Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

29 June 2012*

(Competition — Agreements, decisions and concerted practices — German and French markets for natural gas — Decision finding an infringement of Article 81 EC — Market sharing — Duration of the infringement — Fines)

In Case T-370/09,

GDF Suez SA, established in Paris (France), represented by J.-P. Gunther and C. Breuvart, lawyers,

applicant,

v

European Commission, represented by V. Di Bucci, A. Bouquet and R. Sauer, acting as Agents,

defendant,

APPLICATION for partial annulment of Commission Decision C(2009) 5355 final of 8 July 2009 relating to a proceeding under Article 81 [EC] (Case COMP/39.401 — E.ON/GDF) and, in the alternative, annulment or reduction in the amount of the fine imposed on the applicant,

THE GENERAL COURT (Fifth Chamber),

composed of S. Papasavvas (Rapporteur), President, V. Vadapalas and K. O'Higgins, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 21 September 2011,

gives the following

Judgment

Legal context

1. *European Union law*

1 Directive 98/30/EC of the European Parliament and of the Council of 22 June 1998 concerning common rules for the internal market in natural gas (OJ 1998 L 204, p. 1) ('the first gas directive') established common rules for the transmission, distribution, supply and storage of natural gas. It laid down the rules

* Language of the case: French.

relating to the organisation and functioning of the natural gas sector, including liquefied natural gas (LNG), access to the market, the operation of systems, and the criteria and procedures applicable to the granting of authorisations for transmission, distribution, supply and storage of natural gas.

2 The first gas directive required Member States to gradually open the market for the supply of natural gas to large consumers to competition and to give third parties access to the existing transmission system.

3 Under Article 29(1) and Article 30 of the first gas directive, Member States had to bring into force the laws, regulations and administrative provisions necessary to comply with the directive no later than 10 August 2000.

4 The first gas directive was repealed and replaced, as of 1 July 2004, by Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30 (OJ 2003 L 176, p. 57).

2. *National laws*

French law

5 Article 1 of Law No 46-628 of 8 April 1946 on the nationalisation of electricity and gas (JORF of 9 April 1946, p. 2651) ('the 1946 Law') provided, before its repeal by Regulation 2011-504 of 9 May 2011 codifying the legislative part of the Energy Code (JORF of 10 May 2011, p. 7954):

'As from the enactment of this Law,

…

(2) the production, transport, distribution, import and export of combustible gas shall be nationalised.

…'

6 Before amendment by Law No 2004-803 of 9 August 2004 on the public electricity and gas service and on electricity and gas undertakings (JORF of 11 August 2004, p. 14256), the first paragraph of Article 3 of the 1946 Law stated:

'The management of the nationalised gas undertakings shall be entrusted to a public undertaking of an industrial and commercial nature called Gaz de France (GDF), Service National.'

7 Until the entry into force of Law No 2003-8 of 3 January 2003 on the gas and electricity markets and on the public energy service (JORF of 4 January 2003, p. 265) ('the 2003 Law'), the 1946 Law conferred a monopoly on imports and exports of gas on Gaz de France.

8 The 2003 Law, which sought to transpose the first gas directive, opened the French gas market to competition. Inter alia, that law gave eligible customers access to natural gas networks and to the supply of natural gas and abolished the monopoly on imports and exports of gas.

9 Gaz de France was turned into a public limited company by Law 2004-803.

German law

10 The Energiewirtschaftsgesetz (Law on the energy industry) ('the 1935 EnWG') of 13 December 1935 (RGBl. I, p. 1451) provided for a State system for the authorisation and monitoring of the activities of German gas companies.

11 Under Paragraph 103 of the Gesetz gegen Wettbewerbsbeschränkungen (Law against restrictions on competition) ('the GWB') of 27 July 1957 (BGBl. I, p. 1081), certain agreements between energy distribution companies as well as between those companies and local authorities were exempt from the prohibition of concluding agreements which restrict competition. That exemption covered, in particular, agreements known as demarcation agreements, by which undertakings agreed not to supply electricity or gas in each other's territories, and agreements known as exclusive concession agreements, by which a local authority granted an exclusive concession to a company, allowing it to use public terrain to construct and operate electricity and gas distribution networks. In order to be valid, those agreements had to be notified to the competent competition authority, which had the power to prohibit them if it took the view that they constituted a misuse of the legal exemption.

12 The Gesetz zur Neuregelung des Energiewirtschaftsrechts (Law on the reform of energy industry law) of 24 April 1998 (BGBl. 1998 I, p. 730) abolished, with immediate effect, the exemption applicable to demarcation and exclusive concession agreements laid down in Paragraph 103 of the GWB. That law also replaced the 1935 EnWG by the Gesetz über die Elektrizitäts- und Gasversorgung — Energiewirtschaftsgesetz (Law on electricity and gas supply — Law on the energy industry) ('the 1998 EnWG').

13 The Erstes Gesetz zur Änderung des Gesetzes zur Neuregelung des Energiewirtschaftsrechts (First Law amending the Law on the reform of energy industry law) of 20 May 2003 (BGBl. 2003 I, p. 685) amended the 1998 EnWG for the purpose of implementing the first gas directive.

Background to the dispute

1. *The undertakings in question*

14 The applicant, GDF Suez SA, derives from the merger between Gaz de France and Suez SA on 22 July 2008. It is a French undertaking which is present across the entire energy chain, in electricity and in natural gas, upstream to downstream. It is the incumbent operator and the leading natural gas supplier in France. It is also one of the leading natural gas suppliers in Europe.

15 E.ON AG is a German undertaking which produces, transports, distributes and supplies energy, mainly natural gas and electricity.

16 E.ON Ruhrgas AG, which derives from the merger between E.ON and Ruhrgas AG and has been wholly owned by E.ON since 31 January 2003, is the largest natural gas supplier in Germany and one of the main players on the European market. By a decision of 18 September 2002 authorising that merger, the German authorities required E.ON Ruhrgas to implement a gas release programme ('the GRP') relating to a total quantity of 200 TWh. That quantity was to be released at six annual auctions, each involving a quantity of 33.33 TWh, with the first deliveries starting on 1 October 2003.

2. *The MEGAL agreement*

17 By an agreement of 18 July 1975 ('the MEGAL agreement'), Gaz de France and Ruhrgas decided to construct and operate the MEGAL gas pipeline together. The MEGAL gas pipeline, which has been fully operational since 1 January 1980, is one of the main gas pipelines for importing gas into Germany and France. It crosses southern Germany and links, across a distance of 461 km, the German-Czech border to the Franco-German border between Waidhaus (Germany) and Medelsheim (Germany).

18 The inlet and outlet points for the gas bought by Gaz de France and Ruhrgas were defined in Appendix 2 to the MEGAL agreement. A certain number of outlet points from the MEGAL gas pipeline were established in respect of Ruhrgas and additional outlet points could be added if

required. As regards Gaz de France, it was stated that the outlet point from the gas pipeline for all the quantities of gas to be transported for that company was to be a point on the border between Germany and France near Habkirchen (Germany), unless the parties to the MEGAL agreement agreed otherwise.

19 Under the MEGAL agreement, Gaz de France and Ruhrgas set up the joint undertaking MEGAL GmbH Mittel-Europäische Gasleitungsgesellschaft, now MEGAL Mittel-Europäische Gasleitungsgesellschaft mbH & Co. KG ('MEGAL'), which was to be responsible for the construction and operation of the MEGAL gas pipeline and the transport of gas by that pipeline. The ownership of the gas pipeline was also conferred on MEGAL.

20 Pursuant to the MEGAL agreement, Gaz de France and Ruhrgas also set up the joint undertaking MEGAL Finance Co. Ltd ('MEGAL Finco'), which was responsible for securing and managing the capital necessary for the construction of the MEGAL gas pipeline.

21 On 18 July 1975, Ruhrgas and Gaz de France also signed 13 letters ('the side letters') which served to explain certain technical, financial and operational aspects of the management of the MEGAL gas pipeline. Those letters include the letter known as 'Direktion I' and the letter known as 'Direktion G'.

22 The Direktion G letter reads as follows:

'…

The Carrying Capacities Contracted or to be Contracted by Gaz de France for the transportation of gas shall concern gas which has been or will be purchased by Gaz de France and will be delivered to [MEGAL] and/or [MEGAL Finco] for transit for Gaz de France to and destined for consumption in France.

The Carrying Capacities Contracted or to be Contracted by Ruhrgas for the transportation of gas shall concern the transportation for any other transit purposes and the transportation of gas through the Pipeline and taken from the Pipeline in the Federal Republic of Germany destined for consumption in the Federal Republic of Germany, or purchased by Ruhrgas and destined for transit through the Federal Republic of Germany.

…'

23 The Direktion I letter provides:

'…

Gaz de France undertakes not to deliver or supply directly and indirectly any gas in connection with the [MEGAL] agreement to any customer in the Federal Republic of Germany.

…'

24 On 22 June 1976, Ruhrgas and Gaz de France notified the Bundeskartellamt (German Federal Cartel Office) of the setting-up of MEGAL and MEGAL Finco.

25 By an agreement of 13 August 2004 ('the 2004 agreement'), Gaz de France and E.ON Ruhrgas confirmed that they had long regarded the Direktion G and Direktion I letters as 'null and void' and that that agreement repealed those letters with retroactive effect.

26 On 5 September 2005, Gaz de France and E.ON Ruhrgas signed a consortium agreement ('the 2005 agreement'), which entered into force on 13 October 2005, by which they reformulated their contractual relationship regarding MEGAL. The consortium agreement provided that each of the

partners in MEGAL had 'Beneficial Use Agreements' in relation to its share of the capacity in the MEGAL gas pipeline. That agreement was supplemented by an interim agreement of 9 September 2005 (the 'interim agreement').

27 On 23 March 2006, Gaz de France and E.ON concluded an agreement annulling all the other agreements relating to MEGAL concluded between them prior to the 2005 agreement.

3. *Administrative procedure*

28 On 5 May 2006, the Commission adopted decisions ordering Gaz de France and E.ON, as well as all their subsidiaries, to submit to an inspection under Article 20 of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1). Inspections took place on 16 and 17 May 2006.

29 Pursuant to Article 18 of Regulation No 1/2003, the Commission sent a number of requests for information to Gaz de France, E.ON and E.ON Ruhrgas (collectively, 'the undertakings in question').

30 On 18 July 2007, the Commission initiated proceedings within the meaning of Article 11(6) of Regulation No 1/2003.

31 On 9 June 2008, the Commission sent a statement of objections to the undertakings in question. In response, those undertakings submitted written observations and were heard at a hearing which was held on 14 October 2008.

32 On 27 March 2009, the Commission informed the undertakings in question of additional facts which had been taken into account since the statement of objections and requested them to respond in writing. The Commission also allowed them access to the non-confidential versions of their respective responses to the statement of objections and to the documents gathered since its adoption. The undertakings in question sent their observations on 4 May 2009 (as regards the applicant) and 6 May 2009 (as regards E.ON and E.ON Ruhrgas).

The contested decision

33 On 8 July 2009, the Commission adopted Decision C (2009) 5355 final relating to a proceeding under Article 81 [EC] (Case COMP/39.401 — E.ON/GDF) ('the contested decision'), a summary of which was published in the *Official Journal of the European Union* of 16 October 2009 (OJ 2009 C 248, p. 5).

34 In the contested decision, the Commission stated that the conduct concerned was the agreement and/or concerted practice, within the meaning of Article 81 EC, between the undertakings in question, not to penetrate — or to penetrate only in a limited manner — each other's home market and thus to protect their home markets by not selling on the other's home market the gas transported by the MEGAL gas pipeline.

35 The Commission found inter alia that the MEGAL agreement, Appendix 2 to that agreement and the Direktion G and Direktion I letters constituted agreements within the meaning of Article 81(1) EC, since the undertakings in question had expressed their common intention to behave on the market in a particular manner. According to the Commission, those agreements limited the commercial conduct of those undertakings by restricting their use of the gas transported by the MEGAL gas pipeline.

36 The Commission also observed that the undertakings in question had met on numerous occasions to discuss their reciprocal strategies for the sale in Germany and France of gas transported by the MEGAL gas pipeline and to find out about their respective strategies. According to the Commission,

those contacts and the exchange of sensitive commercial information were intended to influence the commercial conduct of those undertakings, to implement the Direktion G and Direktion I letters and to adapt their content to the new market conditions following the liberalisation of the European gas markets ('the liberalisation'), without however removing the restrictions which those letters contained.

37 Consequently, the Commission found that the conduct of the undertakings in question, which consisted of an initial market-sharing agreement and of concerted practices in the form of periodic meetings designed to reach agreement and to implement that initial agreement for a period of more than 25 years, constituted a single and continuous infringement and a 'restriction of competition by object'.

38 As regards the beginning of the infringement, the Commission found that, in Germany, it began on the date on which the MEGAL gas pipeline became operational, namely 1 January 1980. It found that, in France, the infringement began on the date on which the first gas directive should have been transposed, namely 10 August 2000. As a result of the legal monopoly, deriving from the 1946 Law, which existed on the importation and supply of gas, the Commission found that the conduct at issue could not have restricted competition before the liberalisation. In that regard, although the first gas directive was transposed in France in 2003, the Commission stated that competition could have been restricted as from 10 August 2000, inasmuch as, as of that date, the applicant's competitors could have supplied eligible customers in France.

39 As regards the end of the infringement, the Commission stated that, although the undertakings in question had officially repealed the Direktion G and Direktion I letters on 13 August 2004, they ceased to apply the restrictions preventing the applicant from using the outlet points of the MEGAL gas pipeline in Germany, with the exception of the volumes purchased under the GRP, only at the end of September 2005. Furthermore, the Commission took the view that the fact that, as of 2004, the applicant had purchased from E.ON Ruhrgas volumes of gas from the MEGAL gas pipeline for delivery in Germany did not mark the end of the infringement, given that, until October 2005, the sales of gas from the MEGAL gas pipeline made in Germany by the applicant corresponded to the volumes purchased by that undertaking under the GRP.

40 In those circumstances, the Commission found that the infringement for which the applicant and E.ON Ruhrgas were liable had lasted at least from 1 January 1980 until 30 September 2005 as regards the infringement committed in Germany and at least from 10 August 2000 until 30 September 2005 as regards the infringement committed in France. Having taken control of E.ON Ruhrgas on 31 January 2003, E.ON was, according to the Commission, 'jointly and severally liable' with E.ON Ruhrgas for an infringement which lasted from 31 January 2003 to 30 September 2005.

41 The Commission imposed fines on the undertakings in question pursuant to Article 23(2) of Regulation No 1/2003. To that end, it applied the methodology set out in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (OJ 2006 C 210, p. 2) ('the 2006 Guidelines').

42 In doing so, the Commission took the view that the sales concerned by the infringement were sales of gas transported by the undertakings in question via the MEGAL gas pipeline to customers in Germany and to eligible customers in France, with the exception of those made under the GRP.

43 In view of the gravity of the infringement, the Commission applied an initial percentage of 15% of the sales concerned.

44 As regards the duration of the infringement taken into account for the purpose of determining the amount of the fine, the Commission used, as regards France, the period from 10 August 2000 to 30 September 2005, that is to say, 5 years, 1 month and 20 days. It found that, as regards Germany, it was necessary to limit the period in respect of which the fine had to be imposed to that of 24 April

1998 — the date on which the German legislature abolished the de facto monopoly which existed in that country on account of the exemption for demarcation agreements — to 30 September 2005, that is to say, 7 years and 5 months.

45 Having regard to the nature of the infringement in question, the Commission applied to the cartel an additional amount of 15% of the sales concerned.

46 The Commission found that, in view of the special circumstances of the present case, it was appropriate to establish, by way of exception, an identical basic amount for the two undertakings in question. So as not to disadvantage one of them, the Commission took as the basic amount of the fine the amount corresponding to the lowest value of sales. It therefore fixed the same basic amount of fine in respect of all the undertakings in question, namely EUR 553 million.

47 As it did not find that there were any aggravating or mitigating circumstances, the Commission did not adjust that basic amount.

48 The Commission therefore imposed a fine of EUR 553 million on E.ON and E.ON Ruhrgas ('jointly and severally liable') and a fine in the same amount on the applicant.

49 Articles 1 and 2 of the operative part of the contested decision read as follows:

'Article 1

[The undertakings in question] have infringed the provisions of Article 81(1) [EC] by participating in an agreement and in concerted practices in the natural gas sector.

The duration of the infringement, was for [the applicant] and E.ON Ruhrgas … at least from 1 January 1980 until 30 September 2005, as far as the infringement committed in Germany is concerned, and at least from 10 August 2000 to 30 September 2005, as far as the infringement committed in France is concerned. The duration of the infringement for E.ON … was from 31 January 2003 to 30 September 2005.

Article 2

As regards the infringement(s) referred to in Article 1, the following fines are imposed:

(a) E.ON Ruhrgas … and E.ON …, jointly and severally liable: EUR 553 000 000

(b) [the applicant]: EUR 553 000 000

…'

Procedure and forms of order sought

50 By application lodged at the Registry of the General Court on 18 September 2009, the applicant brought the present action.

51 By document lodged on 25 September 2009, the applicant requested confidentiality vis-à-vis third parties as regards certain passages of the application.

52 By document lodged on 8 July 2010, the applicant requested confidentiality vis-à-vis third parties as regards certain passages of the annexes to the application, the defence and the reply.

53 By document lodged on 2 September 2010, the applicant requested confidentiality vis-à-vis third parties as regards certain passages of the rejoinder.

54 On hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure pursuant to Article 64 of its Rules of Procedure, requested that the parties reply to a question and lodge certain documents. The parties complied with that request within the prescribed period.

55 The parties presented oral argument and answered questions put by the Court at the hearing, which was held on 21 September 2011. At the Court's request, the applicant also lodged a document at the hearing.

56 The applicant claims that the Court should:

— annul, entirely or in part, Article 1 of the contested decision in so far as it makes it liable for having infringed the provisions of Article 81(1) EC by participating in an agreement and in concerted practices in the natural gas sector from at least 1 January 1980 until 30 September 2005, with regard to the infringement in Germany, and from 10 August 2000 at least until 30 September 2005, with regard to the infringement in France and, as a consequence, in addition annul Article 3 of the contested decision in so far as it requires it to cease the infringements referred to in Article 1 or with an identical or similar object or effect;

— in the alternative, annul or substantially reduce the amount of the fine which was imposed on it in Article 2 of the contested decision;

— order the Commission to pay the costs.

57 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

58 The applicant claims, principally, that the contested decision should be annulled in part and, in the alternative, that the fine imposed on it by the decision should be cancelled or reduced.

A – *The head of claim seeking the partial annulment of the contested decision*

59 In support of its claim seeking the partial annulment of the contested decision, the applicant puts forward four pleas in law alleging, first, errors of fact and of law in the application of Article 81 EC as regards the existence of an agreement and/or of a concerted practice prior to August 2000, second, errors of fact and of law in the application of Article 81 EC as regards the existence of an agreement and/or of a concerted practice after August 2000, third, a manifest lack of evidence as regards the existence of an agreement and/or of a concerted practice aimed at restricting the use in France by E.ON and E.ON Ruhrgas (without distinction, including references to Ruhrgas, 'E.ON') of the gas transported by the MEGAL gas pipeline and, fourth, errors of fact and of law in the application of Article 81 EC as regards the existence of an agreement and/or of a concerted practice between the undertakings in question after August 2004.

1. *The first plea, alleging errors of fact and of law in the application of Article 81 EC as regards the existence of an agreement and/or of a concerted practice prior to August 2000*

60 This plea, by which the applicant argues that the Commission misapplied Article 81 EC in holding that the side letters infringed that article prior to August 2000, comprises three parts, alleging, first, infringement of Article 81 EC based on the lack of anti-competitive object and effect (even potential)

of those letters prior to August 2000, second, infringement of Article 81 EC based on the lack of effect on intra-Community trade prior to August 2000 and, third, an infringement of Article 81 EC, of the rules on the taking of evidence and of the duty to state reasons based on the lack of evidence concerning the existence of the alleged infringement between January 1980 and February 1999.

a) The first part

61 In this part of the plea, the applicant submits that the Commission infringed Article 81 EC on the ground that the side letters had neither the object nor the effect (even potential) of restricting competition on the German and French markets for gas prior to August 2000.

62 In this regard, it must be borne in mind that Article 81(1) EC prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.

63 The anti-competitive object and effect of an agreement are not cumulative but alternative conditions for assessing whether such an agreement comes within the scope of the prohibition laid down in Article 81(1) EC. According to settled case-law, the alternative nature of that condition, indicated by the conjunction 'or', leads first to the need to consider the precise object of the agreement, in the economic context in which it is to be applied. Where, however, the analysis of the content of the agreement does not reveal a sufficient degree of harm to competition, the effects of the agreement should then be considered and, for it to be caught by the prohibition, it is necessary that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent. It is also apparent from the case-law that it is not necessary to examine the effects of an agreement once its anti-competitive object has been established (see Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others* v *Commission and Others* [2009] ECR I-9291, paragraph 55 and the case-law cited).

64 In order to assess the anti-competitive nature of an agreement, regard must be had in particular to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part. In addition, although the parties' intention is not a necessary factor in determining whether an agreement is restrictive, there is nothing prohibiting the Commission or the Courts of the European Union from taking that aspect into account (see *GlaxoSmithKline Services and Others* v *Commission and Others*, paragraph 63 above, paragraph 58 and the case-law cited).

65 Furthermore, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives (see Case C-551/03 P *General Motors* v *Commission* [2006] ECR I-3173, paragraph 64 and the case-law cited).

66 Finally, it must be pointed out that, on a number of occasions, the Court has held agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports, to be agreements whose object is to restrict competition within the meaning of Article 81 EC (see, to that effect, *GlaxoSmithKline Services and Others* v *Commission and Others*, paragraph 63 above, paragraph 61 and the case-law cited).

67 The two complaints raised in support of this part, alleging, first, an error of law and of fact and, second, a manifest error of assessment, should be examined in the light of the above considerations.

68 In the first place, the applicant claims that the Commission made an error of law and of fact in considering that the side letters had an anti-competitive object between January 1980 and August 2000. In this regard, it puts forward two series of arguments concerning, first, failure to take account

of the legal and economic context existing at the time when the side letters were signed (see paragraphs 76 to 111 below) and, second, failure to take account of the purpose of the MEGAL gas pipeline and of those letters (see paragraphs 73 to 75 below).

69 In the second place, the applicant claims that the Commission made a manifest error of assessment in finding that its lack of sales in Germany between 1980 and 2000 was due to the cartel arising from the side letters. In this regard, it submits, in essence, three series of arguments concerning, first, the contradictory nature of the positions adopted by the Commission (see paragraph 71 below), second, the irrelevance of the examples of Wingas and Mobil (see paragraphs 102 and 103 below) and, third, the fact that, by considering only the German market, and given the failure to demonstrate competition, even potential, on the French market in 1975, or even prior to 2000, the Commission failed to demonstrate that the precise object of the side letters, intended allegedly to ensure that each of the undertakings in question protected its home market, constituted an anti-competitive market-sharing agreement (see paragraph 70 below).

70 As a preliminary point, the arguments put forward in the context of the third series of arguments relied on in support of the second complaint and first submitted at the time of the reply must be rejected as unfounded without it even being necessary to rule on their admissibility. The fact that, because of the monopoly which existed on the French market, the agreement arising from the side letters related, until 10 August 2000, solely to the German market for gas and was not therefore reciprocal up to that time cannot preclude the view that the undertakings in question had concluded an agreement with the object of market sharing. Thus, even in a monopolistic form, the French market for gas did indeed exist, and the absence of competition on the market because of the existence of a monopoly does not mean that there was no market. The agreement in question could therefore, as the Commission stated in recital 244 of the contested decision, have the object of reinforcing those monopolies prior to the liberalisation and delaying its effects. In those circumstances, the Commission could rightly find that the side letters constituted a market-sharing agreement. Moreover, as regards the existence of the infringement, it does not matter whether or not the agreement contained in the side letters was concluded in the commercial interest of the undertakings in question if it is established, on the basis of the evidence contained in the Commission's file, that they in fact concluded that agreement (see, to that effect, Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering and Others* v *Commission* [2004] ECR II-2501, paragraph 185), as they did in the present case. In addition, the fact that, because of the monopoly which existed on the French market for gas, E.ON was, initially, unable to derive advantage from that agreement or had no interest in concluding it does not affect the anti-competitive object of the agreement in question.

71 The arguments put forward in the context of the first series of arguments relied on in support of the second complaint, by which the applicant submits that the Commission's argument that the German market for gas was open to competition between 1980 and 2000 contradicts the fact that the Commission acknowledged that there were many obstacles to entry into that market prior to the liberalisation and the finding that the side letters could have no significant effect on competition before 1998 to 2000, must also be rejected. Indeed, a market may be open to competition while presenting barriers to entry and the fact that an agreement produces significant effects only from a certain date does not imply that it produced no effect before that date.

72 The arguments set out in the context of the first complaint, seeking to demonstrate that the Commission made an error of law and of fact in finding that the side letters had an anti-competitive object between January 1980 and August 2000, should be examined next.

73 As regards, in the first place, the purpose of the MEGAL gas pipeline and the side letters, the applicant's arguments must be rejected.

74 In fact, as regards, first, the purpose of the MEGAL gas pipeline, it must be borne in mind that, as follows from the case-law cited in paragraph 65 above, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also

pursues other legitimate objectives. In addition, even assuming that the construction of the MEGAL gas pipeline could have had the aim of securing and diversifying supplies of gas to France, that does not preclude the relevant agreement none the less having an anti-competitive object or anti-competitive effects and does not therefore suffice to make that agreement lawful under Article 81 EC. For the same reason, the Court rejects the applicant's argument regarding the agreement concluded between it and MEGAL Finco on 20 July 1981, the legal nature of which, in its view, was, in accordance with the aim of securing and diversifying supplies, comparable to a transit agreement and, consequently, lawful. Moreover, that agreement is not the subject of the contested decision and the Commission did not find that it constituted a cartel or formed part of that established in the present case.

75 As regards, second, the purpose of the side letters, it suffices to find that, even assuming, as the applicant claims, that they related to [*confidential*],[1] that fact does not preclude those letters also having an anti-competitive object or effect. In any event, the applicant produced no direct evidence, dating from the time they were signed, to demonstrate that the side letters related to [*confidential*]. The documents referred to by the applicant in that connection, in its response to the statement of objections and in its written pleadings before the Court, in fact date from 2004 and 2006, the last referring to [*confidential*]. Moreover, no aspect of the wording of the Direktion G or Direktion I letters indicates that they related to [*confidential*].

76 As regards, in the second place, the legal and economic context which existed at the time when the side letters were signed, the applicant relies on the fact that there was no prospect of liberalisation and that the undertakings in question could not be competitors on the German and French markets for gas before 2000.

77 Regarding, first, the prospect of liberalisation at the time when the side letters were signed, the applicant's argument that there was no such prospect must be rejected.

78 It is true that there is nothing to indicate that, on that date, the liberalisation could be foreseen in the short or medium term. In particular, the factors relied on by the Commission in its pleadings are not capable of demonstrating that that was the case. In fact, the Commission states that the first milestones on the path to the liberalisation were reached during the 1980s and, in that context, it cites various texts, the oldest of which is the White Paper of 14 June 1985 on the completion of the internal market. However, not only does the White Paper post-date the signature of the side letters by 10 years, but, in addition, it does not deal with the energy sector. In this regard, the Commission's argument, that the White Paper provided grounds for considering, at the very start of the MEGAL gas pipeline construction project, that liberalisation could be expected in new areas, is irrelevant from a short- or medium-term point of view. As for the other texts to which the Commission refers, they are even more recent than the White Paper in question and date, respectively, from 1990, in the case of Council Directive 90/377/EEC of 29 June 1990 concerning a Community procedure to improve the transparency of gas and electricity prices charged to industrial end-users (OJ 1990 L 185, p. 16), 1991, in the case of Council Directive 91/296/EEC of 31 May 1991 on the transit of natural gas through grids (OJ 1991 L 147, p. 37) and 1994, in the case of Council Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorisations for the prospection, exploration and production of hydrocarbons (OJ 1994 L 164, p. 3). The proposal which resulted in the first gas directive dates from 1992.

79 However, it must be pointed out, as did the Commission, that the construction of a gas pipeline such as the MEGAL gas pipeline constitutes an investment for very long-term use. The Commission also stated, without being contradicted by the applicant, that a gas pipeline generally has an operational lifespan of 45 to 65 years. Furthermore, it must be stated that, having regard to Articles 2 EC and

1 — Confidential data omitted.

3 EC, in their version in force at the time when the side letters were signed, the European Union already, at that time, had the objective of establishing a common market, which implied, inter alia, the elimination, between Member States, of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect. Moreover, also at that time, the Court of Justice had already had occasion to state that the isolation of national markets was contrary to one of the essential objects of the Treaty, which was to unite national markets in a single market (see, to that effect, Case 192/73 *Van Zuylen* [1974] ECR 731, paragraph 13).

80 In those circumstances, it must be held that, at the time when the side letters were signed, the liberalisation could not be precluded in the long term and was one of the prospects which could reasonably be envisaged. That has, moreover, in essence, been confirmed by E.ON, which stated in its response to the statement of objections, as is apparent from recital 245 of the contested decision, that the Direktion I letter was adopted 'as a precautionary measure … to "prevent even such purely theoretical risks, due to changes in the legal and economic conditions which could not be completely precluded"' from compromising the project. Although, at the hearing, the applicant did not express support for that statement, it shows, at the very least, that, for one of the undertakings in question, legal and economic change was not entirely excluded and that the Direktion I letter was intended to guard against it.

81 As regards, second, the alleged lack of competition on the German and French markets for gas before 2000, it must be borne in mind that, having regard to the requirements set out in Article 81(1) EC regarding effect on trade between Member States and repercussions on competition, that provision applies only to sectors open to competition (see, by analogy, as regards the similar conditions of Article 87(1) EC, Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraph 143).

82 In that regard, it should be pointed out that the examination of conditions of competition must be based not only on existing competition between undertakings already present on the relevant market but also on potential competition, in order to ascertain whether, in the light of the structure of the market and the economic and legal contexts within which it functions, there are real, concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to enter the relevant market and compete with established undertakings (Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 21; Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, paragraph 137; and Case T-461/07 *Visa Europe and Visa International Service* v *Commission* [2011] ECR II-1729, paragraph 68).

83 In order to determine whether an undertaking is a potential competitor on a market, the Commission is required to determine whether, if the agreement at issue had not applied, there would have been real, concrete possibilities for it to enter that market and to compete with established undertakings. Such a demonstration must not be based on a mere hypothesis, but must be supported by evidence or an analysis of the structures of the relevant market. Accordingly, an undertaking cannot be described as a potential competitor if its entry into a market is not an economically viable strategy (see, to that effect, *Visa Europe and Visa International Service* v *Commission*, paragraph 82 above, paragraphs 166 and 167).

84 It necessarily follows that, while the intention of an undertaking to enter a market may be of relevance in order to determine whether it can be considered to be a potential competitor on that market, none the less the essential factor on which such a description must be based is whether it has the ability to enter that market (*Visa Europe and Visa International Service* v *Commission*, paragraph 82 above, paragraph 168).

85 In the present case, the situation in respect of the French market for gas must be distinguished from that of the German market for gas.

86 As regards the French market, it is common ground that the monopoly on the import and supply of gas which the applicant had enjoyed since 1946 was abolished only on 1 January 2003, although the deadline for the transposition, into national law, of the first gas directive expired on 10 August 2000. Consequently, at least until the latter date, there was no competition, even potential, on the French market for gas and the conduct in question could not, as regards that market, be covered by Article 81 EC. As regards the situation that existed after that date, it will be examined under the third plea.

87 As regards the German market, the Commission refuted, in recital 30 of the contested decision, the claim that the applicant had never been a potential competitor of E.ON before the liberalisation. It stated in that regard that German law had never prohibited the entry into the market of new suppliers, but had simply permitted incumbent suppliers to erect significant barriers to entry by concluding agreements which were exempt from the application of the legislation on competition. Furthermore, the Commission stated that the exemption which those agreements enjoyed was not absolute, but subject to certain conditions. Agreements which were to be subject to an exemption had to be notified to the competent competition authority, which could prohibit an agreement if it took the view that it constituted a misuse of the legal exemption. Finally, relying on the cases of Wingas and of Mobil, the Commission pointed out that the possibility of competition despite the very significant barriers to entry was not just theoretical. It concluded that it was possible for the applicant to sell gas in the territory traditionally supplied by E.ON, despite considerable barriers to entry, with the result that it could be regarded as a potential competitor of E.ON throughout the period in question. The Commission also indicated, in recital 240 of the contested decision, that it disputed neither the existence of barriers to entry nor the fact that cross-border competition was only marginal between the incumbent operators. It further pointed out, in recital 294 of that decision, that neither the 1935 EnWG nor Paragraph 103 of the GWB provided for a legal monopoly for E.ON or any other incumbent operator in German territory.

88 The applicant contests those assessments, submitting that the German market for gas was totally closed to competition by means of legislative and regulatory barriers, the structure of that market and the lack of third-party access to the network, such that it did not compete with E.ON on that market.

89 It is necessary, in this regard, to draw a distinction between the period from 1980 to 1998, on the one hand, and the period from 1998 to 2000, on the other.

90 As regards, in the first place, the period from 1980 to 1998, it must be stated, first, that, until 1 January 1990, Paragraph 103(5) of the GWB provided that, as a general rule, the refusal of access to the network was not unfair if that request for access had the object of supplying gas to a customer located in the geographical area served by the distributor to which the request was addressed. It is true, as the Commission notes, that that form of presumption of legality of the refusal of access to the network applied only as a general rule and under certain conditions. However, as the applicant asserted, without it being disputed by the Commission, the Bundesgerichtshof (Federal Court of Justice, Germany) held, in a judgment of 15 November 1994 (NJW 1995, p. 2718), that, on the basis of Paragraph 103 of the GWB, in the version which applied prior to 1990, the exertion of control over abuses of a dominant position involving connections to the transmission network was in practice precluded.

91 Second, it must be stated that it is common ground that, until 24 April 1998, demarcation agreements, namely those by which public service companies agreed among themselves not to supply gas in a particular territory, and exclusive concession agreements, namely those by which a local authority granted an exclusive concession to a public service company allowing it to use public terrain to construct and operate gas distribution networks, were exempt under Paragraph 103(1) of the GWB from the provisions of that law prohibiting anti-competitive agreements.

92 It is true that it is apparent from recital 23 of the contested decision that, in order to be valid, those agreements had to be notified to the Bundeskartellamt, which had the power to prohibit them if it took the view that the agreements in question constituted a misuse of rights. Similarly, as the

Commission points out, no undertaking was obliged to participate in demarcation agreements, and those agreements bound only the contracting parties, with the result that they could not prohibit a third party, such as the applicant, from selling gas.

93 However, it is apparent from recital 24 of the contested decision that the simultaneous use of demarcation agreements and exclusive concession agreements had the effect of establishing de facto a system of areas of exclusive supply within which a single gas undertaking could supply customers with gas, although there was no legal prohibition against other companies supplying gas.

94 The Commission also admits, in recital 371 of the contested decision, that the incumbent German suppliers had a de facto monopoly in their respective areas of supply. It also confirms this in its written pleadings, where it admits the existence, between 1980 and 1998, of 'de facto territorial monopolies' or 'purely de facto monopolies'.

95 In those circumstances, it must be held that, at least until 24 April 1998, the German market for gas was characterised by the existence of de facto territorial monopolies. This partitioning of the German market for gas was, moreover, reinforced, during this period, by the circumstances described by the applicant, namely, first, that that market was structured on three levels constituting so many separate markets, which implied the need to conclude more than one transmission contract before reaching the end-customer, and, second, that there was no provision covering third-party access to the network.

96 It is clear that that situation, which existed on the German market for gas until 24 April 1998, was likely to result in the absence of any competition, not only actual, but also potential, on that market. In that regard, it must be pointed out that it has been held that a geographical monopoly which local gas distribution undertakings enjoyed precluded any competition between them (see, to that effect, Case T-87/05 *EDP* v *Commission* [2005] ECR II-3745, paragraph 117).

97 Neither the contested decision nor the case-file contains evidence capable of proving to the requisite legal standard that, if the agreement at issue had not applied and notwithstanding the characteristics of the German market for gas described in paragraphs 90 to 95 above, there would have been, until 24 April 1998, a real, concrete possibility for the applicant to enter the German gas market and to compete with the established undertakings as required by the case-law referred to in paragraphs 82 and 83 above.

98 Consequently, the fact referred to in recital 294 of the contested decision that there was, in Germany, no legal monopoly is irrelevant. In order to ascertain whether there is potential competition on a market, the Commission must examine the real, concrete possibilities for the undertakings concerned to compete among themselves or for a new competitor to enter that market and compete with established undertakings. That examination on the part of the Commission must be made on the objective basis of those possibilities, with the result that the fact that they are precluded on account of a monopoly which derives directly from national legislation or, indirectly, from the factual situation arising from the implementation of that legislation is irrelevant.

99 Furthermore, the statement, in recital 30 of the contested decision, that the applicant not only had the legal right to sell gas in the territory traditionally supplied by E.ON, but that that was factually possible (despite significant barriers to entry), cannot, as such, constitute a sufficient demonstration of the existence of potential competition. The purely theoretical possibility of the applicant's entry into the market is not sufficient to establish the existence of such competition. Furthermore, such a statement is based on a mere hypothesis and does not constitute a demonstration supported by factual evidence or an analysis of the structures of the relevant market, in accordance with the case-law referred to in paragraph 83 above, and the examples referred to in support of it are moreover irrelevant, as is apparent from paragraphs 102 and 103 below.

100 The same is true of the circumstances referred to in recital 240 of the contested decision that the undertakings in question were important players in the European gas sector and each had to be regarded as a natural new competitor on the other's market, or well-placed competitors which had in

principle every chance of succeeding in entering the neighbouring market, or that Germany and France were neighbouring and closely connected markets, which increased the chances of success. Such general and abstract information does not serve to show that, despite the competitive situation existing on the German market for gas, the applicant would have been in a position, if the agreement at issue had not applied, to enter that market.

101 The same is therefore true, for the same reasons, of the information, referred to in recital 240 of the contested decision, that the undertakings in question had the necessary strength, resources and infrastructure to enable them to enter the market and that the applicant's subsidiaries EEG and PEG and its minority share in GASAG and VNG constituted strong advantages for strengthening its position on that market.

102 The examples of Wingas and Mobil, which were referred to in recitals 30 and 243 of the contested decision in order to illustrate that it was possible to enter the German market for gas, do not appear to be relevant in supporting the Commission's argument, as the applicant submits, in essence, in the second series of arguments put forward in support of the second complaint in this part. First, it is clear from recital 30 of that decision that Wingas is a joint undertaking owned by BASF and Gazprom which succeeded in entering the German market for gas in the 1990s as a result of Gazprom's gas supplies and the construction of a vast network of new pipelines which ran parallel to those of E.ON and of other incumbent suppliers. According to the applicant, the Commission, in its decision of 29 September 1999 in Case IV/M.1383 — Exxon/Mobil ('the Exxon/Mobil decision'), stated that Wingas' experience was not likely to be repeated as that undertaking was a lucky combination between a very big (probably even the largest) German industrial gas consumer and a very big Russian producer (see recital 100 of the Exxon/Mobil decision). Furthermore, it is clear from the report on the Commission inquiry into the energy sector (SEC(2006) 1724), referred to by the applicant, that, in the context of that report, Wingas was considered to be an 'incumbent' and not a 'new entrant' given its unique position on the German market. Second, Mobil also entered the German market for gas in the 1990s by negotiating access to the networks of the incumbent operators of transmission networks. It is clear that the Commission itself stated that Mobil was in a somewhat atypical situation in Germany (see recital 251 of the Exxon/Mobil decision). It pointed out inter alia that that undertaking produced a substantial part of German gas and was a part of the German gas establishment and that that was probably, according to the Commission, the reason why Mobil had been able to import gas to Germany without having its own high-pressure pipeline network by means of a third-party access to the network. The Commission also stated that Mobil was in a unique position (see recital 219 of the Exxon/Mobil decision).

103 It is true, as the Commission maintains, that the applicant also enjoyed benefits and was not in a typical situation. However, having regard to the unique and specific nature of the situations of Wingas and Mobil, which the Commission itself acknowledged, those undertakings are not themselves capable of showing that there was a real, concrete possibility, for a new entrant, to penetrate the German market for gas and compete with the established undertakings. In this context, it must be noted that, as the applicant maintained, operators, namely [*confidential*], which were in the same situation as it — that is to say, dominant operators in a neighbouring country with a gas pipeline located in Germany — were unable to enter the German market for gas, which the Commission moreover acknowledges, while none the less noting that Mobil and Wingas entered that market.

104 In any event, the contested decision does not contain any evidence, even that of a general nature, to show that, during the period from 1 January 1980 to 24 April 1998, notwithstanding the circumstances implying the existence of regional monopolies on the German market for gas, the construction of throughput pipelines or the conclusion of agreements on access to the network with an incumbent operator on the route taken by the MEGAL gas pipeline was not an economically viable strategy, within the meaning of the case-law cited in paragraph 83 above, and represented a real, concrete possibility, for an operator such as the applicant, the co-owner of the MEGAL gas pipeline, to enter that market and compete with undertakings established on that market. In particular, there is

no evidence which permits the inference that the applicant's entry into the market could have taken place, by those means, sufficiently quickly for the threat of a potential entry to influence the conduct of the participants in the market, or on the basis of costs which would have been economically viable. It should be pointed out that the contested decision does not contain any information permitting the inference that the Commission carried out an examination of the existence of potential competition in accordance with the requirements of the case-law cited in paragraph 83 above.

105 In the light of the foregoing, it must be held that the Commission has not established that there was potential competition on the German market for gas from 1 January 1980 to 24 April 1998.

106 Moreover, by stating, in recital 372 of the contested decision, that, by repealing the exemption from competition law applicable to demarcation agreements on 24 April 1998, the German legislature clearly determined that the gas sector should be opened to competition after that date, the Commission tends to admit, at least implicitly, that, before that date, the German legislature itself took the view that the gas sector was not open to competition and, consequently, that there was no potential competition.

107 As regards, in the second place, the period from 24 April 1998 to 10 August 2000, it must be borne in mind that the restrictions stemming from the presumption of legality of the refusal of access to the network and the exemption applicable to demarcation agreements and exclusive concession agreements no longer existed during that period on account of the legislative amendments which had previously taken place.

108 The applicant, however, submits that, until 2000, there was no provision governing third-party access to the network in Germany, as the first agreements providing for third-party access to the network were not signed until that year.

109 In that regard, it must first be pointed out that the fact that there is no rule governing third-party access to the network as regards the transmission and distribution of gas is undoubtedly a barrier to entry into the German market for gas, but cannot imply that access is totally impossible, all the more so because, as is clear from paragraph 90 above, since 1 January 1990 the presumption of legality of the refusal of access to the network has been abolished. Thus the fact that, in the absence of rules governing third-party access to the network in Germany during the period in question, there was no requirement for an owner operating a network to grant access to one of its competitors does not mean that the possibility of negotiating such access was precluded. In any event, it is clear from the contested decision that, from 1 January 1999, a right of third-party access to the network follows from Paragraph 19(4)(4) of the GWB, on access to an essential infrastructure, which the applicant has not disputed.

110 As regards the structure of the German market, whilst it was also capable of constituting a barrier to entry into that market during the period from 24 April 1998 to 10 August 2000, the fact remains that there is no evidence to permit the inference that, during that period, which post-dates the legislative amendments made in 1998, it was capable, on its own or in conjunction with the absence of a rule governing third-party access to the network, of totally precluding any potential competition on the German market. Moreover, the applicant confines itself to alleging that that structure was a high barrier to entry, reinforced by the vertical integration of the supraregional wholesalers. It does not, however, claim that it prevented all access to the market.

111 In those circumstances, it is clear that there is no evidence to show that the Commission was wrong to find that there was potential competition on the German market for gas from 24 April 1998 to 10 August 2000.

112 In the light of all the foregoing, the first part of the plea must be upheld in so far as it relates to the period from 1 January 1980 to 24 April 1998 and rejected in so far as it relates to the period from 24 April 1998 to 10 August 2000.

113 As the first part of the plea is upheld only in part, the other parts put forward in support of this plea must still be examined in so far as they relate to the period from 24 April 1998 to 10 August 2000.

b) The second part

114 In this part of the plea, the applicant disputes the Commission's analysis that the cartel could have a significant effect, actual or potential, on trade in gas between France and Germany prior to August 2000.

115 In this regard, the applicant puts forward, in essence, two complaints, alleging, first, failure to state reasons and, second, an error of fact and of law.

– The first complaint

116 The applicant submits that the contested decision is vitiated by a failure to state reasons in that it has not been shown to what extent the cartel affected trade in gas between France and Germany from 1 January 1980 and that the conditions for the application of Article 81 EC were met on that date.

117 In this regard, it must be observed that the obligation to state reasons is an essential procedural requirement which must be distinguished from the question whether the statement of reasons is well founded, which goes to the substantive legality of the contested measure (see, to that effect, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67, and Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraph 54). According to settled case-law, the statement of the reasons on which a decision having adverse effect is based must make it possible to carry out an effective review of its legality and must provide the party concerned with details sufficient to allow that party to ascertain whether or not the decision is well founded. The adequacy of such a statement of reasons must be assessed in the context of the circumstances of the case, and in particular the content of the measure in question, the nature of the reasons relied on and the interest which addressees may have in obtaining explanations (Case T-38/92 *AWS Benelux* v *Commission* [1994] ECR II-211, paragraph 26, and Case T-310/94 *Gruber + Weber* v *Commission* [1998] ECR II-1043, paragraph 209).

118 In the present case, the Commission observed, in recital 261 of the contested decision, that, according to the case-law, for an agreement to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that it has an influence, direct or indirect, actual or potential, on the pattern of trade between Member States. It added in recital 262 of that decision that, in accordance with the Guidelines on the effect on trade concept contained in Articles 81 [EC] and 82 [EC] (OJ 2004 C 101, p. 81), market-sharing agreements which cover more than one Member State, by their very nature, are likely to harmonise competitive conditions, to affect the interpenetration of trade by diverting traditional trade patterns from their natural course, and thus to affect trade between Member States. The Commission then observed, in recital 263 of that decision, that the application of Article 81(1) EC to a market-sharing agreement and to a concerted practice is not limited to the share of the participants' sales which has actually involved a transfer of goods from one Member State to another and that the fact that, by their very nature, those goods are easily subject to cross-border trade gives a good indication as to whether trade between Member States is likely to be affected. It stated, in the same recital, that, in the present case, in tending to freeze the competitive situation prior to the liberalisation by limiting the supply of gas transported by the MEGAL gas pipeline, which is the principal means of importing natural gas to Germany and France, and therefore by preventing cross-border competition on the German and French markets for gas, the agreement and the anti-competitive conduct of the undertakings in question prevented them from seeking to do business on each other's home market and therefore had or at least was likely to have an appreciable effect on trade between Member States.

119 In these circumstances, it must be held that the Commission has demonstrated to the requisite legal standard the reasons for which it considered that the cartel had affected trade between France and Germany from 1 January 1980 and that the conditions for the application of Article 81 EC were fulfilled. In this regard, it must be observed that the contested decision also refers explicitly to the situation 'before the liberalisation', namely before 10 August 2000, such that the applicant is wrong to claim that the Commission's findings are confined to the period after that date.

120 The first complaint must therefore be rejected.

– The second complaint

121 The applicant argues that the decision is vitiated by an error of fact and of law. In its view, the side letters could have no appreciable actual or potential influence on trade between Germany and France before August 2000, given that the German and French markets were, de facto or de jure, closed to competition before that date, such that the trade in natural gas between those countries would have been no different in the absence of the practices in question.

122 In that regard, it must be borne in mind that Article 81(1) EC applies only to agreements which may affect trade between Member States. According to settled case-law, for an agreement, decision or practice to be capable of affecting trade between Member States, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors of law or of fact, that they have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States in such a way as to cause concern that they might hinder the attainment of a single market between Member States (see Case C-238/05 *Asnef-Equifax and Administración del Estado* [2006] ECR I-11125, paragraph 34 and the case-law cited).

123 Thus an effect on intra-Community trade is normally the result of a combination of several factors which, taken separately, are not necessarily decisive. In order to assess whether an arrangement has an appreciable effect on trade between Member States, it is necessary to examine it in its economic and legal context (see *Asnef-Equifax and Administración del Estado*, paragraph 122 above, paragraph 35 and the case-law cited). It is of little importance in that regard that the influence of a cartel on trade is unfavourable, neutral or favourable. A restriction of competition is liable to affect trade between Member States when it is likely to divert trade patterns from the course which they would otherwise have followed (see, to that effect, Joined Cases 209/78 to 215/78 and 218/78 *van Landewyck and Others* v *Commission* [1980] ECR 3125, paragraph 172).

124 Furthermore, the capability of a cartel to affect trade between Member States, that is to say, its potential effect, is sufficient for it to fall within the scope of Article 81 EC and it is not necessary to demonstrate an actual effect on trade (Joined Cases C-215/96 and C-216/96 *Bagnasco and Others* [1999] ECR I-135, paragraph 48, and Joined Cases T-259/02 to T-264/02 and T-271/02 *Raiffeisen Zentralbank Österreich and Others* v *Commission* [2006] ECR II-5169, paragraph 166). It is none the less necessary for the potential effect of the cartel on inter-State trade to be appreciable, or, in other words, that it be not insignificant (see, to that effect, Case C-306/96 *Javico* [1998] ECR I-1983, paragraphs 12 and 17).

125 A cartel extending over the whole of the territory of a Member State, moreover, has, by its very nature, the effect of reinforcing the partitioning of markets on a national basis, thus impeding the economic interpenetration which the EC Treaty is designed to bring about (*Asnef-Equifax and Administración del Estado*, paragraph 122 above, paragraph 37).

126 In the present case, it must be stated that, since it has not been established that there was potential competition on the German market for gas from 1 January 1980 to 24 April 1998 (see paragraphs 104 and 105 above) and since it is common ground that the French market was closed to competition until at least August 2000, the Commission erred in finding that the agreement and practices at issue had been capable of having an appreciable effect on trade between Member States prior to 24 April 1998.

127 That is particularly the case given that the Commission based its finding in that regard, as is apparent from recital 263 of the contested decision, inter alia on the fact that that agreement and those practices prevented cross-border competition on the German and French markets for gas. Since there was no competition on those two markets, no competition could be prevented and consequently trade between Member States could not be affected.

128 As regards the period from 24 April 1998 to 10 August 2000, the present complaint must, by contrast, be rejected, since the existence of potential competition on the German market for gas has not been reasonably called into question (see paragraph 111 above), and the restriction thereof was therefore capable of having an appreciable effect on trade between Member States.

129 These considerations are not invalidated by the applicant's arguments based on the guidelines on the effect on trade concept contained in Articles 81 EC and 82 EC. The applicant in fact disputes the statements which appear in recital 262 of the contested decision (see paragraph 118 above), arguing that the absence of a prospect of liberalisation and of completing the internal market in gas before (at least) August 2000 is an objective factor, within the meaning of the case-law, precluding, with an adequate degree of likelihood, the market-sharing agreement in question exerting an appreciable effect on trade between Member States. As observed during the examination of the first part, on the date when the side letters were signed, the prospect of liberalisation could not be precluded in the long term (see paragraph 80 above). Moreover, the fact that the internal market for gas had not been completed did not, of itself, preclude the existence of intra-Community trade in gas which might be affected, as such trade could indeed exist despite the fact that the internal market had not been completed. The applicant's objection must therefore be rejected. The Court also rejects the argument based on the fact that the guidelines state that '[i]f there are absolute barriers to cross-border trade between Member States, which are external to the agreement or practice, trade is only capable of being affected if those barriers are likely to disappear in the foreseeable future', since the abolition of those barriers was not excluded in the long term.

130 It follows from the foregoing that the second complaint raised under the second part of this plea must be upheld in part and also, therefore, the second part, in so far as it relates to the period from 1 January 1980 to 24 April 1998. This part must, on the other hand, be rejected in so far as it relates to the period from 24 April 1998 to 10 August 2000.

c) The third part

131 In this part of the plea, the applicant alleges that the contested decision infringes Article 81 EC, the rules on the taking of evidence and the duty to state reasons, based on the lack of evidence concerning the existence of the alleged infringement between January 1980 and February 1999.

132 In this regard, it must be noted, as a preliminary point, that, since the Commission ignored the existence of an infringement committed in France prior to 10 August 2000 and since it follows from the examination of the first part that it erred in finding that an infringement was committed in Germany between 1 January 1980 and 24 April 1998, the examination of this part of the plea must be limited to the period between the latter date and February 1999.

133 Next, it must be observed that, in the context of a complex infringement which has involved many producers seeking over a number of years to regulate the market between them, the Commission cannot be expected to classify the infringement precisely, for each undertaking and for any given moment, as an agreement or a concerted practice, as in any event both those forms of infringement are covered by Article 81 EC (Joined Cases T-305/94 to T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 696).

134 The Commission is therefore entitled to classify that type of complex infringement as an agreement 'and/or' concerted practice, inasmuch as the infringement includes elements which are to be classified as an 'agreement' and elements which are to be classified as a 'concerted practice' (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 133 above, paragraph 697).

135 In such a situation, the dual characterisation has to be understood not as requiring, simultaneously and cumulatively, proof that each of those factual elements presented the constituent elements both of an agreement and of a concerted practice, but rather as referring to a complex whole comprising a number of factual elements some of which are characterised as agreements and others as concerted practices for the purposes of Article 81(1) EC, which lays down no specific category for a complex infringement of this type (*Limburgse Vinyl Maatschappij and Others* v *Commission*, paragraph 133 above, paragraph 698).

136 Moreover, it is settled case-law that the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (see Case C-105/04 P *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission* [2006] ECR I-8725, paragraphs 94 and 135 and the case-law cited).

137 Such indicia and coincidences serve to reveal not just the existence of anti-competitive practices or agreements, but also the duration of a continuous anti-competitive practice or the period of application of an agreement concluded in breach of the competition rules (*Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 136 above, paragraph 95).

138 It should, finally, be borne in mind that the requirement of legal certainty, on which economic operators are entitled to rely, entails that when there is a dispute concerning the existence of an infringement of competition law the Commission, which bears the burden of proving infringements which it finds, must adduce evidence which will sufficiently establish the existence of the facts constituting the infringement. With specific regard to the alleged duration of an infringement, the same principle of legal certainty requires that, if there is no evidence directly establishing the duration of an infringement, the Commission should adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that that infringement continued uninterruptedly between two specific dates (Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79).

139 In the present case, the Commission found, as is apparent from recital 211 of the contested decision, that the conduct of the undertakings in question, which consisted of an initial market-sharing agreement and of concerted practices in the form of periodic meetings designed to reach agreement and to implement that initial agreement for a period of more than 25 years, constituted a single and continuous infringement and a 'restriction of competition by object'. It pointed out that it would be artificial to split up such continuous conduct, characterised by a single purpose, by treating it as consisting of several separate infringements, when what was involved was a single infringement which progressively manifested itself in both agreements and concerted practices.

140 As the applicant stated, the Commission produced no evidence concerning the infringement in question as regards the period between January 1980 and 4 February 1999. That is not disputed by the Commission, which accepts, in the defence, that, apart from the side letters, it did not produce specific evidence prior to 1999. In that regard, the Court rejects from the outset the Commission's explanation that it did not consider it necessary, having seized documents dating from after 1999 during its inspections, to ask the undertakings in question for earlier documents. It is unacceptable that the Commission should rely on its own failure in the collection of evidence as justification for failing to fulfil the obligations incumbent on it in that regard.

141 However, the fact that evidence of the existence of a continuous infringement was not produced for certain specific periods does not preclude the infringement being regarded as established during a longer overall period than those periods provided that such a finding is supported by objective and consistent indicia (see, to that effect, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 136 above, paragraph 98).

142 It must be borne in mind that, as is evident from the contested decision, in 1975 the undertakings in question concluded a written market-sharing agreement comprising the MEGAL agreement, its appendices and the side letters and consisting of an undertaking not to penetrate — or to penetrate only in a limited manner — each other's home market and thus to protect their home markets by not selling on the other's home market the gas transported by the MEGAL gas pipeline. As is clear from this judgment, taken as a whole, none of the arguments put forward by the applicant calls this finding into question. The agreement was not concluded for a fixed period, and no provision of the agreement gives a date for its expiry.

143 There is nothing to indicate that the MEGAL agreement, its appendices and the side letters were cancelled prior to 1999. Moreover, the applicant did not produce any evidence from before that date to that effect. It must be specified, in this context, that the fact that, following the examination of the first part of this plea, the Court annuls Article 1 of the contested decision in so far as it finds the existence of an infringement committed in Germany prior to 1998 does not, as such, call into question the existence of the market-sharing agreement but the date on which it became an infringement. As for the fact that the 2004 agreement states that the undertakings in question had 'long' regarded the 1975 side letters as 'null and void', it cannot give any precise indication from which to infer that the agreement in question in the present case was cancelled before 1999. On the contrary, it follows from documents from after that date, and in particular from the emails from the applicant's legal department dated 9 and 17 February 2000, which refer expressly to the Direktion G and Direktion I letters, the evidential value of which is analysed in paragraph 163 below, that the applicant continued to refer to that agreement, which indicates that, in 2000, it had not been cancelled.

144 In these circumstances, the MEGAL agreement, its appendices and the side letters should be regarded as having been in force between 1975 and 1999, thus during the period relevant for the purposes of examining the present part as defined in paragraph 132 above, namely between 1998 and 1999, so that there was no need for the Commission to produce additional evidence concerning their implementation during that period. In this regard, it must be pointed out that the situation at issue in the present case differs from that which resulted in the *Dunlop Slazenger* v *Commission* judgment, paragraph 138 above, which the applicant cites. In that case, the Commission established in particular the existence of two letters dating respectively from 1977 and 1985, by which the undertaking in question agreed not to export. The Court found that, since it was unable to rely on evidence supporting the continuous nature, between 1977 and 1985, of that undertaking's alleged infringement, the Commission had not established to the requisite legal standard that the infringement must have started in 1977. However, unlike in the present case, the 1977 letter, as is clear from paragraph 45 of that judgment, related to a one-off offer and was not a measure of unspecified duration as in the case of the MEGAL agreement and the side letters.

145 It follows that the third part of this plea must be rejected.

146 It follows from all the foregoing that the first and second parts of the present plea must be upheld in part and that the third must be rejected.

147 Consequently, Article 1 of the contested decision must be annulled inasmuch as it finds the existence of an infringement committed in Germany between 1 January 1980 and 24 April 1998.

2. *The second plea, alleging errors of fact and of law in the application of Article 81 EC as regards the existence of an agreement and/or of a concerted practice after August 2000*

148 This plea, by which the applicant alleges that the Commission made errors of fact and of law in the application of Article 81 EC as regards the existence of an agreement and/or of a concerted practice after August 2000, is divided into four parts, alleging, first, infringement of Article 81 EC based on the

lack of a single and continuous infringement between 1 January 1980 and 30 September 2005 and, consequently, the time-barring of the side letters, second, infringement of Article 81 EC and of the rules on the taking of evidence based on the absence of a concurrence of wills between the undertakings in question to apply the side letters after August 2000, third, infringement of Article 81 EC based on a manifest error of assessment of the meetings and exchanges between the undertakings in question between 1999 and 2005 and, fourth, an infringement of Article 81 EC and of the duty to state reasons based on an error in the assessment of the autonomy of the applicant's conduct in Germany and of E.ON's conduct in France.

149 The first part should be examined last.

a) The second part

150 In this part of the plea, the applicant alleges that the Commission failed to demonstrate to the requisite legal standard the existence of a concurrence of wills between the undertakings in question in applying the side letters after August 2000.

151 In this regard, it must be borne in mind that it is incumbent on the Commission to prove the infringements found by it and to adduce evidence capable of demonstrating to the requisite legal standard the existence of the circumstances constituting an infringement (see *JFE Engineering and Others* v *Commission*, paragraph 70 above, paragraph 173 and the case-law cited).

152 Moreover, in proceedings for annulment brought under Article 230 EC, all that is required of the European Union judicature is to verify the legality of the contested measure (*JFE Engineering and Others* v *Commission*, paragraph 70 above, paragraph 174).

153 Thus, the role of a Court hearing an application for annulment brought against a Commission decision finding the existence of an infringement of the competition rules and imposing fines on the addressees consists in assessing whether the evidence and other information relied on by the Commission in its decision are sufficient to establish the existence of the alleged infringement (see *JFE Engineering and Others* v *Commission*, paragraph 70 above, paragraph 175 and the case-law cited).

154 Furthermore, it must be borne in mind that, where there is doubt on the part of the Court, the benefit of that doubt must be given to the undertakings accused of the infringement. The Court cannot therefore conclude that the Commission has established the existence of the infringement at issue to the requisite legal standard if it still entertains doubts on that point, in particular in proceedings for the annulment of a decision imposing a fine (see *JFE Engineering and Others* v *Commission*, paragraph 70 above, paragraph 177 and the case-law cited).

155 Consequently, the Commission must produce sufficiently precise and consistent evidence to support the firm conviction that the alleged infringement took place (see *JFE Engineering and Others* v *Commission*, paragraph 70 above, paragraph 179 and the case-law cited).

156 However, it is not necessary for every item of evidence produced by the Commission to satisfy those criteria in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on by the institution, viewed as a whole, meets that requirement (see *JFE Engineering and Others* v *Commission*, paragraph 70 above, paragraph 180 and the case-law cited).

157 In the present case, it is apparent from recital 163 of the contested decision that the Commission considered that the undertakings in question concluded, in 1975, an agreement under which the applicant would not sell gas transported by the MEGAL gas pipeline to customers in Germany and that E.ON would not sell gas transported by the MEGAL gas pipeline in France. It took the view that, when the European markets for gas had been opened up and, consequently, when the market-sharing

agreement was 'likely to have an appreciable effect on the market in 1998/2000', those undertakings did not officially terminate that agreement and did not explicitly declare it obsolete. In that regard, it observed that both the internal documents of the undertakings in question and the exchanges between them show that they considered that the ban on the applicant using the outlet points on the MEGAL gas pipeline in Germany and the ban on E.ON transporting gas to France by that gas pipeline were binding.

158 The three complaints put forward by the applicant in support of the first part, based, first, on breach of the principle of the presumption of innocence and lack of evidential value of the side letters after August 2000, second, on lack of evidential value of the evidence adduced by the Commission to demonstrate that the undertakings in question reached agreement to consider those letters binding after that date and, third, on the fact that the applicant produced evidence demonstrating the 'abandonment' of the side letters after the liberalisation, must be examined in the light of the above factors.

159 To that end, it appears expedient to examine, first, the second complaint, followed by the third and, finally, the first complaint.

– The second complaint

160 The applicant alleges, in essence, that the evidence on which the Commission relied is imprecise and ambiguous and does not suffice to substantiate a concurrence of wills capable of constituting the agreement in question, namely the application of the side letters, after the liberalisation.

161 In that regard, it must be borne in mind that, in order to assess the probative value of a document, regard should be had first and foremost to the credibility of the account it contains and, in particular, to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears sound and reliable (see Joined Cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP *Dresdner Bank and Others* v *Commission* ECR II-3567, paragraph 121 and the case-law cited).

162 In the present case, there is nothing to call into question the evidential value of the documents that the Commission relied on in finding the side letters to be binding after August 2000.

163 In the first place, as regards the documents from the applicant's legal department, it must be observed that, in recitals 64 and 65 of the contested decision, the Commission referred to the content of a note of 3 December 1999 and emails of 9 and 17 February 2000. As regards, first, the note of 3 December 1999, it is clear, in essence, from it that that legal department considered that the applicant could not avail itself of the new legal environment as regards the liberalisation to supply customers in Germany with gas transported by the MEGAL gas pipeline. According to that note, if the applicant were able to use the gas in transit to supply such customers, that would subvert the agreements on that pipeline. As regards, second, the emails of 9 and 17 February 2000, as the Commission noted, they refer expressly to the Direktion G and Direktion I letters. They state that the first of those letters is akin to a 'vast sharing of the market' between the undertakings in question, 'which raises the issue of the legal value of such a document (void!)' and that, by the second of those letters, described as 'superb', those undertakings agree that the applicant is not to deliver gas (directly or indirectly) to customers in Germany. In this regard, the applicant's argument that those emails confirm the difficulties in interpreting the side letters must be rejected. It is true that those emails show that the applicant's legal department questioned whether E.ON could transport gas for third parties via the MEGAL gas pipeline and stated that, in the past, its reading of the letters in question had been favourable to E.ON, namely that it could require a third party wishing to transport gas using that pipeline to enter into a contract with it. However, it remains the case that the analysis of the side letters concerned, carried out by the applicant's legal department, regarding the restrictions they imply, is explicit and

quite unambiguous, as is apparent from the wording of those documents. In those circumstances, the Commission did not err in relying on those three documents in reaching the view, in essence, on that basis, that the applicant was aware of the unlawful nature of the agreement but that it continued to comply with it, as indicated in point 4.2.2.2 of the contested decision.

164 In the second place, regarding the notes made by E.ON on the meetings of 4 February and 24 June 1999, it is clear, first, from the note on the first of those meetings that E.ON noted with concern certain remarks made at previous meetings to the effect that some people within the applicant were considering at least a separate marketing of gas via the MEGAL gas pipeline in Germany. According to that document, the applicant stated in reply that its aim was to optimise its position as transporter and shareholder and that, in the event of new rules on third-party access to the network entering into force, it would have to defend its interests whilst taking into account the close historical link with E.ON. It also promised to keep E.ON well informed of its thoughts. It is clear, second, from the note on the second meeting that the applicant stated that it was considering the possibility of taking up commercial opportunities in Germany, although that was not directed against E.ON. According to this note, it also mentioned that, under the current contractual regime for the MEGAL gas pipeline, it could use the pipeline only as a transit line and was not authorised to remove gas in Germany. E.ON replied, in this regard, that the applicant having an option to withdraw gas from the MEGAL gas pipeline would involve a general amendment to the MEGAL contractual framework. This confirms not only that the applicant attempted to reassure E.ON regarding its intentions in Germany, but also that the undertakings in question considered themselves to be bound by the provisions of the agreement in question.

165 The Commission did not therefore err in finding, in recital 70 of the contested decision, that, although they are capable of demonstrating that E.ON considered that some people within the applicant were considering penetrating the southern German market, those documents also show that E.ON attempted to dissuade the applicant, which promised to consider the close historical link with E.ON and to keep it well informed of its thoughts. In the light of the wording of those documents, the Commission also rightly took the view that the undertakings in question had agreed that any entry by the applicant into the market in the area of the MEGAL gas pipeline should be subject to their agreeing a common position.

166 It is true that, as the applicant observes, neither of the two documents refers explicitly to upholding the side letters. However, it is clear from them, and in particular from the document on the meeting of 24 June 1999, that the undertakings in question still considered themselves to be bound by the contractual framework on the MEGAL gas pipeline, of which the side letters were an integral part, and by the restrictions that those letters implied as regards the possibility of the applicant taking gas from that gas pipeline in Germany. In any event, contrary to what the applicant would have one believe, it does not appear from recitals 67 to 70 of the contested decision that the Commission used those documents to demonstrate that the undertakings considered those letters to be binding, since the conclusions appearing in recital 70 dealt neither with their being obsolete nor with their binding nature. Finally, as regards point 4.2.2.4 of the contested decision, in which it is stated that '[the applicant] promises not to clash with [E.ON] in Germany', it must be pointed out that, although such a consideration may appear simplistic, it is not altogether incorrect, since the documents in question demonstrate that the applicant intended to consider its relationship with E.ON and keep it informed of its thoughts on possible sales in Germany and that the commercial opportunities it proposed to take up would not be directed against E.ON.

167 In the third place, as regards E.ON's internal note of 8 June 2001, which was written with a view to a meeting with the applicant on 12 June 2001, the Commission inferred from it, as is apparent from recital 77 of the contested decision, that E.ON was aware of the fact that the ban prohibiting the applicant from taking gas from the MEGAL gas pipeline infringed competition law. In that regard, it must be said that that note exists in the context, in particular, of discussions on the restructuring of the contractual framework for the MEGAL gas pipeline. It follows that, in the context of the new

model referred to, it was anticipated that the applicant would benefit from an inlet and outlet right along the MEGAL gas pipeline, which in practice could not in any case be legally refused under the GWB or the EnWG. E.ON was therefore well aware that the German legislation meant that the applicant could not be refused the right to take gas from the MEGAL gas pipeline. It is only in the future context of the renegotiation of the MEGAL agreement, with the introduction of the concept of beneficial use, that granting such a right to the applicant was envisaged. In any event, it also follows from that note that the applicant wanted to be able to benefit from outlet points on the MEGAL gas pipeline in Germany, which therefore implies that it did not benefit from such outlet points under the existing contractual framework. The applicant was therefore wrong in claiming that the Commission should have found that it was clear from that note that the side letters were no longer in force.

168 In the fourth place, as regards the exchange of letters between the undertakings in question on 13 and 21 May 2002, the Commission found, in recital 81 of the contested decision, that it confirmed that E.ON considered the Direktion G letter to be binding and that none of the undertakings in question had suggested that that letter and the Direktion I letter were obsolete. In this context, it must be observed that the letter sent by E.ON to the applicant on 21 May 2002, in reply to its letter of 13 May 2002, refers expressly to the Direktion G letter, stating that the transport carried out for another undertaking through the MEGAL gas pipeline is in full accordance with that letter. If that letter had been regarded as obsolete and as not binding the undertakings in question, E.ON would not have stated that the transport in question was in accordance with it. The fact, mentioned by the applicant, that it did not refer to the Direktion G or Direktion I letters in its letter of 13 May 2002 does not conclusively demonstrate the obsolescence of those provisions or the absence of a concurrence of wills. Even if the applicant did not in fact refer to them in that letter, it remains the case, as the Commission asserted in recital 83 of the contested decision, that E.ON would not have relied on the Direktion G letter in claiming that it was entitled to provide transport for one of its customers if that letter had not previously been invoked as prohibiting that type of transport. In any event, even assuming that E.ON might have referred unilaterally to that letter, first, that would have no effect on the conclusion that the letter appeared to be binding at least on that undertaking and, second, that would not mean that the side letters were no longer binding on the applicant. As regards the applicant's statement that E.ON referred to the Direktion G letter to reinforce its negotiating position as regards its right to provide transport for third parties, it is in any case not capable of undermining the conclusions reached by the Commission. Finally, the applicant's argument that the exchange of letters refers to the conditions of third-party transport and not to market sharing does not call into question the fact that that exchange also highlights the binding nature, at least for E.ON, of the Direktion G letter or support the view that the applicant regarded the side letters as obsolete. After all, in view of its wording, it could be inferred from the exchange in question, as the Commission stated in recital 83 of the contested decision, that the applicant considered that the MEGAL agreement, as it applied at the time, prohibited E.ON from supplying gas in France via the MEGAL gas pipeline, even for the account of a third party. This position is, moreover, in accordance with the interpretation of the Direktion G letter provided to the applicant by its legal department, which is set out in the emails of 9 and 17 February 2000.

169 In the fifth place, as regards E.ON's minutes of the meeting of 23 May 2000, the email from E.ON of 27 February 2003 and E.ON's minutes of a meeting of 19 February 2004, it must, as a preliminary point, be pointed out that, as the applicant asserts, none of these documents refers specifically to the side letters. However, the Commission did not claim, in the contested decision, that that was the case.

170 It must then be observed that it follows clearly from E.ON's minutes of a meeting of 23 May 2002 between managers from E.ON and the applicant, that, at that meeting, the applicant gave an assurance that it did not, at that time, intend to sell gas taken from the MEGAL gas pipeline in the south of Germany. Moreover, the email of 27 February 2003, addressed by an E.ON manager in France to an E.ON director in Germany, refers to a private meeting held by the former with a manager from the applicant. It follows that the manager from the applicant stated, in particular, at that meeting, that the applicant appeared convinced that it had to conduct itself well in approaching the

German market. It is also apparent that, even if the applicant could attempt to sell gas in the E.ON area, that would be done to investigate the market rather than to carry out a direct frontal attack. Finally, it is clear from E.ON's minutes of a meeting of 19 February 2004 between representatives of the applicant and of E.ON that, during that meeting, the applicant indicated to E.ON that it understood that the latter was and wished to remain the principal supplier for [*confidential*] and that it intended to respect E.ON's current supply contracts.

171 In those circumstances, it is evident that it follows clearly from those three documents, read as a whole, that the undertakings in question exchanged information on their development strategies and, in particular, that the applicant made known its intention not to carry out a frontal attack on E.ON on the German market and not to sell gas in the south of Germany. That being so, even if they do not refer directly to the side letters, these documents demonstrate that the undertakings in question complied with the market sharing that resulted from the MEGAL agreement and the abovementioned letters. The applicant's allegation that the statements reported by those documents do not relate to the alleged infringement must therefore be rejected.

172 As regards the evidential value of these documents, it must be pointed out, in relation to the fact, mentioned by the applicant, that they are internal E.ON documents which are not corroborated by exchanges between the undertakings in question, that the relevance of that fact will be refuted in paragraphs 224 to 226 below. What is more, it should be noted that these documents were drawn up by E.ON services following meetings or interviews which were held between representatives of the undertakings in question. They are, moreover, addressed to E.ON managers. Furthermore, the information they contain, which is precise and not vague, as the applicant alleges, tends to corroborate and confirm the existence of market sharing. In these circumstances, these documents must be considered to be sound and reliable and not, as the applicant alleges, as having little or no evidential value. As for the fact that one of those documents, namely the email of 27 February 2003, reports the statements made during a private conversation, there is nothing to indicate that they are wrong, and the precision of the wording in fact tends to demonstrate that they are true. Finally, there is nothing to indicate that those who wrote these documents, in particular the email of 27 February 2003, gave a personal interpretation of the facts or had a personal interest in embellishing those facts in order to present their superiors with a result in accordance with their expectations, as was the case in *Dresdner Bank and Others* v *Commission*, paragraph 161 above, paragraph 132, which is referred to by the applicant.

173 In the sixth place, as regards the email of 16 March 2004, it must be pointed out that, by that email, E.ON's head of sales in France informed two of E.ON's employees in Germany of a meeting which he had had with one of the applicant's employees (who is one of his former classmates) on the gas release issue in France and the possible interest of E.ON and the applicant's looking into solutions to enable 'reasoned competition'. It is apparent from that email that, although the applicant did not want to seem to be afraid of the pressure from the national energy regulatory authority, it was not ignoring it and did not like to be too openly the subject of criticism and that therefore, if something could be done to show that new entrants could have access to the south of France, it would view it positively. It is also apparent from that email that, as the applicant wished to satisfy that authority, its employee suggested a swap whereby the applicant would make gas available to E.ON in the south of France zone in return for something. In that connection, according to the email, he was thinking mainly of the issues surrounding MEGAL. It is also apparent from that email that the applicant's employee stated that, according to his knowledge of the MEGAL agreement, all the existing MEGAL capacity at Medelsheim was booked by the applicant, with the result that in fact even the volumes which E.ON was, at that time, importing were illegal.

174 In the present case, first, contrary to the applicant's claim, there is nothing to indicate that that email merely reflects the personal feelings of its author. Indeed, it follows clearly from the wording of the document that that author, E.ON's head of sales in France, intends to report to the German E.ON management the information he obtained during a private meeting with an employee of the applicant

and not his own interpretation of the discussion. That discussion appears in fact to reflect the applicant's position and not that of its employee who attended the meeting in question. That meeting was, moreover, held at the request of the applicant's employee, who wished to have a discussion before a high-level meeting which was to take place later between the undertakings in question and which related to issues of direct concern to the applicant, namely the issues of gas release in France and the possible interest of the undertakings in question in exploring solutions which would permit 'reasoned competition'. In addition, the statements reported are sufficiently explicit and detailed that there is no ambiguity as to their interpretation. It was not therefore necessary, for that document to be taken into account, that it be sent to the applicant so that it could distance itself from it, a possibility considered in the judgment in *Dresdner Bank and Others* v *Commission*, paragraph 161 above, to which the applicant referred. Furthermore, as will be observed in paragraph 225 below, the applicant is wrong to submit that it follows from that judgment that a report of a meeting consisting of a note for purely internal use which was not sent to it until the administrative procedure has extremely poor evidential value.

175 Second, the applicant claims that the plausibility of the statements reported was subject to caution. It does not, however, put forward any evidence in the application in support of that allegation and confines itself to referring to its response to the statement of objections. Whilst the body of the application may be supported and supplemented on specific points by references to certain extracts from documents annexed to it, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential submissions in law which must appear in the application (Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17, and order in Case T-154/98 *Asia Motor France and Others* v *Commission* [1999] ECR II-1703, paragraph 49). As it is not supported by any other evidence in the application, the applicant's allegation must therefore be rejected. Moreover, in the light of the capacity of those who wrote and reported them, as well as their content and in particular their precision, those statements appear to be genuine, sound and reliable.

176 Third, in any event, that document, which moreover refers explicitly to the 'MEGAL agreements', corroborates the conclusions which may be drawn from other documents on which the Commission relies in claiming the existence of an agreement to share the German and French markets for gas. Thus, contrary to the applicant's claim, that document may be relied on to prove the infringement in question. The applicant's argument based on that document must therefore be rejected.

177 In the seventh place, as regards the additional documents taken into account after the statement of objections, the applicant confines itself to stating that it has demonstrated their lack of precision and their ambiguity, without, however, indicating to what extent the Commission made an error in their interpretation. In any event, it must be stated that the Commission confined itself to citing those documents in footnote 98 to the contested decision by way of examples which, like an email of 21 July 2004 cited in recital 102 of the contested decision, also supported its statement that internal documents from the applicant showed that it considered that it was unable to take gas from the MEGAL gas pipeline because of the terms of a contract with E.ON, although it had considered doing so. The applicant's argument concerning these additional documents must also therefore be rejected.

178 In the eighth place, the applicant's line of argument that it provided another coherent explanation of the evidence relied on by the Commission or that, where evidence is unclear and must be interpreted, the parties are free to substitute a plausible explanation of the facts for that put forward by the Commission must be rejected. In fact, the case-law on which that line of argument is based relates to circumstances in which the Commission relies solely on the conduct of the undertakings in question on the market in finding that an infringement has been committed. In the present case, the Commission relied on multiple items of documentary evidence to support its finding of the existence of an anti-competitive agreement. Moreover, those items of evidence are not unclear and are sufficiently free of ambiguity. It follows that the case-law invoked by the applicant cannot be relevant here unless the Commission has failed to establish the existence of the infringement on the basis of the documentary evidence adduced by it (see, to that effect, *JFE Engineering and Others* v

Commission, paragraph 70 above, paragraphs 186 and 187 and the case-law cited). However, as regards the foregoing, that is not the case, since the evidence adduced by the Commission, read in combination with the MEGAL agreement, its appendices and the side letters, was sufficient to justify its assessment.

179 It follows that none of the applicant's arguments calls into question the Commission's conclusion that both the internal documents from the undertakings in question and the exchanges between them show that they considered that the ban on the applicant using the outlet points from the MEGAL gas pipeline in Germany and the ban on E.ON transporting gas by that pipeline in France were binding. Moreover, the indicia advanced by the Commission in that regard, taken as a whole, suffice to justify its assessment.

180 It follows that the second complaint must be rejected.

– The third complaint

181 The applicant submits that it demonstrated, first, that the undertakings in question had officially and explicitly declared the side letters obsolete from the date of the liberalisation and had reiterated that position on several occasions and, second, that those undertakings, from that date, no longer considered themselves bound by those letters. In its view, the Commission failed to take account of that evidence or manifestly erred in its assessment.

182 In the first place, as regards the alleged declaration that the side letters were obsolete, it should be borne in mind that, in recital 163 of the contested decision, the Commission found that, when the European gas markets were opened up to competition, the undertakings in question did not terminate the agreement in question and did not explicitly declare those letters obsolete.

183 First, the applicant alleges that, on 7 January 2002, E.ON sent it a fax listing the MEGAL agreements and setting out how they were to be treated. It stated, in particular, that the Direktion G and Direktion I letters must be regarded as 'obsolete', which demonstrated that the undertakings in question officially considered the side letters to be non-binding in the new regulatory context.

184 In that regard, it must first of all be pointed out that the fax sent by E.ON to the applicant on 7 January 2002 followed a meeting between the undertakings in question which took place on 14 December 2001, the aim of which, according to the applicant, was to place the MEGAL agreement in the new regulatory context. Moreover, the flyleaf of that fax states that a draft list of existing agreements between the undertakings in question and the treatment to be given to the respective provisions within the 'beneficial use' concept is annexed to it. A list of the provisions of the MEGAL agreement, the appendices to it and the side letters, including the Direktion G and Direktion I letters, is annexed to the fax concerned. That annex bears the words 'New structure MEGAL; transformation of the basic agreement and all relating contracts into a new consortium agreement' at the top of each page. The Direktion G letter is described in that annex as having as its subject-matter 'the capacity commitments' of the undertakings in question, and the question is raised of whether or not there may be 'transportation agreements by MEGAL with third parties'. The Direktion I letter is described in that annex as having as its subject-matter the fact that there will be 'no delivery or supply by [the applicant] in Germany'. Concerning the treatment to be given to those letters, the fax has the word 'obsolete' opposite the names of the letters.

185 Read as a whole and having regard to its context, it must be held that, far from stating that the undertakings in question regarded the Direktion G and Direktion I letters as already obsolete, the fax that E.ON sent to the applicant on 7 January 2002 merely states that those undertakings envisaged that those letters would be obsolete in the context of a new agreement which was being negotiated. In fact, the word 'obsolete' indicates that the undertakings in question took the view that it was not necessary to insert such clauses in that new agreement. That is borne out by the fact that, in respect

of those provisions for which the treatment mentioned is not 'obsolete', it is expressly stated that they must be inserted into the new agreement or in the appendices to it, if necessary by altering them. In addition, the flyleaf of that fax states that the fax concerns 'existing agreements'. The Commission was therefore right to find, in recital 80 of the contested decision, that that fax referred to the role that those side letters were to play in the future in the context of the new MEGAL agreement and of the 'beneficial use' concept. The fact, mentioned by the applicant, that the list attached to the fax concerned refers to other side letters which, in its view, were obsolete on the date of the fax, is irrelevant in this regard. Therefore, as the Commission found in recital 80 of the contested decision, it cannot be inferred from the fax in question that the undertakings in question regarded the Direktion G and Direktion I letters as obsolete on the date on which it was sent.

186 Next, the applicant's argument that the evidence post-dating the fax sent by E.ON to the applicant on 7 January 2002 concerning the application of the side letters has insufficient probative value must be rejected. In fact, in the application, the applicant refers explicitly, in support of that argument, only to the letter from E.ON dated 21 May 2002. However, the allegations concerning that letter have already been refuted, as is clear from paragraph 168 above. In addition, assuming that, in support of that argument, the applicant also intends to refer to the documents mentioned in paragraphs 168 to 178 above, it suffices to note that the relevant allegations were rejected in those paragraphs.

187 Finally, contrary to the applicant's claim, the Commission did not contradict itself in stating that the interpretation of the fax which E.ON sent it on 7 January 2002 was not quite clear but nevertheless giving an inculpatory interpretation. Although it is true that it admitted that the interpretation of that fax was not perfectly clear, the Commission none the less considered, on the basis of its content, that that fax did not establish that the undertakings in question regarded the side letters as obsolete on that date. Moreover, it cannot be considered that, in rejecting the applicant's interpretation of that document and in holding that it did not clearly establish that the undertakings in question considered the side letters to be obsolete, the Commission gives an inculpatory interpretation of it. In doing so, it in fact confined itself, in essence, to rebutting the position of the applicant, which claimed that the document was exculpatory.

188 Second, the applicant alleges that the Commission made a manifest error of assessment of several facts confirming its interpretation of the fax of 7 January 2002. In that regard, it refers, in the application, to an internal document of 19 December 2002 which raised the question whether it did not automatically have the right to take gas from the MEGAL gas pipeline, even without a change in structure, while pointing out that E.ON persisted in repeating that the holder of a transport contract may use its gas throughout the length of that transport, and to the minutes of a meeting held on 23 June 2004 which indicated in particular that E.ON again confirmed that the applicant already had the right of access to any outlet point on the MEGAL gas pipeline in so far as capacity was available.

189 However, it must be observed that those documents are not capable of supporting the applicant's argument. In fact, although it may well follow from them that E.ON, in essence, indicated that, under certain conditions, it was possible to have outlet rights on the MEGAL gas pipeline, it remains the case that it is clear from subsequent documents, and in particular from an email of 21 July 2004, that the applicant considered that, on that date, its ability to take gas from that gas pipeline was limited to the quantities purchased under the GRP and that, apart from those quantities, it had no outlet points on that gas pipeline. It follows, in fact, from that email that the applicant considered that sales were possible from any outlet point on that gas pipeline up to the quantities of gas obtained under the GRP. Above that limit, it considered that the additional sales were no longer linked to the quantities of gas obtained under the GRP and that, for those quantities, the only inlet points that could be used were those of [*confidential*]. It was stated that the other outlet points were excluded pending a global agreement. This email confirms, moreover, the position set out in several documents dating from the first half of 2004, hence post-dating the document of 19 December 2002. Thus it follows from handwritten notes made at a meeting of 28 January 2004 that the outlet points on the MEGAL gas pipeline were designated solely for E.ON since the applicant did transit only and it would be asked to

invest in order to be able to take gas. It also follows from a note by the applicant of 10 May 2004 that, as regards the inlet and outlet points on the MEGAL gas pipeline, on that date it had only the right to take 'gas obtained at auction', namely gas purchased under the GRP, at any inlet or outlet point on that gas pipeline. It is also stated explicitly in that note that the transport of gas [*confidential*] to end-customers in Germany via an outlet point on the MEGAL gas pipeline was not feasible on that date, because the applicant had no such outlet points on the gas pipeline to the west. Similarly, it is stated in the minutes of a 'Tour d'horizon' meeting of 27 May 2004 that the applicant's representative indicated that he was not aware of the file but that he had heard that the applicant wished to supply gas in the south of Germany from the MEGAL gas pipeline, which would not have been the case if it already enjoyed outlet rights. Finally, as regards in particular the document of 19 December 2002, it is clear from a full reading of this document that it mentions possible developments in the applicant's rights under the future contractual framework for the MEGAL gas pipeline. It cannot, however, be inferred from this that the applicant considered that it definitely had outlet rights on that gas pipeline, or a fortiori that it regarded the side letters as obsolete.

190 In addition, the evidence referred to by the applicant conflicts with the contractual provisions of Appendix 2 to the MEGAL agreement, which did not confer on the applicant an outlet right on the MEGAL gas pipeline in Germany, unless the undertakings in question agreed otherwise, and there is nothing to permit the inference that, at that time, those provisions had been revoked or that those undertakings had formally agreed to amend them.

191 In those circumstances, the applicant's argument regarding a manifest error of assessment of several facts confirming the interpretation of the fax of 7 January 2002 must be rejected.

192 In the second place, as regards the applicant's conduct, which is alleged to attest that it did not consider itself bound by the side letters, it must be pointed out that the Commission observed, in recital 163 of the contested decision, that neither the internal sales strategies of each of the two undertakings on the home market of the other nor the actual sales of gas on those markets provided the evidence to refute the conclusion that they had maintained their market-sharing agreement.

193 In that regard, the applicant objects that the Commission infringed Article 81 EC and its obligation to state reasons by failing to take account of the evidence attesting to offers to customers located in the south of Germany of gas supplies from the MEGAL gas pipeline. In its view, those offers demonstrate the absence of a concurrence of wills following the liberalisation.

194 That objection must, however, be rejected.

195 As regards, first of all, the statement of reasons, it must be observed that, in order to infer the statement which appears in recital 163 of the contested decision, the Commission indicated in particular, in recital 73 of that decision, that the applicant sold gas in Germany only from 2001 and to a very limited extent. In fact, according to the table which appears in that recital, the applicant's market shares in Germany were [*confidential*]. According to that table, it sold gas from the MEGAL gas pipeline only from 2004, in order to supply [*confidential*]. Moreover, the Commission stated, in recital 101 of the contested decision, that the supplies from that gas pipeline corresponded to a relatively small amount of the applicant's total sales in Germany and that the volumes of gas sold from that gas pipeline in Germany between 2004 and September 2005 were almost exclusively gas volumes purchased by the applicant from E.ON under the GRP. That being so, it must be held that the statement of reasons for the contested decision was sufficient. It should none the less be observed that the contested decision does not refer explicitly, in that regard, to the offers made by the applicant to customers in the south of Germany as regards supplies from the MEGAL gas pipeline. However, it is settled case-law that, although under Article 296 TFEU the Commission is obliged to state the reasons on which its decisions are based, mentioning the factual and legal elements which provide the legal basis for the measure in question and the considerations which have led it to adopt its decision, it

is not required to discuss all the issues of fact and of law raised by every party during the administrative proceedings (Case T-8/89 *DSM* v *Commission* [1991] ECR II-1833, paragraph 257, and Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, paragraph 92).

196 As regards, next, the merits of the statement in recital 163 of the contested decision, the applicant's argument that the Commission infringed Article 81 EC by failing to take account of its offers must be rejected. In fact, [*confidential*]. Moreover, in the light of the factors referred to in paragraph 197 below, from which it is apparent that, at least until the second half of 2003, the applicant itself refrained from making sales from the MEGAL gas pipeline in southern Germany, the relevance of the offers mentioned by the applicant must be qualified in so far as they relate to that period. Finally, as they relate only to Germany, those offers are not capable of affecting the Commission's statement in so far as it relates to the French market. In these circumstances, the existence of offers from the applicant is not, as such, capable of demonstrating either the inaccuracy of the Commission's statement or the lack of agreement or of concurrence of wills between the undertakings in question.

197 In the third place, as regards the difficulties encountered by the applicant in taking gas from the MEGAL gas pipeline, it must, as a preliminary point, be observed that, contrary to the applicant's claim, the Commission did not consider [*confidential*]. In fact, that statement, set out in recital 144 of the contested decision, does not appear in the Commission's assessment but in the summary of the arguments put forward by the undertakings in question. Next, it must be pointed out that the barriers to the applicant's development in southern Germany do not result solely from a question of third-party access to the network, [*confidential*], but also from voluntary conduct on its part. It should be noted that, in the minutes of the meeting held on 23 May 2002, it is stated that the applicant was not contemplating selling gas from the MEGAL gas pipeline in southern Germany. Similarly, it is apparent from a briefing note from the applicant dated 29 August 2003 that since 2001 it had not contemplated taking gas from the MEGAL gas pipeline in order to market it in the south of Germany, which was E.ON's most developed market. Similarly, it must be borne in mind that it follows from an email of 27 February 2003 that the applicant appeared convinced that it had to conduct itself well in approaching the German market and that, even if it could attempt to sell gas in the E.ON area, that would be done to investigate the market rather than to carry out a direct frontal attack. Finally, and in any event, the fact [*confidential*] cannot call into question the existence of the infringement at issue in so far as it is based on the MEGAL agreement, its appendices and the side letters. The argument based on the procedure in Case COMP/39.317 — E.ON Gas, regarding the conduct of E.ON, is therefore irrelevant. [*confidential*]

198 In the fourth place, as regards the development of E.ON's sales in France, it is apparent from recital 73 of the contested decision that E.ON did not start selling gas in France until 2003, and did so to a very limited degree. In the table which appears in that recital, it is stated that E.ON's market share in France was 0.05% in 2003, 0.21% in 2004 and 0.5% in 2005 and that its customers numbered three, four and eight respectively in those years. Therefore, although E.ON's sales grew regularly from 2003, it remains the case that they stayed at an extremely low level and involved a very limited number of customers. It is clear, moreover, from the internal briefing note to E.ON for the 'Tour d'horizon' meeting of 20 December 2001, referred to in recital 116 of the contested decision, that E.ON wished to inform the applicant, at that meeting, that a sales office, the role of which was to show its presence in France and not to burst aggressively onto the French market, had been opened in Paris (France). Moreover, it is apparent from an E.ON briefing note for the 'Tour d'horizon' meeting of 2 July 2004 that E.ON intentionally refrained from acting on the French market until the summer of 2003. It is also apparent from the applicant's minutes of the 'Tour d'horizon' meeting of 27 May 2004 that the western boundary to E.ON's intervention in continental Europe was the western border of Germany and that E.ON had no marked interest in France in particular. In those circumstances, it must be considered that E.ON's sales in France are not capable of showing that it did not consider itself to be bound by the side letters. The alleged industrial reasons for E.ON's weak development, the alleged aggressive commercial policy in France and the results obtained, plus the fact that the development of those sales was unbroken from 2005, cannot call into question the documentary evidence attesting explicitly to E.ON's desire to limit its entry into the French market for gas.

199 It must none the less be pointed out that, as regards the French market, that conclusion is valid only until the 2004 agreement, by which the undertakings in question declared that the side letters were 'null and void'. The situation during the period after that date will be examined under the third part of the fourth plea (see paragraphs 367 to 378 below).

200 It follows from the above that, subject to that reservation, the third complaint must be rejected.

– The first complaint

201 The applicant submits that, in finding that the side letters continued to be applied after the liberalisation, the Commission breached the principle of the presumption of innocence. In its view, the Commission should, by contrast, presume the 'abandonment' of those letters from August 2000, without even requiring proof of their official cancellation by the undertakings in question from that date.

202 In that regard, it must be borne in mind that the principle of the presumption of innocence resulting in particular from Article 6(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 (the 'ECHR'), is one of the fundamental rights which, according to the case-law of the Court of Justice, are protected under the European Union legal order. Given the nature of the infringements in question and the nature and degree of gravity of the ensuing penalties, the principle of the presumption of innocence applies in particular to the procedures relating to infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments (see *JFE Engineering and Others* v *Commission*, paragraph 70 above, paragraph 178, and Case T-279/02 *Degussa* v *Commission* [2006] ECR II-897, paragraph 115 and the case-law cited).

203 The principle of the presumption of innocence implies that every person accused is presumed to be innocent until his guilt has been established according to law (Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission* [2005] ECR II-4065, paragraph 106).

204 In the present case, it should first of all be recalled that, as has already been pointed out, in particular, in paragraph 142 above, it is apparent from the contested decision that, in 1975, the undertakings in question concluded a written market-sharing agreement comprising the MEGAL agreement, its appendices and the side letters and consisting of an undertaking not to penetrate — or to penetrate only in a limited manner — each other's home market and thus to protect their home markets by not selling on the other's home market the gas transported by the MEGAL gas pipeline. As is clear from this judgment as a whole, none of the arguments put forward by the applicant calls this finding into question. It must also be borne in mind that, as follows from paragraph 143 above, there is nothing to indicate that that agreement was cancelled prior to 1999, or 2000, and that the fact that, following the examination of the first part of the first plea, the Court annuls Article 1 of the contested decision in so far as it finds the existence of an infringement committed in Germany prior to 1998 does not, as such, call into question the existence of the market-sharing agreement but the date on which it became an infringement.

205 It follows, moreover, from the examination of the second and third complaints submitted in support of this part that there is no evidence to call into question the considerations set out in recital 163 of the contested decision, according to which, first, following the liberalisation, the undertakings in question did not officially terminate their agreement and did not explicitly declare it obsolete and, second, neither the internal sales strategies of the two undertakings on each other's home market, nor their sales of gas on those markets, provide evidence to refute the conclusion that they maintained their market-sharing agreement.

206 In these circumstances, it must be held that, contrary to the applicant's claim, the Commission did not err in failing to presume the 'abandonment' of the side letters from August 2000.

207 The case-law cited by the applicant under this complaint is irrelevant. In fact, unlike the circumstances in Case T-30/91 *Solvay* v *Commission* [1995] ECR II-1775, in the present case the Commission had direct evidence of the existence of the alleged agreement and/or alleged concerted practice after August 2000, which enabled it to demonstrate that the undertakings in question still considered themselves bound by the market-sharing agreement concluded in 1975. That evidence was examined in particular in recitals 61 to 136 of the contested decision. The evidence, some of which refers to the side letters, is based in particular on exchanges of correspondence and reports of meetings between the undertakings in question as well as on documents internal to those undertakings, some of which refer to meetings between the undertakings. As is apparent from the examination of the second and third complaints in this part, the applicant has demonstrated neither that that evidence has no probative value nor that the Commission erred in finding that the undertakings in question had not 'abandoned' the side letters after 2000. As regards the lack of evidence of the existence of an unlawful practice between 1980 and 1999, the relevance of this fact was refuted during the examination of the third part of the first plea. It follows that the Commission adequately demonstrated the existence of the initial agreement and its subsequent continuation and that, unlike in the circumstances giving rise to *Solvay* v *Commission*, it did not put forward the use of the old agreements as evidence establishing the existence of a subsequent infringement.

208 It follows from all the foregoing that the first complaint must also be rejected.

209 As none of the complaints raised in support of the second part is well founded, it must be rejected in its entirety.

b) The third part

210 In this part of the plea, the applicant alleges that the Commission erred in interpreting the meetings and exchanges which took place between the undertakings in question between 1999 and 2005 and that the contested decision is therefore vitiated by a manifest error of assessment.

211 In this regard, it must be borne in mind that a concerted practice refers to a form of coordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. The criteria of coordination and cooperation constituting a concerted practice must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market (see Joined Cases 40/73 to 48/73, 50/73, 54/73 to 56/73, 111/73, 113/73 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraph 26; Joined Cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others* v *Commission* [1993] ECR I-1307, paragraph 63; and Case C-7/95 P *Deere* v *Commission* [1998] ECR I-3111, paragraph 86).

212 While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market (see, to that effect, *Suiker Unie and Others* v *Commission*, paragraph 211 above, paragraph 174, and *Deere* v *Commission*, paragraph 211 above, paragraph 87).

213 It is apparent from case-law that, on a highly concentrated oligopolistic market, the exchange of information on the market is such as to enable operators to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between the operators (Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-4529, paragraph 34).

214 It follows that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted (see *Deere* v *Commission*, paragraph 211 above, paragraph 90, and Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraph 81).

215 It must, finally, be borne in mind that, in accordance with settled case-law, to prove to the requisite standard that an undertaking participated in a cartel, it is sufficient for the Commission to establish that the undertaking concerned participated in meetings during which agreements of an anti-competitive nature were concluded, without manifestly opposing them. Where participation in such meetings has been established, it is for that undertaking to put forward evidence to establish that its participation in those meetings was without any anti-competitive intention by demonstrating that it had indicated to its competitors that it was participating in those meetings in a spirit that was different from theirs (see Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P *Aalborg Portland and Others* v *Commission* [2004] ECR I-123, paragraph 81).

216 The two complaints raised by the applicant in support of this part, intended, in essence, to contest the Commission's assessment of the existence of a concerted practice, first, to share the German and French markets for gas in connection with the side letters and, second, to exchange sensitive information between competitors, must be examined in the light of the above considerations.

– The first complaint

217 The applicant claims that the meetings and exchanges between the undertakings in question between 1999 and 2005 are incapable of demonstrating the existence of a concerted practice of sharing the German and French markets for gas in connection with the side letters.

218 In this context, it must be noted that, in recital 163 of the contested decision, the Commission found that the meetings between the undertakings in question pursued the same objective as the side letters, namely to share the markets and to restrict access to their home markets to what they judged to be strictly necessary.

219 The applicant disputes that finding, claiming that the Commission failed to substantiate it to the requisite legal standard. It raises, in essence, four arguments in this regard.

220 In the first place, as regards the applicant's argument that the documents referred to by the Commission in support of its allegations are of only extremely poor probative value, it must be borne in mind, as a preliminary point, that, even if the Commission finds explicit evidence of unlawful contact between operators, such as the minutes of a meeting, it will normally be only fragmentary and sparse, so that it often proves necessary to reconstruct certain details by deduction. In most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules (*Aalborg Portland and Others* v *Commission*, paragraph 215 above, paragraph 57). It must also be observed that, as follows from the case-law cited in paragraph 161 above, in order to assess the probative value of a document, regard should be had first and foremost to the credibility of the account it contains and, in particular, to the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, the document appears sound and reliable.

221 In the present case, first, the applicant's allegation that no 'direct evidence' of the concerted practice in question was adduced must be rejected as ineffective. In fact, since the activities which anti-competitive practices and agreements entail take place in a clandestine fashion, meetings are held in secret and the associated documentation is reduced to a minimum (*Aalborg Portland and Others* v *Commission*,

paragraph 215 above, paragraph 55), the Commission cannot be required necessarily to rely on direct evidence of those practices and agreements. It is apparent moreover from the case-law cited in paragraph 220 above that, in most cases, the existence of an anti-competitive practice or agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules. In any event, the allegation in question must be rejected as unfounded. As is clear from the contested decision, the Commission acted on the basis of numerous internal notes and minutes of meetings between the undertakings in question, including the 'Tour d'horizon' meetings, arranged several times a year between managers of those undertakings, which must be considered to be direct evidence of the practices concerned. It follows from those documents, and in particular from those referred to in recital 180 of the contested decision, that, at various meetings, the undertakings in question coordinated their actions with a view to sharing the German and French markets for gas.

222 Second, the applicant's argument relating to the documents allegedly conveying the autonomy of the strategies pursued by the undertakings in question will be refuted in paragraphs 259 to 269 below.

223 Third, the applicant's allegation that 'most' of the evidence adduced by the Commission, which is frequently vague, does not relate to the infringement in question must be rejected. It is in fact ineffective since the applicant does not claim that any of the documents relied on by the Commission relates to the infringement in question and confines itself to mentioning, in that context, 'most' of the evidence adduced by the Commission. In any event, such an allegation is unfounded. It must be borne in mind that the fact that a document refers only to some of the facts referred to in other evidence is not sufficient to require the Commission to exclude that document from the body of inculpatory evidence (*JFE Engineering and Others* v *Commission*, paragraph 70 above, paragraph 238). Moreover, even if certain documents do not directly relate to the market sharing by the undertakings in question, they are none the less capable of corroborating the existence of that sharing and illustrate the collusive relations maintained between those undertakings. In any event, some of the documents cited by the Commission relate directly to the infringement in question. That is the case in particular of the E.ON minutes of a meeting of 23 May 2002, from which it is apparent, as has been stated in paragraph 197 above, that the applicant informed E.ON that it did not, at that time, intend to sell gas taken from the MEGAL gas pipeline in the south of Germany. This is also true of the internal E.ON minutes of the 'Tour d'horizon' meeting of 29 March 2004, to which the applicant refers, from which it follows that it intended to participate in the GRP out of fears that Russian gas could fall into 'the wrong hands' and that additional competition could develop along the MEGAL gas pipeline. As regards the general nature of the information at issue, it must be pointed out that it would be too easy for an undertaking guilty of an infringement to escape any penalty if it was entitled to base its argument on the vagueness of the information produced regarding the operation of an illegal agreement in circumstances in which the existence and anti-competitive purpose of the agreement had nevertheless been sufficiently established, as in the present case (see, to that effect and by analogy, *JFE Engineering and Others* v *Commission*, paragraph 70 above, paragraph 203).

224 Fourth, the fact that items of evidence other than the side letters on which the contested decision is based are not documents common to or exchanged by the undertakings in question, but internal documents of those undertakings, is irrelevant. It must be observed, first of all, that, in the contested decision, the Commission stated that it also had 'non-internal' documents, which are mentioned in footnote 199 and whose relevance the applicant has not legitimately called into question. In any event, no provision or any general principle of European Union law prohibits the Commission from relying, as against an undertaking, on statements made by other incriminated undertakings. If that were not the case, the burden of proving conduct contrary to Articles 81 EC and 82 EC, which is borne by the Commission, would be unsustainable and incompatible with the task of supervising the proper application of those provisions which is entrusted to it by the EC Treaty (see *JFE Engineering and Others* v *Commission*, paragraph 70 above, paragraph 192 and the case-law cited, and judgment of 8 July 2008 in Case T-54/03 *Lafarge* v *Commission*, not published in the ECR, paragraph 57 and the case-law cited). The same is true as regards the internal documents of another incriminated

undertaking. Internal reports found during an inspection of offices belonging to one incriminated undertaking may be used as evidence against another incriminated undertaking (see, to that effect, Case T-3/89 *Atochem* v *Commission* [1991] ECR II-1177, paragraphs 31 to 38, and Case T-59/99 *Ventouris* v *Commission* [2003] ECR II-5257, paragraph 91). What is more, having regard to the very nature of the practices in question and to the associated difficulties concerning the taking of evidence, as noted in paragraph 221 above, the Commission cannot be required to rely on documents exchanged by or common to the undertakings in question. It may therefore rely on internal documents of those undertakings, as long as they make it possible to establish the existence of an infringement.

225 Regarding the judgment in *Dresdner Bank and Others* v *Commission*, paragraph 161 above, on which the applicant relies in the context of its argument, it cannot be inferred from it that, in general, an internal document of an undertaking which has not been distributed to another undertaking will for that reason be of poor probative value. That does not follow explicitly from that judgment and, in any event, is contradicted by *Atochem* v *Commission* and *Ventouris* v *Commission*, paragraph 224 above. Thus, in *Dresdner Bank and Others* v *Commission*, paragraph 161 above, it was merely held that the report at issue in that case was a purely internal memo which was not distributed among the applicants in that case until the administrative procedure, so that they were unable to distance themselves from what was stated in it. However, that fact was only one of the items of evidence taken into account in that judgment in finding that that report was merely an indicium giving rise to a suspicion of the existence of a concurrence of wills. By contrast to the case underlying that judgment, in the present case the Commission produced multiple documents originating from both the applicant and E.ON which unequivocally corroborate the existence of the practices concerned.

226 Finally, as regards the fact that the Commission relied on internal documents, such as preparatory briefing notes, where there is nothing to prove that the content was exchanged during the meetings to which they relate, it must be pointed out that, although that fact may result in the probative value of those documents being qualified, it cannot prevent the Commission from relying on them by way of inculpatory evidence to corroborate its conclusions based on other documents. The fact that the undertakings in question intended to deal with certain subjects relating to the market sharing between them in itself constitutes an indication that such sharing actually existed (see, to that effect and by analogy, *JFE Engineering and Others* v *Commission*, paragraph 70 above, paragraph 231). These documents are not therefore without probative value and thus, contrary to the applicant's claim, are relevant.

227 Fifth, the Court rejects the applicant's allegation that the documents on which the contested decision is based for the most part contain only personal and subjective analyses and assessments from more or less highly placed employees who are not always authorised to represent or commit the undertaking. In fact, the Commission did not act solely on the basis of such documents but also on minutes of 'Tour d'horizon' meetings bringing together managers from the undertakings in question. Moreover, the applicant has not demonstrated that the Commission relied solely on the basis of such documents, but has confined itself to mentioning 'most' of them, without specifically citing those to which it wishes to refer. However, assuming that, by its allegation, the applicant is referring to the email of 16 March 2004, it should be noted that the probative value of that email has already been confirmed in paragraph 174 above. Moreover, assuming that it is referring to the email of 27 February 2003, giving an account of a private meeting between one of its employees and an E.ON employee, it is clear from that email that, at that meeting, the applicant's employee wished to give the E.ON employee certain information likely to be of interest to both the applicant and E.ON concerning the applicant's ambitions in Germany. Furthermore, as regards the level of detail, the content and the capacity of the author of the statements set out in that email, they appear perfectly plausible, objectively reflecting the tenor of the exchange. Finally, this document clearly corroborates the existence of market sharing, given that it is apparent from it, in particular, that the applicant appeared to be convinced that it had to conduct itself well in approaching the German market and that, even if it could attempt to sell gas in the E.ON area, that would be done to investigate the market rather than to carry out a direct frontal attack.

228 Sixth, the applicant's allegation that the items of evidence on which the Commission relies are not related to each other must also be rejected. In fact, the applicant confines itself to stating that the subjects dealt with vary from one document to the other, without putting forward any evidence that the Commission's overall analysis is manifestly wrong. Moreover, as follows from the case-law cited in paragraph 220 above, the Commission must often rely on a number of coincidences and indicia. It cannot, however, be required that the documents on which it relies in that regard automatically present a common thematic link. Thus the important thing is that the evidence relied on by the Commission is sufficiently precise and coherent to form the basis of a firm conviction that the alleged infringement exists. It is sufficient for the coincidences and indicia on which the institution acts, taken together, to constitute evidence of an infringement of the competition rules. In any event, as has already been observed, in the present case the Commission had not only indicia and evidence of the practices concerned but also the written agreement on which they were based, the cancellation of which the applicant failed to demonstrate.

229 In these circumstances, the applicant's argument relating to the poor probative value of the documents on which the contested decision relies must be rejected.

230 In the second place, regarding the applicant's argument that the meetings and exchanges between the undertakings in question between 1999 and 2005 are incapable of demonstrating a concurrence of wills between them with a view to sharing the German and French markets for gas, in the spirit of the side letters, it must be observed that the applicant's line of argument concerning the documents relating to the meetings and exchanges of 4 February 1999, 24 June 1999, 23 May 2002, 27 February 2003, 19 February 2004 and 16 March 2004 was refuted during the examination of the present plea. In the light of their content, those items, of themselves, are capable of demonstrating the existence of a concurrence of wills between those undertakings in the context of the infringement at issue. It follows that that argument may be rejected on that basis alone.

231 For the sake of completeness, it must be stated, in any event, that, as follows from paragraphs 232 to 238 below, the applicant's argument aimed at disputing the Commission's considerations in recitals 114 to 122 of the contested decision, according to which the undertakings in question undertook not to adopt aggressive behaviour and at times criticised each other's sales or prices, is unfounded.

232 Contrary to the applicant's claim, the Commission does not appear to have erred in interpreting the documents on which it relied, namely the E.ON briefing note for the 'Tour d'horizon' meeting of 20 December 2001, the applicant's internal briefing note of 29 August 2003 for the meeting of 2 September 2003, the E.ON minutes of the 'Tour d'horizon' meeting of 29 March 2004, the E.ON minutes of the 'Tour d'horizon' meeting of 27 May 2004 and the E.ON briefing note for the meeting of 2 July 2004. None of the evidence put forward by the applicant in fact calls into question the Commission's assertions based on those documents.

233 As regards, first of all, the Commission's assertion in recital 115 of the contested decision that the market-sharing agreement was maintained while the view was taken that the limited and controlled entry of each undertaking into the home market of the other was preferable to competition from new entrants and was a way of showing the authorities that some competition was developing on the market, the applicant cannot refute it by means of a critique of the minutes of the 'Tour d'horizon' meeting of 29 March 2004. The Commission did not in fact rely on those minutes to support that assertion, since, in that regard, it relied on an internal note of the applicant of 24 September 2002 which indicated, in particular, as is clear from that recital, that the large German operators needed alibis in Germany to show that the market was open and that the undertakings in question may have had a common interest in concluding a 'deal' with a strong strategic content which would enable them to exchange positions in Europe. Similarly, contrary to the applicant's claim, the Commission did not consider that the applicant's wish to develop in Germany primarily by means of external growth, as attested by the minutes in question, was linked to the existence of a cartel with E.ON. The appellant's argument in that respect is, therefore, ineffective.

234 In any event, that argument is unfounded. It follows from the minutes of the 'Tour d'horizon' meeting of 29 March 2004 that the applicant intended to participate in the GRP for fear in particular that further competition might develop along the MEGAL gas pipeline, which, contrary to the applicant's submission, presents a link with the infringement at issue. As regards the applicant's allegation that those minutes show its wish to develop in Germany without affecting E.ON's interests, it must be observed that, assuming that were the case, those minutes none the less also show its wish to control the level of competition. The fact that the applicant informed E.ON of its dissatisfaction following the failure of its attempt to buy E.ON's holding in [*confidential*] and of its intention to develop in Germany by means of external holdings does not mean that that finding may be called into question. The Commission did not therefore err in inferring from those minutes, in recital 98 of the contested decision, that the applicant had attempted to develop a consensus with E.ON on the common objective of avoiding the gas [*confidential*] sold under the GRP being bought by third-party competitors of the undertakings in question along the MEGAL gas pipeline.

235 As regards, next, the Commission's statement, in recital 116 of the contested decision, that E.ON continued to reassure the applicant that it did not intend to compete on the French market in an aggressive manner, it must be borne in mind, in the light of the E.ON briefing note for the 'Tour d'horizon' meeting of 20 December 2001 and the E.ON minutes of the 'Tour d'horizon' meeting of 27 May 2004, on both of which the Commission relied, that that statement does not appear to be wrong. In the case of the briefing note, the fact that that document is not confirmed by an exchange of correspondence between the undertakings in question or an internal document of the applicant is irrelevant here, as is apparent from the case-law cited in paragraph 224 above. Moreover, even if there is nothing to indicate that E.ON effectively informed the applicant that the role of the sales office it had just opened in Paris was to show its presence and not to burst aggressively onto the market, it remains the case that that preparatory note clearly shows that E.ON wished to reassure the applicant regarding its commercial strategy in France. That note is therefore relevant evidence in determining the existence of collusion between the undertakings in question. In the case of E.ON's minutes of the meeting of 27 May 2004, the applicant acknowledges that the information concerning the fact that E.ON informed it that the western boundary to its intervention in continental Europe was the western border of Germany, and that it had no marked interest in particular in France, reflected E.ON's commercial strategy in Europe. None the less, it disputes that that decision was subject to prior agreement on its part. However, the Commission did not claim that that was the case. It confined itself to alleging that E.ON continued to reassure the applicant that it did not intend to compete on the French market in an aggressive manner. The fact, mentioned by the applicant, that E.ON made such information public, even if it is assumed to have been established, is not capable of calling that assessment into question. The applicant's argument in relation to these documents must therefore be rejected.

236 As regards, finally, the Commission's statement, in recital 117 of the contested decision, that the undertakings in question regretted the sales achieved on each other's home market, it does not appear to be wrong in the light of the applicant's internal briefing note of 29 August 2003 for the meeting of 2 September 2003, the minutes of the meeting of 27 May 2004 and the E.ON briefing note for the meeting of 2 July 2004, on which it relies.

237 In fact, as regards, first, the briefing note of 29 August 2003, the applicant's argument that that document contains judgements merely reflecting the personal and subjective opinion of its authors must be rejected since it is apparent from it that a comparative analysis of the activities of the undertakings in question was carried out in an objective manner. Regarding the applicant's argument that there is nothing to indicate that the points mentioned in that briefing note were in fact discussed or explained, it must be observed that, in that briefing note, the items that the applicant intended to bring up at that meeting are in any event explained. Finally, contrary to the applicant's claim, that note is evidence of the existence of the cartel, since it is apparent from it that the applicant's commercial activity in Germany falls into a strictly controlled and reasonable framework of compensation in other European countries for the market share lost in France. It follows from this,

moreover, that E.ON, from the outset, adopts a model of frontal competition on the French market while the applicant, by contrast, in a spirit of partnership, adopts the approach of reasoned competition on the two markets. It was specified, in this context, that it is essential to position the discussion with E.ON in the area of market prices. Thus the briefing note concerned indicates that the applicant regretted the competitive nature of E.ON's offers in France and intended to adopt an attitude of reasoned competition and to reach agreement with that undertaking on market prices, which is not competitive conduct, notwithstanding the offers that the applicant made in Germany and the difficult context it found there. Finally, the Commission was correct in considering, on the basis of the briefing note concerned, that the applicant had countered E.ON's offer aimed at supplying a customer without making full use of its room for manoeuvre. In fact, it is apparent from this document that, as regards this offer, the applicant did not exhaust the room for manoeuvre available to it within its commercial framework, but made greater use of that room for manoeuvre when it had to face competition from [*confidential*], for example. The fact, mentioned by the applicant, that, because of a legitimate strategy, [*confidential*] cannot explain the adoption of different conduct depending on the competitor it had to face up to.

238 As regards, second, the minutes of the meeting of 27 May 2004 and the note on that of 2 July 2004, there is nothing to indicate that the Commission's interpretation is incorrect. It follows from the minutes that the applicant continued to be perceived as pursuing aggressive and dangerous commercial conduct on the German market. It also follows from the note that, in the context of discussions between E.ON and the applicant, E.ON's position was that, because of excessively aggressive offers, the value of gas on the German market had been destroyed, while the applicant's position was to assert that it had had to give in to pressure from the Commission, which was forcefully calling for cross-border competition, and that, for it, in view of its size and geographical position, the German market was of considerable importance. The Commission was therefore able to rely on these documents in finding that the undertakings in question regretted the sales achieved on each other's home market. Moreover, even if they demonstrate the existence of a certain form of competition, these documents also highlight the fact that those undertakings were exchanging information on their respective commercial strategies. They also constitute evidence of the existence of a market-sharing (or concerted penetration) agreement on the home markets, since it follows from them that, in view of the applicant's activities in Germany, E. ON's sales activities increased in France, as such symmetrical penetration was possible only if such an agreement existed. In addition, in the light of their wording, the Commission did not err in using those documents to establish the infringement in question.

239 In the third place, as regards its argument that documents in the file which were ignored or misinterpreted demonstrate the absence of concerted practice, the applicant submits that those documents demonstrate the autonomy of the strategy pursued by the undertakings in question in Germany and in France, the existence of frontal competition between them on their respective home markets and the applicant's wish to complete the restructuring of the MEGAL agreement as quickly as possible in order to become a full-scale transporter in Germany. That argument must be rejected. The Commission demonstrates the existence of a concerted market-sharing practice stemming from the meetings and exchanges that took place between the undertakings in question between 1999 and 2005, subject to the reservations regarding the French market during the period after August 2004, which will be examined under the fourth plea, to the requisite legal standard, in particular by means of the documents relating to the meetings and exchanges of 4 February 1999, 24 June 1999, 23 May 2002, 27 February 2003, 19 February 2004 and 16 March 2004. Next, with the exception of the applicant's internal minutes of 19 January 2004 and the GDF Deutschland business plan for Germany of 30 April 2004, the applicant confines itself, in substantiating its argument, to referring to the evidence produced in its response to the statement of objections and does not set out in the application any line of argument relating specifically to these documents. In addition, with the exception of the latter two documents, such a reference to documents annexed to the application is inadmissible, for the reasons set out in paragraph 175 above. Moreover, as regards the applicant's internal minutes of 19 January 2004, it suffices to note that they concern only 10 supply contracts which, additionally, relate to customers located exclusively in the north-west of Germany (and therefore outside the supply zone of

the MEGAL gas pipeline) and that they state that the high costs of third-party access to the network or the current impossibility of obtaining supplies from the MEGAL gas pipeline make it difficult for other parties to enter the territory. Furthermore, far from demonstrating the existence of frontal competition between the undertakings in question as the applicant asserts, this document confirms the lack of competition between them in the supply zone of the MEGAL gas pipeline and the impossibility for the applicant of supplying from that pipeline. The reason for that impossibility is not stated, but it may be inferred from the minutes in question that it is separate from the difficulties relating to third-party access to the network, which are also mentioned. Finally, regarding the GDF Deutschland business plan for Germany of 30 April 2004, it states that the conclusion of new contracts accelerated clearly from the second half of 2003 and that this results from over two years' presence in the area, [*confidential*]. It is also apparent from it that any presence of the applicant on the German market places it in confrontation with the major operators. However, this document does not state whether the contracts in question relate to the supply zone of the MEGAL gas pipeline. On the other hand, it confirms that the applicant concentrated its offers on the north-west of Germany, [*confidential*]. These documents are therefore incapable of calling the Commission's arguments into question.

240 In the fourth place, as regards the applicant's argument that the meetings concerned were justified by the structural and commercial links uniting the undertakings in question, it must be observed that, although the Commission does not dispute the legitimacy of such links, it remains the case that they cannot justify meetings that also give rise to a concerted practice prohibited by Article 81(1) EC. In the present case, as is apparent in particular from recitals 50, 63 and 158 of the contested decision, the Commission considered that, even if many of those meetings were intended to tackle legitimate subjects for discussion, the undertakings in question frequently used those contacts to discuss the implementation of the market-sharing agreement. As there is nothing in the file to call this finding into question, the applicant's argument must be rejected.

241 It follows from the foregoing that the applicant is wrong to assert that the meetings and exchanges between the undertakings in question between 1999 and 2005 are incapable of indicating the existence of a practice of exchanging sensitive information with each other, in connection with the side letters.

242 The first complaint must therefore be rejected.

– The second complaint

243 The applicant claims that the Commission made an error of fact and of the law in finding that the meetings and exchanges between the undertakings in question between 1999 and 2005 demonstrated the existence of a practice of exchanging sensitive information between the undertakings in question, whether in connection with the side letters or independently of them.

244 As a preliminary point, in so far as, by this complaint, the applicant refers to a concerted practice independent of the side letters, it must be stated that its argument is ineffective. In the contested decision, the Commission did not explicitly find that the contacts between 1999 and 2005 constituted infringements independent of those letters. By contrast, it is apparent from the contested decision, read as a whole, that it saw the concerted practices in question as being linked to the implementation of the market-sharing agreement stemming from the MEGAL agreement and the side letters.

245 Next, it must be stated that the arguments put forward by the applicant in support of this complaint are unfounded, whether they refer to a concerted practice in connection with the side letters or to one independent of them.

246 In the first place, as regards the applicant's argument concerning a contradiction in the contested decision, it must be observed that, in recital 161 of that decision, the Commission points out that the undertakings in question did not exchange detailed commercial data on sales, prices, costs, margins or

customers and that such sharing of information was not necessary in the present case to arrive at a common position aimed at not using the gas transported via the MEGAL gas pipeline to compete on the home market of the other party and, more generally, to practise 'more reasonable' competition. In recital 186 of the contested decision, the Commission states that the undertakings in question exchanged commercially sensitive information, that is to say, information on prices and strategies, regularly examined and reached prior agreement on their future reciprocal strategies and acted in accordance with the expectations of the other party. Contrary to the applicant's claim, these two statements are not contradictory. The fact that the undertakings in question did not exchange 'detailed commercial data' does not preclude their having exchanged 'commercially sensitive information'. The undertakings in question could exchange data which, although not detailed, could be of a general nature but none the less significant in determining their commercial strategies.

247 In the second place, the Court rejects the applicant's argument disputing the Commission's analysis, in recital 161 of the contested decision, that the sharing of detailed information was not necessary since each incumbent supplier enjoyed a quasi-monopoly position on its traditional home market and that it was sufficient to inform the other party that no (active) entry into that party's home market was envisaged. As follows from the case-law cited in paragraph 213 above, on a highly concentrated oligopolistic market, the exchange of information is such as to enable operators to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between operators. This case-law does not require the information in question to be detailed information. Thus, in the context of an oligopolistic market, such as that at issue in the present case, the exchange of even general information relating in particular to the commercial strategy of an undertaking is capable of affecting competition. Moreover, although the applicant submits that, in practice, such a scenario is extremely rare, it recognises, in the reply, that the case-law does not, in principle, preclude an exchange of 'general' information being objectionable where it aims to reduce the degree of uncertainty on the functioning of the market in question and, consequently, to restrict competition between undertakings. It should further be added that the case-law accepts that, in so far as the undertaking participating in the concerted action remains active on the market in question, there is a presumption of a causal connection between the concerted practice and the conduct of the undertaking on that market, even if the concerted action is the result of a meeting held by the participating undertakings on a single occasion (*T-Mobile Netherlands and Others*, paragraph 213 above, paragraph 62). In the present case, the concerted action is based on numerous meetings.

248 The fact, mentioned by the applicant, that the undertakings in question penetrated each other's market to a limited degree does not call into question the fact that the sharing of detailed information was not necessary, given that competition could, in any event, be affected by the exchange of information since the uncertainty that must exist between competing undertakings had been removed by the concerted action. In these circumstances, the applicant is wrong to claim that the Commission's analysis reduces the standard of proof required to establish an infringement.

249 In the third place, the applicant's argument based on the fact that the undertakings in question did not exchange any confidential and strategic information within the meaning of the case-law cannot succeed. The fact, mentioned by the applicant, that the undertakings in question did not exchange information on costs, prices, margins, volumes sold or customers is irrelevant since, in the context of a highly concentrated oligopolistic market such as the market for gas, it suffices that there was an exchange of information within the meaning of the case-law cited in paragraph 213 above. As follows, in particular, from the documents cited in recitals 84, 87, 120, 121 and 180 of the contested decision, a number of contacts were made, during which information was exchanged on the respective strategies of the undertakings in question on each other's home market.

250 Contrary to the applicant's claim, it must be stated that the discussions held between the undertakings in question did not constitute 'vague declarations of intent'. It is apparent, for example, from the minutes of 27 May 2002 relating to a meeting of 23 May 2002 that, at a meeting with E.ON, the applicant gave an assurance that it had no current plans to sell gas in Germany. Similarly, it is clear

from the minutes of the meeting of 27 May 2004 that the western boundary of E.ON's intervention in western Europe was the western border of Germany and that E.ON had no interest in France in particular. Moreover, in the application, the applicant does not state to which specific discussion it refers and confines itself to referring to its response to the statement of objections.

251 In the fourth place, the applicant's argument by which it disputes the relevance of the documents on which the Commission relies must be rejected.

252 Regarding, first, the email of 27 February 2003, it must be borne in mind that, in that document, it is stated that, although the applicant might attempt to sell gas in E.ON's area, it would be done to investigate the market rather than to carry out a direct frontal attack. Moreover, the applicant's objection based on the fact that that document involves personal and subjective opinions was rejected in paragraph 227 above. The applicant's argument based on the fact that it was unaware of that private meeting must be rejected since it follows from the email that its representative asked to meet the E.ON representative in the context of preparing for a subsequent meeting between the undertakings in question and wanted to pass on certain information likely to be of interest to both it and E.ON. Furthermore, contrary to the applicant's assertion, there is nothing in the file to show that it mounted a direct frontal attack on the German market, given that it in fact confined itself, in essence, to selling the quantities of gas obtained under the GRP during the period at issue.

253 Regarding, second, the email of 16 March 2004, it is apparent from it that, at a meeting with an E.ON employee, an employee of the applicant informed him that the applicant regarded the prices applied by E.ON to certain customers as being too low. It is also apparent that employees of the undertakings in question entered into exchanges on their relations with certain customers as regards the prices applied to those customers. It is further apparent that the applicant's representative informed the E.ON representative that, in the eastern France zone, the applicant did not wish to alter its price levels for 'small/medium' customers, although a reduction was possible for larger customers. Contrary to the applicant's claim, that information could be of interest to E.ON, which, as is apparent from the contested decision, started to sell gas in France in 2003. Similarly, although it is not very detailed, such information made E.ON aware of the general price strategy that the applicant intended to implement as regards different types of customer in the context of the entry of competitors into its territory. Regarding the fact that [*confidential*], it cannot justify the exchange of information to which the email of 16 March 2004 refers, which, in any event, reduced the level of uncertainty which must normally exist between competitors. Furthermore, as regards the alleged subjective nature of the retranscription that was carried out, the relevant argument was refuted in paragraphs 174 and 227 above.

254 Thus the emails of 27 February 2003 and 16 March 2004 are evidence of an exchange of strategic information.

255 Finally, contrary to the applicant's statements in the reply, the Commission was not obliged to 'list' the general strategic information that was exchanged, since it is apparent from the contested decision that such information was in fact exchanged. As regards the fact that the exchanges between the undertakings in question took place in the context of negotiating the new MEGAL agreement, it cannot justify an exchange of information likely to affect competition. In any event, the information in question, in particular that mentioned in the minutes of 27 May 2002 and in the email of 27 February 2003, goes beyond information relating to the renegotiation of the MEGAL agreement.

256 It follows that, contrary to the applicant's claim, the exchanges of information referred to by the Commission in the contested decision were such as to reduce the uncertainty of the undertakings in question as to the functioning of the German and French markets for gas and their respective future conduct on those markets and, consequently, appreciably to affect competition between them.

257 It follows from the foregoing that the applicant's argument that the meetings and exchanges between the undertakings in question between 1999 and 2005 are incapable of demonstrating the existence of a practice of exchanging sensitive information between them, whether in connection with or independently of the side letters, must be rejected.

258 The second complaint must therefore also be rejected, as, consequently, must the third part in its entirety.

c) The fourth part

259 In this part of the plea, the applicant claims that the contested decision is vitiated by a failure to state reasons and an infringement of Article 81 EC in so far as it found the practices concerned to constitute an agreement and/or a concerted practice without having examined the evidence adduced during the administrative procedure and intended to demonstrate the applicant's autonomous conduct in Germany and E.ON's autonomous conduct in France. In particular, in the applicant's view, the Commission failed to examine the economic arguments capable of calling into question the very existence of the infringement at issue.

260 It must be stated that the applicant essentially advances two series of arguments regarding, first, the failure to take account of evidence demonstrating the autonomous conduct of the two undertakings in question on each other's market and, second, the failure to take account of economic evidence.

261 In the first place, with regard to the evidence proving the autonomous conduct of the undertakings in question which the Commission allegedly failed to examine, it must be pointed out that the arguments advanced by the applicant are unfounded.

262 First, as far as the applicant's arguments based on its own autonomous conduct are concerned, it must be stated first of all that the evidence adduced by the applicant is general and incapable of demonstrating autonomous conduct relating specifically to the supply of gas transported via the MEGAL gas pipeline, the infringement found to exist in the present case being limited to this sector, as is clear from recital 199 of the contested decision.

263 Next, with regard to the alleged [*confidential*], the applicant is wrong to claim that it conducted [*confidential*], since certain documents, such as the email of 27 February 2003, show that it had no intention of so doing. In addition, the existence of a [*confidential*] is contradicted by the applicant's internal note of April 2005, which was drafted following complaints from E.ON [*confidential*]. In any event, even assuming that it did conduct [*confidential*], the fact remains that, as is clear from the evidence produced by the Commission, the latter formed the subject of many exchanges with E.ON, the undertakings in question having mutually expressed their regret for the [*confidential*] to one another at their various meetings and attempted to reassure each other in this regard, as has already been found to be the case (see paragraph 164 above). Furthermore, with regard to the alleged [*confidential*] obtained by the applicant, it need merely be pointed out that it is clear from recital 101 of the contested decision that the applicant's sales from the MEGAL gas pipeline did not begin until October 2004 and that the volume of those sales was essentially comparable to the volumes acquired under the GRP at least until October 2005.

264 Finally, as far as the [*confidential*] are concerned, the line of argument advanced by the applicant to the effect that [*confidential*] is incapable of demonstrating its autonomous conduct and of calling into question the Commission's considerations which prove the existence of the infringement in question. It is apparent from case-law that proof of the existence of circumstances which cast the facts established by the Commission in a different light and thus allow another, plausible explanation of those facts to be substituted for the one adopted by the Commission in concluding that the competition rules have been infringed is relevant only if the Commission relies solely on the conduct of the undertakings in question on the market in finding that an infringement has been committed (see, to that effect, *JFE Engineering and Others* v *Commission*, paragraph 70 above, paragraph 186 and the case-law cited). That is not the case here, given that the Commission relies on numerous items of documentary evidence which the applicant has not, as is apparent from the foregoing, been able to prove devoid of evidential value. In any event, with regard specifically to the barriers to access [*confidential*], those circumstances are, as such, incapable of ruling out the existence of the infringement in question.

265 Second, as far as the applicant's arguments based on the autonomous conduct of E.ON in France are concerned, it must be pointed out, first, that the argument based on the fact that E.ON chose to defend its home market and to develop its activities only to a limited degree in other European countries and that E.ON never regarded the French market as a priority market is — as is clear from the case-law referred to in the previous paragraph — incapable of calling into question the Commission's considerations by which the existence of the infringement is established. Second, with regard to the applicant's statement that, despite its minimal interest in the French market, E.ON adopted an aggressive course of conduct in France, it is sufficient to point out that, as stated in paragraph 198 above, E.ON's sales in France are not capable of showing that it did not consider itself to be bound by the side letters.

266 In the second place, with regard to the economic arguments which the Commission allegedly failed to examine, it must be observed that, in the present case, the Commission took as the primary basis for its findings the object of restricting competition pursued by the agreement and the concerted practices found in Article 1 of the contested decision. Furthermore, it relied on numerous items of documentary evidence which, in its view, establish both the existence of that agreement and those concerted practices and their restrictive object. In addition, as regards the specific case of agreements which, as in the present case, involve respecting domestic markets, it is clear from case-law, first, that, in themselves, they pursue the object of restricting competition and fall within a category of agreements expressly prohibited by Article 81(1) EC and, second, that that object, whose reality was incontestably established by documentary evidence, cannot be justified by an analysis of the economic context of the anti-competitive conduct concerned (see, to that effect, *JFE Engineering and Others* v *Commission*, paragraph 70 above, paragraph 184 and the case-law cited).

267 In addition, in the present case, as is apparent from the examination of the first plea and of the second and third parts of this plea, the applicant has been unable to call into question the documentary evidence which enabled the Commission to establish the existence of the agreement and of the concerted practices in question as well as their anti-competitive object throughout the period relevant to this plea. In those circumstances, the Commission cannot be criticised for not conducting a general and in-depth economic assessment of the sector and of the conduct of the undertakings in question. As for the reference to *Solvay* v *Commission*, paragraph 207 above, that judgment has no bearing on the present case since, unlike in the case of the facts which led to that judgment, in the present case the Commission was able to rely on several items of documentary evidence covering the period relevant to this plea, subject to the considerations set out in the final part of the fourth plea.

268 Finally, to the extent that the applicant also complains that the Commission failed to examine evidence demonstrating its autonomous conduct in Germany and that of E.ON in France, it is sufficient to refer to the foregoing considerations, in particular those contained in paragraphs 259 to 267 above, refuting the argument advanced by the applicant relating to the autonomy of the undertakings in question.

269 It follows from all the foregoing that the fourth part of this plea must be rejected.

d) The first part

270 The applicant submits that, in the absence of a single and continuous infringement throughout the period from 1980 to 2005, the side letters were, in any event, time-barred in accordance with Article 25 of Regulation No 1/2003.

271 It must be borne in mind in this regard that, pursuant to Article 25(1) and (2) of Regulation No 1/2003, the power of the Commission to impose fines in relation to infringements of the provisions of competition law is subject, in principle, to a five-year limitation period which begins to run on the day on which the infringement is committed or, in the case of continuing or repeated infringements, on the day on which the infringement ceases. In accordance with paragraphs 3 and 4 of the same article, the

limitation period is interrupted by any action taken by the Commission for the purpose of the investigation or proceedings in respect of an infringement; the limitation period is interrupted with effect from the date on which the action is notified to at least one undertaking which has participated in the infringement and that interruption applies for all the undertakings which have participated in the infringement. Finally, paragraph 5 of that same article makes clear that each interruption starts time running afresh, but that the limitation period expires at the latest on the day on which a period equal to twice the limitation period has elapsed without the Commission having imposed a fine or a penalty. That period is extended by the time during which limitation is suspended.

272 Moreover, it must be stated that a decision finding an infringement is not a penalty within the meaning of Article 25 of Regulation No 1/2003 and is not therefore covered by the limitation period provided for in that article (see, by analogy, *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission*, paragraph 203 above, paragraph 61). Chapter VI of Regulation No 1/2003, which is concerned with penalties, covers only fines and periodic penalty payments, and the view cannot be taken on the basis of any of the provisions of that regulation that the Commission decisions referred to in Article 7 of the regulation, by which the Commission finds that there is an infringement of Article 81 EC or of Article 82 EC, come under the penalties mentioned in that chapter. Accordingly, the expiry of the limitation period for the power to impose fines and periodic penalty payments cannot imply the extinction of the implied power to find the infringement (see, by analogy, *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission*, paragraph 203 above, paragraphs 62 and 63).

273 As regards the applicant's argument that the Commission was required to establish that it had a legitimate interest in order to find that the side letters constituted an infringement which was time-barred, that argument must be rejected. Indeed, as is clear from the foregoing, the expiry of the limitation period for imposing penalties does not imply the expiry of the limitation period for finding an infringement. In any event, in accordance with the case-law to which the applicant refers, it is only where it intends to take a decision finding an infringement which the undertaking concerned has already terminated that the Commission must establish that it has a legitimate interest in so doing (see, to that effect, *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission*, paragraph 203 above, paragraph 37). In the context of this part of the plea, the applicant's argument is based on an alleged limitation period applicable to the infringement — or even, as it claims in the reply, solely on the date on which the infringement began — and not on the fact that the infringement was committed in the past.

274 In those circumstances, the line of argument advanced by the applicant is ineffective to the extent that it relates to the limitation period applicable to the side letters or the infringement.

275 In so far as the applicant's argument relates to the absence of a single and continuous infringement, that argument must be rejected as unfounded. It should be recalled in this regard that infringement of Article 81 EC may result not only from an isolated act but also from a series of acts or from continuous conduct (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 81). In the context of an infringement extending over a number of years, the fact that the agreement is shown to have applied during different periods, which may be separated by longer or shorter periods, has no effect on the existence of the agreement, provided that the various actions which form part of the infringement pursue a single purpose and fall within the framework of a single and continuous infringement (*Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied* v *Commission*, paragraph 136 above, paragraph 98).

276 In the present case, the Commission held, in recital 203 of the contested decision, that the agreements and concerted practices fell within the framework of a general project which determined the lines of action of the undertakings in question on the market and restricted their respective commercial conduct with a view to achieving an identical anti-competitive objective and a sole economic aim, namely that of restricting any competition between them in relation to the gas transported via the MEGAL gas pipeline. In recital 211 of that decision, it essentially found that the conduct of the undertakings in question constituted a single and continuous infringement and a 'restriction of competition by object'.

277 In addition, as is clear in particular from the examination of the first plea (see paragraphs 142 and 143 above), the applicant has been unable either to call into question the existence of the market-sharing agreement at issue in the present case prior to 2000 or to demonstrate the termination of that agreement, even though it has been held that the date from which the Commission deemed that the agreement began to constitute an infringement is, as far as Germany is concerned, incorrect.

278 Moreover, as is clear in particular from the examination of the second part of this plea, the applicant is wrong to claim that the Commission has failed to demonstrate the existence of a concurrence of wills on the part of the undertakings in question to apply the side letters after 2000. Similarly, none of the arguments put forward by the applicant with the intention of claiming that the meetings and exchanges between the undertakings in question between 1999 and 2005 were incapable of demonstrating the existence of a concerted market-sharing practice in connection with the side letters or of an exchange of sensitive information between competitors has been accepted.

279 In those circumstances, the Commission did not err in taking the view that the conduct in question constituted a single and continuous infringement and a 'restriction of competition by object', even though the duration of that infringement is incorrect in so far as the German market is concerned.

280 With regard to the applicant's argument that the liberalisation of the market resulted in a 'major break' which brought into question the common objective pursued since 1975, it must be pointed out that it has not shown that all the conduct of the undertakings in question was not directed at one and the same objective, namely that of preventing — or of limiting in so far as possible — any competition in relation to their customers by agreeing not to enter each other's traditional home market for the supply of gas via the MEGAL gas pipeline, as observed by the Commission in recital 205 of the contested decision. Moreover, as is apparent from the foregoing, the evidence adduced by the Commission shows that, even after the date specified by the first gas directive for its implementation, those undertakings referred to the side letters and they regarded those letters as binding.

281 It follows from all the foregoing that the first part of the plea must be rejected, without it being necessary to rule on its admissibility in so far as the applicant made reference to the annexes to the application.

282 The second plea must therefore be rejected in its entirety.

3. *The third plea, alleging a manifest lack of evidence as regards the existence of an agreement and/or of a concerted practice aimed at restricting the use in France by E.ON of the gas transported by the MEGAL gas pipeline*

283 This plea, put forward in the alternative and by which the applicant claims that an infringement of Article 81 EC could not be found to exist with regard to the French market, is divided into three parts alleging, first, an infringement of Article 81 EC due to the absence of any infringement on the French market caused by the Direktion G letter, second, an infringement of Article 81 EC by virtue of a manifestly incorrect assessment of the meetings and exchanges between the undertakings in question in relation to France and, third, in the alternative, an infringement of Article 81 EC on account of the exception relating to the State action in France prior to January 2003.

a) The first part

284 In this part of the plea, the applicant claims that an infringement of Article 81 EC could not be found to exist with regard to the French market on the basis of the Direktion G letter. In this connection, it advances, in essence, three complaints concerning, first, a lack of clarity in that letter and breach of the principle of the presumption of innocence, second, a manifest error of interpretation of that letter and, third, the absence of any evidence adduced by the Commission in support of its interpretation of that letter.

285 In the first place, with regard to the applicant's complaint based on a lack of clarity in the Direktion G letter and breach of the principle of the presumption of innocence, the applicant relies on a contradiction between the statement of objections and the contested decision regarding the restrictions imposed by that letter.

286 It must be pointed out in this regard that the Commission stated in paragraph 50 of the statement of objections that 'until the entry into force of the first gas directive … in 2000, [the side] letters did not impose any explicit restriction on [E.ON], since [the applicant] had a monopoly on imports of gas in France'. As for the contested decision, it is stated therein that the Commission was of the view, inter alia, that the Direktion G letter contained restrictions for E.ON. Accordingly, in recital 222 of the contested decision, the Commission found that that letter 'had the aim of preventing E.ON … from supplying French customers with gas transported by [the] MEGAL [gas pipeline], which represents, for [E.ON], the main access route for the importation of gas via Germany to the French market'.

287 There is no need to rule on the existence of a discrepancy between the statement of objections and the contested decision or to examine the explanations put forward by the Commission in this regard, as the applicant's related line of argument is, in any event, ineffective. In particular, it cannot be inferred from that line of argument, as such, that the Direktion G letter is ambiguous or that it was incapable of constituting a market-sharing agreement without breaching the principle of the presumption of innocence.

288 After all, the statement of objections is a preparatory document containing assessments of fact and of law which are purely provisional in nature. The subsequent decision is not necessarily required to be a replica of the statement of objections, since the Commission must take into account the factors emerging from the administrative procedure in order either to abandon such objections as have been shown to be unfounded or to amend and supplement its arguments, both in fact and in law, in support of the objections which it maintains (see, to that effect, Joined Cases 100/80 to 103/80 *Musique Diffusion française and Others* v *Commission* [1983] ECR 1825, paragraph 14; Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraph 70; and *Aalborg Portland and Others* v *Commission*, paragraph 215 above, paragraph 67).

289 In the second place, with regard to the applicant's complaint based on a manifest error of interpretation of the Direktion G letter, it must be pointed out with regard, first, to the lack of symmetry between the terms used in the side letters that the Commission did not take the view that those letters had been worded in a symmetrical manner. In addition, the fact that the Direktion G letter is not drafted in an identical or symmetrical manner to the Direktion I letter does not, as such, affect the possibility that the Commission might consider that those letters have a similar purpose, namely that of providing for a sharing of the national markets for gas and of restricting access to the respective national market of the undertakings in question.

290 It must therefore be ascertained, second, whether, having regard to the content of the Direktion G letter, the Commission was entitled to take the view that that letter sought to prohibit E.ON from marketing gas passing in transit through the MEGAL gas pipeline in France.

291 In that regard, it must be borne in mind that the Direktion G letter is drafted as follows:

'…

The Carrying Capacities Contracted or to be Contracted by [GDF] for the transportation of gas shall concern gas which has been or will be purchased by [GDF] and will be delivered to [MEGAL] and/or [MEGAL Finco] for transit for [GDF] to and destined for consumption in France.

The Carrying Capacities Contracted or to be Contracted by [E.ON] for the transportation of gas shall concern the transportation for any other transit purposes and the transportation of gas through the Pipeline and taken from the Pipeline in the Federal Republic of Germany destined for consumption in the Federal Republic of Germany, or purchased by [E.ON] and destined for transit through the Federal Republic of Germany.

…'

292 It must indeed be observed that, in the light of its wording, the Direktion G letter does not expressly prohibit E.ON from delivering or supplying gas passing in transit through the MEGAL gas pipeline in France.

293 However, as the Commission stated in recital 198 of the contested decision, it may be deduced from the Direktion G letter that, whereas the gas which the applicant transports through the MEGAL gas pipeline must be conveyed to France, the gas which E.ON transports through that gas pipeline must be either taken from the pipeline in Germany or transported for any other transit purposes, which means that E.ON is not authorised to convey gas transported by that gas pipeline to France. The expression 'transportation for any other transit purposes' must be read in the light of the preceding paragraph, which attributes to the applicant carrying capacities for gas delivered 'for transit for [it] to … France'. That expression therefore means that E.ON is entitled to carrying capacities to deliver gas in transit to countries other than France. According to that letter, therefore, the gas which E.ON could transport through the MEGAL gas pipeline had to be destined either for consumption in Germany or for transit to countries other than France.

294 Consequently, even though the Direktion G letter does not expressly prohibit E.ON from selling gas in France, it nevertheless limits its possibilities of transporting gas to that country via the MEGAL gas pipeline and, consequently, of selling gas from that gas pipeline there. That letter cannot therefore be regarded simply as having the purpose — as the applicant submits — of specifying the conditions applicable to third parties in relation to transmission via the MEGAL gas pipeline.

295 That interpretation is borne out by a reading of the Direktion G letter in conjunction with Appendix 2 to the MEGAL agreement. [*confidential*] The gas transported for E.ON could not therefore use an outlet in France and, consequently, be sold in that country. [*confidential*]

296 The Commission did not therefore err in finding, in recital 222 of the contested decision, that the Direktion G letter had the aim of preventing E.ON from supplying French customers with gas transported by the MEGAL gas pipeline. As regards the argument put forward by the applicant at the reply stage that another, plausible explanation of the facts could be substituted for the explanation adopted by the Commission, it must be recalled, once again, that the case-law on which that argument is based relates to the circumstances in which the Commission relies solely on the conduct of the undertakings in question on the market in finding that an infringement has been committed (see, to that effect, *JFE Engineering and Others* v *Commission*, paragraph 70 above, paragraph 186) and in which the Commission has no documentary evidence. However, that is not the case here. Indeed, in the light of its form and its wording, the Direktion G letter must be regarded as constituting documentary evidence, such that that case-law does not apply. The same is true of the evidence which confirms the content of the letter, namely the MEGAL agreement and Appendix 2 thereto.

297 Finally, with regard to the applicant's complaint alleging that the Commission has not provided proof capable of demonstrating that the Direktion G letter had the object and/or effect or restricting E.ON's development in France, that complaint must likewise be rejected. Indeed, as is clear from the foregoing, the Commission's interpretation of that letter is not vitiated by any error. Thus, even assuming that the evidence put forward by the Commission in the contested decision were incapable of supporting its interpretation, this would have no bearing on that interpretation, which, moreover, is confirmed by a reading of the letter in conjunction with the MEGAL agreement and Appendix 2 thereto.

298 In any event, it must be pointed out, for the sake of completeness, that, as is clear from paragraphs 299 to 303 below, the arguments advanced by the applicant are incapable of calling into question the evidence presented by the Commission in the contested decision in support of its interpretation.

299 First, the applicant's argument that, by acknowledging, in recital 198 of the contested decision, that, at the time the side letters were signed, any competition on the part of E.ON was precluded by law on account of the monopoly held by the applicant, the Commission confirmed that the object and/or effect of the Direktion G letter could not, as a matter of principle, be to restrict E.ON's sales in France must be rejected on the same grounds as those set out in paragraph 70 above.

300 Second, the arguments put forward by the applicant seeking to dispute the relevance of the reference to Appendix 2 to the MEGAL agreement must be rejected for the reasons set out in paragraph 295 above.

301 Third, with regard to the Commission's statement, in recital 198 of the contested decision, that the contact between the undertakings in question since 1999 makes clear that there was a link between E.ON's conduct on the French market and the applicant's conduct on the German market, it must be pointed out first of all that the Commission did not specifically rely on this finding to confirm its interpretation of the Direktion G letter. As the recital in question makes clear, that finding was in fact one of the factors taken into account to support, in general terms, the view that the agreement and/or concerted practice also concerned sales of gas made by E.ON in France from the MEGAL gas pipeline. The applicant's line of argument in relation to this statement is therefore ineffective for the purposes of this part of the plea. Next, it must be observed that there is no evidence capable of demonstrating that the Commission's statement is 'invalidated', as the applicant claims. Nor does the latter put forward any such evidence in the application. On the contrary, the Commission's statement is confirmed, inter alia, by a briefing note prepared for the 'Tour d'horizon' meeting of 2 July 2004 which states that E.ON deliberately held back from activity on the French market until the summer of 2003 and that, as a result of the applicant's activities in Germany, its sales activities in France increased, thus demonstrating the existence of a link between the sales of each undertaking on the other's market. This is likewise the case with a briefing note produced by E.ON on 5 October 2005 for a meeting held on 11 October 2005, from which it is apparent that it was in response to the applicant's activities in Germany that E.ON began to sell gas in France at the end of 2003.

302 Fourth, contrary to the applicant's claim, the Commission did not err in taking the view that its interpretation of the Direktion G letter was consistent with that of the applicant's legal department. It is true that the emails of 9 and 17 February 2000 make clear that that legal department was giving consideration to the issue of whether E.ON could transport gas for third parties via the MEGAL gas pipeline and stated that, in the past, it had adopted an interpretation in E.ON's favour by taking the view that the latter could require a third party wishing to transport gas via that gas pipeline to contract with it and not with MEGAL Finco. However, other than in relation to that issue, that same department expressly stated that the content of the letter was akin to a vast 'sharing of the market' between the undertakings in question. This means therefore that the applicant's legal department was of the opinion that that letter restricted E.ON's ability to market gas in France from the MEGAL gas pipeline. The applicant is therefore wrong to claim that those emails are capable of supporting its interpretation.

303 Fifth, the arguments advanced by the applicant with a view to contesting the documentary evidence produced by the Commission in support of its claims, specifically the exchange of letters of 13 and 21 May 2002 and the email of 16 March 2004, must be rejected. It must be stated as a preliminary point that, as is clear from recitals 81 and 96 of the contested decision, the Commission did not use those documents to confirm its interpretation of the Direktion G letter but, in essence, to find that the agreement in question was still in force. Next, with regard to the arguments concerning the exchange of letters of 13 and 21 May 2002, those arguments must be rejected on the same grounds as set out in paragraph 168 above. Finally, on the issue of the arguments regarding the email of 16 March 2004, they must, on the one hand, be rejected for the reasons set out in paragraph 174 above in so far as they relate to the evidential value of that email. On the other hand, they must be rejected in so far as they seek to call into question the relevance of the existence of available but unused capacities. Indeed, it is by explicit reference to the MEGAL agreements and in the light of the finding that all the capacities were reserved by the applicant that the email of 16 March 2004 classifies the imports made by E.ON into France as 'illegal'. As for [*confidential*], the Commission did not take such a factor as a basis for supporting its line of argument, with the result that the arguments developed by the applicant in this connection are irrelevant.

304 It follows from all the foregoing that the first part of the plea must be rejected.

b) The second part

305 In this part of the plea, the applicant claims that an infringement of Article 81 EC could not be found to exist with regard to the French market on the basis of the meetings and exchanges between the undertakings in question. In this connection, it disputes the relevance of five meetings upon which the Commission relied in order to establish the existence of a concerted practice.

306 Since the arguments put forward by the applicant concerning the documents relating to those five meetings — which took place on 27 February 2003, 2 September 2003, 16 March 2004, 27 May 2004 and 2 July 2004 — have been rejected (see, in particular, paragraphs 237, 238, 252 and 253 above), this part of the plea must be rejected.

c) The third part

307 The applicant is of the view that, in accordance with the State action exception to the application of Article 81 EC, the Commission was unable to determine as the date on which the infringement began on the French market a date prior to January 2003, the date of the transposition of the first gas directive into French law and of the adoption of the 2003 Law bringing to an end in law the applicant's legal monopoly on imports and exports of gas and opening the French market to competition for eligible customers.

308 It must be borne in mind, as a preliminary point, in this regard that, as far as the infringement committed in France is concerned, the Commission took the view, as is clear from Article 1 of the contested decision, that the duration of that infringement was, at the very least, from 10 August 2000 to 30 September 2005. It follows that this part of the plea must be rejected in so far as it might relate to the period prior to 10 August 2000 given that, in relation to that period, the Commission has not found any infringement to have been committed in France. In particular, the Court rejects the applicant's argument that the Commission did not draw the necessary conclusions from its finding, made in the context of the action for failure to fulfil obligations which resulted in the judgment in Case C-159/94 *Commission* v *France* [1997] ECR I-5815, that the legal monopoly on imports held by the applicant prohibited any competition from foreign operators in France, since that finding pre-dates the period at issue in the present case.

309 It is therefore necessary to examine whether, in relation to the period between 10 August 2000 and January 2003, an infringement of Article 81 EC by the undertakings in question could be ruled out in relation to France.

310 It must be pointed out in this connection that the Commission stated in recital 289 of the contested decision that the applicant's legal monopoly on imports was officially abolished in French law only on the entry into force of the 2003 Law. It did, however, make clear that, under European Union law, the French authorities were required to bring that monopoly to an end on the expiry of the period for the implementation of the first gas directive, that is to say, by 10 August 2000. It added that, as a public undertaking, the applicant could not rely on the fact that the French authorities had failed to transpose the first gas directive into national law in good time. It therefore concluded in recital 291 that, as far as the supply of gas in France was concerned, the conduct under investigation had infringed Article 81 of the EC Treaty with effect from 10 August 2000 at least.

311 This assessment must be approved.

312 In accordance with settled case-law, Articles 81 EC and 82 EC apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles 81 EC and 82 EC do not apply. In such a

situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings. Articles 81 EC and 82 EC may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of the undertakings (Joined Cases C-359/95 P and C-379/95 P *Commission and France* v *Ladbroke Racing* [1997] ECR I-6265, paragraphs 33 and 34, and Case C-207/01 *Altair Chimica* [2003] ECR I-8875, paragraphs 30 and 31).

313 In the present case, it must be pointed out first of all that — with effect from the expiry of the period allowed for the transposition of the first gas directive, the objective of which was to create a competitive market for gas — the French authorities were required to disapply any provision contrary to that directive. They could not, in particular, enforce such provisions against competitors of the applicant which wished to enter the French market for gas. Indeed, the primacy of European Union law requires any provision of national law which contravenes a rule of the European Union to be disapplied, regardless of whether it was adopted before or after that rule (Case C-198/01 *CIF* [2003] ECR I-8055, paragraph 48).

314 In addition, it should be pointed out that a body, irrespective of its legal form, which has been entrusted by a measure adopted by a public authority with providing, subject to the control of that public authority, a service in the public interest and which enjoys, to that end, exceptional powers as compared with the rules applicable to relations between individuals, as was the case with the applicant, is an entity against which the provisions of a directive capable of having direct effects may be enforced (Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 18).

315 Next, it must be stated, as the Commission rightly pointed out in recital 290 of the contested decision, that, from August 2000, gas suppliers were able to enter the French market and certain customers were declared to be eligible. Furthermore, the applicant acknowledges having taken the step, with effect from August 2000, of adopting a transitional system of third-party access to the network, thus enabling a gradual opening of the French market to competition. The French authorities had also stated in the context of Case C-259/01 *Commission* v *France* [2002] ECR I-11093, paragraphs 12 and 13, that the transitional system of access to the gas transmission and distribution network, in effect since 10 August 2000, enabled eligible customers, within the meaning of Article 18 of the first gas directive, to have access to the gas system by means of transmission contracts for a minimum term of one year. The application of that system enabled eligible customers to renegotiate their gas supply contracts and even to change supplier. A year after that system was put in place, 14% of eligible customers on the French market had changed supplier and four new economic operators had appeared on that market.

316 Finally, as is clear from the preparatory note for the 'Tour d'horizon' meeting of 20 December 2001, to which reference is made in recital 116 of the contested decision, E.ON opened a sales office in France. This would not have taken place if the French market had been completely closed to competition at that time. Similarly, it is apparent from a briefing note for the 'Tour d'horizon' meeting of 2 July 2004 that E.ON deliberately held back from activity on the French market until the summer of 2003. Its inactivity on the French market was therefore not, at least up until that time, due to legislative constraints.

317 In those circumstances, it must be held that, although it was still formally in force, with effect from 10 August 2000 the 1946 Law could no longer be regarded, in practice, as requiring the anti-competitive conduct at issue or creating a legal framework which itself eliminates any possibility of competitive conduct on the part of the undertakings in question for the purposes of the case-law referred to in paragraph 312 above. The applicant is therefore wrong to claim that the Commission could not take the view, first, that the alleged infringement began on 10 August 2000 and, second, that, in accordance with the 1946 Law, the applicant enjoyed a legal monopoly on gas imports and supply, a situation which had remained unchanged. Furthermore, contrary to the applicant's claim, that situation — that is to say, its legal monopoly — did not remain unchanged until the adoption of the

2003 Law, since from 10 August 2000 the French authorities were required to have transposed the first gas directive and the applicant itself acknowledges that it took the step, from August 2000 onwards, of adopting a transitional system of third-party access to the network, thus enabling a gradual opening of the French market to competition.

318 The foregoing conclusions are not called into question by the fact that it is clear from *Commission* v *France*, paragraph 315 above, paragraph 21, that the practices adopted by the economic operators, in the present case the applicant, with effect from 10 August 2000, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty. In order to establish whether Article 81 EC applies, the only relevant issue in this case is in fact whether, from that date onwards, the 1946 Law required the anti-competitive conduct in question or created a legal framework which itself ruled out any possibility of competitive conduct. However, this is not the case here, as is clear from the foregoing. In any event, a body which, like the applicant, is subject to State control cannot rely on the failure of the State to comply with its obligations under the Treaty on the Functioning of the European Union (TFEU) in order to justify anti-competitive conduct which is prohibited by that treaty.

319 It is likewise necessary to reject the argument advanced by the applicant that the 'opening-up' it displayed from August 2000 cannot be equated with the end of the legal monopoly or the monopoly based on the fact that the transitional rules governing third-party access to the network put in place had not been approved by the legislature. The Commission was in fact required to examine the situation on the French market for gas objectively and not simply theoretically with a view to establishing whether, notwithstanding the formal continuation of the legal monopoly on imports provided for in the 1946 Law, that law was capable of preventing any competition on the market. The origin and nature of the measures which enabled that opening-up cannot affect the finding, in recital 290 of the contested decision, that competition was actually possible on the French market.

320 Accordingly, contrary to the applicant's claim, there is nothing 'paradoxical' about the Commission's reliance on the fact that the applicant's competitors were able to supply eligible customers in France from 10 August 2000, since in fact that situation is solely the result of the applicant's own conduct. Similarly, the applicant is wrong to take the view that this is tantamount to censuring it for having taken part in the liberalisation, and runs counter to the objectives of the European Union and of competition policy. Furthermore, in this case, the Commission has imposed penalties in relation to the agreement and the concerted practices at issue and not because, with effect from 10 August 2000, the applicant proceeded to implement the first gas directive, albeit in part and to a limited degree. In any event, in accordance with the case-law referred to in paragraph 313 above, the applicant was required to contribute towards the implementation of the first gas directive, which it did, albeit imperfectly, by its conduct from 10 August 2000 onwards.

321 Furthermore, as the applicant points out, it is settled case-law that, in accordance with the principle of legal certainty, an undertaking cannot be exposed to any penalties, either criminal or administrative, in respect of past conduct where that conduct was required by a national law which precluded the possibility of competition capable of being prevented, restricted or distorted by the autonomous conduct of undertakings (see, to that effect, *CIF*, paragraph 313 above, paragraph 53). Nevertheless, that case-law does not apply to the present case since, as has already been stated, notwithstanding the formal continued application of the 1946 Law, there was in fact a possibility of competition capable of being prevented. In addition, that law did not require the conduct at issue here.

322 As regards the applicant's argument that, prior to the implementation of the first gas directive, the legal and regulatory framework did not offer sufficient legal certainty to the new competitors, this argument must likewise be rejected since, as has been already held, despite the continued application of the 1946 Law, the possibility of competitive conduct on the part of those competitors was not precluded and E.ON deliberately held back from activity on the French market until the summer of 2003. Moreover, it is clear from the case-law cited in paragraph 313 above that, from 10 August 2000 onwards, the provisions of the 1946 Law could no longer be enforced against foreign operators wishing

to supply gas in France in accordance with the unconditional and precise provisions of the first gas directive. In those circumstances, it is not possible to rely on alleged legal uncertainty existing prior to the actual transposition of the first gas directive with a view to justifying the conduct of the undertakings in question. It must also be stated in this regard that an operator of E.ON's size had the necessary resources to take advantage of the liberalisation from 10 August 2000 by relying on the directly effective provisions of the directive, even though that directive had not been transposed into French law. Furthermore, as is clear from recital 290 of the contested decision, E.ON supplied gas in Belgium after the expiry of the period allowed for the transposition of the first gas directive and prior to the adoption of the measures implementing that directive. Similarly, contrary to the implication contained in the applicant's arguments, the Commission did not complain that E.ON developed its activities on the French market only after January 2003, but simply criticised the undertakings in question for having concluded a market-sharing agreement contrary to Article 81 EC.

323 It follows from the foregoing that the Commission was able to find that an infringement of Article 81 EC had been committed by the undertakings in question in relation to France during the period from 10 August 2000 to January 2003. Accordingly, the Commission did not infringe that provision in the present case by determining the date on which the infringement began on the French market to be 10 August 2000.

324 The third part of the plea must therefore be rejected, as, consequently, must the third plea in its entirety.

4. *The fourth plea, alleging errors of fact and of law in the application of Article 81 EC as regards the existence of an agreement and/or of a concerted practice between the undertakings in question after August 2004*

325 This plea, raised in the further alternative and by which the applicant submits that the Commission failed to demonstrate, to the requisite legal standard, that an agreement and/or a concerted practice existed between the undertakings in question after 13 August 2004, is divided into three parts alleging, first, the infringement of Article 81 EC on account of the absence of a concurrence of wills on the part of the undertakings in question to apply the side letters after August 2004, second, an infringement of Article 81 EC by virtue of a manifestly incorrect assessment of the meetings and exchanges between those undertakings after August 2004 and, third, in the alternative, an infringement of Article 81 EC and a breach of the rules relating to the taking of evidence and of the duty to state reasons on account of the lack of any evidence that the infringement existed on the French market after August 2004.

326 Before examining these parts of the plea, it must be borne in mind that, according to settled case-law, the system of competition established by Articles 81 EC and 82 EC is concerned with the economic consequences of agreements, or of any comparable form of concertation or coordination, rather than with their legal form. Consequently, in the case of agreements which have ceased to be in force, it is sufficient, in order for Article 81 EC to apply, that they produce their effects beyond the date on which they formally came to an end. It follows that the duration of an infringement must be appraised not by reference to the period during which an agreement is in force, but by reference to the period during which the undertakings concerned adopted conduct prohibited by Article 81 EC (see Joined Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraph 187 and the case-law cited).

327 In the present case, the Commission held, in recital 299 of the contested decision, that the infringement ended when the undertakings in question actually ceased to apply the Direktion I and Direktion G letters and the contractual restriction preventing the applicant from using the outlet points of the MEGAL gas pipeline in Germany to supply customers with gas. Although those letters were officially repealed by the 2004 agreement, the Commission found, in recital 300 of the contested

decision, that the contractual restriction in question ended, at the earliest, only at the end of September 2005. It took account of the fact that the interim agreement of 9 September 2005 allowed the applicant to market carrying capacities in the MEGAL gas pipeline as from 1 October 2005 and that the 2005 agreement entered into force on 13 October 2005. Furthermore, it stated, in the same recital, that, at the same time, the applicant's sales of gas from that gas pipeline to customers established in Germany noticeably exceeded the volumes which it had purchased in the context of the GRP only as from October 2005. It therefore found that Article 81 EC applied given that the concerted practice continued beyond the termination of the MEGAL agreement and continued to produce its effects until that agreement was replaced.

328 It follows that the Commission took the view that the infringement continued after the 2004 agreement on the basis not only of the evidence proving that the undertakings in question continued, despite the formal repeal of the side letters, to apply those letters, but also of the fact that the contractual restrictions preventing the applicant from using the outlet points of the MEGAL gas pipeline in Germany, contained in Appendix 2 to the MEGAL agreement, remained in force even after the 2004 agreement.

329 It is in the light of those considerations that the different parts of this plea must be examined.

a) The first part

330 In this part of the plea, the applicant states that the contested decision infringes Article 81 EC on account of the absence of any concurrence of wills on the part of the undertakings in question to apply the side letters after August 2004.

331 In this connection, the applicant essentially advances two complaints alleging, first, a manifest error of assessment and, second, the non-probative value of the evidence relied on by the Commission.

– The first complaint

332 The applicant states that the Commission made a manifest error of assessment regarding the applicant's participation in the GRP; more specifically, it erred by finding that the fact that the applicant sold gas in the south of Germany in 2004 was not sufficient to prove the absence of any market sharing.

333 In this regard, it must be pointed out, first, that, contrary to the applicant's claim, the existence of gas sales in Germany from the MEGAL gas pipeline from October 2004 is not capable, as such, of constituting proof that the side letters were no longer regarded as binding. Indeed, it must be borne in mind that, as is clear from recital 73 of the contested decision, [*confidential*]. The applicant therefore sold gas in Germany only to a limited degree from 2003 onwards, as the Commission made clear. In addition, the sales of gas from the MEGAL gas pipeline, which began only in 2004, represent a relatively small percentage (or, as the Commission found in recital 101 of the contested decision, a 'relatively minimal' percentage) of the applicant's total sales in Germany and, contrary to its claims, cannot be regarded as significant. Indeed, in 2004 and 2005, [*confidential*]. Finally, it is clear from recital 101 of the contested decision that the volumes of gas from the MEGAL gas pipeline sold by the applicant in Germany between 2004 and September 2005 were almost exclusively purchased from E.ON under the GRP, the transfer of those volumes of gas being a requirement under the decision of the German authorities to allow the merger between E.ON and Ruhrgas.

334 In view of all those factors, it is true that the sales of gas from the MEGAL gas pipeline do prove the existence of commercial canvassing as the applicant claimed. However, they are incapable on their own of proving that the side letters did not have binding effect. Furthermore, documentary evidence tends to prove in essence, as the Commission stated in recital 102 of the contested decision, that the applicant was of the view that it could not sell volumes of gas greater than those acquired under the

GRP on account of the provisions of contracts with E.ON (see, in particular, paragraphs 337 to 339 below). As for the argument that the Commission should have taken into account the offers submitted by the applicant, it is sufficient to state that, in any event, those offers would have been unable on their own to establish the existence of competition (see paragraph 196 above), all the more so since the applicant itself acknowledged in its response to the statement of objections that none of the offers which it mentioned came to anything. With regard to the applicant's argument based on the fact that the Commission did not take account of the fact that some of the supplies of gas made from September 2005 onwards related to contracts negotiated as early as 2004, reference is made to the considerations contained in paragraph 350 below.

335 Second, the argument based on the fact that the Commission fails to explain why active participation in the GRP and the use of the volumes of gas purchased under the GRP for resale in Germany do not constitute proof that a cartel did not exist is ineffective, since the Commission was required to establish that the infringement existed and not that it did not exist. In any event, the participation in the GRP is incapable of proving that there was no market-sharing agreement; the fact that the applicant freely chose to participate in the GRP and to use the quantities of gas purchased as part of that participation to develop its activity in the south of Germany is irrelevant in this regard. Indeed, it must be stated as a preliminary point that the gas sold in Germany by the applicant under the GRP does not form the subject-matter of the infringement in question, as is apparent from recital 346 of the contested decision. Next, it is clear both from the analysis of the applicant's sales and from documentary evidence that the applicant in fact limited its activity to the volumes acquired under the GRP. It thus made no significant sales beyond those volumes. This demonstrates that, notwithstanding its participation in the GRP, it continued to observe the contractual restrictions resulting from the MEGAL agreement. In addition, E.ON's internal minutes of the 'Tour d'horizon' meeting of 29 March 2004 state that the applicant intended to participate in the GRP because it feared that otherwise the Russian gas would fall into the wrong hands and thus create increased competition.

336 As regards the applicant's argument that its sales from the MEGAL gas pipeline exceeded the volumes acquired under the GRP, that argument must be rejected since, although the Commission has not disputed that fact, it nevertheless did make the point, as the applicant concedes, in recital 113 of the contested decision, that those sales did not significantly exceed those volumes. In any event, even though the volumes of the applicant's sales were slightly higher than the volumes acquired under the GRP, as is apparent from the table in recital 101 of the contested decision, that fact — given the minimal difference between the volumes in question — is incapable of demonstrating that the applicant did not consider itself to be bound by the side letters.

337 Third, there is no evidence to show that the Commission was wrong to state in recital 102 of the contested decision, on the basis of the applicant's email of 21 July 2004, the content of which is reproduced in paragraph 189 above, that the applicant was of the view that it could not take gas from the MEGAL gas pipeline because of the provisions of contracts with E.ON. Accordingly, there are no grounds for taking the view, as the applicant claims, that the inability to take gas from that gas pipeline with the exception of the volumes acquired under the GRP could be explained by [*confidential*]. More specifically, with regard to the applicant's argument based on the fact that a brake was put on the development of its activity in the south of Germany for technical reasons [*confidential*], whereas that was not the case in the context of the GRP, it must be pointed out that such grounds are not mentioned in the email in question to justify the view expressed by the applicant.

338 In this context, it must be pointed out that the fact that that email does not make reference to the side letters is not decisive, and, furthermore, the Commission has never claimed that to be the case. The fact that that email states that, in anticipation of a general agreement on the MEGAL gas pipeline, outlet points on that gas pipeline other than those listed in the email cannot be used, coupled with the fact that the email sets out the conditions governing the supply of gas to customers in southern Germany from the gas pipeline, tends, on the contrary, to indicate that the situation described is the result of the existing MEGAL agreement [*confidential*].

339 Finally, it must be pointed out that the applicant's note of 10 May 2004, mentioned in footnote 98 to the contested decision, confirms the statement made by the Commission in recital 102 of that decision. That recital states that, as far as the inlet and outlet points on the MEGAL gas pipeline are concerned, the applicant (and it alone at that date) is entitled to take the gas acquired from the auctions at any inlet or outlet point on that pipeline. That note also explicitly states that the conveying of gas [*confidential*] to end-customers in Germany via an outlet point on the MEGAL gas pipeline was not practicable at that time, since the applicant had no such outlet points to the west of that gas pipeline.

340 Fourth, it must be stated that the country of origin of the gas was not a factor on the basis of which the Commission found there to be an infringement. Indeed, it is clear from recital 199 of the contested decision that the infringement at issue concerns the supply of gas transported via the MEGAL gas pipeline; no mention is made of the origin of the gas. Similarly, in recital 349 of the contested decision, the Commission states that the sales to which the infringement relates are sales of gas transported by E.ON and by the applicant using the MEGAL gas pipeline, and sold to customers in Germany and eligible customers in France, with the exception of the sales of gas made by E.ON under the GRP to be delivered to Waidhaus, and the sales of gas purchased by the applicant under the GRP to be delivered to Waidhaus. [*confidential*] In those circumstances, the applicant's argument that the Commission contradicted itself by finding there to be an infringement [*confidential*] must be rejected. The same applies to the argument advanced by the applicant that the Commission failed to explain to what extent the origin of the gas might have an impact on the characterisation of that infringement.

341 Finally, with regard to the applicant's claim that — following the Commission's reasoning — the side letters must be regarded as being, at most, a destination clause [*confidential*], it is sufficient to hold, as the Commission itself found, that such a clause constitutes a vertical agreement, generally concluded between a supplier and its customer under a contract for the supply of gas, which seeks to prohibit the customer from re-exporting the gas purchased from the supplier; by contrast, in the present case the clause is a horizontal agreement concluded between two suppliers in the context of establishing a gas transmission infrastructure which seeks to limit the sales of gas transported via that infrastructure on the other's territory. The claim in question must therefore be rejected.

342 It follows from all the foregoing that the first complaint must be rejected.

– The second complaint

343 The applicant casts doubt on the probative value of the evidence relied on by the Commission to demonstrate the continuation of the prohibition on taking gas from the MEGAL gas pipeline after August 2004. In its view, the Commission has failed to produce precise and consistent evidence in support of its claims that, despite the 2004 agreement, the side letters continued to be applied by the undertakings in question after that date.

344 First, with regard to Appendix 2 to the MEGAL agreement, it must be borne in mind that the inlet and outlet points on the MEGAL gas pipeline which could be used by the undertakings in question were specified in that appendix. In relation to the applicant, point 2.1 of that appendix assigned to it just one outlet point, located on the border between France and Germany, for all the quantities of gas transported for it, unless the undertakings in question agreed otherwise. It did not therefore assign any outlet point in Germany to the applicant and thus prevented it from taking gas intended for German customers from the MEGAL gas pipeline. In addition, there is no evidence capable of supporting the view that the appendix in question was revoked or made redundant by the 2004 agreement, or of proving that that agreement constituted a contractual amendment to the appendix agreed upon by the undertakings in question. Indeed, as the Commission stated in recital 107 of the contested decision, the 2004 agreement does not mention that appendix, a point which, moreover, the applicant does not dispute. The wording of the 2004 agreement in fact makes expressly clear that it related solely to some of the side letters, with no mention being made of any other provisions of the MEGAL agreement or its appendices.

Furthermore, the applicant fails to adduce any evidence capable of calling into question the Commission's statement in that recital that, if the undertakings in question had wanted to address the issue of Appendix 2 to the MEGAL agreement in the 2004 agreement, they would have done so explicitly. As for the applicant's claim that the undertakings in question acknowledged, as early as 2001, and then later by the 2004 agreement, the fact that the Direktion I letter — which, in the applicant's view, contained a provision similar to that appendix — was 'null and void', it cannot be inferred, in the absence of any express statement to that effect regarding that appendix (including in the fax of 7 January 2002 or in the 2004 agreement), that that appendix had become obsolete. The applicant's line of argument relating to the appendix in question must therefore be rejected.

345 Second, with regard to the press article of 23 August 2004 referred to in recital 108 of the contested decision, it must be pointed out first of all that it is only one of the items of evidence upon which the Commission based its analysis that the applicant took the view, following the 2004 agreement, that it could not take gas from the MEGAL gas pipeline on account of the provisions of its contracts with E.ON. Indeed, as is clear from recitals 111 and 112 of the contested decision, it also based its analysis on an internal note produced by the applicant in January 2005, the applicant's plan for development in Germany and the applicant's conduct.

346 Next, it must be observed that the press article of 23 August 2004 is taken from a specialist magazine, that it reproduces the words of the applicant's sales director in Germany and that it contains very precise information about the limits to the applicant's ability to take gas from the MEGAL gas pipeline. It is thus clear that, as at the date of that press article, the applicant had not yet reached a definitive arrangement with E.ON concerning the taking of gas from that gas pipeline and that there were limited options available to the applicant to take gas from the gas pipeline. The press article states that the applicant was able to take gas wherever that was feasible on the basis of a common interpretation of the existing rules. In those circumstances, the evidential value of the press article in question cannot be regarded as minimal or non-existent, and the Commission was legitimately able to rely on that document to substantiate its statement that certain evidence demonstrates that the applicant was of the view that it could not take gas from that same gas pipeline by reason of its contractual relations with E.ON. As regards the fact that the press article concerned is dated only 10 days after the 2004 agreement, that fact is not directly relevant, since the person whose words are reproduced had, in view of his position, necessarily to be specifically aware of the situation vis-à-vis the gas pipeline in question.

347 Finally, the applicant is wrong to claim that the Commission refused to take into account the letter of 26 August 2004 by which E.ON responded to the article in question and reiterated that the Direktion I letter was obsolete. The Commission in fact stated, in recital 110 of the contested decision, that that letter would be dealt with in point 4.3.1 of the decision, in the general context of the argument advanced by E.ON that it allowed the applicant to take gas from the MEGAL gas pipeline in Germany. It is for this reason that in recital 149 of the contested decision, which forms part of point 4.3.1 of that decision, the Commission finds that the statement that E.ON accepted the applicant's right to take gas from the MEGAL gas pipeline is contradicted by the evidence that the applicant was of the opinion, both internally and as expressed in its public statements, that it was not entitled to take gas from the gas pipeline beyond the volumes of gas purchased under the GRP. This being the case, the view must be taken that the Commission does respond, implicitly but necessarily, to the argument based on E.ON's letter of 26 August 2004. As for the arguments advanced by the applicant alleging that the letter of 26 August 2004 demonstrates the absence of any concurrence of wills between the undertakings in question, that the side letters were not 'abandoned' at the same time as the 2005 agreement and that the difficulties experienced by the applicant in marketing gas were the result of obstacles which had nothing to do with its own will, it is sufficient to state that those arguments are contradicted by other evidence that post-dates that letter (see, in particular, the documents mentioned in paragraphs 349, 361 and 362 below) as well as by the applicant's conduct on the market (see paragraph 350 below), which demonstrate the continuation of the infringement at issue beyond the 2004 agreement, with the result that the arguments must be rejected. Moreover, although it is apparent from that letter that E.ON confirmed, on several occasions, that the applicant could take gas from the MEGAL gas pipeline, [*confidential*], which shows that, in practice, the possibilities

available to the applicant of taking gas in Germany were still, at that time, to say the least restricted. Finally, as the Commission has stated, it is apparent from that document that E.ON pointed out to the applicant that a public depiction or discussion concerning the possibilities of taking gas from the MEGAL gas pipeline was not constructive, which shows that the objective pursued by E.ON was above all to make the applicant realise that it was preferable not to make public statements on the subject.

348 The applicant's line of argument regarding the press release in question must therefore be rejected.

349 Third, with regard to the applicant's plan for development in Germany, in its version of 2 September 2005, it is apparent from that plan that, for contractual reasons, the applicant could not take gas from the various outlet points of the MEGAL gas pipeline or directly market the carrying capacities which it possessed. The expected conclusion of a new contract with E.ON in respect of the operation of the pipeline could change that situation. In this regard, even assuming that that were proven to be the case, the fact that that development plan was only at a draft stage, as the applicant claims, cannot call into question the accuracy of its content, produced by the applicant's own workforce, or therefore its evidential value. The same is true of the applicant's claim that it has not been updated or verified internally for a number of years. That claim appears to be further contradicted by the fact that that document expressly states that it is the 'version of 2 September 2005'. Moreover, the applicant has failed to produce a final document which has been updated and verified and which differs from that relied on by the Commission.

350 Fourth, as regards the Commission's statement in recital 300 of the contested decision that the sales made by the applicant of gas from the MEGAL gas pipeline to customers established in Germany significantly exceeded the amounts purchased by the applicant under the GRP only with effect from October 2005, the applicant's argument that the Commission made a manifest error of assessment by taking this factor into account in order to determine the date on which the infringement ended must be rejected. Indeed, aside from the fact that, in its view, the Commission dismissed without any reasonable justification the alternative explanations given, namely that the sales in Germany were characterised by marked increases in the month of October and that supplies beginning with effect from October 2005 followed on from supply contracts concluded well before that time, the applicant does not advance any argument to demonstrate a manifest error of assessment. However, for such an error to be found to exist, the applicant must produce evidence on the basis of which the view may be taken that the Commission's reasoning is incorrect, which it fails to do in the present case. In any event, the Commission did respond to the explanations put forward by the applicant. In recital 302 of the contested decision it stated, in response to the explanation regarding the structure of the gas years, that the applicant was aware that all the annual supply contracts entered into force in October and that it could reasonably expect the conclusion of a new agreement with E.ON. The applicant has not explicitly advanced any arguments seeking to dispute that statement. The Commission also stated in recital 113 of the contested decision that, although the applicant had signed supply agreements with customers in advance, the fact remained that it did not actually take gas from the gas pipeline prior to October 2005 and that, accordingly, it had complied with the prohibition on taking gas from the MEGAL gas pipeline in Germany. That assessment must be approved since, as has been made clear, until October 2005 the volumes of gas sold by the applicant in Germany from the MEGAL gas pipeline represented an infinitesimal percentage of German consumption and exceeded only to a very limited degree the quantities of gas acquired under the GRP which E.ON was obliged to transfer.

351 It follows that the second complaint must be rejected, as, consequently must the first part of the plea.

b) The second part

352 In this part of the plea, the applicant calls into question the Commission's assessment of the meetings and exchanges which took place following the 2004 agreement. In its view, the Commission interpreted the meetings and exchanges between the undertakings in question taking place after the 2004 agreement wholly incorrectly. It puts forward five arguments in this connection.

353 In the first place, with regard to the applicant's argument that E.ON continued, after the 2004 agreement, to complain about the competition provided by the applicant in Germany, it must be stated as a preliminary point that the Commission did not take the view, as the line of argument advanced by the applicant implies, that it was not possible on the basis of that fact to rule out the existence of an agreement and/or a concerted practice to continue to apply the side letters. In recitals 130 to 136 of the contested decision, the Commission in fact simply took account of that fact, amongst other facts, with a view to demonstrating, in essence, the existence of collusive conduct, and in particular the existence of exchanges between the undertakings which were more akin to a concerted practice than to competition after the 2004 agreement.

354 Next, it must be stated that the existence of such complaints is, on its own, insufficient to rule out the existence of a cartel. On the contrary, as the Commission essentially submitted, if there had previously been no anti-competitive, market-sharing agreement between two competing undertakings, there would have been no need for one of those undertakings to complain in the course of regular meetings about the competition provided on its territory by the other undertaking. As is apparent from recital 195 of the contested decision, the isolated evidence of disagreement regarding matters which should not be addressed between competitors in a competitive environment demonstrates that the undertakings in question acted within the framework of a common position, even where, on certain occasions, they accused each other of deviating from that position.

355 The fact, mentioned by the applicant, that certain factors point to the existence of intense competition is incapable of contradicting the foregoing considerations. Indeed, the fact that a cartel agreement is not honoured does not mean that it does not exist (see 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*, not published in the ECR, paragraph 74 and the case-law cited). In any event, it must be stated that, even assuming that such competition existed, the fact remains that the undertakings in question complained about the other's sales or the prices applied by the other and reacted to those complaints, as is made clear in recitals 123, 124 and 130 to 136 of the contested decision.

356 Furthermore, although — as is apparent from a note produced by the applicant dated 9 February 2005 — E.ON accused the applicant of 'destroying' the value of gas in Germany and of taking advantage of a price differential [*confidential*] in order to win new customers, which might demonstrate a degree of competitive conduct on the part of the applicant in Germany, the fact remains that the applicant was of the view that it was necessary 'to work on that issue'. However, in a normal competitive context, an undertaking would not contemplate 'working' on the accusations of its competitor regarding its prices. That therefore shows that the applicant intended to address E.ON's concerns.

357 In that regard, if an economic operator accepts another operator's complaints in connection with the competition to which the first operator's products expose the complainant, their conduct amounts to a concerted practice (*Suiker Unie and Others* v *Commission*, paragraph 211 above, paragraph 283). In addition, in the present case, it must be held that by stating that it was going 'to work on that issue' relating to E.ON's complaints concerning its pricing practices in Germany and by drawing up, following complaints by E.ON concerning its pricing positioning in the context of sales to State-owned companies, a note in April 2005, the applicant accepted those complaints within the meaning of that case-law, even though it took the view, as is apparent in particular from that note of April 2005, that it was necessary to place E.ON's perception in context.

358 Furthermore, it must be pointed out that the applicant does not dispute that the fact that, occasionally, the parties to a market-sharing agreement do not comply with that agreement or complain about the other party's non-compliance in no way demonstrates that that agreement has not been maintained and applied. The applicant is, however, of the view that such a principle does not apply in the present case because the undertakings in question repeated, by means of the 2004 agreement, that the side letters were 'null and void', and because the Commission has failed to demonstrate a concurrence of wills on the part of the undertakings in question after August 2004.

359 Nevertheless, first, the applicant's argument by which it seeks to dispute the existence of a concurrence of wills after that date has been rejected in connection with the first part of this plea. Second, even though the undertakings in question stated in the 2004 agreement that they regarded the side letters as 'null and void', the fact remains that they continued to observe the market-sharing agreement stemming from those letters, since E.ON continued to complain about the applicant's actions, which the applicant sought to put into context, as is shown, inter alia, by the notes of 9 February and of April 2005. In addition, with regard specifically to the applicant, until September 2005 it did not take gas from the MEGAL gas pipeline in significantly greater volumes than the quantities acquired under the GRP, as is clear from recitals 101 to 103 of the contested decision.

360 In the second place, with regard to the applicant's argument seeking to dispute the fact that E.ON's fears vis-à-vis the applicant's development in Germany after August 2004 were only apparent, it is sufficient to point out that the Commission did not take the view that those complaints were only 'apparent', as the applicant submits. In any event, such fears are incapable of establishing that there was no agreement, on the same grounds as those on which the arguments regarding E.ON's complaints were rejected (see paragraphs 353 to 359 above). In this context, it must be pointed out that, as has been stated in paragraph 263 above, the applicant's note of April 2005 is incapable of illustrating an aggressive pricing policy on its part in Germany. Moreover, it must be borne in mind that, in accordance with the case-law referred to in paragraph 357 above, in a normal competitive environment, it seems inconceivable that an undertaking would react to its competitor's criticisms regarding its pricing policy and attempt to place the perception of aggressive price positioning on its part in context, as the applicant did in that note, which was drafted following complaints from E.ON. That note is therefore irrelevant as far as demonstrating the absence of any cartel is concerned. Indeed, as the Commission submits, in the circumstances of this case the fears expressed by E.ON tend to demonstrate that the undertakings in question were ensuring that the agreement was observed, for the reasons set out in paragraph 354 above. Contrary to the applicant's claim, this does not amount to reversing the burden of proof, since that finding must be viewed in conjunction with the other evidence which demonstrates the continuation of conduct constituting an infringement after August 2004.

361 In the third place, contrary to the applicant's claim, the Commission was right to find, in recital 124 of the contested decision, that the applicant reacted to E.ON's complaints regarding its pricing policy on the [*confidential*] segment in Germany, taking as a basis for that finding the notes of 9 February and of April 2005. It is sufficient to point out in this regard that the note of 9 February 2005 states that it would be necessary to work on the issue of E.ON's accusations, and that the note of April 2005 was drafted following E.ON's complaints regarding the applicant's price positioning in the context of sales to [*confidential*] which, in E.ON's view, was destroying the value of gas in Germany. There is indeed therefore a link between E.ON's complaints regarding the applicant's policy and the applicant's reactions. In those circumstances, it cannot be submitted that the Commission's interpretation is incorrect. It must be pointed out in this regard that, contrary to the applicant's claims, the Commission did not take the view in the contested decision that the note of April 2005 recommended tempering the applicant's aggressive conduct in Germany. Finally, it must be made clear that, contrary to the applicant's claims, such a reaction cannot be regarded as being an indication of sound management. Indeed, it is clear from that note that the objective was to put E.ON's perception in context and not to preserve the applicant's level of profitability in Germany, as the applicant claims.

362 In the fourth place, with regard to the documents relating to the meeting of 21 September 2005, namely a briefing note of 20 September 2005 prepared for that meeting and an email of 22 September 2005 providing a summary of the meeting, to which reference is made in recitals 132 and 133 of the contested decision, it must be observed, as a preliminary point, that — as it finally conceded in response to a question put by the Court at the hearing — the Commission relied on those documents to find that E.ON continued to complain about the competition provided by the applicant in Germany and that the conduct of the two parties was more akin to a concerted practice than to competition. These documents were therefore held to constitute incriminating evidence, contrary to the Commission's initial claims in its written submissions.

363 Next, it must be stated that the applicant's related argument must be rejected. Indeed, without it being necessary to examine the briefing note of 20 September 2005 prepared for the meeting on the following day, it is sufficient to observe that, far from making clear, as the applicant claims, that [*confidential*], the minutes of that meeting demonstrate the collusive nature of the conduct of the undertakings in question. It is in fact clear from those minutes that the applicant stated that it did not consider Germany to be a key market and that, recently, of nine offers submitted only one had resulted in the acquisition of a new customer. It also stated that it had even lost customers. Accordingly, including a few days prior to the end date of the infringement accepted by the Commission, the applicant exchanged with E.ON information relating to its commercial policy in Germany. Such information was likely to influence E.ON's conduct on the market — as E.ON was made aware of the applicant's position vis-à-vis the German customers — and it also disclosed the course of conduct which the applicant intended to adopt on that market. However, the requirement of independence applicable to the policies of all economic operators, a concept inherent in the provisions of the Treaty relating to competition, strictly precludes any direct or indirect contact between such operators, the object or effect of which is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market, where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question. In this regard, subject to proof to the contrary, which it is for the economic operators concerned to adduce, there must be a presumption that the undertakings participating in concerted arrangements and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market (see, to that effect, *Commission* v *Anic Partecipazioni*, paragraph 275 above, paragraphs 117 and 121). In the light of that case-law, it must be held that the meeting of 21 September 2005 served as a framework for a concerted practice contrary to Article 81(1) EC, the applicant not even having attempted to adduce evidence that it did not take account of the information in question.

364 The Commission did not therefore err by taking into account the documents relating to the meeting of 21 September 2005 in finding that the exchange between the undertakings in question related more to the concerted practice than to competition.

365 Finally, the arguments advanced by the applicant seeking to dispute the existence of an exchange of information have already been rejected in the context of the examination of the second plea, to which reference is therefore made. It is also pointed out that the minutes of the meeting of 21 September 2005 themselves make clear that the undertakings in question exchanged information capable of influencing their conduct on the market and of disclosing such courses of conduct; an exchange of information of this kind is prohibited by Article 81 EC.

366 It follows from all the foregoing that the second part of the plea must be rejected.

c) The third part

367 In this part of the plea, the applicant submits that the contested decision is vitiated by an infringement of Article 81 EC, a breach of the rules relating to the taking of evidence and a failure to state reasons in so far as it adduces no evidence regarding the existence of the infringement on the French market after 13 August 2004.

368 It must be borne in mind in this regard that Article 1 of the contested decision states that the duration of the infringement was from 1 January 1980 to at least 30 September 2005 as far as the infringement committed in Germany is concerned, and from 10 August 2000 to at least 30 September 2005 as far as the infringement committed in France is concerned.

369 However, it must be stated, first of all, that there is no documentary evidence to attest to the continuation of the infringement in question after 13 August 2004, whether in the form of an agreement or of a concerted practice. The last document concerning the French market is E.ON's internal briefing note of 26 June 2004, relating to the 'Tour d'horizon' meeting of 2 July 2004, which is

prior to 13 August 2004, the date of the 2004 agreement. As regards, more specifically, the meetings and exchanges during which, according to recital 307 of the contested decision, the undertakings in question discussed their respective strategies on each other's national markets after August 2004, it must be pointed out that the Commission does not refer, in that recital, to any specific item of documentary evidence relating to a meeting which concerned the French market. Furthermore, the documents relating to the meetings after 13 August 2004 referred to in recitals 123, 124 and 130 to 136 of that decision relate only to the German market for gas and not to the French market.

370 Next, the Commission does not rely on E.ON's conduct on the French market to demonstrate the continuation of the cartel on that market. In particular, it did not refer to E.ON's sales in France, although it did refer, in recital 300 of the contested decision, to the applicant's sales in Germany.

371 Furthermore, the restrictions relating to the outlet points from the MEGAL gas pipeline which may apply to E.ON in France, and in particular those which may stem from Appendix 2 to the MEGAL agreement, are not even referred to by the Commission. The Commission refers, in recitals 299, 300 and 307 of the contested decision, only to the contractual restrictions preventing the applicant from using the outlet points from the MEGAL gas pipeline in Germany to supply customers. In any event, notwithstanding the provisions of Appendix 2 to the MEGAL agreement concerning E.ON, that undertaking could take gas from the MEGAL gas pipeline to sell in France, even though those sales represented only a small share of the market and concerned only a small number of customers, as is apparent from recitals 73 and 101 of the contested decision.

372 Finally, it must be pointed out that the Commission's statement, in recital 304 of the contested decision, that the fact that the undertakings in question negotiated a new agreement shows that they still felt bound by the existing agreement, or the Commission's statement that, in the absence of a new agreement, the old one was still in force cannot be regarded as substantiating to the requisite legal standard its findings concerning the French market. Such general statements cannot be regarded as sufficiently precise and consistent evidence of the continuation of the infringement in France after the 2004 agreement.

373 It must therefore be held that, in the contested decision, the Commission did not adduce any evidence to support the conclusion that the infringement in question continued on the French market following the 2004 agreement. Moreover, at the hearing, the Commission acknowledged that it did not have any evidence relating to the situation on the French market comparable to that concerning the situation on the German market.

374 Since Article 1 of the contested decision makes a distinction between the duration of the infringement on the German market and that on the French market, the Commission also had to substantiate its finding regarding the latter market. In other words, having differentiated, in Article 1, between the separate durations of the infringement on the German market and on the French market, the Commission had to provide the necessary evidence capable of proving to the requisite legal standard that the infringement existed on both of those markets and for both of the periods put forward. The burden of proof concerning the existence of the infringement and, therefore, its duration, falls upon it (see *JFE Engineering and Others* v *Commission*, paragraph 70 above, paragraph 341 and the case-law cited).

375 Those considerations are not called into question by the fact that the infringement constitutes a single and continuous infringement. That nature of the infringement found to exist has no bearing on the fact that, since the Commission deliberately referred, in the operative part of the contested decision, to separate durations of the infringement on the French market and on the German market, it was obliged to prove the durations thus established to the requisite legal standard.

376 Similarly, the Commission's argument that there is no evidence which proves that the infringement in question ended earlier on the French market cannot be accepted, since the burden of proof incumbent upon it cannot be satisfied simply by finding that there is nothing to indicate that that infringement has not ended, despite the 2004 agreement.

377 Furthermore, with regard to the Commission's claim that an early end to the infringement is at odds with a market-sharing agreement or is wholly illogical, it is sufficient to state that such a claim is incapable of demonstrating the continuation of the infringement in question on the two markets concerned. Moreover, that claim is at odds, as the applicant has pointed out, with the Commission's own finding that the infringement at issue did not begin on the same dates. The argument advanced by the Commission that the difference in the start dates of the infringement can be explained simply by the fact that the agreement in question could not produce its effects on the French market because that market was closed to competition and that the difference in the end dates is a question of fact is unconvincing in this regard. Furthermore, the Commission's statement that the undertakings in question continued to comply with the side letters after the 2004 agreement, both in Germany and in France, is wholly unsubstantiated in relation to France.

378 It follows that the Commission has not proven to the requisite legal standard that the infringement in question continued in France during the period from 13 August 2004 to 30 September 2005.

379 Article 1 of the contested decision must therefore be annulled in so far as it finds that the infringement continued in France during that period.

B – *The head of claim seeking the annulment of the fine or a reduction in the amount of the fine*

1. *The head of claim seeking the annulment of the fine*

380 In support of its head of claim seeking the annulment of the fine, the applicant puts forward a single plea in law alleging breach of the principles of equal treatment, proportionality and non-retroactivity.

381 The applicant submits, in essence, that, by imposing a fine on it although it had not imposed a fine in previous similar cases, the Commission breached the principles of equal treatment, proportionality and non-retroactivity.

382 In that regard, it must be pointed out that the purpose of Article 23(2) of Regulation No 1/2003 is to give the Commission the power to impose fines so as to enable it to carry out the task of supervision entrusted to it by European Union law (see, to that effect, *Musique Diffusion française and Others* v *Commission*, paragraph 288 above, paragraph 105, and Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients* v *Commission* [2003] ECR II-2597, paragraph 105). That task includes the duty to investigate and punish individual infringements, but also encompasses the duty to pursue a general policy designed to apply, in competition matters, the principles laid down by the Treaty and to guide the conduct of undertakings in the light of those principles. It follows that the Commission must ensure that fines have a deterrent effect (Joined Cases T-456/05 and T-457/05 *Gütermann and Zwicky* v *Commission* [2010] ECR II-1443, paragraph 79).

383 In the present case, the Commission took the view, in recital 320 of the contested decision, that the imposition of fines does not constitute a breach of the principle of equal treatment. In its view, the facts which led to the earlier decisions referred to by the undertakings in question during the administrative procedure differ from the facts in this case, such that this is not a case of a comparable situation having been treated differently. In this regard, it took account of the nature of the infringement in question in recital 321 of the contested decision, as well as the context, scope and duration of that infringement in recital 322 of that decision. It ultimately rejected the arguments that the undertakings in question had a legitimate expectation that the Commission would not impose fines on the ground that they were unaware, prior to the decisions in GDF/ENI and GDF/ENEL, that they were committing an infringement, or on the ground that a fine was not imposed in the first of those decisions (see recitals 323 to 325 of the contested decision).

384 The complaints put forward by the applicant in the context of this plea must be examined in the light of those factors.

385 With regard, in the first place, to the complaint based on a breach of the principle of equal treatment, it must be borne in mind that, according to settled case-law, the Commission's previous decision-making practice does not in itself serve as a legal framework for the fines imposed in competition matters, since that framework is defined solely in Regulation No 1/2003 and in the guidelines (see, to that effect, Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 254 and the case-law cited). Consequently, decisions in other cases can give only an indication for the purpose of determining whether there might be discrimination, since the facts of those cases, such as markets, products, the undertakings and periods concerned, are not likely to be the same (see, to that effect, Case C-76/06 P *Britannia Alloys & Chemicals* v *Commission* [2007] ECR I-4405, paragraph 60).

386 Nevertheless, observance of the principle of equal treatment, which prevents comparable situations from being treated differently and different situations from being treated in the same way, unless such difference in treatment is objectively justified, is incumbent on the Commission when it imposes a fine on an undertaking for infringement of the competition rules, as it is on any institution in carrying out all its activities (see Case T-67/01 *JCB Service* v *Commission* [2004] ECR II-49, paragraph 187 and the case-law cited).

387 However, previous decisions by the Commission imposing fines can be relevant from the point of view of observance of the principle of equal treatment only where it is demonstrated that the facts of the cases in those other decisions, such as markets, products, the countries, the undertakings and periods concerned, are comparable to those of the present case (see, to that effect, Case T-59/02 *Archer Daniels Midland* v *Commission* [2006] ECR II-3627, paragraph 316 and the case-law cited).

388 In the present case, as is clear from paragraphs 389 to 396 below, the facts of the cases in the previous decisions relied on by the applicant are not comparable to those of the present case, with the result that those decisions are not relevant from the point of view of observance of the principle of equal treatment, in accordance with the case-law cited in paragraph 387 above.

389 Indeed, first, in the cases Sonatrach, E.ON/Gazprom, OMV/Gazprom, ENI/Gazprom and NLNG, a fine was not imposed because the Commission closed those cases without adopting a formal decision finding that there had been an infringement, in particular in the light of the commitments made by the undertakings concerned. However, the situation is different in the present case, since the Commission concluded the proceedings with a decision finding that there had been an infringement of Article 81 EC.

390 Second, contrary to the applicant's claim, the circumstances of the present case differ from those at issue in the cases GDF/ENI and GDF/ENEL.

391 First of all, the fact that the conduct concerned took place in the gas sector contemporaneously, in a period characterised by the liberalisation and therefore by a profound change in the sector, is not capable, as such, of establishing that the circumstances of the cases GDF/ENI and GDF/ENEL are comparable to those of the present case.

392 Next, in GDF/ENI and GDF/ENEL, the Commission took into account the fact that it was the first decision concerning territorial restrictions in the gas sector. However, that is not now the case here.

393 In addition, the restrictions concerned differ in nature. Those at issue in GDF/ENI and GDF/ENEL were vertical, in so far as they stemmed, first, from a transit contract and, second, from a contract which could be regarded as a transportation contract or as a contract of sale. Moreover, it is apparent from the examination which the Commission carried out in those cases regarding the applicability of Article 81(3) EC that it itself viewed the restrictions as vertical restrictions. That is not the situation in the present case, in which the restriction is horizontal, given that it concerns an agreement between two suppliers regarding the use of a gas pipeline and relates to their respective possibilities of selling gas on each other's markets. In this regard, the fact that the Commission held that the possible legal characterisation of the contract at issue in GDF/ENEL as a service/transportation contract does not prevent the clause 'for the use of gas in

Italy' from being regarded as restrictive vis-à-vis resale is not capable of calling into question the fact that the nature of the restrictions is different. Indeed, that finding relates to the effects of the restrictions and not to their nature. In addition, GDF/ENI and GDF/ENEL differ from the present case, as the Commission pointed out, given that those cases related to a contractual clause unilaterally restricting the territory in which ENI and ENEL could use the gas which was the subject-matter of the contract, whereas that is not the situation in the present case, in which the restriction relates to the respective territories of the undertakings in question. It must be made clear in this connection, first, that the applicant does not state to what extent that difference is irrelevant and, second, that its arguments regarding the allegedly asymmetrical nature of the side letters have already been rejected.

394 Furthermore, unlike in the present case, a concerted practice was not found to exist in GDF/ENI and GDF/ENEL. The significance of that difference cannot be called into question by the fact, raised by the applicant, that, according to the contested decision, the concepts of agreements and concerted practices are flexible and may overlap, and that there was therefore no need to draw a precise distinction between those two concepts. Indeed, the fact that it is not necessary to distinguish between those types of infringement cannot be relied on to call into question the fact that the two types of infringement were found to exist in the present case, whereas that was not the case in GDF/ENI and GDF/ENEL. As for the applicant's argument alleging that the meetings and exchanges between the undertakings in question between 1999 and 2005 could not be used as the basis for finding there to be a separate infringement involving the exchange of sensitive information, an infringement unconnected with the side letters, that argument has already been rejected, as is apparent from paragraphs 243 to 258 above.

395 Finally, notwithstanding the errors identified regarding the start date of the infringement in Germany and the end date of the infringement in France, it must be pointed out that the infringement in the cases GDF/ENI and GDF/ENEL was committed over a relatively short period of time — approximately two years — which is not the case here, where the infringement continued for at least seven years in Germany and four years in France. The arguments advanced by the applicant seeking to dispute that difference must therefore likewise be rejected.

396 It follows from all the foregoing that the complaint based on a breach of the principle of equal treatment must be rejected.

397 In the second place, the complaint based on a breach of the principle of the non-retroactivity of penalties must be rejected, since the applicant fails to put forward, in this context, any argument distinct from those advanced in support of the complaint based on a breach of the principle of equal treatment. In any event, this complaint can only be rejected since any undertaking involved in an administrative procedure which may result in the imposition of a fine must take account of the possibility that the Commission may decide at any time to raise the level of the fines by reference to that applied in the past (see, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraph 229), and the fact that the Commission may at any time review the general level of fines as part of the implementation of a different competition policy is therefore reasonably foreseeable from the perspective of the undertakings concerned. This assessment cannot be called into question by the statement, referred to by the applicant and contained in a press release relating to the decisions in GDF/ENI and GDF/ENEL, to the effect that the Commission would show far less clemency in cases where, following the adoption of those decisions, it were to establish restrictions of the same type under other gas contracts. Indeed, it cannot be inferred from this — in the absence of any explicit reference to that effect either in that press release or in those decisions — that the Commission did not intend to impose penalties on infringements which had begun prior to those decisions. In addition, it has already been pointed out that the circumstances of the present case differ from those at issue in GDF/ENI and GDF/ENEL (see paragraphs 390 to 395 above). The applicant is therefore wrong to claim that, in accordance with the principles of equal treatment and of the non-retroactivity of penalties, the Commission formally acknowledged that any hardening of its policy on penalties could in any event take effect only in respect of practices occurring after those decisions.

398 Finally, with regard to the complaint based on a breach of the principle of proportionality, it is necessary to dismiss as irrelevant in the context of the present case the line of argument advanced by the applicant to the effect that the Commission cannot impose a fine in respect of an infringement whose features justified the view in a similar earlier case that no financial penalty was in fact deemed to be proportionate, without the principle of proportionality being breached. The fact that the Commission has not imposed a fine on the perpetrator of a breach of the competition rules cannot in itself prevent a fine from being imposed on the perpetrator of a similar infringement (see, to that effect, Case T-86/95 *Compagnie générale maritime and Others* v *Commission* [2002] ECR II-1011, paragraph 487). Furthermore, the facts of the cases which gave rise to the other decisions relied on by the applicant are not comparable to those of the present case (see paragraphs 389 to 396 above). As regards the applicant's claim that the Commission implicitly took the view that it would be contrary to that principle to impose financial penalties in respect of conduct such as that at issue in the present case at a time when the law had not yet been clarified, that claim must be rejected. Indeed, such a view on the part of the Commission cannot be inferred, as the applicant appears to submit, from the fact that the Commission stated, in a press release relating to the GDF/ENEL case, that it wished to clarify the law for the benefit not only of the undertakings concerned in those cases but also for all undertakings operating in the sector. A point of this kind regarding the need to clarify the law is in fact mentioned by the Commission in that press release simply to justify the fact that it had an interest in adopting a formal decision regarding a past infringement. Such a point is not, however, relevant in the context of calculating the fine in the present case. The same is true of the Commission's finding, made in the decisions in GDF/ENI and GDF/ENEL, that the undertakings in the sector must be prevented from wrongly holding the view or continuing to hold the view that practices such as those observed in the present case are consistent with European Union law. The complaint based on a breach of the principle of proportionality must therefore likewise be rejected.

399 Finally, there is no other ground to justify the Court varying the contested decision as far as the amount of the fine is concerned in the light of the principles of equal treatment, proportionality or non-retroactivity.

400 It follows from all the foregoing that the single plea advanced in support of the head of claim seeking the annulment of the fine must be rejected.

401 The Court further takes the view that there is in this case no public policy ground which it is required to raise of its own motion (see, to that effect, Case C-389/10 P *KME Germany and Others* v *Commission* [2011] ECR I-12789, paragraph 131) to justify it making use of its power to vary the contested decision with a view to annulling the fine.

2. *The head of claim seeking a reduction in the amount of the fine*

402 In support of its head of claim seeking a reduction in the amount of the fine, the applicant puts forward — following a partial withdrawal made at the reply stage — five pleas in law alleging first, that the alleged infringement concerning the gas market in France has not been proved to the requisite legal standard and that the contested decision is vitiated by a failure to state reasons in that regard; second, an incorrect assessment of the duration of the infringement; third, an incorrect assessment of the gravity of the infringement; fourth an incorrect assessment of the need to apply an additional amount of 15%; and fifth, an incorrect assessment of the mitigating circumstances.

a) The first plea, alleging that the alleged infringement concerning the gas market in France has not been proved to the requisite legal standard and that the contested decision is vitiated by a failure to state reasons in that regard

403 The applicant states that, since the Commission has failed to prove to the requisite legal standard the existence of an infringement concerning the gas market in France and the contested decision is vitiated by a failure to state reasons in that regard, the amount of the fine imposed on it must be reduced by a percentage corresponding to its sales in France.

404 It is sufficient to state in this connection that the applicant's arguments regarding the proof of the existence of an infringement concerning the gas market in France and the related statement of reasons in the contested decision have been rejected in the context of the examination of the third plea advanced in support of the form of order seeking the annulment of the contested decision, and that the present plea has no wider independent scope as compared with those arguments.

405 Furthermore, the Court is of the view that there is no other ground to justify it making use of its power to vary the contested decision in relation to the amount of the fine having regard to the existence of the infringement on the French market.

406 The first plea must therefore be rejected.

b) The second plea, alleging an incorrect assessment of the duration of the infringement

407 In the context of this plea, the applicant submits that the Commission incorrectly assessed the duration of the infringement. In the applicant's view, there was no infringement prior to August 2000 in Germany and prior to January 2003 in France. In addition, there was no longer an infringement after August 2004 in either France or Germany or, in the alternative, after August 2004 in France. The applicant takes the view that the duration and value of the sales in relation to the alleged infringement must be reduced as a result, and the amount of the fine reduced accordingly.

408 In this regard, it must be borne in mind, first of all, that, as is apparent from the examination of the third part of the fourth plea advanced in support of the form of order seeking the annulment of the contested decision, the Commission has not demonstrated to the requisite legal standard that the infringement in question continued after 10 August 2004, and until 30 September 2005, in so far as that infringement relates to the French market for gas. It is therefore appropriate for the Court to make use of its power to vary the contested decision and reduce the amount of the fine imposed on the applicant to take account of the duration of the infringement on that market. The practical consequences of the exercise of that power will be set out in paragraphs 458 to 466 below.

409 Finally, since the applicant's arguments seeking to demonstrate, first, that no infringement could be held to exist on the German market prior to August 2000 and on the French market prior to January 2003 and, second, that no infringement could be held to exist after August 2004 on the German market have already been rejected in the context of the examination of the pleas advanced in support of the form of order seeking the annulment of the contested decision, this plea must be rejected in so far as it relates to those arguments, given that, to that extent, it has no wider independent scope as compared with those arguments.

410 Finally, the Court rejects the applicant's argument that, in the exercise of its unlimited jurisdiction, the Court may reduce the amount of the fine imposed on the applicant on the ground that the Commission failed to demonstrate why the reasoning which led it to take account only of the period after April 1998 to calculate the amount of the fine in relation to the German market (even though the infringement in fact began on 1 January 1980) could not be applied to the period between the end of April 1998 and August 2000, despite the absence of third-party access to the network during that period. Indeed, in recital 372 of the contested decision, the Commission stated, with regard to the period from 1998 to 2000, that, by repealing the exemption from competition law applicable to the demarcation agreements on 24 April 1998, the German legislature established that the gas sector had to be opened to competition after that date. In addition, in the context of the examination of the first plea advanced in support of the form of order seeking the annulment of the contested decision, there was no evidence to support the view that the Commission was wrong to hold that potential competition existed in Germany after 1998.

411 Finally, the Court considers that there is no ground to justify it making use of its power to vary the contested decision, as the applicant suggests, in relation to the amount of the fine having regard to the duration of the infringement on the French market, beyond the consequences set out in paragraph 408 above.

412 It follows from the foregoing that, save in so far as it relates to the end of the infringement on the French market, this plea must be rejected.

c) The third plea, alleging an incorrect assessment of the gravity of the infringement

413 In the context of this plea, the applicant claims that the contested decision is vitiated by an error and by a breach of the principle of proportionality as regards the determination of the gravity of the infringement. Referring both to the nature of the infringement and to the lack of any implementation or effects of that infringement, it submits that the percentage of the value of sales accepted by the Commission to determine the basic amount of the fine — in the present case 15% — is excessive and must be reduced by the Court.

414 In that regard, it must be borne in mind that, according to the case-law, the amount of fines must be graduated according to the circumstances and the gravity of the infringement and that, for the purposes of fixing the amount of the fine, the gravity of the infringement is to be appraised by taking into account in particular the nature of the restrictions on competition (see Joined Cases T-39/92 and T-40/92 *CB and Europay* v *Commission* [1994] ECR II-49, paragraph 143 and the case-law cited).

415 Thus, when assessing the gravity of the infringement of competition rules for which an undertaking is liable, in order to determine a fine which is proportionate, the Commission may take into account the exceptional duration of certain infringements; the number and diversity of the infringements, which concerned all or almost all the undertaking's products and some of which affected all the Member States; the particular gravity of the infringements which formed part of a deliberate and coherent strategy seeking, by various eliminatory practices towards competitors and by a policy of retaining customers, to maintain artificially or to strengthen the dominant position of the undertaking in question on markets where competition was already limited; particularly harmful effects of the abuses in terms of competition and the benefit gained by the applicant from its infringements (see, to that effect, Case T-83/91 *Tetra Pak* v *Commission* [1994] ECR II-755, paragraphs 240 and 241).

416 Pursuant to points 19 and 21 of the 2006 Guidelines, the basic amount of the fine is related to a proportion of the value of sales, up to a maximum of 30%, depending on the gravity of the infringement, multiplied by the number of years of the infringement. In addition, in accordance with point 20 of the 2006 Guidelines, the assessment of gravity is made on a case-by-case basis for all types of infringement, taking account of all the relevant circumstances of the case.

417 In the present case, with a view to determining the gravity of the infringement, the Commission took into account, as is clear from recital 364 of the contested decision, inter alia the fact that market-sharing agreements constitute, by their very nature, one of the most serious types of infringement of the provisions of Article 81 EC, the fact that the undertakings acted in concert in order to establish, in the course of regular meetings, a secret and institutionalised project intended to restrict competition in the gas sector, the fact that the agreement and the concerted practices were conceived, directed and encouraged at the highest levels in each undertaking, and were conducted wholly in the interest of those undertakings and to the detriment of their customers and, ultimately, to that of the end-consumers, and the fact that the infringement concerned the gas transported to France and Germany via the MEGAL gas pipeline, that is to say, a substantial part of the common market. It held in recital 365 of the contested decision that, given the nature of the infringement, the appropriate percentage to be applied was 15% of the sales concerned.

418 None of the evidence advanced by the applicant is capable of calling that assessment into question.

419 Indeed, in the light of the examination of the pleas put forward in support of the form of order seeking the annulment of the contested decision, it is impossible to call into question the participation of the undertakings in question, noted in recital 2 of the contested decision, in a complex, single and

continuous infringement of Article 81 EC, which had the effect of restricting competition on their respective national market and entailing, in particular, market-sharing practices and the exchange of confidential information relating to the supply of natural gas transported via the MEGAL gas pipeline. It must be pointed out in this connection that the applicant's claims regarding the nature of the infringement that, first, the side letters did not constitute a horizontal market-sharing agreement but at the very most were akin to a destination clause and that, second, one of the most serious restrictions of competition could not be found to exist on the basis of the meetings and other contact between the undertakings in question, including if those meetings and that contact were considered separately from the side letters, have already been refuted in the context of the examination of the pleas advanced in support of the form of order seeking the annulment of the contested decision (see, in particular, paragraphs 243 to 258 and 341 above). Furthermore, the applicant's legal department acknowledged in its emails of 9 and 17 February 2000 that the Direktion G letter was akin to a vast 'sharing of the market', which demonstrates that the applicant was perfectly aware of the anti-competitive nature of that letter.

420 Such a clear breach of competition law is, by its nature, particularly serious. It frustrates the most fundamental aims of the European Union, and, in particular, the attainment of a single market (see, to that effect, Case T-9/92 *Peugeot* v *Commission* [1993] ECR II-493, paragraph 42). This is confirmed by point 23 of the 2006 Guidelines, which states that horizontal price-fixing, market-sharing and output-limitation agreements, which are usually secret, are, by their very nature, among the most harmful restrictions of competition.

421 Point 23 of the 2006 Guidelines also states that, as a matter of competition policy, such agreements must be heavily fined and, therefore, the proportion of the value of sales taken into account for such infringements will generally be set at the higher end of the scale, which, according to point 21 of the 2006 Guidelines, ranges between 0% and 30%.

422 In those circumstances, the Commission did not err in taking the view in the contested decision that, given the nature of the infringement, the appropriate percentage to be applied was 15% of the sales concerned.

423 The applicant's arguments regarding the implementation and the effects of the infringement must likewise be rejected since, pursuant to point 23 of the 2006 Guidelines, the Commission was entitled to determine an amount having regard solely to the nature of the infringement. In any event, with regard, first, to the issue of implementation, it is apparent from recital 228 of the contested decision that over the years the undertakings in question implemented the agreement at issue as well as a concerted practice; this fact was not called into question in the course of the examination of the form of order seeking the annulment of the contested decision. With regard, second, to the effects of the infringement on the market, the Commission took the view, in that same recital, that, since they had been implemented, it could be assumed that the collusive arrangements subsequently produced specific anti-competitive effects on the market, in that the infringement strengthened the monopolies which existed prior to the liberalisation and delayed the effects of that liberalisation.

424 Finally, there is no other factor capable of justifying the Court making use of its power to vary the contested decision in relation to the amount of the fine having regard to the gravity of the infringement.

425 It follows that the third plea must be rejected.

d) The fourth plea, alleging an incorrect assessment of the need to apply an additional amount of 15%

426 In the context of this plea, the applicant submits that the Commission was not entitled to impose an additional amount of 15% on the ground that market-sharing agreements generally justify, by their nature, the application of an additional amount of at least 15%.

427 It must be borne in mind in this connection that, with regard to the calculation of the amount of fines, point 25 of the 2006 Guidelines provides that, irrespective of the duration of an undertaking's participation in the infringement, the Commission includes in the basic amount a sum of between 15% and 25% of the value of sales in order to deter undertakings from entering into horizontal price-fixing, market-sharing and output-limitation agreements. The Commission may also apply such an additional amount in the case of other infringements.

428 For the purpose of deciding the proportion of the value of sales to be considered in a given case, that same point specifies that the Commission will have regard to a number of factors, in particular those referred to in point 22 of the 2006 Guidelines, namely the nature of the infringement, the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented.

429 In the present case, the Commission stated in recital 375 of the contested decision that market-sharing agreements generally justify, by their nature, the application of an additional amount of at least 15% and that, here, there was no need to apply an additional amount higher than 15%. That assessment must be approved.

430 Indeed, it is sufficient to point out that the Commission rightly took the view that the conduct in question constituted a horizontal market-sharing agreement (see, in particular, paragraph 419 above) and not a territorial restriction clause whose wrongful nature the Commission established only recently, as the applicant submits (see, in particular, paragraphs 341 and 393 above). In addition, for this type of infringement, the 2006 Guidelines provide for the inclusion in the basic amount of the fine of a sum of between 15% and 25% of the value of sales. In those circumstances, the Commission was able, without committing a manifest error, to impose an additional amount of 15%.

431 In any event, even assuming that the infringement in question were not horizontal in nature, it must be observed that point 25 of the 2006 Guidelines allows the Commission to apply an additional amount in relation to infringements other than those of that type.

432 As for the applicant's arguments that it is contrary to the principles of equal treatment and proportionality to approve such an additional amount when cases of a similar nature have been closed without adopting a formal decision, they must likewise be rejected. Indeed, unlike in the present case, in the cases referred to by the applicant the Commission did not find an infringement to have been committed. It could not therefore impose a penalty and apply such an additional amount. Furthermore, as stated in paragraph 389 above, the cases referred to by the applicant related to vertical restrictions and not horizontal restrictions as in the present case.

433 Finally, the Court is of the view that there is no other ground to justify it making use of its power to vary the contested decision in relation to the amount of the fine having regard to the additional amount applied.

434 It follows from the foregoing that the fourth plea must be rejected.

e) The fifth plea, alleging an incorrect assessment of the mitigating circumstances

435 In the context of this plea, the applicant submits that the Commission made an error by refusing to grant it the benefit of mitigating circumstances linked to the fact, first, that it participated to a limited degree in the infringement in question and, second, that its conduct was authorised or encouraged by public authorities or by legislation.

436 It must be pointed out in this regard that it is clear from point 29 of the 2006 Guidelines that the basic amount of the fine may be reduced where the anti-competitive conduct has been authorised or encouraged by public authorities or by legislation, or where the undertaking concerned provides

evidence that its involvement in the infringement is substantially limited and thus demonstrates that, during the period in which it was party to the offending agreements, it actually avoided applying them by adopting competitive conduct on the market.

437 In the first place, as regards the mitigating circumstance linked to limited involvement in the infringement in question, the Commission took the view, in recital 383 of the contested decision, that the evidence disproved the argument advanced by the undertakings in question that the market-sharing agreement and the concerted practices had not been implemented.

438 However, the applicant claims that the Commission failed to take into account evidence which demonstrates that it did adopt competitive conduct.

439 It must be pointed out in the present case that, in order to benefit from the mitigating circumstance linked to limited participation in the infringement in question, the applicant must demonstrate that, during the period in which it was party to the offending agreements, it actually avoided implementing them by adopting competitive conduct on the market or, at the very least, it clearly and substantially breached the obligations relating to the implementation of the cartel to the point of disrupting its very operation (Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraph 113). In other words, it must demonstrate that it did not apply the agreements in question by adopting conduct on the market which was liable to impede the anti-competitive effects of the infringement found to have occurred (see, to that effect, Joined Cases T-109/02, T-118/02, T-122/02, T-125/02, T-126/02, T-128/02, T-129/02, T-132/02 and T-136/02 *Bolloré and Others* v *Commission* [2007] ECR II-947, paragraph 629).

440 However, it must be held that such conduct cannot be demonstrated on the basis of the evidence adduced by the applicant.

441 First, it must be borne in mind that an undertaking which, despite colluding with its competitors, follows a more or less independent policy on the market may simply be trying to exploit the cartel for its own benefit (Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 230). In those circumstances, the fact that the Commission acknowledged that the applicant had attempted to circumvent the restriction in question is incapable of demonstrating conduct on the market which is liable to impede the anti-competitive effects of the infringement found to have occurred. The applicant's argument that the Commission contradicted itself by acknowledging that it had attempted to circumvent the restriction in question must therefore be rejected.

442 Second, none of the evidence adduced by the applicant is capable of demonstrating a substantially limited involvement in the infringement in question or the existence of conduct on the market which is liable to impede the anti-competitive effects of that infringement. In particular, in view of their characteristics, set out in paragraphs 194 and 333 above, and in particular the fact that they began only in October 2004, their limited volume and the fact that they do not represent volumes which are substantially higher than those acquired under the GRP, the sales of gas made by the applicant from the MEGAL gas pipeline are incapable of demonstrating either mitigating circumstance. The fact that the applicant freely participated in the GRP has no bearing on those considerations, as is clear from paragraph 335 above. Similarly, the existence of offers, canvassing or requests for access to the network is not, as such, capable of demonstrating the existence of competitive conduct, since they did not result in substantial sales of gas from the MEGAL gas pipeline, in particular as compared with the volumes acquired under the GRP. Furthermore, [*confidential*], a fact refuted by its internal note of April 2005 in which it itself concedes that it is necessary to put the perception of a [*confidential*] on its part on the German market in context. Finally, as has already been pointed out, it is apparent from documentary evidence included in the file, inter alia, that the applicant intended to explore with E.ON solutions to allow reasoned competition and that it feared that the Russian gas might fall into the wrong hands and enable additional competition around the MEGAL gas pipeline, which contradicts the applicant's claim of limited involvement in the cartel. In addition, there is no evidence to demonstrate that the operation of the cartel was disrupted by the applicant's actions.

443 Third, the applicant is wrong to claim that the Commission has reversed the burden of proof. Indeed, since the Commission has proven the existence of the infringement in question, it is for the applicant to demonstrate, in accordance with point 29 of the 2006 Guidelines, that its involvement in the infringement was substantially limited and, accordingly, that, during the period in which it was party to the offending agreements, it actually avoided applying them by adopting competitive conduct on the market. As regards the applicant's argument based on the fact that it is required to demonstrate that its conduct was liable to impede the effects of the cartel on the market even though the Commission has not proven the existence of such effects, that argument must be rejected. Indeed, even though it was not required to demonstrate the effects of the infringement in question, a fact which is, moreover, a matter of settled case-law, the Commission nevertheless took the view that, given that evidence had been adduced that the anti-competitive agreements and the concerted practice were implemented over the years, it could be presumed that the collusive arrangements produced specific anti-competitive effects on the market, in that the infringement strengthened the monopolies which existed prior to the liberalisation and delayed the effect of that liberalisation.

444 In the second place, as regards the mitigating circumstance linked to the fact that the anti-competitive conduct was authorised or encouraged by the public authorities or by legislation, the Commission took the view in recital 384 of the contested decision that this could not apply to the period following the start of the liberalisation, since, by adopting and implementing the first gas directive, the authorities of the European Union and the Member States demonstrated their intention to make the gas markets competitive. The Commission added that, although the French authorities failed to observe the deadline for the transposition of that directive, they did not prevent eligible customers from being supplied by new competitors with effect from 10 August 2000, such that there are no grounds for regarding that failure as a measure adopted by the French authorities which authorises or encourages an unlawful market-sharing agreement. In recital 385 of the contested decision, the Commission stated that, although it had to be regarded as a justified statement that the public authorities authorised or encouraged the infringement for the whole of the period prior to the adoption of the first gas directive, that statement had in any event already been duly taken into account, since the period of infringement considered for the purpose of calculating the fines begins only in April 1998 for Germany and on 10 August 2000 for France.

445 In this regard, the applicant claims that the Commission should have acknowledged that its conduct had been authorised or encouraged by the public authorities or by legislation.

446 With regard, first, to the applicant's claim that, until the actual transposition of the first gas directive, the German and French legislation authorised the partitioning of the gas markets, it must be borne in mind in relation to Germany that — as is clear from the examination of the first plea advanced in relation to the form of order seeking the annulment of the contested decision — the legal framework did not preclude the existence of potential competition after 24 April 1998.

447 With regard to France, it is apparent from paragraphs 312 to 323 above that not only was the French legal framework no longer able to authorise or encourage the partitioning of the market from 10 August 2000 onwards but, in addition, the measures adopted by France contributed (albeit to a limited degree) to the opening-up of that market with effect from that date. In this connection, it must be pointed out that, contrary to the applicant's claim, the taking into account of the fact that the French authorities did not prevent new competitors from supplying customers is not tantamount to reserving the benefit of the mitigating circumstance in question to cases where the anti-competitive situation is required (and not just authorised) by national legislation. This in fact demonstrates that the French authorities no longer intended to allow the continuation of, and therefore to authorise, the partitioning of the French market.

448 It must likewise be pointed out that, as a public undertaking, the applicant could not in any event, after 10 August 2000, rely on the situation in France, since it is one of the bodies against which the provisions of a directive capable of having direct effect may be enforced, as is made clear in the

case-law referred to in paragraph 314 above. Contrary to the applicant's claim, that case-law does not seek to deprive it, in its capacity as a public undertaking, of the possibility of relying on the mitigating circumstance in question, but rather demonstrates that, in that capacity, it could not adopt a course of conduct running counter to the objective of the directive, and that therefore the French legal framework neither authorised nor encouraged the conduct at issue in the present case.

449 With regard to the actions for failure to comply with obligations brought by the Commission against the French Republic in Cases C-159/94 (paragraph 308 above) and C-259/01 (paragraph 315 above), it cannot be inferred from those cases that the Commission contradicted itself by refusing to grant the applicant the benefit of the mitigating circumstance at issue in the present case. Indeed, it may be deduced from those cases not that the French legal framework authorised or encouraged the agreement in question here, but rather, at most, that the Commission took the view that the French authorities had failed to comply with the obligations incumbent on them under Articles 30, 34 and 37 of the EC Treaty by establishing exclusive rights to import and export gas and electricity with regard to the first case, and failed to comply with their obligations under the first gas directive by failing to implement that directive correctly with regard to the second case. Furthermore, the application brought in Case C-159/94 was dismissed. Finally, it cannot be inferred from the finding allegedly made by the Commission that the German legislative framework did not allow for effective competition on the part of the new foreign entrants to the market that that framework authorised or encouraged anti-competitive conduct.

450 In those circumstances, it must be held that the anti-competitive conduct at issue was not authorised or encouraged by the public authorities or by legislation.

451 With regard, second, to the fact that the gas sector was in a stage of liberalisation during the period of the infringement and that uncertainties existed vis-à-vis the applicable rules, it is sufficient to point out that under no circumstances can it be established on that basis that the anti-competitive conduct was authorised or encouraged by the public authorities or by legislation. Although the German and French authorities did allow a considerable degree of uncertainty to continue from the perspective of the operators as regards the legality of their conduct not only before but also after the liberalisation, that does not establish that they authorised or encouraged the conduct at issue in the present case. The applicant is therefore wrong to claim that such a finding is capable of justifying account being taken, in the context of mitigating circumstances, of the impact of the legislative framework on the calculation of the fine.

452 Furthermore, even assuming that, by its line of argument, the applicant seeks to claim that, in view of the context of liberalisation and the resulting uncertainty, it committed the infringement as a matter of negligence, it is sufficient to state that the emails from its legal department of 9 and 17 February 2000 clearly attest to the fact that it was aware, at the very least, that the Direktion G letter constituted an infringement.

453 Finally, it is necessary to reject the applicant's argument based on Decision C(2004) 4030 final of 20 October 2004 relating to a proceeding under Article 81 [EC] (Case COMP/C.38.238/B.2 — Raw tobacco — Spain). The Commission is not bound by its past assessments (see Joined Cases C-125/07 P, C-133/07 P and C-135/07 P *Erste Group Bank and Others* v *Commission* [2009] ECR I-8681, paragraph 123 and the case-law cited) and, in any event, the situation of Spanish tobacco producers cannot be compared to that of undertakings of the size of those in question in the present case, namely undertakings which are major players on the European market for gas and which enjoyed dominant positions on the market at the time of the facts.

454 In those circumstances, there is no evidence to support the view that the Commission made an error by failing to accept the existence of mitigating circumstances.

455 Furthermore, there is no other factor capable of justifying the Court making use of its power to vary the contested decision in relation to the amount of the fine having regard to mitigating circumstances.

456 The fifth plea must therefore be rejected as must, consequently, all the pleas advanced in support of the head of claim seeking the reduction of the fine, with the exception of the second plea, which is upheld in part and thus requires the Court to make use of its power to vary the contested decision (see paragraph 408 above).

457 The Court further takes the view that there is no public policy ground which it is required to raise of its own motion (see, to that effect, *KME Germany and Others* v *Commission*, paragraph 401 above, paragraph 131) to justify it making use of its power to vary the contested decision with a view to reducing the amount of the fine.

f) The determination of the final amount of the fine imposed on the applicant

458 As is apparent from paragraph 378 above, the Commission has not established to the requisite legal standard that the infringement in question continued after 10 August 2004 and until 30 September 2005 in so far as it related to the French market for gas.

459 The contested decision must therefore be varied to take account, in ascertaining the final amount of the fine to impose on the applicant, of the duration of the infringement committed on the French market, in this case from 10 August 2000 (see paragraph 323 above) to 13 August 2004 (see paragraph 378 above).

460 In that regard, if the method used by the Commission in setting the amount of the fine, as stated in recitals 358 to 391 of the contested decision, is applied, namely (initial percentage applied to the average annual sales in France x duration of the infringement in France) + (percentage of the additional amount applied to the average annual sales in France) + (initial percentage applied to the average annual sales in Germany x duration of the infringement in Germany) + (percentage of the additional amount applied to the average annual sales in Germany), using the corrected figure for the duration of the infringement in France (4 years instead of 5.5) and the average sales in relation to the infringement on the French market [*confidential*], the amount of the applicant's fine should be EUR 267 million [*confidential*].

461 However, it must be borne in mind that the unlimited jurisdiction conferred on the Court by Article 31 of Regulation No 1/2003, in application of Article 229 EC, empowers the Court not only to carry out a simple review of the lawfulness of the penalty - which allows the Court only to dismiss the action for annulment or to annul the contested measure - but also to substitute its own appraisal for the Commission's and, consequently, to vary the contested measure - even without annulling it - in the light of all the factual circumstances, by amending the fine imposed where the question of the amount of the fine is before it (see, to that effect, Case C-3/06 P *Groupe Danone* v *Commission* [2007] ECR I-1331, paragraphs 61 and 62, and Case C-534/07 P *Prym and Prym Consumer* v *Commission* [2009] ECR I-7415, paragraph 86 and the case-law cited).

462 In that regard, it should be observed that the Court is not bound by the Commission's calculations or by its guidelines when it adjudicates in the exercise of its unlimited jurisdiction (see, to that effect, *BASF and UCB* v *Commission*, paragraph 326 above, paragraph 213 and the case-law cited), but must make its own appraisal, taking account of all the circumstances of the case.

463 In the present case, the application of the method followed by the Commission in setting the amount of the fine, as set out in paragraph 460 above, does not take into account all the relevant circumstances.

464 The consequence of the application of that method to the corrected figures concerning the duration of the infringement in France and the average sales in connection with the infringement on the French market during that period would entail a reduction of the applicant's fine which is greatly

disproportionate to the relative importance of the error which has been found to exist. Although the Commission's error relates only to the French market and only to twelve and a half months of the five years and one and a half months initially established by the Commission for the infringement committed on that market, the application of the Commission's method would result in a reduction in the amount of the fine of more than 50%.

465 What is more, the application of the Commission's method would, in setting the fine, underestimate the relative importance of the infringement committed on the German market in comparison with that committed on the French market.

466 Consequently, having heard the parties at the hearing on the possible consequences of a partial annulment of the contested decision so far as concerns the determination of the amount of the fine in the light of the duration of the infringement on the French market, and in view of all the foregoing considerations, in particular in paragraphs 464 and 465 above, the final amount of the fine imposed on the applicant must, in the light of all the circumstances of the case, in particular the duration and the gravity of the infringement, be set at EUR 320 million.

Costs

467 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, as provided for in the first subparagraph of Article 87(3) of those rules, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that each party bear its own costs.

468 In view of the fact that each party has been partially unsuccessful, it must be held that each party shall bear its own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Annuls Article 1 of Commission Decision C(2009) 5355 final of 8 July 2009 relating to a proceeding under Article 81 [EC] (Case COMP/39.401 — E.ON/GDF), first, inasmuch as it found that the duration of the infringement was from 1 January 1980 until at least 24 April 1998 as regards the infringement committed in Germany and, second, inasmuch as it found that an infringement was committed in France from 13 August 2004 to 30 September 2005;**

2. **Sets the amount of the fine imposed on GDF Suez SA in Article 2(b) of Decision C(2009) 5355 final at EUR 320 million;**

3. **Dismisses the action as to the remainder;**

4. **Orders each party to bear its own costs.**

Papasavvas Vadapalas O'Higgins

Delivered in open court in Luxembourg on 29 June 2012.

[Signatures]

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