints alleging infringement of Article 7 EC, taking the view that they were based on a false premiss, because, in this case, the Commission determined, in the decision at issue, the respective liability of Areva T&D SA and Alstom in the participation of the undertaking in question in the infringement during the period between 7 December 1992 and 8 January 2004 and, accordingly, their respective shares of the amount of the fine which they were jointly and severally required to pay to the Commission.

100 — See *Team Relocations and Others* v *Commission*, paragraph 34 and the case-law cited.

101 — This principle is enshrined in Article 5(2) TEU.

172. As regards, third, the complaint alleging breach of the obligation to state reasons, I consider that it cannot succeed. In setting out at paragraphs 214 and 216, and also at paragraph 236 of the judgment under appeal, its reasons for rejecting the pleas based on legal certainty and the unlawful delegation of powers, the General Court merely made legal considerations in applying the rules on joint and several liability as it interpreted them. Irrespective of the fact that I do not agree with that interpretation, I believe that, in the context of the review of legality, it was fully open to the General Court to make such considerations of law. It cannot therefore be maintained that the General Court unlawfully substituted its own reasoning for the reasoning set out in the decision at issue.

173. As regards, last, the Commission's request that the Court should substitute grounds, aimed at challenging its competence to determine the internal relationship between jointly and severally liable undertakings, it should be rejected in the light of the considerations set out at points 160 to 163 and 169 above. In so far as that request corresponds, in essence, to the arguments which the Commission raised in the context of the first and third pleas in its appeal in *Commission* v *Siemens Österreich and Others*, I would refer, for more thorough considerations, to the analysis of those pleas set out at points 42 to 91 of my Opinion in that case.

4. Conclusion on the pleas and complaints relating to the application of the rules on joint and several liability

174. In conclusion, it follows from all of the foregoing that, in my view, Areva's second and third pleas, and also the Alstom group companies' fourth plea, must be upheld and that, consequently, the fine as provided for in the second indent of paragraph 3 of the operative part of the judgment under appeal must be annulled.

E – *Areva's fourth plea, alleging an error of law as regards the application of the principles of proportionality and equal treatment*

175. By its fourth plea, Areva maintains that the General Court made an error of law in not exercising its unlimited jurisdiction to remedy the Commission's breach of the principles of proportionality and equal treatment as regards the fine imposed on it jointly and severally with others.

176. Areva observes, first, that for an infringement lasting four months, it was ordered to pay, jointly and severally, a sum representing almost half of the sum that Alstom is required to pay, jointly and severally, for in infringement lasting 12 years, or almost twice the amount that Alstom is required to pay alone for its direct participation in the infringement for a period of four years. Such a difference between the amounts of the fine is contrary to the principle of proportionality. Second, the General Court breached the principle of equal treatment, since it upheld the decision at issue in which Areva was penalised much more severely than Alstom, although Alstom was one of the founders of the cartel, although the total duration of Alstom's participation in the cartel was 47 times as long as Areva's and although Alstom's turnover was greater than Areva's.

177. Thus, in the exercise of its unlimited jurisdiction, the General Court ought to have assessed whether the amount of the fine imposed on Areva was proportionate to the gravity and duration of the infringement and whether it was consistent with the principle of equal treatment. In application of those principles, the General Court ought to have reduced the amount of the fine for which Areva was held to be jointly and severally liable.

178. It is appropriate, first of all, to examine the objections of inadmissibility raised by the Commission with respect to this plea.

179. The Commission maintains, in the first place, that the plea is inadmissible because in its appeal Areva does not specify the points in the judgment under appeal which in its view are vitiated by an error of law. In that regard, I would observe that, while the Court's new Rules of Procedure provide, in Article 169(2), that the pleas in law and legal arguments relied on are to identify precisely those points in the grounds of the decision of the General Court which are contested, such a requirement was not formally prescribed in the old Rules of Procedure, which are applicable in the present case.[102] Admittedly, even before the new Rules of Procedure entered into force, it had consistently been held that, in accordance with Article 58 of the Statute of the Court of Justice and Article 112(1)(c) of the old Rules of Procedure, an appeal had to indicate precisely the contested elements of the judgment which the appellant sought to have set aside and also the legal arguments specifically advance in support of the appeal.[103]

180. In the present case, however, it must be stated that Areva challenges the General Court, in essence, for having failed to exercise its unlimited jurisdiction. As the complaint relates to an omission, there are, essentially, no points in the judgment under appeal to which the complaint may be attached or which establish that omission. In addition, Areva sets out the legal arguments which specifically support its request, namely an error of law concerning the Commission's alleged breach of the principles of proportionality and equal treatment.

181. In those circumstances, I consider that Areva's fourth plea cannot be declared inadmissible on the ground that it has not specified the points in the judgment under appeal which in its view are vitiated by an error of law.

182. In the second place, the Commission contends that this plea is inadmissible as a new plea which was not raised before the General Court and also in that its purpose is to ask the Court to reconsider the amount of the fine as varied by the General Court, which it has no jurisdiction to do.

183. In that regard, it should first of all be borne in mind that, according to the case-law referred to at point 112 above, as an appeal cannot change the subject-matter of the proceedings before the General Court, a party cannot raise for the first time before the Court of Justice a plea which it could have raised before the General Court but did not raise.

184. Furthermore, although, as I stated at point 122 above, according to the case-law, an appellant may lodge an appeal putting forward, before the Court of Justice, pleas arising from the judgment under appeal itself and seeking to criticise, in law, the merits of that judgment,[104] it is settled case-law that, at the stage of the appeal, the Court of Justice does not for reasons of equity substitute its own appraisal for that of the General Court as regards the proportionate nature of a fine, but confines itself to ascertaining whether the General Court made any manifest errors in the exercise of its unlimited jurisdiction, for example by not having taken all the relevant aspects into account.[105] In the context of proceedings on appeal, an error of law on the part of the General Court owing to the inappropriate amount of a fine can therefore be established only exceptionally, namely where 'the level of the penalty is not merely inappropriate, but also excessive to the point of being disproportionate'.[106]

102 — See footnote 49 to this Opinion.

103 — See Case C-202/07 P *France Télécom* v *Commission* [2009] ECR I-2369, paragraph 55, and also order of 2 February 2012 in Case C-404/11 P *Elf Aquitaine* v *Commission*, paragraph 15.

104 — See my Opinion in *Commission* v *Siemens Österreich and Others*, points 139 and 140, and also the judgment in *Stadtwerke Schwäbisch Hall and Others* v *Commission*, paragraph 17. Unlike Areva, in Case C-232/11 P, in which that Opinion was delivered, Reyrolle raised a plea alleging breach of those principles by the General Court itself when it varied the fine in the exercise of its unlimited jurisdiction.

105 — See point 222 and the case-law cited of the Opinion of Advocate General Kokott in *Schindler Holding and Others* v *Commission*.

106 — See, to that effect, Case C-89/11 P *E.ON Energie* v *Commission* [2012] ECR, paragraph 126, and Case C-70/12 P *Quinn Barlo and Others* v *Commission* [2013] ECR, paragraph 57.

185. It also follows from the Court's case-law that the exercise of unlimited jurisdiction in respect of the determination of fines cannot result in discrimination between undertakings which have participated in an agreement contrary to Article 101(1) TFEU. [107]

186. In the present case, in its appeal, Areva claims that the General Court erred in law by failing to *remedy*, in the exercise of its unlimited jurisdiction, the breach of the principles of proportionality and equal treatment committed by the Commission with respect to the fine for which Areva was jointly and severally liable.

187. The Court has already held that the disproportionate nature of a fine imposed by a Commission decision, since it cannot constitute a plea involving a matter of public order, cannot be reviewed by the General Court of its own motion. The General Court can therefore adjudicate on a plea alleging that a fine is disproportionate only if that plea is raised before it by the applicant. [108] The same considerations apply to a plea alleging breach of the principle of equal treatment. [109]

188. The Court has also emphasised that, although the unlimited jurisdiction conferred on the Courts of the European Union empowers them, in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission's and, consequently, to cancel, reduce or increase the fine or penalty payment imposed, the exercise of that jurisdiction does not amount to a review of the Court's own motion and proceedings before the Courts of the European Union are inter partes. Thus, with the exception of pleas involving matters of public policy which the Courts are required to raise of their own motion, such as the failure to state reasons for a contested decision, it is for the applicant to raise pleas in law against that decision and to adduce evidence in support of those pleas. [110]

189. In this instance, it must be stated that, before the General Court, Areva did not raise a plea alleging breach of the principles of proportionality and equal treatment, by which it claimed that the fine imposed on it was unlawful owing to a breach of those principles. Admittedly, Areva did claim before the General Court that there had been a breach of the principles of equal treatment and proportionality. However, those complaints related to a completely different issue, namely the fact that Alstom and Areva T&D SA were held jointly and severally liable for payment of the fine and not that the amount of the fine imposed on Areva was alleged to be unlawful.

190. Thus, in the light of the case-law referred to at paragraphs 187 and 188 above, since Areva did not raise before the General Court a breach on the Commission's part of the principles of proportionality and equal treatment for the purposes relied on before the Court, it cannot take issue with the General Court, at the stage of the appeal, for having erred in law in not raising of its own motion, even in the context of the exercise of its unlimited jurisdiction, such a breach. In those circumstances, Areva's fourth plea should in my view be rejected as inadmissible.

191. As for Areva's argument that this plea is admissible in any event, since its production in the course of the proceedings is justified by a new element of fact which came to light between the introduction of the action and the introduction of the appeal, namely the transfer of Areva T&D SA to Alstom, I observe that it follows both from the actual words of Article 42(2) of the Rules of Procedure, reproduced at point 75 above, and from the case-law [111] that, in order for a new plea to be admissible

107 — See Case C-441/11 P *Commission* v *Verhuizingen Coppens* [2012] ECR, paragraph 80, and also *Quinn Barlo and Others* v *Commission*, paragraph 46.

108 — See, to that effect, Case C-276/11 P *Viega* v *Commission* [2013] ECR, paragraph 57.

109 — See, to that effect, Case C-279/85 P *Langnese-Iglo* v *Commission* [1998] ECR I-5609, paragraphs 53 to 55, and Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1385, paragraph 90.

110 — See Case C-272/09 P *KME Germany and Others* v *Commission* [2011] ECR I-12789, paragraphs 103 and 104.

111 — See, to that effect, Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraphs 369 to 378, and in particular paragraph 371, and also point 96 of the Opinion of Advocate General Kokott in Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017.

because a new element of fact has come to light, the plea must be 'based' on that new element of fact. It must be stated that the transfer by Areva of Areva T&D SA to Alstom in 2010 can have no impact on what is alleged to be the disproportionate nature of the fine or the alleged discrimination and therefore on the possibility for Areva to raise at first instance a plea alleging breach of the principles of proportionality and equal treatment. In those circumstances, such a new plea is not 'based' on that transfer, which cannot therefore be relied on in order to justify the admissibility of the plea.

192. Last, in so far as Areva's arguments may be interpreted as meaning that it seeks to obtain a fresh appraisal of the appropriateness of the amount of the fine imposed on it, owing to the very short duration of Areva's participation in the cartel, I observe that the fact that Areva's participation in the cartel was very brief does not affect the gravity of the infringement resulting from its specific nature and as reflected in the calculation of the fine, in particular in the determination of the starting amount. The fact that the duration of Areva's participation in the cartel was very short was reflected in the fact that the starting amount was not increased on account of the duration of the infringement. It follows that, in the present case, there is no indication that the amount of the fine set by the General Court is excessive to the point of being disproportionate. In that case, the Court does not have jurisdiction to substitute its own appraisal for the General Court's. [112]

193. Consequently, even when interpreted in the sense described in the preceding point, in accordance with the Court's case-law referred to at point 184 above, Areva's fourth plea must in my view be rejected as inadmissible. [113]

F – *The Alstom group companies' fifth plea, alleging breach of the right to an effective remedy*

194. In the context of their fifth plea, the Alstom group companies maintain that, at paragraphs 223 to 230 of the judgment under appeal, the General Court misunderstood the scope of the plea alleging breach of the right to an effective remedy and therefore did not answer the plea raised before it. In the judgment under appeal, the General Court focused on the requirement for judicial review, and more particularly on the fact that Alstom and Areva T&D SA had indeed enjoyed the right to have the decision reviewed by a court by the actual exercise of remedies, whereas, in reality, the plea raised before the General Court related to the freedom of choice to bring an action, which was limited by the effect of the fact that Alstom and Areva T&D SA were held jointly and severally liable, which linked their legal situations at the procedural level.

195. In that regard, it is apparent on reading paragraphs 223 to 230 of the judgment under appeal that, far from misunderstanding the scope of Alstom's argument, the General Court did indeed answer the plea which Alstom raised before it.

196. In that judgment, the General Court, after referring to the relevant case-law, at paragraphs 224 to 227, considered, correctly, that the fact that the Commission had held Alstom and Areva T&D SA jointly and severally liable had not undermined the right of each of those companies, as an addressee of the contested decision, to submit that decision to judicial review by actual use of the remedies guaranteed by EU law.

112 — *Quinn Barlo and Others* v *Commission*, paragraph 60.

113 — Ibid.

197. The fact that if Areva T&D SA had brought an action, Alstom, in order to avoid having to pay the fine in full, would have been obliged to do likewise, and vice versa, is in reality only the automatic consequence of the imposition of a fine for which the undertakings concerned are jointly and severally liable, which, so far as Alstom and Areva T&D SA are concerned, was justified in the present case for the reasons set out at point 41 above. That consequence certainly has an impact on the strategy of the different undertakings held jointly and severally liable, but does not entail a breach of the right to an effective remedy.

198. In fact, each undertaking held jointly and severally liable retains the right and the possibility to bring an action, which, moreover, both Alstom and Areva T&D SA did. Admittedly, if an undertaking which is jointly and severally liable does not bring an action it will incur the risk of having to pay the fine in full even if the General Court were to annul the decision imposing the fine for which it is jointly and severally liable after another jointly and severally liable undertaking has brought an action. It follows from the case-law, first, that if an addressee of a decision decides to bring an action for annulment, the matter to be tried by the Courts of the Union relates only to those aspects of the decision which concern that addressee and unchallenged aspects concerning other addressees do not form part of the matter to be tried by the relevant Court; and, second, that, consequently, the authority of a ground of a judgment annulling a measure cannot apply to the situation of persons who were not parties to the proceedings and with regard to whom the judgment cannot therefore have decided anything whatever. [114]

199. The General Court therefore did not misunderstand the scope of the plea alleging breach of the right to an effective remedy raised before it by Alstom, since it concluded, at paragraph 230 of the judgment under appeal, that it could not be held that the contested decision, by imposing a fine jointly and severally on Alstom and Areva T&D SA, breached the principle of the right to an effective remedy.

200. It follows that to my mind Alstom's fifth plea must also be rejected.

G – *Conclusion on the analysis of the appeals*

201. It follows from all of the foregoing that in my view Areva's second and third pleas and the Alstom group companies' fourth plea should be upheld and that, consequently, the fine as set out in the second indent of paragraph 3 of the operative part of the judgment under appeal must be annulled.

202. For the remainder, I consider that the appeals should be dismissed.

IV – The actions for annulment and the determination of the fine

A – *The actions for annulment*

203. Under the first paragraph of Article 61 of the Statute of the Court of Justice, the latter may, after quashing the decision of the General Court, itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

204. In the present case, the matter is in my view ready for judgment.

114 — Case C 310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraphs 53 to 55. For an application of these principles in a specific case, see *Commission* v *Tomkins*, paragraphs 43 and 47.

205. The appellants' liability for the infringement found in the decision at issue and upheld by the General Court in the judgment under appeal is not called into question by the analysis of the appeals. Only the fine as prescribed in the second indent of paragraph 3 of the operative part of the judgment under appeal must in my view be annulled owing to errors in the application of the rules on joint and several liability which entailed breaches of law.

206. In that regard, it must be stated that the model of joint and several liability envisaged in the decision at issue, specifically in Article 2(c) thereof, is the same as that envisaged in the second indent of paragraph 3 of the operative part of the judgment under appeal, which upheld it. It follows that the same breaches of law which, in the context of the analysis set out at points 96 to 174 above, led me to propose that that paragraph of the operative part of the judgment should be set aside, also apply in relation to the fine as determined in the decision it issue. In those circumstances, I consider that Article 2(c) of the decision at issue should be annulled, as the appellants sought before the General Court.

B – *The determination of the fine*

207. The partial annulment which I propose with respect to Article 2(c) of the decision at issue means that it is necessary to adjudicate again on the fine set in that decision. In the context of its right to dispose of the case under the first paragraph of Article 61 of the Statute, the Court enjoys unlimited jurisdiction in that regard, as provided for in Article 261 TFEU in conjunction with Article 31 of Regulation (EC) No 1/2003. [115] The Court is therefore free to determine the new amount of the fine. [116]

208. In those circumstances, it should be observed that the amount of the fine imposed on Alstom Grid SAS, EUR 48 195 000, as established by the General Court in the judgment under appeal, has not been called into question by the pleas and complaints which I have proposed should be upheld by the Court. That amount thus remains unaltered.

209. It follows from the considerations set out at point 135 et seq., on the other hand, that in a case such as this, where the two successive parent companies, which were penalised solely on the basis of liability derived wholly from the liability of the subsidiary, will be tied by joint and several liability with their (respectively former and new) subsidiary, the total sum of the amounts which those parent companies are ordered to pay cannot exceed the amount which the subsidiary is ordered to pay. In addition, the parent companies must be able to ascertain unambiguously the amount which they must pay in respect of the period for which they were held jointly and severally liable for the infringement with their subsidiary.

210. As the amount of the fine imposed on the subsidiary, Alstom Grid SAS, was fixed at EUR 48 195 000, it is therefore necessary to determine the share of that amount for which each of the parent companies is held jointly and severally liable with the subsidiary.

211. In that regard, what in my view is a relevant criterion for the purpose of apportioning the subsidiary's fine between the two parent companies may be the respective periods during which they exercised decisive influence over the subsidiary. That criterion is certainly not the only one imaginable. However, in the circumstances of the present case, it seems to me to be an appropriate criterion that allows a certain proportionality to be ensured in the determination of the shares.

115 — Council Regulation of 16 December 2002 on the implementation of the rules on competition set out in Articles [81 EC] and [82 EC] (OJ 2003 L 1, p. 1).

116 — See *Commission* v *Verhuizingen Coppens*, paragraph 79. See also Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 218; Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraphs 141 and 142; Case C-280/98 P *Weig* v *Commission* [2000] ECR I-9757, paragraph 83; and also Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 244.

212. Thus, it is apparent from the case-file that Alstom exercised decisive influence over Alstom T&D SA during the period 7 December 1992 to 8 January 2004, or for a period of 11 years and 1 month.

213. Areva SA and Areva T&D Holding SA exercised decisive influence over Areva T&D SA Amédée Areva T&D AG[117] for a period of four months, between 9 January and 11 May 2004.

214. It follows, in my view, that, in application of the criterion referred to at point 211, Alstom should be considered jointly and severally liable with Alstom Grid SAS for EUR 46 787 847 and Areva T&D Holding SA and Alstom Grid AG should be considered jointly and severally liable with Alstom Grid SAS for EUR 1 407 153.[118]

C – *The determination of Areva's share*

215. In the event that the Court should agree with the interpretation of the rules on joint and several liability which I have proposed – according to which, where joint and several liability is established between persons which constituted an economic unit at the time when the infringement was committed, but which, at the time when the penalty is imposed, are no longer part of the same economic unit, it is necessary to determine the share of the fine that the person which no longer has links justifying its inclusion in the economic unit will have to bear in the internal relationship with the other jointly and severally liable undertakings[119] - it will still be necessary to determine the actual shares of the fine of the persons which, in this case, have a penalty imposed on them jointly and severally but which no longer form part of the unitary economic entity.

216. In that regard, I have already had occasion to observe, first, that, in so far as unlimited jurisdiction empowers the Courts of the European Union, in addition to a mere review of lawfulness, to vary the contested measure, that is to say, to substitute their appraisal for the Commission's,[120] the relevant Court may exercise its unlimited jurisdiction within the limits of the competences conferred on it by the Treaties. Thus, in the case referred to at the preceding point, the Courts of the European Union are in my view empowered, within the framework of their unlimited jurisdiction, to determine the shares of the fine imposed on persons held jointly and severally liable, but which are no longer part of the unitary economic unit that committed the infringement.[121] Second, I have also already observed that unlimited jurisdiction empowers the Courts of the EU to take account of 'all of the factual circumstances', including circumstances that arose after the decision contested before the Court in question was adopted.[122]

217. In the present case, it is apparent from the case-file that, following the transfer of the T&D activities from Alstom to Areva, Alstom Grid SAS and the other two former subsidiaries of Areva (T&D Holding SA and Alstom Grid AG) again became subsidiaries of Alstom.

117 — As for Areva T&D AG, it is apparent from recital 21 to the decision at issue that it was a 'vehicle company' created in order to facilitate the transfer of the T&D activities from Alstom to Areva. It participated directly in the infringement during the period between 22 December 2003 – the date on which those activities were transferred to it – and the end of the infringement on 11 May 2004.

118 — The total duration of Alstom Grid SAS's participation in the cartel was equal to 11 years and 5 months, or 137 months, including 133 months when it was under the decisive influence of Alstom and 4 months during which it was under the influence of Areva, which gives a fine of EUR 46 787 847 for Alstom (EUR 48 195 000/137 x 133) and a fine of EUR 1 407 153 for Areva and its former subsidiaries (EUR 48 195 000/137 x 4).

119 — See point 160 et seq. above and also the references to my Opinion in *Commission* v *Siemens Österreich and Others*.

120 — See point 38 of my Opinion in *Commission* v *Tomkins*.

121 — See points 93 to 95 of my Opinion in *Commission* v *Siemens Österreich and Others*.

122 — See points 38 and 43 of my Opinion in *Commission* v *Tomkins*.

218. It follows that, in this instance, it is Areva that, at the time when the infringement was committed, constituted a unitary economic entity with its former subsidiaries with which it has been held jointly and severally liable and with which, however, at the time when the penalty was varied, it no longer formed part of an economic entity. It is thus the share of the fine imposed on Areva and its former subsidiaries that must be determined.

219. At point 87 of my Opinion in *Commission* v *Siemens Österreich and Others*, I referred to certain circumstances, also mentioned by the Commission itself, relating to the links between a parent company and its subsidiary which, in principle, are irrelevant in precluding the actual exercise of decisive influence, but which may be taken into consideration when determining the degree of relative culpability between the parent company and the subsidiary and, thus, in determining the internal relationship between undertakings held jointly and severally liable for the fine. Among those circumstances, which cannot to my mind be the subject of a binding or exhaustive list, the Commission had mentioned the fact that the parent company did not participate directly in the infringement, the presence or degree of the parent company's interests in the sector affected by the infringement and the fact that the parent company was unaware of the infringement. Also in that Opinion, I also observed that, as is the case in the context of the determination of the penalty, a certain discretion must be recognised in the evaluation of the relevance and significance of the elements to be taken into consideration in each particular case.

220. Procedural economy argues in favour of the Court itself giving final judgment in the case whenever the case-file is complete, the Court has all the necessary material before it and the parties have been able to comment on all the relevant points. [123]

221. In the present case, the case-law contains certain material that might be taken into consideration in determining Areva's relative degree of culpability. [124] On the basis of an analysis of that material, the Court could be in a position itself to give final judgment on the determination of Areva's share of the fine. However, it must be stated that, at this stage of the proceedings, the companies concerned have not been given the opportunity to comment in that regard. In those circumstances, if the Court were to agree with my proposed interpretation of the rules on joint and several liability and were to consider that it has before it sufficient material to be able to determine Areva's share, it would to my mind be necessary to hear the views of the companies concerned on that point.

222. If, on the other hand, the Court were to consider in any event that it does not have before it the material necessary to be able to determine Areva's share, it will then, to my mind, be for the Commission, under its obligation to take the necessary measures to comply with the judgment of the Court, in accordance with Article 266 TFEU, actually to determine that share.

V – Costs

223. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

123 — See point 44 and the case-law cited in the Opinion of Advocate General Kokott in *Commission* v *Verhuizingen Coppens*.

124 — It is apparent from the case-file that Areva had no interests in the sector concerned by the infringement before Alstom acquired its subsidiaries and that it no longer has an interest in the sector, having sold all its activities in the T&D sector (see point 6 of this Opinion). It appears from the decision at issue, moreover, that Areva did not participate directly in the meetings of the cartel during the relevant period. It was, however, the holding company at the head of the group.

224. Under Article 138(1) of those rules, applicable to the procedure on appeal by virtue of Article 84(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Article 138(3) of those rules states that where each party succeeds on some and fails on other heads, the parties are to bear their own costs. Under that provision, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

225. In this instance, I propose that the appeals of Areva and the Alstom group companies in the part concerning the application of the rules on joint and several liability be upheld but that they be dismissed for the remainder. However, according to the solution which I propose, Areva and the Alstom group companies have essentially been successful before the Court.

226. In the light of the circumstances of the present case, I consider that the Commission should be ordered, in addition to bearing its own costs in both sets of proceedings, to pay one third of the costs of Areva and the Alstom group companies in both sets of proceedings. Areva and the Alstom group companies group must bear two thirds of the costs relating to both sets of proceedings.

VI – Conclusion

227. In the light of the foregoing considerations, I propose that the Court should:

(1) set aside the second indent of paragraph 3 of the operative part of the judgment of the General Court of the European Union of 3 March 2011 in Joined Cases T-117/07 and T-121/07 *Areva and Others* v *Commission*;

(2) dismiss the appeals as to the remainder;

(3) annul Article 2(c) of Commission Decision C(2006) 6762 final of 24 January 2007 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/F/38.899 – Gas insulated switchgear);

(4) for the infringements found in Article 1(b) to (f) of Decision C(2006) 6762 final, in addition to the fine of EUR 10 327 500 imposed on Alstom SA, impose on Alstom Grid SAS a fine of EUR 48 195 000, of which EUR 46 787 847 jointly and severally with Alstom SA and EUR 1 407 153 jointly and severally with Areva SA, T&D Holding SA and Alstom Grid AG;

(5) order the European Commission, in addition to bearing its own costs relating to the proceedings at first instance and on appeal, to pay one third of the costs incurred by Areva SA, Alstom SA, T&D Holding SA, Alstom Grid SAS and Alstom Grid AG in relation to the proceedings at first instance and on appeal;

(6) order Areva SA, Alstom SA, T&D Holding SA, Alstom Grid SAS and Alstom Grid AG to bear two thirds of their own costs in relation to the proceedings at first instance and on appeal.