# JUDGMENT OF THE GENERAL COURT (Second Chamber)

3 March 2011 *

In Joined Cases T-122/07 to T-124/07,

**Siemens AG Österreich,** established in Vienna (Austria),

**VA Tech Transmission & Distribution GmbH & Co. KEG,** established in Vienna,

applicants in Case T-122/07,

**Siemens Transmission & Distribution Ltd,** established in Manchester (United Kingdom),

applicant in Case T-123/07,

* Language of the case: German.

**Siemens Transmission & Distribution SA,** established in Grenoble (France),

**Nuova Magrini Galileo SpA,** established in Bergamo (Italy),

applicants in Case T-124/07,

represented by H. Wollmann and F. Urlesberger, lawyers,

v

**European Commission,** represented initially by F. Arbault and O. Weber, and subsequently by X. Lewis and A. Antoniadis, and finally by A. Antoniadis and R. Sauer, acting as Agents,

defendant,

APPLICATION, primarily, for the partial annulment of Commission Decision C(2006) 6762 final of 24 January 2007 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/F/38.899 — Gas insulated switchgear) and, in the alternative, for a reduction of the fine imposed on the applicants,

THE GENERAL COURT (Second Chamber),

composed of I. Pelikánová (Rapporteur), President, K. Jürimäe and S. Soldevila Fragoso, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 16 March 2010,

gives the following

## Judgment

### Background to the dispute

I — *Applicants and the VA Tech Group*

1 On 20 September 1998, VA Technologie AG acquired a subsidiary of Rolls-Royce, namely Reyrolle Ltd, which became VA Tech Reyrolle Ltd then Siemens Transmission & Distribution Ltd, the applicant in Case T-123/07 ('Reyrolle'). On 13 March 2001, VA Technologie, through its wholly-owned subsidiary VA Tech Transmission & Distribution GmbH & Co. KEG, the second applicant in Case T-122/07 ('KEG'), transferred Reyrolle into the newly created company VA Tech Schneider High Voltage GmbH ('VAS'), in which it held 60% of the shares through its subsidiary, the remainder of which were held by Schneider Electric SA. Schneider's transfer into VAS consisted of Schneider Electric High Voltage SA, which became VA Tech Transmission & Distribution SA, then Siemens Transmission & Distribution SA, the first applicant in Case T-124/07 ('SEHV'), and of Nuova Magrini Galileo SpA, the second applicant in Case T-124/07 ('Magrini'), which were previously wholly-owned subsidiaries of it. Since 1999 SEHV has regrouped the former high-tension activities of several subsidiaries of Schneider Electric.

2 In October 2004, VA Technologie acquired, through KEG, all of Schneider Electric's shares in VAS.

3 In 2005, Siemens AG acquired exclusive control of the group whose parent company was VA Technologie ('the VA Tech Group'), via a public bid announced by a subsidiary, namely the first applicant in Case T-122/07 Siemens AG Österreich ('Siemens Österreich'). Following that take over, VA Technologie and, subsequently, VAS were merged with Siemens Österreich.

II — *GIS and the prelitigation procedure*

4 Gas insulated switch gear ('GIS') is used to control energy flow in electricity grids. It is heavy electrical equipment, used as a major component for turnkey power sub-stations. Substations are auxiliary power stations where electrical current is converted. In addition to the transformer, other essential components for substations are control systems, relays, batteries, chargers and switchgear. The function of switchgear is to protect the transformer from overload and/or insulate the circuit and a faulty transformer.

5 Insulation of switchgear may be through gas, air or some combination of the two, namely hybrid switchgear. GIS is sold across the world either as part of turnkey power substations or as loose equipment which has to be integrated into a turnkey power substation. It accounts for 30 % to 60 % of the total price of those substations.

6 On 3 March 2004, ABB Ltd informed the Commission of anti-competitive practices in the GIS sector and made an oral application for immunity from fines pursuant to the Commission Notice of 19 February 2002 on immunity from fines and reduction of fines in cartel cases (OJ 2002 C 45, p. 3) ('the Leniency Notice').

7 The practices reported by ABB entailed coordination on a worldwide scale for the award of GIS projects, involving market sharing, allocation of quotas and maintenance of respective market shares, the allocation of GIS projects to designated producers and manipulation of the bidding procedure for those projects (bid-rigging) in order to ensure that the assigned producers were awarded the contract in question, the fixing of prices by means of complex price arrangements for GIS projects which were not allocated, the termination of licence agreements with non cartel members and the exchange of sensitive market information.

8 The oral application for immunity made by ABB was supplemented by oral statements and documentary evidence. On 25 April 2004, the Commission granted conditional immunity to ABB.

9 On the basis of ABB's statements, the Commission launched an investigation and, on 11 and 12 May 2004, it carried out inspections at the premises of Areva T&D SA, Siemens AG, the VA Tech Group, Hitachi Ltd and Japan AE Power Systems Corp ('JAEPS').

10 On 30 July 2004, the VA Tech group provided the Commission with a memorandum and documents and, on 23 August 2004, additional explanations.

11 On 20 April 2006, the Commission adopted a Statement of Objections, which was notified to 20 companies including the applicants.

III — *Contested decision*

12 On 24 January 2007, the Commission adopted Decision C(2006) 6762 final relating to a proceeding under Article 81 [EC] and Article 53 of the EEA Agreement (Case COMP/F/38.899 — Gas insulated switchgear) ('the contested decision'). That decision was notified to the applicants on 7 or 8 February 2007.

13 In addition to the applicants and Schneider Electric, the contested decision was addressed to ABB, Alstom, SA, Areva, SA, Areva T&D AG, Areva T&D Holding SA and Areva T&D SA (referred to collectively as 'the companies in the Areva Group'), Fuji Electric Holdings Co., Ltd and Fuji Electric Systems Co., Ltd (referred to collectively as 'Fuji'), Hitachi Ltd and Hitachi Europe Ltd (referred to collectively as 'Hitachi'), JAEPS, Mitsubishi Electric System Corp. ('Melco'), Siemens and Toshiba Corp.

14 In recitals 113 to 123 of the contested decision, the Commission stated that the various undertakings which participated in the cartel had coordinated the allocation of GIS projects worldwide — except for specific markets — according to agreed rules in order to maintain quotas largely reflecting estimated historic market shares. It pointed out that the allocation of GIS projects had been carried out on the basis of a joint 'Japanese' quota and a joint 'European' quota, which the Japanese and European producers then had to distribute among themselves. An agreement signed in Vienna on 15 April 1988 ('the GQ Agreement') established rules allowing the allocation of GIS projects to either Japanese producers or to European producers and to set their value against the corresponding quota. In addition, in recitals 124 to 132 of the contested

decision, the Commission stated that the various undertakings which participated in the cartel had entered into an unwritten agreement ('the common understanding'), under which GIS projects in Japan, on the one hand, and in the countries of European members of the cartel, on the other — together described as the 'home countries' for GIS projects — were reserved to Japanese members and European members of the cartel respectively. GIS projects located in the 'home countries' were not the subject of information exchanges between the two groups and were not charged to their respective quotas.

15 The GQ Agreement also contained rules relating to the exchange of information necessary for operation of the cartel between the two groups of producers, carried out in particular by their respective secretaries, and to the manipulation of the bidding procedures concerned and the fixing of prices for GIS projects which could not be allocated. Under the terms of Annex 2 to the GQ Agreement, the agreement applied worldwide, except in the United States, Canada, Japan and 17 Western European countries. Furthermore, under the common understanding, GIS projects in European countries, other than the 'home countries', were also reserved for the European group, as the Japanese producers had undertaken not to submit bids for GIS projects in Europe.

16 According to the Commission, the sharing of GIS projects between the European producers was governed by an agreement also signed in Vienna on 15 April 1988, entitled 'E-Group Operation Agreement for GQ Agreement' ('the EQ Agreement'). It indicated that the distribution of GIS projects in Europe followed the same rules and procedures as those governing the distribution of GIS projects in other countries. In particular, GIS projects in Europe also had to be notified, recorded, allocated, arranged or have received a minimum price.

17 In recital 142 of the contested decision, the Commission stated that, in the GQ and EQ Agreements, and for the purpose of the organisation and good functioning of the cartel, different members of the cartel were identified by a code, consisting of numbers for the European members and letters for the Japanese members. The initial codes were replaced by just numbers from July 2002.

18 In Article 1(p) and (t) of the contested decision, the Commission found that Siemens Österreich and KEG had participated in the infringement from 20 September 1998 to 13 December 2000 and from 1 April 2002 to 11 May 2004.

19 In Article 1(m), (q) and (r) of the contested decision, the Commission found that Reyrolle, SEHV and Magrini had participated in the infringement from 15 April 1988 to 13 December 2000 and from 1 April 2002 to 11 May 2004.

20 In Article 2(1) of the contested decision, in respect of the infringements contained in Article 1 of the contested decision, Siemens Österreich and KEG were fined EUR 12 600 000 jointly and severally with Reyrolle.

21 In Article 2(l) of the contested decision, in respect of the infringements contained in Article 1 of the contested decision, Reyrolle was fined EUR 22 050 000, for EUR 17 550 000 of which it was jointly and severally liable with SEHV and Magrini, and EUR 12 600 000 with Siemens Österreich and KEG.

22 In Article 2(k) and (1) of the contested decision, in respect of the infringements contained in Article 1 of the contested decision, SEHV and Magrini were fined EUR 22 050 000, for EUR 17 550 000 of which it was jointly and severally liable with Reyrolle, and EUR 4 500 000 with Schneider Electric.

**Procedure and forms of order sought by the parties**

23 By applications lodged at the Registry of the General Court on 17 April 2007, the applicants brought the present actions.

24 On 27 August 2007, the Commission lodged its defences.

25 On 22 October 2007, the applicants lodged their replies.

26 On 14 December 2007, the Commission lodged its rejoinders.

27 By order of 20 January 2010, the General Court decided, after hearing the parties, to join the present cases for the purposes of the oral procedure and the judgment, in accordance with Article 50 of the Rules of Procedure of the General Court.

28 By way of measures of organisation of procedure provided for in Article 64 of the Rules of Procedure, the parties were invited to reply to written questions put by the Court. The applicants and the Commission replied to those questions within the period allowed.

29 The parties presented their oral arguments and their replies to oral questions put by the Court at the hearing on 16 March 2010.

30 At the hearing on 16 March 2010, SEHV and Magrini produced, at the Court's request, a copy of the judgment of the tribunal de commerce de Grenoble (commercial court of Grenoble) (France) of 18 December 2009 in a case involving some of the applicants, on which the parties were given the opportunity to comment. At the Commission's request, the Court granted it an additional deadline until 26 March 2010 to submit its written observations. Those observations, which were submitted within the period allowed, were taken into account by the Court only in so far as they related to the judgment of the tribunal de commerce de Grenoble of 18 December 2009.

31 The applicants claim that the General Court should:

— annul Article 1 of the contested decision in so far as it finds that Reyrolle, SEHV and Magrini infringed Article 81 EC and Article 53 of the Agreement establishing the European Economic Area ('the EEA agreement') during the period from 15 April 1988 to 13 December 2000 and that they all infringed those provisions

during the periods from 1 April 2002 to 9 October 2002 and from 21 January 2004 to 11 May 2004;

— annul Article 2 of the contested decision in so far as it concerns them;

— if necessary, reduce the amount of the fines imposed on them to a maximum of EUR 1 980 000 for Siemens Österreich and KEG, EUR 1 100 000 for Reyrolle and Magrini and EUR 2 750 000 for SEHV;

— order the Commission to pay the costs.

32 The Commission contends that the General Court should:

— dismiss the actions;

— order the applicants to pay the costs.

## Law

### I — *The actions for annulment*

33 In support of their claims for annulment the applicants raise two pleas in law. The first is based on an infringement of Article 81(1) EC, Article 53(1) of the EEA Agreement, Article 23(2) and (3) and Article 25 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). The second plea is based on a breach of the right to be heard.

#### A — *The first plea, based on an infringement of Article 81 EC, Article 53(1) of the EEA Agreement, and certain provisions of Regulation No 1/2003*

34 Within the context of the first plea the applicants claim that, in setting the fine, the Commission infringed Article 81 EC, Article 53 of the EEA Agreement and certain provisions of Regulation No 1/2003 in several respects. That plea is divided into three parts, based, first, on a lack of evidence of the alleged infringement, second, on errors of assessment regarding the duration of the alleged infringement and, third, on the excessive amount of the fine imposed. In Cases T-123/07 and T-124/07 Reyrolle, SEHV and Magrini further claim that the limitation period for the alleged infringement had expired for the period prior to 16 July 1998.

1. Lack of evidence of the alleged infringement

(a) Arguments of the parties

35 The applicants submit that the Commission did not provide sufficient evidence of an infringement of Article 81 EC during the period prior to 13 December 2000. They claim that it is clear from Annex 2 to the GQ Agreement that the European markets were excluded from the scope of that agreement. Thus, the Commission was not able to infer from that agreement the existence of a cartel for the purposes of Article 81 EC, that is to say an agreement which has as its object or effect the prevention, restriction or distortion of competition within the common market.

36 In addition, the probative value of the list of GIS projects referred to in recital 164 of the contested decision is doubtful. First, the Commission does not state why that list was drawn up and does not state whether the GIS projects which are listed were the subject of agreements between the parties. Second, in so far as that list relates to only 11 GIS projects which concern the common market geographically, out of a total of some 1 620, it shows, above all, that such agreements did not have significant effects within the common market.

37 The Commission disputes the arguments raised by the applicants.

(b) Findings of the Court

38 It is apparent from the contested decision, in particular from recitals 124 to 163 thereof, that the Commission considered that the cartel which the applicants are accused of forming and for which it imposed a fine was based on the 'common understanding' that GIS projects in the 'home countries' were reserved to the Japanese and European members of the cartel, on the protection of the so-called 'home' markets in Europe, and on market sharing in 'non-home European countries' between European producers by manipulating bidding procedures and fixing prices. According to the Commission, it is the implementation of the 'common understanding', of which the GQ Agreement constituted but one of the elements, which gave rise to a cartel affecting the common market.

39 In order to prove the existence and the scope of the 'common understanding', the Commission made reference to a number of factors in the contested decision, the most important of which being the statements of ABB, of the witness Mr M., of Fuji and Hitachi, and certain documents such as the GQ Agreement and the EQ Agreement and their annexes, a list of GIS projects discussed within the cartel, supplied by ABB, an undated document found during the Commission's inspection of the VA Tech Group's premises, entitled 'Summary of discussions with JJC', and an exchange of letters dated 18 January 1999 between Mr W., Mr J. and Mr B., all employed within the VA Tech Group.

40 In order to dispute the existence of an infringement of Article 81 EC and of Article 53 of the EEA Agreement, the applicants merely state that the object or effect of the GQ Agreement was not to prevent, reduce or distort competition within the common market and they dispute the probative value of the list of GIS projects in Europe set out in recital 164 of the contested decision. On the other hand, they challenge neither the existence of a 'common understanding', nor the probative value of the other elements referred to in paragraph 39 above, on which the Commission based its

finding that the concerted practice had had such an effect. However, given the large number of factors on which the Commission based its findings in the present case, the applicants cannot dispute in a general manner the existence of an infringement of Article 81 EC without specifically calling into question the Commission's preliminary findings and, in particular, stating in detail how the evidence relied on by the Commission is inadmissible, irrelevant or devoid of probative value.

41 It must be held that, even taking account of the fact that the wording of the GQ agreement excluded its application in the majority of European countries and disregarding the list of GIS projects in Europe in recital 164 of the contested decision, the evidence relied on by the Commission is sufficient to show the scope of the 'common understanding'.

42 First, the Commission's finding that the European members of the cartel discussed and allocated GIS projects within the common market and within the EEA is sufficient, in itself, to establish that the cartel affected competition in those territories. It is also apparent from the contested decision that the Commission also based its findings on ABB's and Mr M.'s statements as well as on those of Fuji and Hitachi, Annex 2 to the EQ Agreement, the list of GIS projects in Europe set out in recital 164 of the contested decision, the document entitled 'Summary of discussions with JJC', and the exchange of letters of 18 January 1999.

43 Second, as is apparent from recitals 125 to 131 of the contested decision, the Commission's finding that the European and Japanese producers divided the market at issue worldwide with the result that the GIS projects in Japan were reserved for Japanese producers and the GIS projects in Europe were, in principle, reserved for European

producers, was based on ABB's and Mr M.'s statements, those of Fuji and Hitachi, and Annex 2 to the EQ Agreement.

44 Third, as is apparent from recitals 133 to 138 of the contested decision, the Commission's finding that 'home' markets in Europe were protected, with the result that, in the countries in which European producers were present historically, the GIS projects were reserved for them from the outset and did not count towards their quotas under the cartel, was based on ABB's and Mr M.'s statements, on the document entitled 'Summary of discussions with JJC', and on the exchange of letters of 18 January 1999.

45 Therefore, even supposing that the applicants' criticism relating to the two items of evidence which they call into question were founded, that would not then call into question the Commission's finding that the cartel prevented, reduced or distorted competition within the common market and within the EEA.

46 Consequently, the first part of the first plea must be rejected.

2. Errors of assessment in respect of the duration of the alleged infringement

47 The applicants submit that the contested decision is vitiated by errors of assessment in respect of the duration of the infringement, which meant that it was unduly lengthened. Those errors concern, first, the date on which they discontinued their participation in the infringement, second, the date on which the undertaking formed by the companies belonging to the VA Tech Group ('the undertaking VA Tech') resumed its

participation in the infringement and, third, the date the infringement was brought to an end.

(a) The date on which the applicants discontinued their participation in the infringement

Arguments of the parties

48 The applicants submit, in the alternative, in relation to the first part of the first plea, based on a lack of evidence of the alleged infringement of Article 81 EC and Article 53 of the EEA Agreement, that the Commission erred in finding that they had discontinued their participation in the infringement on 13 December 2000, the date the event was organised at Ville-d'Avray (France) to celebrate what the applicants had been led to believe by the other participants to be the winding-up of the cartel, whereas the Commission should have determined that discontinuation to have taken place as of 16 July 1998, the date on which the final GIS project in Europe referred to in recital 164 of the contested decision was discussed or, at the latest, as of 12 October 2000, the date on which a meeting was held in Zurich (Switzerland) at which they were informed of the alleged winding-up of the cartel.

49 The Commission disputes the applicants' arguments.

Findings of the Court

50 It should be noted, at the outset, that it is not disputed that Reyrolle, SEHV and Magrini actually discontinued their participation in the cartel. However, the parties are at odds as to the exact date of that discontinuation. The applicants dispute having participated in the cartel after 16 July 1998 or, at the latest, after 12 October 2000. The Commission submits that Reyrolle, SEHV and Magrini did not discontinue their participation in the cartel until the 'farewell party' held on 13 December 2000.

51 That disagreement raises the question as to who has the burden of proof in that regard. The applicants consider that it was the Commission's task to prove the duration of the infringement, whereas the Commission contends that, once it has shown that an unlawful cartel exists, that cartel is deemed to continue to exist until evidence is provided that it has been terminated, which must be provided by the undertaking which participated in it.

52 In that regard, it is appropriate to recall the settled case-law that it is for the party or the authority alleging an infringement of the competition rules to prove its existence by establishing, to the requisite legal standard, the facts constituting an infringement, and it is for the undertaking invoking a defence against a finding of an infringement to demonstrate that the conditions for applying such a defence are satisfied, so that the authority will then have to resort to other evidence (Case T-120/04 *Peróxidos Orgánicos* v *Commission* [2006] ECR II-4441, paragraph 50; see also, to that effect, Case C-185/95 P *Baustahlgewerbe* v *Commission* [1998] ECR I-8417, paragraph 58; and 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 78).

53 In the present case, the principle that the Commission is required to prove every constituent element of the infringement, including its duration (see, to that effect, Case T-43/92 *Dunlop Slazenger* v *Commission* [1994] ECR II-441, paragraph 79; Case T-48/98 *Acerinox* v *Commission* [2001] ECR II-3859, paragraph 55; and Case T-62/02 *Union Pigments* v *Commission* [2005] ECR II-5057, paragraph 36), which is likely to have an effect on its definitive findings as to the gravity of that infringement is not called into question by the fact that the applicants in Cases T-123/07 and T-124/07 raised a defence of limitation, the burden of proof for which is in principle borne by the applicants.

54 Reliance on such a defence necessarily requires that the duration of the infringement and the date on which it ceased be established. However, those circumstances alone cannot provide justification for transferring the burden of proof in this regard to the applicants. The duration of the infringement, which requires that the date on which it ended be known, is one of the essential elements of the infringement, which must be proved by the Commission, irrespective of the fact that the disputing of those elements also forms part of the defence of limitation. That conclusion is also justified by the fact that a Commission proceeding under Regulation No 1/2003 on limitation is not time-barred is the application of an objective legal criterion, which derives from the principle of legal certainty (see, to that effect, Joined Cases T-22/02 and T-23/02 *Sumitomo Chemical and Sumika Fine Chemicals* v *Commission* [2005] ECR II-4065, paragraphs 80 to 82), and, thus, is a condition for the validity of any decision imposing a penalty. The Commission is required to comply with this condition even if the undertaking concerned has raised no defence in this regard (*Peróxidos Orgánicos* v *Commission*, paragraph 52 above, paragraph 52).

55 That apportionment of the burden of proof is likely to vary, however, inasmuch as the evidence on which a party relies may be of such a kind as to require the other party to provide an explanation or justification, failing which it is permissible to conclude that the burden of proof has been discharged (*Peróxidos Orgánicos* v *Commission*, cited in paragraph 52 above, paragraph 53; see also, to that effect, *Aalborg Portland*

*and Others* v *Commission*, paragraph 52 above, paragraph 79). Where, as in this case, the Commission has adduced evidence of the existence of an agreement, it is for an undertaking which has taken part in that agreement to adduce evidence that it distanced itself from that agreement, evidence which must demonstrate a clear intention, brought to the notice of the other participating undertakings, to withdraw from that agreement (Case T-168/01 *GlaxoSmithKline Services* v *Commission* [2006] ECR II-2969, paragraph 86; see also, to that effect, Joined Cases C-2/01 P and C-3/01 P *BAI and Commission* v *Bayer* [2004] ECR I-23, paragraph 63; and *Aalborg Portland and Others* v *Commission*, paragraph 52 above, paragraphs 81 to 84).

56 In the present case, the question whether the Commission was able to find that the applicants discontinued their participation in the cartel on 13 December 2000 must be assessed in the light of those principles.

57 It is apparent from recitals 188 to 190 and 297 of the contested decision that the Commission based its findings, in that regard, on ABB's, Areva's and Schneider Electric's statements. Thus, ABB declared that it had decided, in a common understanding with Alstom, to exclude the applicants from the cartel as a result of their relatively high quota in relation to their production capacity. To that end, a meeting was organised on 13 December 2000 in Ville-d'Avray, allegedly putting an end to the cartel, which none the less continued between ABB, Alstom, Fuji, Melco and Toshiba. In addition, the Commission states that Areva and Schneider Electric confirmed that that meeting took place at the end of November or at the beginning of December 2000 but Areva denied that the purpose of that meeting was to exclude participants from the cartel.

58 The applicants dispute 13 December 2000 as the date they discontinued their participation in the cartel by raising two arguments. First, they submit that that date should be set as 16 July 1998, the date on which the final GIS project in Europe, referred to in recital 164 of the contested decision, was discussed. Second, they claim, as in the

procedure before the Commission, that it was decided to bring the cartel to an end on 12 October 2000 at a meeting in Zurich, that the meeting of 13 December 2000 was merely a 'farewell party', and that the cartel did not continue between those two dates.

59 As regards the first argument, it should be noted that, as stated in paragraphs 41 to 45 above, the existence of the 'common understanding' imputed to the applicants in the contested decision must be regarded as sufficiently substantiated even if the list of GIS projects situated in Europe, referred to in recital 164 of the contested decision, were disregarded. Therefore, the fact that the last discussion relating to a GIS project on that list was held on 16 July 1998 cannot constitute evidence that the cartel ceased to exist as of that date, or that the applicants ceased to participate in it as of then. Therefore, that argument must be rejected.

60 As regards the second argument, it is apparent from the case-law cited in paragraph 55 above that, where, as in this case, the Commission has adduced evidence of the existence of an agreement, it is for an undertaking which has taken part in that agreement to adduce evidence that it distanced itself from that agreement, evidence which must demonstrate a clear intention, brought to the notice of the other participating undertakings, to withdraw from that agreement.

61 The applicants' argument that the situation in which a participant is ousted from a cartel as a result of collusion on the part of the other participants, under the pretext that the cartel had come to an end, must be assimilated to expressly distancing oneself from the cartel, must indeed be accepted. However, given that the Commission has furnished evidence of the existence of the 'common understanding', the onus is on the applicants to prove that the other participants led them to believe that the cartel had come to an end. In addition, even supposing that the termination of the cartel was not announced 'by surprise' at the meeting on 13 December 2000, but some time prior

to that, the date of 12 October 2000, indicated by the applicants, is not substantiated by any evidence. In the absence of any evidence as to the actual date of their eviction from the cartel, the Commission was thus authorised to set 13 December 2000 as the date on which the applicants discontinued their participation and is not required to prove that unlawful agreements were concluded precisely on that date.

62 Consequently, the complaint relating to the date on which the applicants discontinued their participation in the infringement must be rejected.

(b) The date on which the undertaking VA Tech resumed its participation in the infringement

Arguments of the parties

63 The applicants consider that the Commission wrongly found that the undertaking VA Tech had resumed its participation in the cartel, through VAS, from 1 April 2002. In their view, although that undertaking was already informed of the reconvening of the cartel as of the summer of 2002, it had not yet participated at that time. It did not participate until 9 October 2002, the date of the meeting in Paris (France) which some of its representatives attended. The applicants submit that their own statements were supported, in that regard, by other information in the file. In particular, the undertaking VA Tech was not represented at the meeting in Frankfurt (Germany) on 10 July 2002 nor did it participate in the agreements or concerted practices relating to

GIS projects which were due to be completed in the period between April and October 2002. In any event, the Commission acted incoherently in identifying the time at which the cartel was resumed since, in the case of Hitachi, it decided to take account of the date on which it first participated in a multilateral meeting.

64 The Commission rejects the applicants' arguments.

Findings of the Court

65 As is apparent from recitals 199, 203, 204 and 441 of the contested decision, the Commission essentially based its conclusion that the undertaking VA Tech resumed its participation in the cartel, on 1 April 2002 at the latest, on the indications in ABB's response to the Statement of Objections, in which ABB explained that witness Mr M. recalled that, after leaving the cartel in 2000, the undertaking VA Tech resumed its participation during the first three months of 2002. In the absence of a precise date, the Commission determined 1 April 2002 as being the most favourable date for that undertaking. According to the Commission, ABB's statement is very credible since it is only as a result of it that it learned that the undertaking VA Tech had discontinued its participation in the cartel for a period of time. In the Statement of Objections, the Commission had supposed that the undertaking VA Tech had participated in the cartel without interruption. In addition, the Commission considers that that statement is substantiated by the handwritten notes of Mr Z., an employee of the VA Tech Group, which were found on the group's premises during inspections carried out in April 2004.

66 As regards the notes of Mr Z., in recital 204 of the contested decision reference is made to three pages which, according to the Commission, contain questions raised in relation to the VA Tech Group's interest in a GIS project in Ravenna (Italy), the possibility of fixing price levels, discussions with Japanese producers, a meeting planned for July to discuss GIS projects and the status of discussions at the end of August 2002. Those pages are reproduced on pages 2014, 2018 and 2024 of the procedural file before the Commission.

67 In that regard, it should be noted that Mr Z.'s notes do not, for the most part, contain any reference to the date on which they were taken or the date of the facts referred to therein. In addition, it is not possible to draw conclusions from the order in which the pages appear in the Commission's file for the proceedings, since it is evident that the order of certain pages was changed in relation to the chronological order in which they were taken. In particular, the order of the pages reproduced on pages 2014 and 2015 of the procedural file before the Commission was reversed, as is apparent from page 2014 which is visible on the right of page 2015, and page 2016, which contains the minutes of a meeting of the board of directors of 27 June 2002 and could therefore provide dated information, could not have directly followed page 2014 since it is two pages further on.

68 Therefore, the only reliable information in terms of the date on which the notes of Mr Z. were taken is that which can be inferred from the rare references to dates, which are on the same page as the information to which the Commission refers.

69 First, it should be noted that neither the passages of the notes taken by Mr Z. which were cited in the contested decision, nor those indicated by the Commission in its response to the written questions of the Court, enable 1 April 2002 to be established as the date on which the undertaking VA Tech resumed its participation in the cartel.

Although the applicants do not dispute that those notes were made in 2002, the date 1 April is not referred to expressly therein and can also not be inferred from the content of those notes.

70 Second, the file of the proceedings before the Commission contains, inter alia, the phrases 'discuss package with Jap. They have taken a series of initiatives' and 'in practice, reserve a date in July 10 to discuss 1 package of projects Gd export with Japanese'. Those phrases enable the conclusion to be drawn that the note in which they are contained was made prior to 1 July 2002 and thus, at the latest, in June 2002. In the absence of a precise date it is therefore necessary, in accordance with the principle *in dubio pro reo*, to determine 1 July 2002 as the date on which the undertaking VA Tech resumed its participation in the cartel.

71 Third, as regards the subject of the concerted action between the producers, it should be noted that, in the contested decision, the Commission found that, during the second phase of the infringement, the GIS projects were no longer discussed individually, but in 'packages'. The applicants have not disputed that. Similarly, the applicants have not disputed that, during that second phase, the cartel was involved with GIS projects within the EEA. The first part of the first plea in which the applicants dispute that the cartel had an effect within the common market applied only to the first phase of their participation. Therefore, the fact that the note referred to in paragraph 70 above does not mention a GIS project within the EEA is not as such to call into question the fact that the applicants participated, as of their return to the cartel in 2002, in discussions on GIS projects within the EEA.

72 It follows that the complaint alleging that the Commission wrongly found that the applicants had resumed their participation in the cartel from 1 April 2002 must be upheld.

(c) The end date of the infringement

Arguments of the parties

73 The applicants submit that the Commission erred in considering that the infringement had ended definitively only as of 11 May 2004 and not as of 21 January 2004 at the very latest, the date of the last meeting at which GIS projects were discussed, without an agreement being reached. As the coordination system then began to collapse, the meetings served merely to discuss how the cartel was to continue and a few other issues unrelated to competition law.

74 The Commission disputes the claim that the cartel was brought to an end on 21 January 2004 at the latest and not on 11 May 2004. It claims that the cartel continued after 21 January 2004 and that ABB did not end its participation until February 2004. At the very least, the agreements had repercussions until the meeting which followed ABB's departure.

Findings of the Court

75 First, it must be borne in mind that, according to settled case-law, it follows from the actual wording of Article 81(1) EC that agreements between undertakings are prohibited, regardless of their effect, where they have an anti-competitive object (Case C-49/92 P *Commission* v *Anic Partecipazioni* [1999] ECR I-4125, paragraph 123, and

Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 *JFE Engineering* v *Commission* [2004] ECR II-2501, paragraph 181). Consequently, it is not necessary to show actual anti-competitive effects where the anti-competitive object of the conduct in question is proved (see Case T-62/98 *Volkswagen* v *Commission* [2000] ECR II-2707, paragraph 178 and the case-law cited).

76 In the present case, the Commission relied primarily on the restrictive object, in terms of competition, of the agreements and concerted practices referred to in Article 1 of the contested decision. First of all, it found, in recitals 303 and 304 of the contested decision, that the object of complex of agreements and/or concerted practices described was to restrict competition within the meaning of Article 81 EC and Article 53 of the EEA Agreement and that, in such circumstances, it was superfluous for the application of those provisions to take account of the concrete effects of an agreement, before adding, in recital 308, that, by its very nature, the implementation of an agreement of the type described leads to a significant distortion of competition. Similarly, as regards the setting of fines, the Commission expressly affirmed, in recital 477 of the contested decision, that it did not rely specifically on a particular impact when determining the gravity of the infringement.

77 Second, it should also be noted that, as the Commission pointed out in recital 215 of the contested decision, on the basis of the statements of the VA Tech Group, the communications and meetings within the cartel after ABB's departure concerned, inter alia, the exchange of information relating to pending tender proceedings, outsiders' positions, whether or not to continue the contacts, and security issues. Those subjects of discussion show that, even if the members remaining in the cartel after ABB's departure did not manage to agree on specific projects, they intended to continue the cartel in the future or, at the very least, had not yet taken a decision to bring it to an end.

78 That interpretation of the facts is not called into question by Hitachi's statements concerning the end of the cartel, referred to by the applicants. According to the applicants, Hitachi stated, in relation to the meeting of 21 January 2004, that 'the parties had rejected all the proposals' and that 'the meeting was then adjourned'. That same company concluded from this, in another statement, that 'the new system had started to collapse in January 2004, which is when the last working meeting took place which ABB had attended'.

79 First of all, the fact that no agreement on the GIS projects discussed was able to be concluded at the meeting on 21 January 2004 does not mean that the cartel ceased to exist as of then — even though, in Hitachi's *ex post* assessment, that failure may have constituted the starting point of the 'collapse of the cartel'. The subjects discussed at the subsequent meetings, which were not disputed by the applicants, bear witness to the will to pursue the cartel without ABB. Second, Hitachi's assessment that the cartel had begun to collapse in January 2004 only confirms, as if it were necessary, that the cartel had not yet collapsed in January 2004.

80 Accordingly, it was not necessary for the Commission to prove the conclusion of new agreements on specific GIS projects at the meetings which took place after that of 21 January 2004 in order to be able to conclude that the cartel continued to exist after that date.

81 Therefore, the applicants have not shown that the Commission committed an error of assessment in determining 11 May 2004 as the date of the end of the cartel. It follows that the complaint alleging such an error of assessment must be rejected.

82 Accordingly, Article 1 of the contested decision must be annulled in so far as the Commission finds therein that the applicants committed an infringement between 1 April and 30 June 2002. For the rest, the part of the first plea based on errors of assessment relating to the duration of the infringement must be rejected.

3. The part alleging that the alleged infringement was time-barred for the period prior to 16 July 1998

(a) Arguments of the parties

83 Reyrolle, SEHV and Magrini consider that, for the period prior to 16 July 1998, the imposition of fines is time-barred. In their view, the five-year limitation period must be calculated from 16 July 1998 and, since their participation in the new system was limited to one year and three months, the increase in the starting amount applied in accordance with the duration of the infringement should be reduced to 10 %.

84 Reyrolle, SEHV and Magrini add that the argument that there was a continuing infringement, defended by the Commission, is erroneous in so far as they are concerned, since the conditions laid down in the case-law, namely that there be no interruption in the infringements and that the conduct of the undertakings at issue result from a general intention, are not satisfied.

85 The Commission contests those arguments.

(b) Findings of the Court

86 Article 25(1)(b) of Regulation No 1/2003 lays down a limitation period of five years for infringements of the type imputed to the applicants. In accordance with the first sentence of Article 25(3) of that regulation, 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.

87 In the present case, the plea of limitation raised in respect of the first phase of the infringement imputed to Reyrolle, SEHV and Magrini requires that two cumulative conditions be satisfied. First of all, that first phase has to have come to an end by 10 May 1999 at the latest, that is to say five years before the day preceding the inspections carried out by the Commission on 11 and 12 May 2004. Second, the two stages of the infringement imputed to them must not form part of a single and continuous infringement, for the purposes of Article 25(2) of Regulation No 1/2003, since, in such a case, time begins to run on the day on which the infringement ceases.

88 As set out in paragraphs 57 to 62 above, the Commission rightly found, in the contested decision, that the first phase of the infringement imputed to Reyrolle, SEHV and Magrini did not end until 13 December 2000 and thus after 10 May 1999. Therefore, the plea of limitation must be rejected.

89 In any event, the second condition set out in paragraph 87 above has not been satisfied any more than the first. The Commission rightly found that the agreement in which Reyrolle, SEHV and Magrini participated in 2002 was essentially the same as the one which they had participated in until 2000.

90 The Courts of the Union have identified several relevant criteria for assessing whether there is a single infringement, namely the identical nature of the objectives of the practices at issue (see, to that effect, Case C-113/04 P *Technische Unie* v *Commission* [2006] ECR I-8831, paragraphs 170 and 171; Case T-21/99 *Dansk Rørindustri* v *Commission* [2002] ECR II-1681, paragraph 67; and Case T-43/02 *Jungbunzlauer* v *Commission* [2006] ECR II-3435, paragraph 312), the identical nature of the goods or services concerned (see, to that effect, the 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, paragraphs 118, 119 and 124, and *Jungbunzlauer* v *Commission*, paragraph 312), the identical nature of the undertakings which participated in the infringement (*Jungbunzlauer* v *Commission*, paragraph 312), and the identical nature of the detailed rules for its implementation (*Dansk Rørindustri* v *Commission*, paragraph 68). Other relevant criteria are whether the physical persons involved on behalf of the undertakings are identical and whether the geographical scope of the practices at issue is identical.

91 In the present case, it should be noted that all of the criteria referred to above enable it to be found that the cartel in which Reyrolle, SEHV and Magrini participated in 2002 was essentially the same as the one in which they had participated until 2000.

92 First, the objective of stabilising the market shares of the members of the cartel, of sharing the global market between the Japanese and European producers — in particular by reserving the European markets for European producers — and of avoiding price erosion, was the same during the two periods at issue.

93 Second, the ways in which the cartel functioned remained unchanged overall, even though they evolved progressively over the years, in particular on the basis of the reduction in the number of participating undertakings following the consolidation of the sector and on the basis of the technical evolution of means of communication. However, as the Commission stated in recital 280 of the contested decision, those changes did not occur at a precise moment in time between 2000 and 2002, but as

and when. In addition, those changes did not affect the essential principles of its functioning, namely the allocation of GIS projects between the members of the cartel on the basis of quotas set by them, by bid-rigging, and by fixing minimum prices for GIS projects which had not been allocated.

94 Those detailed findings of the Commission in relation to the functioning of the cartel, the detail of which is not disputed by the applicants, cannot be invalidated by the general and unsubstantiated claim that 'the coordination as of 2002 was carried out in accordance with a completely new system', as demonstrated, inter alia, by the statements of ABB's employees. In the passages cited by the applicants in Cases T-123/07 and T-124/07 out of context, the employee at issue, Mr Wi., essentially recounts that, at the time of the facts, his superior had kept from him the real extent of the 'cooperation' with the other GIS producers and the fact that the cartel, as it stood as of 2002, continued as during the previous stage of the cartel.

95 Third, during the two periods at issue, the cartel concerned the same market, namely the market for GIS projects in the form of loose equipment or turnkey power sub-stations.

96 Fourth, the undertakings involved in the cartel and the various companies which constituted those undertakings essentially remained the same throughout the duration of the cartel between 1988 and 2004, taking into account the consolidation process in the GIS sector which took place during that period, the only exceptions being the temporary absence of Siemens, the undertaking VA Tech and Hitachi.

97 Fifth, the persons representing the various undertakings within the cartel were, to a very large extent, the same in 2000 and 2002, with the exception of normal fluctuations within each undertaking. The continuity of the representatives is demonstrated by the various lists of meetings which form part of the file and, in particular, the one set out in Annex I to the contested decision, and by the list of collaborators of the undertakings concerned which were active in the cartel, set out in Annex II to the contested decision.

98 Sixth, the geographical scope of the cartel was the same in 2000 and during the period 2002 to 2004. It grew slightly from 1988 as a result of the fact that the markets in Central and Eastern European countries had become accessible to the members of the cartel in the meantime.

99 In addition, the fact, pointed out by the Commission and which was not disputed by the applicants in Cases T-123/07 and T-124/07, that the cartel was continued by the other members without the undertakings which were temporarily absent and that the objective continuity of a single infringement was thus preserved also shows that that the cartel was one and the same.

100 Finally, as regards the subjective element, it is sufficient that, when the undertaking VA Tech resumed its participation in the cartel, Reyrolle, SEHV and Magrini were aware that they were participating in the same cartel as before. It should be noted, in that regard, that certain employees who represented the undertaking VA Tech in the cartel from 2002 already had managerial functions within the companies which made up that group before those companies temporarily discontinued their participation in the cartel in 2000. Thus Mr Z., Mr V., Mr C., Mr B., and Mr W., who feature on the list of participants at the various meetings from October 2002 (see Annex I to the contested decision), had already worked for Reyrolle, SEHV, Magrini and Schneider Electric prior to 2000 (see Annex II to the contested decision). Reyrolle, SEHV and Magrini must therefore have been aware of the factors indicating that the cartel was one and the same. Contrary to what the applicants in Cases T-123/07 and T-124/07

claim, the subjective element is thus not ruled out by the fact that they were tricked into believing in 2000, by the other participants to the cartel, that the cartel had been dissolved. It is not their level of knowledge in 2000 which is decisive in that regard, but their knowledge at the time they resumed their participation in the cartel.

101 Therefore, the plea of limitation raised by Reyrolle, SEHV and Magrini must, in any event, be rejected on the basis that the two stages of the infringement in which they were accused of being involved formed part of a single and continuous infringement.

102 In conclusion, the part of the first plea based on the limitation of the first phase of the infringement imputed to Reyrolle, SEHV and Magrini must be rejected.

4. The part alleging that the fines imposed are excessive

103 In support of that part, the applicants raise several complaints, alleging, first, that the threshold of 10 % of the turnover of Reyrolle, SEHV and Magrini was exceeded; second, a failure to take account of the individual situation of those companies; third, that the fine imposed on Siemens Österreich and KEG was excessive in relation to the one imposed on Reyrolle; fourth, an incomprehensible determination of the joint and several liability of the individual applicants; fifth, that the Commission erroneously

held Reyrolle liable in addition to its parent company; sixth, infringement of the principle *ne bis in idem* in respect of Siemens Österreich and KEG; and, seventh, a failure to reduce the fine imposed on Siemens Österreich and KEG.

104 It should be noted that the first four complaints essentially allege an erroneous application by the Commission of the concept of undertaking for the purposes of Community competition law. In the arguments put forward in support of those complaints, the applicants criticise the fact that, in calculating their fines, the Commission applied a starting amount based on the total turnover of the VA TECH Group for 2005 and not on their individual turnovers, and the fact that the amounts which the individual companies in that group are required to pay jointly and severally were determined in an incomprehensible manner. Therefore, those four complaints need to be addressed together before examining the other complaints.

(a) The first four complaints alleging, in essence, an erroneous application by the Commission of the concept of undertaking for the purposes of Community competition law

Arguments of the parties

105 Reyrolle, SEHV and Magrini accuse the Commission of having applied, when calculating their fines, a starting amount based on the total turnover of the VA Tech Group, as it existed at the time of the contested decision, and not on their individual turnovers.

106 According to Reyrolle, SEHV and Magrini, the Commission thereby manifestly contradicted the approach, adopted on several occasions in the contested decision, pursuant to which it intended to hold the subsidiaries of the VA Tech Group 'individually liable' for the infringement of Article 81 EC and Article 53 of the EEA Agreement. Reyrolle, SEHV and Magrini also claim that the method of calculation applied by the Commission led to Reyrolle's being held responsible for the conduct of SEHV and Magrini and vice versa, even though they were not linked for the most part of the duration of the infringement, namely during the period from 15 April 1988 to 13 December 2000. Such 'retroactive shared responsibility' is contrary to the principle that the penalty must be proportionate to the offence committed, since the result is that the economic weight of those companies in the cartel is substantially exaggerated.

107 Reyrolle, SEHV and Magrini also assert that, in the contested decision, the Commission did not respect the ceiling of 10 % of turnover, laid down in Article 23(2) of Regulation No 1/2003. For 2005, their global turnovers amounted to roughly EUR 118 953 000 for Reyrolle, EUR 222 034 242 for SEHV and EUR 103 047 112 for Magrini, with the result that the fines of EUR 22 050 000 imposed on them are excessive.

108 In addition, Reyrolle, SEHV and Magrini consider that the method of calculation proposed by the Commission infringes Article 7(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the ECHR'), signed in Rome on 4 November 1950, pursuant to which a heavier penalty is not to be imposed than the one that was applicable at the time the offence was committed. In their view, the retroactive application by the Commission of the concept of economic unit, for the purposes of calculating the amount of the fine, led to a heavier penalty.

109 Reyrolle adds that the Commission should have taken account of its limited capacity to cause significant damage to competition within the common market, either by reducing the starting amount of its fine, or by taking account of mitigating circumstances. For technical reasons, its business activities within the EEA were limited to the United Kingdom and Ireland throughout the duration of the GQ Agreement. Therefore, as it exaggerates its competitive weight on the common market, its global turnover is not a relevant reflection of its capacity to harm other operators within the EEA.

110 Siemens Österreich and KEG submit that the amount of the fine imposed on them is disproportionate in relation to the fine incurred by Reyrolle as a result of the Commission's choice to fine them as if they had been linked to SEHV and Magrini during the period from 1998 to 2000, thereby substantially exaggerating their economic weight within the cartel.

111 Siemens Österreich and KEG add that, in principle, the fines imposed on parent companies for infringements committed by their subsidiaries, based on the decisive influence which parent companies have over the commercial conduct of their subsidiaries, cannot be heavier than those incurred by the subsidiaries. However, they submit, in the present case, that, in the light of the duration of the infringements imputed to them, the amount of the fine imposed on them is twice that of Reyrolle, that is to say EUR 242 307 per month of infringement for them and EUR 124 576 per month of infringement for Reyrolle.

112 According to Siemens Österreich and KEG, the approach adopted by the Commission fails to take account of the principle that a fine should correspond to the individual contribution of a company to the matters complained of and the 'principle of fault' and, consequently, infringes Article 23(2) of Regulation No 1/2003 and Article 7(1) of

the ECHR. Such an approach is also contrary to the Commission's Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) [CS] (OJ 1998 C 9, p. 3) ('the Guidelines'). In addition, in its defence, the Commission wrongly assumes, and without any evidence, that VA Technologie was aware or should have been aware, when Reyrolle was acquired and VAS was created, of Reyrolle's participation in the cartel, even though VA Technologie 'did not enter the GIS sector … until after the acquisition of Reyrolle' and that the due diligence carried out on that occasion did not reveal any collusive activity.

113 Siemens Österreich and KEG consider that the Commission first had to calculate the amount of the fines for each subsidiary of the VA Tech Group, before calculating, on a *pro rata* basis for the duration of the control exercised by that group over each of the subsidiaries, the amount of the fine to be paid jointly and severally by the parent companies. Pursuant to that method, the fines imposed by the Commission should have corresponded to EUR 720 000 for Reyrolle, EUR 900 000 for SEHV and EUR 360 000 for Magrini, that is a total of EUR 1 980 000.

114 SEHV and Magrini also submit that the total fine of EUR 22 050 000 imposed on them in the contested decision was wrongly divided up between, first, the group of which Schneider Electric is the parent company ('the Schneider Group') in the amount of EUR 4 500 000 and, second, the VA Tech Group in the amount of EUR 17 550 000. They state that the calculation which the Commission probably made results in Schneider Electric essentially assuming a very limited amount of liability, namely 40 %, for the period during which it controlled them on its own. By contrast, the VA Tech Group and Reyrolle were manifestly disadvantaged.

115 SEHV and Magrini add that the Commission established the starting amount of the fine applied to Schneider Electric in the light of its shareholding in VAS. VA Technologie transferred into VAS various business activities which had nothing to do with the cartel. Therefore, the amount set in Article 2(l)(i) of the contested decision which SEHV, Magrini and Reyrolle are to pay jointly and severally is manifestly excessive.

116 The Commission contends that the setting of the amount of the fine in the contested decision is in line with the criteria established in the case-law and takes account, as far as necessary, of the individual situations of Reyrolle, SEHV and Magrini.

117 As regards Article 7 of the ECHR, the Commission notes that it is not directly applicable in the present case. In addition, it states that the contested decision does not infringe the prohibition of retroactivity nor the principle of 'no punishment without law'.

118 The Commission also contests Reyrolle's argument that the taking into account of the global turnover of that company leads to an excessive starting amount for the calculation of the amount of its fine. It considers itself entitled, when a cartel covers almost the entire global market, to base its findings on global turnover as an indicator of the gravity of the infringement. In addition, it submits that no provision of Community law provides that a fine must be proportionate to the duration of the infringement.

119 Furthermore, the Commission notes that Siemens Österreich and KEG do not claim that the sum of two hypothetically separate fines imposed on the VA Tech Group, one for Reyrolle's conduct and the other for SEHV's and Magrini's conduct, would be

lower than the single fine set in the contested decision. A decision can be annulled only if the alleged erroneous calculation actually caused harm to the applicant.

120 As regards the calculation of the amounts to be paid jointly and severally, the Commission submits that that complaint is inadmissible since SEHV and Magrini were not directly affected by that calculation and cannot assert the interests of the worldwide undertaking. The Commission also considers that it gave sufficient reasons for its calculation of the applicants' fines. In addition, the Commission is of the view that the attribution of a larger share of the joint and several liability to Schneider Electric would be significantly less favourable to the VA Tech Group than the allocation which it made, since the overall liability of that group would be significantly greater.

121 Finally, the Commission essentially submits in its replies to the written questions put by the Court and also at the hearing, that it is free to determine the amounts to be paid jointly and severally, since joint and several liability is advantageous for the companies concerned. Consequently, there is nothing irregular about the fact that Reyrolle, on the one hand, and SEHV and Magrini, on the other, were held jointly and severally liable for a sum unrelated to the period of their common participation in the cartel in their capacity as subsidiaries of the VA Tech Group, that the participation of Reyrolle on an individual basis for 10 years before being purchased by VA Technologie does not result in it having to bear a sum on its own, or even that Siemens Österreich and KEG were not held jointly and severally liable for a part of SEHV's and Magrini's fine. In addition, in the Commission's view, the information set out in recital 468 of the contested decision concerning the periods of joint and several liability must not be understood as constituting a definitive decision as to joint and several liability, in the sense of joint and several debts. When the Commission took a decision, in recital 468, on the personal liability of Reyrolle for the period from 15 April 1988 to 20 September 1988, it did not rule out that joint and several liability could be determined for reasons other than the existence of an economic entity; only joint and several liability with its parent companies was ruled out for that period. The Commission considers

that, ultimately, those held liable jointly and severally are completely free to distribute the total amount of the fine among themselves, which constitutes an advantage for them.

Findings of the Court

— The principle that penalties must be specific to the offender and the offence

122 First of all, it should be recalled that, according to the principle that penalties must be specific to the offender and the offence, a natural or legal person may be penalised only for acts imputed to him individually (Joined Cases T-45/98 and T-47/98 *Krupp Thyssen Stainless and Acciai speciali Terni* v *Commission* [2001] ECR II-3757, paragraph 63); that principle applies in any administrative procedure that may lead to the imposition of sanctions under Community competition law (Case T-304/02 *Hoek Loos* v *Commission* [2006] ECR II-1887, paragraph 118). However, that principle must be reconciled with the notion of undertaking for the purposes of Article 81 EC, as interpreted by the case-law. In that regard, it should be noted that the notion of undertaking, for the purposes of Article 81 EC, includes economic units which consist of a unitary organisation of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement of the kind referred to in that provision (see Case T-9/99 *HFB and Others* v *Commission* [2002] ECR II-1487, paragraph 54 and the case-law cited). Community competition law recognises that different companies belonging to the same group form an economic unit and therefore an undertaking within the meaning of Article 81 EC if the companies concerned do not determine independently their

own conduct on the market (see, to that effect, Case T-203/01 *Michelin* v *Commission* [2003] ECR II-4071, paragraph 290).

123 Consequently, it is necessary to reject the assertion made by Siemens Österreich and KEG that the fact that an undertaking involved in an infringement is made up of several different companies does not mean that they have to be treated as a single participant to the infringement. That assertion results from confusion of the notions of undertaking and company and is not supported by the case-law cited by the applicants.

124 Similarly, it is also necessary to reject the argument raised by Reyrolle, SEHV and Magrini, set out in paragraph 108 above, that the retroactive application by the Commission, for the purposes of calculating the fine, of the concept of economic unit leads to a heavier penalty and, therefore, infringes Article 7(1) of the ECHR, pursuant to which a heavier penalty is not to be imposed than the one that was applicable at the time the offence was committed. The Commission's practice of taking account, for the purposes of calculating fines, of the turnover of undertakings — and, therefore, where necessary, the cumulative turnover of all the companies which make up an undertaking — has always been consistent and should therefore be familiar to economic operators. In addition, the applicants had continued to participate in the infringement after a merger which led to an increase in the undertaking's turnover. They cannot therefore call on the Commission to treat them as if the merger had never happened, given that the principle that it is the turnover of the undertaking and not the individual turnovers of the companies which make up the undertaking, taken individually, which is relevant for the purposes of calculating fines was applicable during the period in which the cartel was operational and was thus not applied retroactively.

125 It should also be added that the Commission's consistent practice of taking account, for the purposes of determining the starting amount of fines, of turnover for the last full year of the infringement, has been implicitly accepted in the case-law (see, to that effect, Case C-291/98 P *Sarrió* v *Commission* [2000] ECR I-9991, paragraphs 85 to 87).

126 In that regard, the case-law should first be noted, according to which the deterrence of fines is one of the factors by reference to which the gravity of infringements must be determined (Case C-219/95 P *Ferriere Nord* v *Commission* [1997] ECR I-4411, paragraph 33, and Joined Cases T-101/05 and T-111/05 *BASF and UCB* v *Commission* [2007] ECR II-4949, paragraph 45). The dissuasive nature of a fine depends to a large extent on whether it is sufficiently material for the undertaking concerned. Therefore, in order to be able to measure the dissuasive effect of a fine in respect of a company which participated in an infringement, account needs to be taken of the situation as it stood at the end of the infringement and not the situation as it may have stood at an earlier point in time. The taking into account of an earlier situation may result in a fine which is far too low to be sufficiently dissuasive, in the case where the turnover of the undertaking concerned has increased in the meantime, or in a fine which is higher than necessary to be dissuasive, in the case where the turnover of the undertaking concerned has decreased in the meantime.

127 Second, it would be impractical and completely excessive, in the light of the principle of good administration and the requirements of procedural economy, to require the Commission to take account of the evolution of the turnovers of the undertakings at issue throughout the entire duration of the cartel. Such an approach would involve, as the Commission rightly points out, calculating a separate starting amount of the fine for each year of participation in the cartel and, to that end, determining the respective market shares of the participants for each year of the infringement.

128 Therefore, it is also necessary to reject the argument of Siemens Österreich and KEG, set out in paragraph 110 above, that the approach adopted by the Commission, characterised by the imposition of a fine on them which takes account of the turnover of the VA Tech Group for 2003 and not the lower turnover prior to the acquisition of SEHV and Magrini, resulted in their economic weight in the cartel being exaggerated.

129 Similarly, it is necessary to reject the argument of Siemens Österreich and KEG, set out in paragraph 112 above, that that approach on the part of the Commission fails to take account of the principle that a penalty must correspond to the individual contribution of a company to the facts complained of and the principle of fault. It is apparent from the contested decision and, in particular recitals 468(c) and 507 thereof that those applicants were held liable only for the period during which they participated in the cartel, through their subsidiaries, namely Reyrolle, initially, and then also SEHV and Magrini as of 2001.

130 As regards the argument of Siemens Österreich and KEG, also set out in paragraph 112 above, that the Commission wrongly assumes that VA Technologie was aware or should have been aware, when Reyrolle was acquired and VAS was created, of Reyrolle's participation in the cartel, it should be recalled that the Commission may reasonably presume that a wholly-owned subsidiary carries out, in all material respects, the instructions given to it by its parent company and that that presumption means that the Commission is not required to check whether the parent company has actually exercised that power (see Case T-330/01 *Akzo Nobel* v *Commission* [2006] ECR II-3389, paragraph 83 and the case-law cited). The attribution to the parent company of the conduct of a wholly-owned subsidiary is thus not conditional on evidence that the parent company had knowledge of its subsidiary's actions. On the contrary, it is for the parent company, when it considers that, despite the 100 % shareholding in its subsidiary, the subsidiary determines its conduct independently on the market, to rebut that presumption by providing sufficient evidence (see *Akzo Nobel* v *Commission*, paragraph 83 and the case-law cited).

131 In the present case, the fact whether, when Reyrolle was acquired in 1998, VA Technologie was aware of its participation in the cartel is irrelevant, since Siemens Österreich and KEG have not disputed, before the Court, the fact that Reyrolle, which has been a wholly-owned subsidiary of the VA Tech Group since 1998, carried out its instructions in all material respects and did not determine its conduct independently on the market. Consequently, the fact that the Commission might have wrongly considered that VA Technologie was aware of such participation is not capable of invalidating the contested decision.

132 In addition, as regards the creation of VAS in 2001, the Commission was entitled to take the view that VA Technologie was aware at that time of the participation in the cartel of both its former subsidiary Reyrolle and its new subsidiaries SEHV and Magrini. The Commission stated, in recital 454 et seq. of the contested decision, that several persons representing the undertaking VA Tech at cartel meetings also occupied management posts, at the same time, both within its subsidiaries Reyrolle, SEHV and Magrini and within their parent companies, namely VA Technologie and VAS — whose legal successor is Siemens Österreich — and KEG. Siemens Österreich and KEG have not disputed those findings before the Court.

133 That argument must therefore be rejected.

134 Finally, since the entity which committed the infringement of Article 81 EC and Article 53 of the EEA Agreement is the undertaking for the purposes of competition law, which does not have legal personality as such, in its decision sanctioning that infringement and imposing fines, the Commission must determine the individual companies within the undertaking to which the decision is to be addressed and which will be liable for payment of fines on behalf of the undertaking. It follows that the individual fines imposed on the various companies which constitute the undertaking are to be calculated, except in exceptional circumstances, on the basis of the economic

strength and thus the turnover of the undertaking and not on the basis of the economic strength of the individual companies.

135 In the present case, the Commission first explained, in recital 333 of the contested decision, that Article 81 EC and Article 53 of the EEA Agreement applied to the undertaking for the purposes of Community law, a notion that was not identical with the notion of corporate legal personality in national commercial, company or fiscal law. However, since a decision sanctioning an infringement of those articles has to be addressed to legal persons, it was necessary for the Commission to identify, within the undertakings concerned, the legal persons to whom the decision was to be addressed. Next, in recital 335 of the contested decision, the Commission explained that parent companies exercising a decisive influence over a subsidiary's commercial conduct could be held jointly and severally liable for the infringement committed by the subsidiary, although that did not exempt the subsidiary of its own liability. The liability of the parent company was thus additional to that of the subsidiary. Those considerations take full account of the principles set out in paragraphs 122 and 134 above.

136 Therefore, it is necessary to reject the argument of Reyrolle, SEHV and Magrini, set out in paragraph 106 above, that the imposition of a fine based on the total turnover of the VA Tech Group is not in line with an approach of holding the various subsidiaries of that group individually liable for the infringement.

— The various companies to which the conduct of the undertakings which participated in the cartel may be attributed and the application of the rules governing the joint and several liability for payment of fines

137 First of all, it is necessary to determine the various companies to which the conduct of the undertakings which participated in the cartel may be attributed. Secondly, it will be necessary to examine whether the Commission correctly calculated the amount of the fines to be imposed on the applicants and, in particular, whether it correctly determined the amounts which they are required to pay jointly and severally. Since that examination concerns the internal coherence of the contested decision, at this stage account needs to be taken of the duration of the infringement determined by the Commission in the contested decision and, in particular, of the date 1 April 2002 and not that of 1 July 2002 (see paragraphs 72 and 82 above) as the date on which the undertaking VA Tech resumed its participation in the cartel.

138 First, as regards the determination of the various companies to which the conduct of the undertakings having participated in the cartel may be imputed, it should be recalled, at the outset, that it is not disputed that Reyrolle, SEHV and Magrini did not determine their conduct on the market autonomously with respect to the participation of the undertaking VA Tech in the cartel. As is apparent from paragraph 1 above, for Reyrolle, that is the period from 20 September 1998, namely the date it was acquired by VA Technologie and, for SEHV and Magrini, the period after 13 March 2001, namely the date on which VAS was created. The Commission inferred from this, in the contested decision, that, during those periods, Reyrolle, SEHV and Magrini, together with VA Technologie and VAS (absorbed in 2006 by Siemens Österreich) and KEG formed one and the same undertaking for the purposes of Article 81 EC, which the applicants do not dispute.

139 Next, as the Commission pointed out in recital 337 of the contested decision, legal entities which have participated in their own right in an infringement and which have subsequently been acquired by another company continue to bear responsibility themselves for their unlawful conduct prior to their acquisition, where they have not been purely and simply absorbed by the acquiring undertaking, but continued their activities as subsidiaries (see, to that effect, Case C-279/98 P *Cascades* v *Commission* [2000] ECR I-9693, paragraphs 78 to 80). In such a case, the acquiring undertaking may be held responsible only for the conduct of its subsidiary with effect from its acquisition if the subsidiary continues the infringement and if the liability of the new parent company can be established (see, to that effect, Case C-286/98 P *Stora Kopparbergs Bergslags* v *Commission* [2000] ECR I-9925, paragraphs 37 to 39).

140 In the present case, the situation of Reyrolle, on the one hand, and of Siemens Österreich and KEG, on the other, is similar to the second situation referred to in paragraph 139 above, since Reyrolle initially participated in the infringement independently and subsequently, from 20 September 1998, pursued its unlawful activity as a subsidiary of the VA Tech Group (see paragraph 1 above).

141 In addition, the same principle must apply, *mutatis mutandis*, in the case where, prior to its acquisition, the company acquired participated in the infringement not independently, but as a subsidiary of another group, as was the case for SEHV and Magrini, which, before belonging to the undertaking VA Tech, were part of the undertaking belonging to the Schneider Group ('the undertaking Schneider') until 13 March 2001.

142 In that regard, it is apparent from the file that 60% of Reyrolle, SEHV and Magrini was held by the VA Tech Group from 13 March 2001, through VAS. The Commission

set out, in recitals 454 and 455 of the contested decision, without being contradicted by the applicants, that it considered that VA Technologie and KEG were in a position to exercise decisive influence over the commercial conduct of Reyrolle, SEHV and Magrini, through their 60% shareholding in VAS. It came to the conclusion that, between 13 March 2001, the date VAS was created, and 11 May 2004, the date the cartel was terminated, Siemens Österreich and KEG or their legal predecessors formed one and the same undertaking with the subsidiaries Reyrolle, SEHV and Magrini. In particular, it is apparent from recitals 423, 424, 450 and 467 of the contested decision that the Commission considered that Schneider Electric's liability for the participation of its former subsidiaries SEHV and Magrini had ended with the creation of VAS on 13 March 2001, in spite of the fact that it had held, until October 2004, a 40% shareholding in VAS.

143 It follows from the application of the principle set out in paragraph 139 above that SEHV and Magrini continue to bear responsibility themselves for their unlawful conduct prior to the takeover on 13 March 2001 by the VA Tech Group. In addition, since, prior to that date, those companies belonged to a different undertaking, with Schneider Electric, the latter must be held jointly and severally with them in respect of that period.

144 It is apparent from the above that four separate periods need to be distinguished:

— first, during the period from 15 April 1998 to 20 September 1998, Reyrolle is solely liable for its participation in the cartel; as regards its parent company at the time, Rolls-Royce, the infringement is time-barred;

— second, during the period from 15 April 1988 to 13 December 2000, SEHV and Magrini are liable for their participation in the cartel jointly and severally with Schneider Electric, which was their parent company at the time;

— third, during the period from 20 September 1998 to 13 December 2000, Reyrolle is liable for its participation in the cartel jointly and severally with Siemens Österreich, the legal successor of VA Technologie, its parent company at that time;

— fourth, during the period from 1 July 2002 (1 April 2002 according to the contested decision) and 11 May 2004, Reyrolle, SEHV and Magrini are liable jointly and severally for their participation in the cartel with their parent companies KEG and Siemens Österreich, the legal successor of their former parent companies, namely VAS and VA Technologie.

145 In accordance with the principle set out in paragraphs 139 to 143 above, the Commission actually found, in recitals 449 to 451 of the contested decision, as regards Reyrolle's participation in the infringement, that Reyrolle should be held solely liable for that participation for the period prior to its acquisition by the VA Tech Group, namely from 15 April 1988 to 20 September 1998, that Siemens Österreich and KEG should be held jointly and severally liable, with Reyrolle, for that participation as of its acquisition by the VA Tech Group, namely from 20 September 1998 to 13 December 2000 and from 1 April 2002 to 11 May 2004 and that SEHV and Magrini, other subsidiaries of the VA Tech Group which participated in the infringement, should be held jointly and severally liable for that participation for the period from 1 April 2002 to 11 May 2004.

146 As regards the participation of SEHV and Magrini, the Commission found, in recital 465 of the contested decision, that Schneider Electric should be held jointly and severally liable with them for that participation for the period from 15 April 1988 to 13 December 2000 and, in recital 467 of the contested decision, that Siemens Österreich and KEG should be held jointly and severally liable with them for that participation for the period from 1 April 2002 to 11 May 2004.

147 The Commission was thus rightly able to consider, in recital 468 of the contested decision, that:

'Therefore,

(a) [Reyrolle] should be held solely liable for its involvement in the infringement from 15 April 1988 to 20 September 1998;

(b) [SEHV] and [Magrini] should be held jointly and severally liable with [Schneider Electric] from 15 April 1988 to 13 December 2000; and

(c) [Siemens Österreich and KEG] should be held jointly and severally liable from 20 September 1998 to 13 December 2000 and from 1 April 2002 to 11 May 2004 (until 13 December 2000, jointly and severally with [Reyrolle], and from 1 April 2002 onwards, also jointly and severally with [SEHV] and [Magrini].'

148 Second, as regards the calculation of the amount of the fines to be imposed on the various companies to which the conduct of the undertakings which participated in the cartel may be attributed and, in particular, the determination of the amounts to be paid jointly and severally, it needs to be examined whether, in recitals 122, 134, 139, 141 and 143 of the contested decision, and in the allocation which it determined in recital 468 of the contested decision, the Commission respected the principles referred to above.

149 In that regard, it needs to be pointed out that joint and several liability between companies for the payment of fines due as a result of an infringement of Article 81 EC and Article 53 of the EEA Agreement is a legal effect which follows as a matter of law from the substantive provisions of those articles.

150 According to the case-law, where several persons may be held personally liable for the participation in an infringement of one and the same undertaking for the purposes of competition law, they must be regarded as jointly and severally liable for that infringement (see, to that effect, Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, paragraph 41; Case C-294/98 P *Metsä-Serla and Others* v *Commission* [2000] ECR I-10065, paragraphs 33 and 34; Joined Cases T-339/94, T-340/94, T-341/94 and T-342/94 *Metsä-Serla and Others* v *Commission* [1998] ECR II-1727, paragraphs 42 to 44; *HFB and Others* v *Commission*, paragraph 122 above, paragraphs 54, 524 and 525; *Tokai Carbon and Others* v *Commission*, paragraph 90 above, paragraph 62; and Case T-112/05 *Akzo Nobel and Others* v *Commission* [2007] ECR II-5049, paragraphs 57 to 62).

151 The unitary conduct of the conduct of the undertaking on the market justifies, for the purposes of the application of competition law, that the companies or, more generally, the persons which can be held personally liable for it may be held liable jointly and severally (see, to that effect, *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission*, paragraph 150 above, paragraph 41; Case 52/69 *Geigy* v

*Commission* [1972] ECR 787, paragraph 45; *HFB and Others* v *Commission*, paragraph 122 above, paragraphs 54, 524 and 525; and *Tokai Carbon and Others* v *Commission*, paragraph 150 above, paragraph 62). The joint and several liability for the payment of fines imposed for an infringement of Article 81 EC and Article 53 of the EEA Agreement, inasmuch as it contributes to the effective recovery of those fines, is part of the objective of deterrence which is pursued generally by competition law (see, to that effect, Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661, paragraphs 172 and 173; and Case C-289/04 P *Showa Denko* v *Commission* [2006] ECR I-5859, paragraph 61) and respects the principle of non bis in idem, a fundamental principle of European Union law, also laid down in Article 4 of Protocol No 7 of the ECHR, which precludes penalising more than once, for the same infringement of competition law, the same conduct of the undertaking on the market through the persons which may be held personally liable for it (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 52 above, paragraph 338; Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraphs 95 to 99; and Joined Cases T-217/03 and T-245/03 *FNCBV and Others* v *Commission* [2006] ECR II-4987, paragraph 340).

152 The fact that the personal liabilities incurred by several companies due to the participation of the same undertaking in an infringement is not identical does not prevent them from being fined jointly and severally, since the joint and several liability for payment of a fine covers only the period of the infringement during which they formed an economic unit and thus constituted an undertaking for the purposes of competition law.

153 In that regard, contrary to what the Commission claims in its argument set out in paragraph 121 above, it is not free to determine the sums to be paid jointly and severally. It follows from the principle that penalties must be specific to the offender and to the offence concerned, as described in paragraph 122 above, that each company must be able to discern from the decision imposing a fine on it to be paid jointly and severally with one or more other companies the amount which it is required to bear

in relation to the other joint and several debtors, once payment has been made to the Commission. To that end, the Commission must, inter alia, specify the periods during which the companies concerned were jointly liable for the unlawful conduct of the undertakings which participated in the cartel and, where necessary, the degree of liability of those companies for that conduct.

154 Therefore, in the present case, the Commission had to take account of the findings which it made, in recital 468 of the contested decision, regarding the periods of joint responsibility of the various companies belonging to the undertaking VA Tech in order to determine the amounts to be paid jointly and severally by those companies. In so far as possible, those amounts must reflect the weighting of the individual shares of the joint liability of those companies, as identified in that recital.

155 It should be added that, like the concept of 'undertaking' for the purposes of competition law, of which it is merely an ipso jure legal effect (see paragraphs 150 and 151 above), the concept of 'joint and several liability for the payment of fines' is an autonomous concept which must be interpreted by reference to the objectives and system of competition law of which it forms part and, where necessary, to the general principles deriving from the national legal systems as a whole. In particular, even though the nature of the payment obligation on the companies fined jointly and severally by the Commission as a result of an infringement of Community competition law differs from that of joint debtors of a private-law obligation, it is appropriate to seek guidance, in particular, in the rules on joint and several obligations.

156 Thus, the decision by which the Commission imposes on several companies the payment of a fine jointly and severally necessarily produces all the effects which are inherent, by force of law, in the legal rules governing the payment of competition law

fines, both in relations between creditors and joint and several debtors and in those between joint and several debtors.

157 It is therefore exclusively for the Commission, in exercising its power to impose fines under Article 23(2) of Regulation No 1/2003, to determine the respective shares of the various companies of the fines imposed on them jointly and severally, in so far as they formed part of the same undertaking, and that task cannot be left to the national courts, contrary to what the Commission suggested at the hearing.

158 It must be held that, in the absence of a contrary indication in the decision by which the Commission has imposed a fine jointly and severally on several companies for an infringement by an undertaking, that decision attributes that infringement to them in equal measure (see, to that effect, Case C-196/99 P *Aristrain* v *Commission* [2003] ECR I-11005, paragraphs 100 and 101). Companies on which a fine has been imposed jointly and severally and which incur, unless otherwise specified in the decision imposing the fine, liability in equal measure for the infringement must, in principle, contribute in equal amounts to the payment of the fine imposed on account of that infringement. Consequently, where a company against which the Commission proceeds pays the whole amount of the fine, it may, on the basis of the Commission's decision, make a claim for recovery against each of the other joint and several debtors in respect of its share. Although the decision imposing a fine on several companies jointly and severally does not make it possible to determine, from the outset, which of those companies will actually be called on to pay the amount of the fine to the Commission, it does not leave any doubt as to the shares of the fine for which they are personally liable, with the result that each of them will be able, where necessary, to bring an action against its joint and several codebtors for repayment of the sums which it might have paid in excess of that share.

159 Therefore, in the absence of any finding in the contested decision that, within the undertaking VA Tech, certain companies are more responsible than others for the participation of that undertaking in the cartel during a given period, it must be assumed that they are all equally liable and, consequently, that the shares of the fine imposed on them jointly and severally are equal.

160 However, it is evident in the present case that the calculation of the individual fines of SEHV and Magrini and the calculation of the amounts which Siemens Österreich, KEG, Reyrolle, SEHV and Magrini and Schneider Electric are required to pay jointly and severally, as set out in recitals 505, 509 and 552 of the contested decision, and the result set out in Article 2(j) to (l) of the contested decision, do not take account of the principles referred to above or of the findings in recital 468 of the contested decision.

161 First, the Commission held Reyrolle, SEHV and Magrini jointly and severally liable for EUR 17 550 000 of the total fines of EUR 22 050 000 which it imposed on them (recitals 509 and 552 and Article 2(k) and (l)(i) of the contested decision).

162 However, those three companies belonged to the same undertaking only in the period from 1 April 2002 to 11 May 2004, namely for a period of two years and one month. As is apparent from recitals 507 and 509 of the contested decision, the total fine imposed on the undertaking VA Tech was EUR 12 600 000 for the period from 20 September 1998 to 11 May 2004, namely a period of four years and four months and thus more than double the period referred to above. Therefore, even taking account of the fact that the fines imposed on various companies within an undertaking which participated in the cartel do not have to be proportionate to the duration of the infringement (see, in that regard, paragraph 181 above), the sum of EUR 17 550 000, for which the subsidiaries SEHV and Magrini are liable jointly and severally with

Reyrolle, manifestly exceeds the sum which, on the basis of the Commission's own findings in the contested decision, is appropriate to sanction the participation of SEHV and Magrini in the cartel as subsidiaries of the VA Tech Group between 1 April 2002 and 11 May 2004.

163 Second, of the total fine of EUR 22 050 000 imposed on Reyrolle by the Commission, EUR 12 600 000 is to be born jointly and severally by Siemens Österreich and KEG and EUR 17 550 000 jointly and severally by SEHV and Magrini (recitals 509 and 552 and Article 2(l)(i) and (ii) of the contested decision).

164 On the one hand, the sum to be paid by Reyrolle jointly and severally with other companies clearly exceeds the total amount of its fine. Although, as the Commission stated in its answers to the written questions put by the Court, that cannot lead to a situation in which Reyrolle is required to pay a sum greater than EUR 22 050 000, such a calculation of the sums to be paid jointly and severally does not enable the applicants to discern from the contested decision the shares which they will be required to bear when dividing the sums among themselves, once payment has been made to the Commission, contrary to the latter's obligation set out in paragraph 153 above. On the other hand, it must be noted that, contrary to what the Commission rightly found in recital 468(a) of the contested decision, Reyrolle was not held solely liable for a part of its fine for the period between 1988 and 1998, during which it participated alone in the infringement.

165 Third, it is apparent from the table in recital 509 and from Article 2(l) of the contested decision, that Siemens Österreich and KEG were not held jointly and severally liable for part of the fine imposed on SEHV and Magrini, contrary to what the Commission rightly stated at the end of recital 468(c) of the contested decision, to take account of

the period of two years and one month during which those companies belonged to the same undertaking.

166 It must be concluded that, in holding Reyrolle, SEHV and Magrini jointly and severally liable for payment of a fine which clearly exceeds their joint liability, in not holding Siemens Österreich and KEG jointly and severally liable for payment of part of the fine imposed on SEHV and Magrini, and in not holding Reyrolle solely liable for a part of the fine imposed on it, the Commission infringed the principle that penalties must be specific to the offender and to the offence, as set out in paragraph 122 above.

167 Consequently, Article 2 of the contested decision must be annulled in so far as it concerns the calculation of the fine imposed on SEHV and Magrini and the amounts to be paid jointly and severally by the applicants.

— The failure to take account of the particular circumstances of Reyrolle, SEHV and Magrini when applying to them the starting amount calculated for the undertaking VA Tech

168 Reyrolle, SEHV and Magrini submit that, given their particular circumstances, the fact that the Commission applied to them the starting amount calculated for the undertaking VA Tech means that they were fined disproportionately in relation to the size of their contribution to the cartel.

169 The argument raised by Reyrolle (see paragraph 109 above) is that the Commission failed to take account, in applying to it the starting amount calculated for the undertaking VA Tech, of its limited capacity to harm competition within the common market, since its business activities were limited to the United Kingdom and Ireland during the period of the GQ Agreement.

170 In that regard, it should be noted that, in the case where a worldwide cartel which, in addition to price fixing, also allocates markets, the Commission may legitimately rely on the global turnover from sales of the product concerned so that the starting amounts reflect the nature of the infringement, its actual impact on the market and the scope of the geographic market, having regard to the considerable disparity in size between the members of the cartel (see, to that effect, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01 *Tokai Carbon and Others* v *Commission* [2004] ECR II-1181, paragraphs 197 and 198, and Case T-329/01 *Archer Daniels Midland* v *Commission* [2006] ECR II-3255, paragraph 87).

171 In the present case, it should be pointed out, first of all, that the United Kingdom and Ireland, taken together, make up a significant part of the common market. Harm caused to competition on those markets cannot therefore be classed as minor. Secondly, the infringement imputed to the applicants in the contested decision includes precisely the complaint that the undertakings concerned allocated different national markets at the European level, by means of a 'home countries' system. Therefore, the fact that, under such an unlawful agreement, Reyrolle limited its business activities within the common market to its domestic markets cannot be regarded as a mitigating circumstance. Thirdly, according to the Commission's findings, which were not contested by the applicants, the participants to the cartel had themselves taken account of their global turnover when setting the individual quotas within the cartel, quotas which applied both at the European level — outside of 'home countries' — and at the global level. It follows that the Commission was also entitled to take account

of their global turnover from GIS projects when assessing the specific weight of the various undertakings involved.

172 Consequently, Reyrolle's argument must be rejected.

173 The argument raised by SEHV and Magrini (see paragraph 115 above) is that the Commission established the starting amount applied to the undertaking Schneider in the light of its shareholding in VAS. Since VA Technologie brought into VAS various business activities which were not related to the cartel, the resultant relationship between the starting amounts of the fine applied to the undertaking VA Tech and to the undertaking Schneider does not correspond to the relationship between the turnover from GIS projects made by the subsidiaries which VA Technologie and Schneider Electric brought into VAS. The result is that the starting amount determined for the undertaking Schneider was too low in relation to the starting amount set for the undertaking VA Tech.

174 SEHV and Magrini claim that the business activities brought into VAS by VA Technologie which are unrelated to the GIS projects cannot justify the imposition on the undertaking VA Tech of a higher fine that that imposed on the undertaking Schneider. SEHV and Magrini consider that the Commission should have divided the starting amount on the basis of the turnover made on GIS projects by the former subsidiaries of VAS or on the basis of their quotas within the cartel, which they calculate, according to the table set out in recital 144 of the contested decision, at 2.79 % for Reyrolle and 7.28 % for SEHV and Magrini.

175 It should be noted, as regards the starting amount applied to the undertaking Schneider, that that amount was not set, as for the other undertakings, on the basis of the global turnover made in 2003, no doubt because the Commission considered that it was no longer participating in the cartel during that period. As is stated at the end of

recital 489 of the contested decision, the starting amount applied to the undertaking Schneider was established at 40 % of the starting amount applied to the undertaking VA Tech, given that it held a 40 % shareholding in VAS, which grouped together, as of 13 March 2001, all of the business activities concerning GIS of the VA Tech Group and the Schneider Group. The size of that shareholding thus gives an idea of the relative importance of the turnovers of Reyrolle, on the one hand, and of SEHV and Magrini, on the other, when VAS was created.

176 The argument of SEHV and Magrini must be rejected for three reasons.

177 First, the complaint raised in that regard essentially concerns the claim that the Commission disadvantaged VA Technologie, KEG and Reyrolle in relation to Schneider Electric, SEHV and Magrini. However, SEHV and Magrini have no interest in raising that complaint. If the Court were to uphold that complaint and therefore increase the starting amount of the fine in relation to the undertaking Schneider, that would lead to an increase in the share of the fine imposed on them for their participation in the infringement during the period in which they belonged to that undertaking, but without reducing the fine imposed on them for the period in which they belonged to the undertaking VA Tech. SEHV and Magrini thus benefit from an alleged error by the Commission and cannot, on that basis, be permitted to challenge it before the Court. For that reason, the present argument must be rejected as inadmissible.

178 Second, for the sake of completeness, the claim that VA Technologie brought into VAS a significant number of business activities which were not related to GIS projects is not substantiated. In addition, SEHV and Magrini do not even state what those

business activities were, or the relative weight which they had in relation to the GIS activities. It is thus necessary to reject that argument also for that reason.

179 Third, the initial individual quotas within the cartel, as referred to in recital 144 of the contested decision and on which SEHV and Magrini base their line of argument, were subsequently amended. Thus, recital 145 of the contested decision contains a table in which it is stated, for an unspecified period, but after Alstom had taken over the GIS activities of AEG in 1996, a quota of 10.94 % for the undertaking Schneider and a quota of 10.3 % for Reyrolle. Towards the end of the first phase of the applicants' participation in the cartel, Reyrolle's weight in relation to that of SEHV and Magrini was therefore greater than the figures given by SEHV and Magrini, which must therefore be rejected in any event as erroneous.

— The increase as a result of the duration of the infringement

180 First, Siemens Österreich and KEG claim, as set out in paragraph 111 above, that, in relation to the duration of the respective infringements imputed to them, the fine imposed is twice the fine imposed on Reyrolle, namely EUR 242 307 per month of infringement for Siemens Österreich and KEG, compared with EUR 124 576 per month of infringement for Reyrolle.

181 It should be noted, in that regard, as does the Commission in its defence in Case T-122/07, that Community law does not require that the fines imposed on various companies within the same undertaking be proportionate to the duration of the participation imputed to each of those companies. In addition, Siemens Österreich and KEG have not invoked such a principle, but merely claimed that there is a principle

pursuant to which the fine imposed on parent companies held jointly and severally liable for the infringement committed by their subsidiaries and based on the decisive influence which the former exercise over the commercial conduct of the latter cannot be any heavier than that incurred by those subsidiaries, to then criticise the fact that the fine set in the contested decision was higher, per month of participation, for them than for Reyrolle, in respect of the period during which they controlled the latter. Since the fines imposed on the various companies within the same undertaking do not have to be proportionate to the duration of the participation imputed to each of those companies, such a comparison between the amount in euros, per month of participation in the infringement, applied to two companies accused of participating for different periods of time cannot amount to unequal treatment.

182 Therefore, it does not appear that the Commission's practice of setting fines in a manner which is not strictly proportionate to the duration goes beyond the limits of its recognised discretion under the case-law (see, to that effect, Case T-150/89 *Martinelli* v *Commission* [1995] ECR II-1165, paragraph 59; Case T-49/95 *Van Megen Sports* v *Commission* [1996] ECR II-1799, paragraph 53; and Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 127).

183 Second, Siemens Österreich and KEG claimed, in that regard, that there is a contradiction between the operative part of the contested decision and the grounds for that decision. As the Commission also stated, in its defence in Case T-122/07, it follows implicitly but clearly from the Guidelines that the fines calculated on the basis thereof are not at all proportionate to the duration of the infringements. On the contrary, the fact that, according to the end of Point 1 B of the Guidelines, the basic amount results from the addition of the starting amount, established purely on the basis of the gravity of the infringement, and the increase as a result of duration evidently implies that the amount per month of infringement will be digressive with duration, since the relative weight of the — invariable — starting amount in that sum will diminish in line with the increase for duration. In so far as the Commission stated at numerous intervals, in the contested decision, that it calculated fines in accordance with its Guidelines, as is

also consistent with its standard practice, there can be no question, in respect of the digressive nature of the amount of the fine per month, of contradiction or incoherence between the operative part of the contested decision and the grounds raised in support thereof.

184 Consequently, that argument must be rejected.

— The ceiling of 10 % of turnover

185 As set out in recital 107 above, Reyrolle, SEHV and Magrini submit that the contested decision fails to respect the ceiling of 10 % of turnover laid down in Article 23(2) of Regulation No 1/2003.

186 In that regard, it should be noted, first of all, that the fact that several companies are held jointly and severally liable for a fine on the ground that they form an undertaking for the purposes of Article 81 EC does not mean, as regards the application of the maximum amount of 10 % of turnover laid down by Article 23(2) of Regulation No 1/2003, that the obligation of each of them is limited to 10 % of the turnover which it achieved during the last business year. According to settled case-law, the maximum amount of 10 % of turnover within the meaning of that provision must be calculated on the basis of the total turnover of all the companies constituting the single economic entity acting as an undertaking for the purposes of Article 81 EC, since only the total turnover of the component companies can constitute an indication of the

size and economic power of the undertaking in question (*HFB and Others* v *Commission*, paragraph 122 above, paragraphs 528 and 529, and *Akzo Nobel and Others* v *Commission*, paragraph 150 above, paragraph 90).

187 Contrary to what the applicants claim, the concept of undertaking, for the purposes of Article 23(2) and (3) of Regulation No 1/2003, is thus not different from the concept of undertaking for the purposes of Article 81(1) EC. Therefore, it is also not necessary, in the case of the joint and several liability of several companies within a group forming an undertaking for the purposes of those provisions, to determine the ceiling in relation to the company with the lowest turnover.

188 The judgment in *Aristrain* v *Commission*, paragraph 158 above, referred to by the applicants, is not such as to call that consideration into question. In the case which gave rise to that judgment, the Commission found that two companies belonging to the same group had participated in an infringement, but imposed a fine only on one of them, stating that that fine also took account of the conduct of the other company. Since the Commission did not give any reasons for its choice of addressee of the contested decision and did not, in particular, show that the company on which the fine had been imposed had managerial control over the other, the Court of Justice partially annulled the contested decision for failure to state adequate reasons (*Aristrain* v *Commission*, paragraph 158 above, paragraphs 93 to 100). In that judgment, the Court of Justice was thus not opposed to the idea that all the companies making up an undertaking be taken together for the purposes of applying the ceiling of 10 % of total turnover of that undertaking but merely noted that the Commission was required to show the existence of factual circumstances justifying the treatment of several companies as an economic unit.

189 In the present case, as noted in paragraph 138 above, it is not disputed that, at the end of the cartel, Reyrolle, SEHV and Magrini formed, together with Siemens Österreich and KEG, their respective predecessor companies, one and the same undertaking. Therefore, the Commission was able, in principle, to take the total turnover of that

undertaking as a reference for the calculation of the 10 % ceiling for each of the fines imposed on the companies which constituted that undertaking.

190 Reyrolle, SEHV and Magrini refer, in addition, to the Court's case-law, according to which, if an economic unit which participated in an infringement has broken up between the end of the infringement and the date of adoption of the decision sanctioning that infringement, each addressee of the decision is entitled to have the ceiling of 10 % of turnover applied individually to it (*Tokai Carbon and Others* v *Commission*, paragraph 90 above, paragraph 390). They infer from this that, as a general rule, the ceiling of 10 % can be calculated on the basis of the global turnover of an economic entity only if that entity remained identical from the time of the infringement to the date the Commission adopted the decision. Therefore, in their view, the ceiling of 10 % must also be calculated separately for each company where the economic entity has grown after the infringement.

191 That argument must be rejected because the economic entity designated as 'VA Tech' in the contested decision and comprising, inter alia, Reyrolle, SEHV and Magrini, did not grow between the end of the cartel and the contested decision. All of the applicants were part of it on the day the cartel ended, 11 May 2004, and were still part of it on the day the contested decision was adopted, 24 January 2007 — even though some of them changed name or, in the case of VAS, were absorbed by another company.

192 Therefore, the argument that the ceiling of 10 % of turnover was exceeded in respect of Reyrolle, SEHV and Magrini must be rejected.

(b) The fifth complaint, alleging that the Commission erroneously held Reyrolle liable in addition to its parent company

Arguments of the parties

193 Reyrolle submits that its employees no longer participated, as of 2002, in the project coordination system and that it was concerned by the cartel only as a 'component of VAS'. The subsidiaries are individually liable for anti-competitive practices only in so far as they participated personally. By contrast, the subsidiaries cannot be held liable for the conduct of their parent company. Therefore, the applicant cannot have a fine imposed on it in respect of the second phase of infringements, namely the period from 2002 to 2004.

194 The Commission disputes Reyrolle's arguments.

Findings of the Court

195 First, it should be noted that Reyrolle's present complaint is the result of an overly formalistic understanding of the infringement imputed to it in the contested decision. Participation in cartel meetings is reprehensible only as an external manifestation of the fact that the participants wanted to collude and that they felt bound by the unlawful agreements concluded within the cartel. Reyrolle has not claimed to have distanced itself from those agreements or from the cartel in general, nor that it no longer respected the rules of the cartel and the concrete agreements on GIS projects when conducting its business. Therefore, even supposing that, after the creation of

VAS, Reyrolle was no longer represented at meetings within the cartel by its own employees, that does not show that its conduct, as a legal person, did not constitute an infringement of Article 81(1) EC.

196 Second, the fact that a parent company has the conduct of its subsidiary attributed to it for having determined the subisidary's commercial conduct does not mean that the parent company has to be regarded as having carried out that conduct instead of the subsidiary. In other words, the liability of a parent company for the conduct of its subsidiary in no way exonerates the subsidiary from its own liability as a legal person and the subsidiary thus remains individually liable for the anti-competitive practices in which it participated.

197 Therefore, the present complaint must be rejected.

(c) The sixth complaint, based on an infringement of the principle *ne bis in idem*

Arguments of the parties

198 Siemens Österreich and KEG submit that Article 2(l)(ii) of the contested decision infringes the principle *ne bis in idem* in that it may lead to them being sanctioned twice for the same infringement. It is apparent from recitals 487 and 505 of the contested decision that the Commission intended to impose a fine of EUR 22 050 000 on

the undertaking VA Tech. The Commission then arbitrarily divided the fine between the various legal persons constituting that undertaking on the date the infringement was terminated. That division could lead the VA Tech Group and, ultimately, Siemens Österreich and KEG, which are the only companies in the group with sufficient financial resources, to have to pay, for the same infringement, an additional fine of EUR 4 500 000 if Schneider Electric, as it has stated it would, were to refuse to pay the fine imposed on it jointly and severally with SEHV and Magrini.

199 In addition, the unlawful conduct of SEHV and Magrini during the period from 1988 to 2000 would be sanctioned twice, since it would both increase Reyrolle's liability — whose starting amount takes account of SEHV's and Magrini's turnover — and the joint and several liability of SEHV, Magrini and Schneider Electric.

200 The Commission contests the arguments of the parties.

Findings of the Court

201 First, it should be noted that it is not in the interests of Siemens Österreich and KEG to raise this complaint since it does not affect them personally. Under Article 2(l) of the contested decision, they are fined only EUR 12 600 000 jointly and severally with Reyrolle. By contrast, they are not held jointly and severally liable for payment of the fine imposed on SEHV and Magrini. Therefore, if Schneider Electric were to request repayment from SEHV and Magrini, that would not increase the amount owed by

Siemens Österreich and KEG. It should be added, in so far as the latter claim to be the only companies within the VA Tech Group with sufficient financial resources, that neither the contested decision nor Community law in general provides that, if the addressee of a decision imposing a fine lacks liquidity, its parent company is required to pay the fine instead.

202 Second, as stated in paragraph 167 above, Article 2 of the contested decision must be annulled in so far as concerns the calculation of the fine imposed on SEHV and Magrini and the sums to be paid jointly and severally by the companies belonging to the undertaking VA Tech. Consequently, the present complaint raised by Siemens Österreich and KEG has become obsolete.

203 Third, the fact that the turnover of SEHV and Magrini may be taken into account both for the purposes of determining the starting amount of Reyrolle's fine, including for the period from 1988 to 2000, during which it did not form part of one and the same undertaking with SEHV and Magrini, and for the purposes of calculating the fine imposed on SEHV and Magrini for the same period, is the inevitable consequence of the fact that, during the period at issue, those companies did not belong to the same undertaking for the purposes of Community competition law. However, that does not constitute a double penalty for the same infringement in respect of either Reyrolle or the undertaking VA Tech, in so far as, for the period from 1988 to 2000, the undertaking VA Tech and the undertaking Schneider are fined separately.

204 Consequently, that complaint must be rejected.

(d) The seventh complaint, based on the failure to reduce the fine

Arguments of the parties

205 Siemens Österreich and KEG argue that Article 2(l)(ii) of the contested decision infringes the rules relating to mitigating circumstances, as they result from the Guidelines, the case-law of the Courts of the Union, and the Leniency Notice. In particular, they submit that the Commission did not take account of the fact that they voluntarily discontinued their participation in the infringement as of 21 January 2004, before the Commission intervened, that they had ceased all contact contrary to the competition rules with the other members of the cartel when the inspections were carried out, that the undertaking VA Tech played a passive role within the cartel, that they cooperated actively during the administrative procedure and that they always acknowledged the participation of the undertaking VA Tech in the cartel from October 2002 to March 2004.

206 The Commission disputes the arguments of Siemens Österreich and KEG.

Findings of the Court

— The mitigating circumstances

207 It should be noted that Section 3 of the Guidelines provides for a reduction in the basic amount of the fine for 'special mitigating circumstances' such as an exclusively passive or 'follow-my-leader' role in the carrying out of the infringement, and termination of the infringement as soon as the Commission intervenes.

208 It should be pointed out that the Guidelines do not set out in mandatory terms the mitigating circumstances that the Commission is required to take into account. Consequently, the Commission retains a measure of discretion in making an overall assessment of the size of any reduction in the fines to reflect mitigating circumstances (see, to that effect, Case T-50/00 *Dalmine* v *Commission* [2004] ECR II-2395, paragraph 326).

209 In the present case, first, in so far as the applicants claim that they voluntarily discontinued their participation in the infringement as of 21 January 2004, it is sufficient to note that, as is apparent from the recitals referred to in paragraphs 77 to 81 above, the Commission was entitled to find that the applicants had participated in the cartel until 11 May 2004.

210 Second, as regards the 'termination of the infringement as soon as the Commission intervenes' in Section 3 of the Guidelines, the complaint raised by Siemens Österreich and KEG can also not succeed.

211 The Commission is under no obligation, in the exercise of its discretion, to reduce a fine because of the termination of a manifest infringement, whether that termination occurred before or after its intervention (*Tokai Carbon and Others* v *Commission*, paragraph 90 above, paragraph 292).

212 In the present case, the infringement at issue was undoubtedly a manifest infringement since it related to a secret cartel whose object was price fixing and allocation of markets. That type of cartel is expressly prohibited by Article 81(1)(a) and (c) EC and constitutes a particularly serious infringement, which the Commission rightly found in recital 479 of the contested decision. Therefore, Siemens Österreich and KEG wrongly complain that the Commission failed to reduce their fines for having terminated their participation in that infringement.

213 Even though, in the past, the Commission has regarded voluntary termination of an infringement as a mitigating circumstance, it is entitled, when applying its Guidelines, to take account of the fact that, even though their illegality was established at the inception of Community competition policy, very serious manifest infringements are relatively frequent and, therefore, to take the view that it is appropriate to abandon that generous practice and no longer reward the termination of such an infringement by a reduction of the fine (*Tokai Carbon and Others* v *Commission*, paragraph 90 above, paragraph 294 and the case-law cited). In any event, the Court does not consider it appropriate to review that assessment on the part of the Commission, even in the exercise of its unlimited jurisdiction.

214 In the light of the above, the fact that the companies which belonged to the undertaking VA Tech terminated their participation in the infringement as soon as the Commission intervened does not constitute a mitigating circumstance.

215 Third, as regards the 'exclusively passive or "follow-my-leader" role in the infringement', referred to in Section 3 of the Guidelines, the argument raised by Siemens Österreich and KEG must also be rejected.

216 First of all, Siemens Österreich and KEG argue that they did not participate in the elaboration of anti-competitive agreements. In that regard, the Commission found, in the contested decision, that Reyrolle, Magrini and Schneider Electric, as the representative of the legal predecessors of SEHV, had participated in the elaboration of the agreements underlying the cartel and were cofounders of it. In that respect, it should be noted that Annex 1 to the GQ Agreement, which contains the list of the founding members of the cartel and their codes, lists, inter alia, numbers '13', '26', and '32', which the Commissions found, without being contradicted by the applicants, to represent Reyrolle, the Schneider Group and Magrini respectively. Since Siemens Österreich and KEG have not disputed, in a substantiated manner, the finding that their subsidiaries participated in the elaboration of the GQ Agreement, that argument must be rejected.

217 Secondly, Siemens Österreich and KEG submit that the undertaking VA Tech was deceived by the other members of the cartel in that it was led to believe, in December 2000, that the cartel had been brought to an end and in that, during the second phase of its participation, the other members debated GIS projects without its knowledge.

218 It is sufficient, in that regard, to find that the fact that the undertaking VA Tech, whose participation in the cartel — an infringement characterised as very serious, as noted in paragraph 212 above — was demonstrated by the Commission to the required legal standard, was deceived by the other participants to that cartel, which thereby attempted to obtain additional advantages to those which they obtained under the cartel, cannot render that undertaking's conduct less serious. Therefore,

such circumstances are not capable of constituting a mitigating circumstance and, in particular, do not show the exclusively passive or 'follow-my-leader' role of that undertaking within the cartel.

— The application of the Leniency Notice

219 According to the case-law, the reduction of fines for cooperation on the part of the undertakings participating in infringements of Community competition law is based on the consideration that such cooperation facilitates the Commission's task of establishing the existence of an infringement and, where relevant, to bring it to an end (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*, ECR I-5425, paragraph 399; Case T-311/94 *BPB de Eendracht* v *Commission* [1998] ECR II-1129, paragraph 325; Case T-338/94 *Finnboard* v *Commission* [1998] ECR II-1617, paragraph 363; and Case T-347/94 *Mayr-Melnhof* v *Commission* [1998] ECR II-1751, paragraph 330).

220 As is stated in point 29 of the Leniency Notice, the notice has created legitimate expectations on which undertakings may rely when disclosing the existence of a cartel to the Commission. In view of the legitimate expectation which undertakings intending to cooperate with the Commission are able to derive from the notice, the Commission must therefore adhere to the notice when, for the purpose of determining the fine to be imposed on Siemens Österreich and KEG, it assesses their cooperation (see, to that effect and by analogy, Case T-26/02 *Daiichi Pharmaceutical* v *Commission* [2006] ECR II-713, paragraph 147 and the case-law cited).

221 Within the limits laid down by the Leniency Notice, the Commission has a broad discretion in assessing whether the evidence provided by an undertaking represents added value within the meaning of point 22 of that notice and, on that basis, whether it is appropriate to grant a reduction to an undertaking under that notice (see, by analogy, *Dansk Rørindustri and Others* v *Commission*, paragraph 219 above, paragraphs 393 and 394, 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 532). That assessment is the subject of limited review by the Court.

222 It should be noted, in that regard, that Siemens Österreich and KEG have not shown, to the required legal standard, that their contribution represented significant added value with respect to the evidence already in the Commission's possession, in the sense of point 21 of the Leniency Notice. It is for the applicants to indicate precisely the information provided by them to the Commission and how that information facilitated the Commission's task of establishing the facts at issue.

223 In the present case, Siemens Österreich and KEG submit that, as regards the period from October 2002 to March 2004, the VA Tech Group drew up lists of GIS projects and meetings showing, in detail, which meetings VAS and its subsidiaries participated in and which GIS projects were actually discussed. That those indications helped the Commission to gather evidence of the infringement committed by the undertaking VA Tech and other undertakings is evidenced by the fact that, in recital 163 of the contested decision for example, the Commission lifted whole segments of the matters disclosed by the VA Tech Group.

224 The Commission, which does not deny having used the information provided by the VA Tech Group, noted, in recitals 539, 541 and 542 of the contested decision, that, all in all, it was already aware of those facts and that the VA Tech Group had thus not

provided any evidence facilitating its task of establishing the facts at issue. The Commission also took account of the fact that the VA Tech Group denied certain facts which the Commission regarded as established and that it made contradictory statements, which did not facilitate the Commission's conclusions.

225 It is apparent, from recital 163 of the contested decision — the only passage in the contested decision, referred to by Siemens Österreich and KEG, in which the Commission based its findings on the information produced by the VA Tech Group — that the claim that the Commission lifted 'whole segments of the matters disclosed' by the VA Tech Group is exaggerated. The only instance in which the Commission expressly referred to the declaration made by the VA Tech Group pursuant to the Leniency Notice was in relation to the fact that several GIS project packages in and outside Europe were discussed between October 2002 and February 2004. Even supposing the applicants were justified in claiming that it is because of them that the Commission gained access for the first time to the distinction made, as of 2002, between European project packages, referred to as 'EP', and other project packages, referred to as 'P', the added value of that information cannot be classed as significant for the purposes of point 21 of the Leniency Notice.

226 Siemens Österreich and KEG have not stated the extent to which the information disputed by the Commission facilitated the latter's task of proving the facts in question, nor identified any other information among that supplied to the Commission which facilitated its task.

227 It follows that, in the light of the discretion granted to the Commission, under the case-law cited in paragraph 221 above, it cannot be accused of having unlawfully refused to reduce the fine imposed on Siemens Österreich and KEG.

228 Consequently, that complaint must be rejected.

B — *The second plea, based on an infringement of substantial procedural requirements and, more specifically, of the applicants' right to examine the witness against them, resulting from Article 6(3)(d) of the ECHR, and of the right to a fair hearing*

Arguments of the parties

229 The applicants submit, in essence, that the Commission infringed their right to examine the witness against them, one of the procedural guarantees stemming from Article 6(3)(d) of the ECHR and their right to a fair hearing. In finding that the undertaking VA Tech had resumed its participation in the infringement, through VAS, from 1 April 2002, the Commission relied on the statements of Mr M., ABB's main witness, without respecting, from the outset, their right to examine or to have examined that witness against them. That procedural guarantee is even more essential as the witness in question has a personal interest in the present case in the applicants being fined heavily, given that the competitor undertaking which he represents is itself exempt from payment of its fine pursuant to the Leniency Notice, and that Article 19 of Regulation No 1/2003 does not, in any case, require him to see the truth.

230 The applicants submit that those principles are applicable to the procedure before the Commission in relation to cartels even though it is not a criminal procedure before a court, since the legal nature of fines for the purposes of Article 23 of Regulation

No 1/2003 as sanctions in the broader sense is recognised. In any event, the procedure before the Court cannot remedy that irregularity by hearing that witness.

231 The Commission challenges the applicants' arguments.

Findings of the Court

232 It is settled case-law that fundamental rights form an integral part of the general principles of law whose observance the Community Courts ensure (Opinion 2/94 [1996] ECR I-1759, paragraph 33, and Case C-299/95 *Kremzow* [1997] ECR I-2629, paragraph 14). For that purpose, the Court of Justice and the General Court draw inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and *Kremzow*, paragraph 14). Furthermore, Article 6(2) EU states that the Union shall respect fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

233 It is therefore necessary to examine whether, in the light of those considerations, the Commission failed to observe the rights of the defence, a fundamental principle of the Community legal order (Case 322/81 *Nederlandsche Banden-Industrie-Michelin* v *Commission* [1983] ECR 3461, paragraph 7), by not offering the applicants the possibility of examining the witness Mr M. directly.

234 In that regard, it should be noted that, according to the case-law, that principle requires that the undertakings and associations of undertakings concerned be afforded the opportunity, from the stage of the administrative procedure, to make known their views on the truth and relevance of the facts, objections and circumstances put forward by the Commission (see Case T-314/01 *Avebe* v *Commission* [2006] ECR II-3085, paragraph 49 and the case-law cited). By contrast, that principle does not require that those undertakings be afforded, in the administrative procedure, the opportunity themselves to cross-examine the witnesses heard by the Commission (see, to that effect, *Aalborg Portland and Others* v *Commission*, paragraph 52 above, paragraph 200).

235 Therefore, it is necessary to reject the second plea raised by the applicants.

II — *The applications for amendment*

236 As is apparent from paragraphs 65 to 72 above, Article 1 of the contested decision must be annulled in so far as it finds that the applicants participated in an infringement of Article 81 EC and Article 53 of the EEA Agreement in the period from 1 April to 30 June 2002. The result is a reduction, for all the applicants, in the duration of the infringement by three months compared with the duration determined in the contested decision.

237 In addition, as is apparent from paragraphs 137 to 167 above, Article 2 of the contested decision must be annulled in so far as concerns the calculation of the fine to be imposed on SEHV and Magrini and in so far as concerns the determination of the amounts to be paid jointly and severally by the applicants.

238 It should be noted, in that regard, that, where the examination of the pleas raised by an undertaking against the legality of a Commission decision imposing on it a fine for infringement of the Community competition rules has revealed an illegality, it is necessary for the Court to consider whether it must, under its unlimited jurisdiction, amend the contested decision (Case T-59/02 *Archer Daniels Midland* v *Commission* [2006] ECR II-3627, paragraph 443).

239 The applicants have requested the Court to reduce the fines imposed on them to a maximum of EUR 1 980 000 for Siemens Österreich and KEG, EUR 1 100 000 for Reyrolle and Magrini, and EUR 2 750 000 for SEHV.

A — *The fines imposed on SEHV and Magrini*

240 The Court considers that it is necessary to amend the contested decision in so far as it concerns the calculation of the fines imposed on SEHV and Magrini and in so far as it concerns the determination of the amounts to be paid jointly and severally by them and the other companies with which they constituted an undertaking for the purposes of Community competition law during the period of their participation in the cartel.

241 Both the Commission and the applicants have affirmed, in their pleadings and/or at the hearing, that, in the present case, there were several possibilities for calculating the fines. In that regard, account needs to be taken of various considerations. First of all, the liability incurred by a company as a result of its participation in an infringement should in principle lead to a single fine, calculated in relation to the sum of the periods during which it participated in the infringement. Second, the fines imposed on the various companies belonging to the same undertaking throughout the duration of the infringement should be calculated on the basis of the economic power of that undertaking during the last full year of its participation in the infringement, in order to ensure that the fine is sufficiently dissuasive. Third, in the case where,

as here, certain companies belonged to two different undertakings successively, for which different starting amounts were also calculated, it is, however, necessary to impose on those companies a fine made up of two separate amounts for each of the periods corresponding to the time they belonged to those two undertakings, in order to determine in an appropriate manner the amounts to be paid jointly and severally by the companies to which the infringement may be imputed.

242 Therefore, a fine needs to be set for SEHV and Magrini made up of two separate amounts for each of the periods of the infringement during which they were controlled by Schneider Electric and by VA Technologie respectively.

243 As regards the period from 1 July 2002 and 11 May 2004, during which SEHV and Magrini were controlled by VA Technologie, in the contested decision the Commission set a starting amount of EUR 9 000 000 for the fine imposed on the undertaking VA Tech. As is apparent from paragraphs 122 to 136 and 203 above, the applicants' arguments are not such as to call that amount into question.

244 It is apparent from recital 492 of the contested decision that, on account of the duration of the infringement, the Commission increased the starting amounts, on the basis of the Guidelines, by 10 % per full year of infringement and 5 % for each additional period equal or additional to six months, but less than one year. The starting amount of EUR 9 000 000 of the fine for the undertaking VA Tech must therefore be increased by 15 % to take account of the period of one year and ten months between 1 July 2002 and 11 May 2004, which results in a starting amount of EUR 10 350 000 (9 000 000 +

1 350 000) for the undertaking VA Tech which, in the absence of aggravating or mitigating circumstances, corresponds to the amount of the fine.

245 That fine must be paid jointly and severally by Reyrolle, Siemens Österreich and KEG, SEHV and Magrini, which, during that period, formed an undertaking for the purposes of Community competition law. In accordance with the considerations set out in paragraphs 158 and 159 above, as between themselves, the joint and several debtors are each to bear a fifth of the amount of EUR 10 350 000.

246 As regards the fine for the period from 15 April 1988 to 13 December 2000, during which SEHV and Magrini belonged to the Schneider Group, in the contested decision the Commission set a starting amount of EUR 3 600 000 for the undertaking Schneider. As noted in paragraphs 176 to 179 above, the arguments of SEHV and Magrini are not such as to call that amount into question. In accordance with the Guidelines, that starting amount of the fine must be increased by 125 % to take account of that period of twelve years and seven months, which results in a basic amount of EUR 8 100 000 (3 600 000 + 4 500 000) for the undertaking Schneider which, in the absence of aggravating or mitigating circumstances, corresponds to the amount of the fine.

247 That amount must be paid jointly and severally by Schneider Electric, SEHV and Magrini, which, during that period, formed an undertaking for the purposes of Community competition law. In accordance with the principle set out in paragraph 158 above, as between themselves, each of the joint and several debtors is to bear a third of the amount of EUR 8 100 000.

248 In that regard, first, it should be noted that the total amount of the fine imposed on Schneider Electric is unchanged from the one set in the contested decision. In addition, the allocation of the amounts to be paid jointly and severally under that fine is more in Schneider Electric's favour than the fine determined in the contested decision. In such circumstances, the fact that Schneider Electric has not been heard does not prevent an amendment of the contested decision as indicated in the preceding paragraph.

249 Second, the Court does not consider it appropriate to follow the reasoning suggested by the Commission to justify its choice, in the contested decision, to impose on SEHV and Magrini only the part of the fine of the undertaking Schneider corresponding to the increase on account of the duration of the infringement.

250 Indeed, to order Schneider Electric to pay an amount which SEHV and Magrini would not be required to pay would presuppose that the Commission addresses an additional complaint to it, which either extends beyond the participation of its (former) subsidiaries SEHV and Magrini, or relates to a longer period.

251 However, there is no such an additional complaint in the contested decision. The Commission did state, in paragraph 29 of its rejoinder in Case T-124/07, that 'in principle, it is legitimate to impose an individual fine on Schneider Electric for its individual conduct'. However, it has not stated in the contested decision or in its pleadings before the Court what that individual conduct on the part of Schneider Electric consisted of and to what extent such conduct differs from that for which it was held liable for the participation in the cartel of its (former) subsidiaries. In addition, the Commission itself stated, in its replies to the written questions put by the Court, that that reference to 'individual conduct' should not be understood in the sense that it accuses Schneider Electric of conduct which goes beyond the facts complained of in

respect of SEHV and Magrini. Finally, the Commission stated, in recital 423 of the contested decision, with no reservations, that it intended to hold Schneider Electric, SEHV and Magrini jointly and severally liable for the period from 15 April 1988 to 13 December 2000.

252 It follows that, since Schneider Electric, on the one hand, as a parent company, and SEHV and Magrini, on the other, as subsidiaries, together formed the undertaking Schneider, they must be held liable for the same amount, subject only to any aggravating or mitigating circumstances in relation to just one of the companies. It is established that such circumstances do not exist in the present case, neither in respect of Schneider Electric nor SEHV and Magrini.

253 In its reply to the written questions put by the Court, the Commission also stated that it had limited the joint and several liability of Schneider Electric and of its former subsidiaries to the part of the fine corresponding to the increase on account of the duration of the infringement, in order to prevent SEHV and Magrini from having to pay two starting amounts as a result of their turnover being taken into account to calculate the starting amount of the fine for both the undertaking VA Tech and the undertaking Schneider. The fine imposed on SEHV and Magrini, namely EUR 22 050 000, already includes a starting amount of EUR 9 000 000, which takes account of their turnover, among other things. It would therefore be unfair to make them also jointly and severally liable for the starting amount of the fine of the undertaking Schneider, namely EUR 3 600 000, based on the same turnover.

254 The Court considers that, since Article 2 of the contested decision has been annulled in so far as concerned the calculation of the fines imposed on SEHV and Magrini, it is not necessary to examine the relevance of the reasoning proposed by the Commission.

That reasoning concerns the fines imposed in the contested decision, characterised by an approach whereby the amount of the fine imposed on SEHV and Magrini had to be calculated on the basis of a single starting amount for the entire duration of their participation in the cartel, without regard being had to the fact that those two companies belonged to two different undertakings successively. As amended by the Court, the fine for SEHV and Magrini is based on a separate calculation for each of the periods during which they belonged to the undertaking Schneider and the undertaking VA Tech. Accordingly, the starting amounts of the fines are not imposed twice for the same period.

255 In addition, the starting amount of a fine constitutes only a figure in the calculation algorithm applied to determine the basic amount of that fine applicable to an undertaking, and is not, in itself, a detachable part of the fine. On the contrary, the basic amount of the fine must be regarded as an indivisible sum, in the light of the collective liability of the various companies which constitute the undertaking concerned, with the result that the starting amount of that fine cannot, given the joint and several liability, be treated differently from the increase on account of the duration of the infringement — unlike the multipliers applied to take account of aggravating or mitigating circumstances which influence only the fines of companies in respect of which those circumstances arose or to which they may be imputed (see paragraph 252 above).

256 Thus, SEHV, Magrini and Schneider Electric are required to pay jointly and severally the fine of EUR 8 100 000 imposed on them for their participation in the cartel during the period prior to 13 March 2001, during which they belonged to the same undertaking.

257 Therefore, a total fine of EUR 18 450 000 is imposed on SEHV and Magrini.

B — *The fines imposed on Reyrolle, Siemens Österreich and KEG*

258 The Court considers that it is necessary to amend the contested decision in so far as it concerns the calculation of the fines imposed on Siemens Österreich, KEG and Reyrolle and in so far as it concerns the amounts to be paid jointly and severally by them and the other companies with which they constituted an undertaking for the purposes of Community competition law during the period of their participation in the cartel.

259 As is apparent from recitals 506 and 507 of the contested decision, the Commission held Reyrolle liable for an infringement of a duration of 14 years and 9 months and Siemens Österreich and KEG liable for an infringement of a duration of 4 years and 4 months.

260 Therefore, as is apparent from paragraph 72 above, Article 1 of the contested decision must be annulled in so far as the Commission found therein an infringement on the part of the applicants for the period from 1 April to 30 June 2002, the duration of the infringement imputed to them must be reduced by 3 months, bringing it to 14 years and 6 months for Reyrolle and 4 years and 1 month for Siemens Österreich and KEG.

261 The Guidelines provide for an increase of 10 % per full year of infringement and 5 % for every additional period equal to or greater than six months, but less than one year. Therefore, the reduction of the duration of the infringement by three months for Reyrolle, Siemens Österreich and KEG does not lead to a reduction in the increase made on account of duration which is applied to them. That increase thus remains 145 % for Reyrolle and 40 % for Siemens Österreich and KEG. It follows that the basic amounts of their fines — which, in the absence of aggravating or mitigating

circumstances, correspond to the amounts of their fines — remain unchanged, namely EUR 22 050 000 and EUR 12 600 000 respectively.

262 In accordance with the findings made by the Commission in recital 468 of the contested decision and taking account both of the three month reduction in the duration of the infringement for all the applicants and of the calculation of the amount of the fine for SEHV and Magrini in paragraph 244 above, of the EUR 22 050 000 imposed on Reyrolle, an initial amount of EUR 10 350 000 must be paid jointly and severally by Siemens Österreich, KEG, SEHV and Magrini. As noted in paragraph 245 above, in their relations among themselves, each of the joint and several debtors is to bear a fifth of the amount of EUR 10 350 000.

263 In addition, of the fine of EUR 22 050 000 imposed on Reyrolle, a second amount of EUR 2 250 000 must be paid jointly and severally by Siemens Österreich and KEG. In accordance with the considerations set out in paragraphs 158 and 159 above, each of the joint and several debtors is to bear a third of that amount.

264 Finally, of the fine of EUR 22 050 000 imposed on Reyrolle, that company is to bear only EUR 9 450 000.

265 As for the remainder, the applications for amendment of the contested decision must be dismissed.

**Costs**

266 Pursuant to Article 87(3) of the Rules of Procedure, the Court may order that the costs be shared or that each party bear its own costs where each party succeeds on some and fails on other heads.

267 In Case T-122/07, since the action has been upheld in part, the Court will make an equitable assessment of the case in holding that the Commission is to pay one tenth of the costs incurred by Siemens Österreich and KEG and one tenth of its own costs. Siemens Österreich and KEG will pay nine tenths of their own costs and nine tenths of the costs incurred by the Commission.

268 In Case T-123/07, since the action has been upheld in part, the Court will make an equitable assessment of the case in holding that the Commission is to pay one tenth of the costs incurred by Reyrolle and one tenth of its own costs. Reyrolle will pay nine tenths of its own costs and nine tenths of the costs incurred by the Commission.

269 In Case T-124/07, since the action has been upheld in part, the Court will make an equitable assessment of the case in holding that the Commission is to pay one fifth of the costs incurred by SEHV and Magrini and one fifth of its own costs. SEHV and Magrini will pay four fifths of their own costs and four fifths of the costs incurred by the Commission.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

**1. Annuls Article 1(m), (p), (q), (r) and (t) of Commission Decision C(2006) 6762 final of 24 January 2007 relating to a proceeding under Article 81 EC and Article 53 of the EEA Agreement (Case COMP/F/38.899 — Gas insulated switchgear), in so far as the Commission found therein an infringement on the part of Siemens AG Österreich, VA Tech Transmission & Distribution GmbH & Co. KEG, Siemens Transmission & Distribution Ltd, Siemens Transmission & Distribution SA and Nuova Magrini Galileo SpA, for the period from 1 April to 30 June 2002;**

**2. Annuls Article 2(j), (k) and (l) of Decision C(2006) 6762 final;**

**3. Imposes the following fines for the infringements found in Article 1(m), (p), (q), (r) and (t) of Decision C(2006) 6762 final:**

— **Siemens Transmission & Distribution SA and Nuova Magrini Galileo, jointly and severally with Schneider Electric SA: EUR 8 100 000;**

— **Siemens Transmission & Distribution Ltd, jointly and severally with Siemens AG Österreich, VA Tech Transmission & Distribution GmbH & Co. KEG, Siemens Transmission & Distribution SA and Nuova Magrini Galileo: EUR 10 350 000;**

— **Siemens Transmission & Distribution Ltd, jointly and severally liable with Siemens AG Österreich and VA Tech Transmission & Distribution GmbH & Co. KEG: EUR 2 250 000;**

— **Siemens Transmission & Distribution Ltd: EUR 9 450 000;**

4. **Dismisses the remainder of the actions;**

5. **In Case T-122/07, orders the European Commission to pay one tenth of the costs incurred by Siemens AG Österreich and VA Tech Transmission & Distribution GmbH & Co. KEG and one tenth of its own costs, and orders Siemens AG Österreich and VA Tech Transmission & Distribution GmbH & Co. KEG to pay nine tenths of their own costs and nine tenths of the costs incurred by the Commission;**

6. **In Case T-123/07, orders the Commission to pay one tenth of the costs incurred by Siemens Transmission & Distribution Ltd and one tenth of its own costs, and orders Siemens Transmission & Distribution Ltd to pay nine tenths of their own costs and nine tenths of the costs incurred by the Commission;**

**7. In Case T-124/07, orders the Commission to pay one fifth of the costs incurred by Siemens Transmission & Distribution SA and Nuova Magrini Galileo and one fifth of its own costs, and orders Siemens Transmission & Distribution SA and Nuova Magrini Galileo to pay four fifths of their own costs and four fifths of the costs incurred by the Commission.**

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 3 March 2001.

[Signatures]

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