JUDGMENT OF THE GENERAL COURT (Third Chamber)

16 December 2010 *

In Case T-19/07,

Systran SA, established in Paris (France),

Systran Luxembourg SA, established in Luxembourg (Luxembourg),

represented by J.-P. Spitzer and E. De Boissieu, lawyers,

applicants,

v

European Commission, represented initially by E. Montaguti and F. Benyon, and subsequently by E. Traversa and E. Montaguti, acting as Agents, with A. Berenboom and M. Isgour, lawyers,

defendant,

APPLICATION for compensation for the damage allegedly suffered by the applicants owing to illegalities following an invitation to tender by the Commission relating to the maintenance and linguistic enhancement of its machine translation system,

* Language of the case: French.

THE GENERAL COURT (Third Chamber),

composed of J. Azizi, President, E. Cremona and S. Frimodt Nielsen (Rapporteur), Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 27 October 2009,

gives the following

Judgment

Facts of the case

I — *The different versions of the Systran software*

1 Four versions of the Systran machine translation software (also known as 'the Systran system') must be distinguished:

— the initial version ('Systran Mainframe'), created in 1968 by Mr Toma and marketed by the Californian company World Translation Center, Inc. (WTC) and other associated companies (together 'the WTC group');

— the version initially used by the European Commission ('EC-Systran Mainframe'), which formed the subject-matter of a series of contracts entered into between 1975 and 1987 by the WTC group and the Commission, a series of contracts between the Commission and service providers and a series of contract between the Systran group (which took over the WTC group) and the Commission;

— the new version ('Systran Unix'), which was created by the first applicant, Systran SA ('Systran'), following the acquisition of the WTC group in 1986, to operate in the Unix and Windows environments; this version was developed by the Systran group beginning in 1993;

— the new version used by the Commission ('EC-Systran Unix'), which formed the subject-matter of a contract entered into in 1997 between the second applicant, Systran Luxembourg SA ('Systran Luxembourg'), and the Commission.

II — *History of the relations between the parties*

2 The history of the contractual relations between the parties, the WTC group and its acquirer, the Systran group, on the one hand, and the Commission, on the other, is necessary in order to be able to define the extent of the property and user rights relating to the different versions of the Systran software used by the Commission, namely EC-Systran Mainframe and then EC-Systran Unix. The Commission relies on that history to support its assertion that the present action has a contractual basis, whereas the applicants observe that none of those contracts, on which, moreover, it does not rely, has any impact on the applicants' intellectual property rights or the action.

A — *First period: from Systran Mainframe to EC-Systran Mainframe*

3 The parties agree in recognising that the creator of the Systran machine translation software is Mr Toma and that the companies in the WTC group were the sole owners of the Systran Mainframe version of that software.

1. Initial contracts between WTC (and other companies) and the Commission

4 On 22 December 1975 WTC and the Commission signed a contract relating, first, to the installation and development of the English-French SYSTRAN machine translation system and, second, to the initial development of the French-English Systran machine translation system ('the initial contract').

5 The first paragraph of Article 1 of the initial contract, entitled 'Subject', is worded as follows:

'The Contractor shall undertake, on behalf of the Commission, the further development of its SYSTRAN English-French machine translation system (hereinafter called "the Basic System") and the initial development of a SYSTRAN French-English machine translation system.'.

6 Article 3 of the initial contract, entitled 'Remuneration', states:

'In consideration of the work provided for by this contract the Commission shall pay to the Contractor the sum of [USD] 161 800 as follows:

…

These payments include compensation for granting the right to use the Basic System throughout the contract period. They cover all expenditure incurred by the Contractor in the performance of the contract, inclusive of cost of labour, computer time, travel and material supplies.'

7 Article 4 of the initial contract, entitled 'System use after contract completion', is worded as follows:

'(a) It is agreed that rights in the system as existing at the date of expiration of the contract (hereinafter called "the Modified System") and the relevant documentation are granted by the Contractor to the Commission on a limited basis, i.e. exclusively for the Commission's own needs and for similar needs of Government agencies of the Member States of the Community, and for English-French and French/English translation only, but with no limitation in time. …

(b) Should the Commission, after termination of the present contract, wish to develop further the Modified System by application of another pair of languages of the Community, in house or by a third party, the Commission shall pay the contractor a fixed sum not exceeding [USD] 100 000 for the first such pair and [USD] 80 000

for each other pair, or [USD] 200 000 per combination involving a new language. These amounts cover the right for the Commission to use the further developed Modified System on an exclusive basis for all purposes as it sees fit and with no limitation in time

Alternatively, should the Commission, after termination of the present contract, wish to order further development of the Modified System from the Contractor by application to any other pair of languages, the Commission will pay the Contractor a fixed sum of no more than [USD] 25 000 for the first such pair, and [USD] 20 000 each for any other pair, or [USD] 50 000 for any combination involving a new language,

(c) The Contractor shall have the right to use on his own account and for his own purposes the Modified System as developed under the present contract and contracts for further development by application to other pairs of languages, as specified under 4(b), second paragraph, with the exception of those vocabularies specifically developed for the Commission. Access to these vocabularies will be given to the Contractor on a case-by-case basis, for annual rental not exceeding 20 % of the cost price; they will be made available to the Contractor free of charge for demonstration purposes only.'

8 According to Article 5(f) of the initial contract, the contract was to be governed by Luxembourg law and the appropriate Luxembourg courts were to have exclusive jurisdiction in any disputes between the contracting parties.

9 Following the initial contract, between 1976 and 1987 the Commission entered into a large number of contracts with companies in the WTC group in order to improve the Systran system and also to develop new pairs of languages (nine pairs of languages in all).

10 In addition, the Commission entered into a number of contracts with various companies outside the WTC group, which were not parties to the contract, authorising them to use the Systran system for the benefit of the government agencies of the Member

States and the Community institutions. In one of those contracts, entitled 'Technical cooperation framework agreement', concluded on 18 January 1985 with a French company, Gachot SA, the Commission stated that 'the Systran system, software and dictionaries, continue[d] to be the property of the Commission' (Article 4, 'Rights of use'). Under that framework agreement, the Commission authorised Gachot SA to use 'its Systran machine translation system for the benefit of bodies in the European public sector' and, in return, Gachot SA provided the Commission with information on the quality of the translations produced, enabling it to improve the performance of the system (Article 1, 'Subject'). The cooperation between the Commission and Gachot SA was made without financial support (Article 3, 'Expenses').

2. Collaboration contract between the Systran group and the Commission

11 By a series of contracts concluded from September 1985, Gachot SA acquired the companies of the WTC group, which owned the Systran technology and the Systran Mainframe version, and following that acquisition became Systran.

12 By letter of 2 February 1987 from the Director General of the Directorate-General (DG) 'Telecommunications, information industry and innovation', the Commission requested Gachot SA to answer a number of questions; the answers were given in a letter of 5 February 1987:

'Question 1: Can Mr Gachot prove that he (or [Gachot SA] …) is indeed the owner or majority shareholder of the companies WTC and Systran Institut and that he accepts all liabilities incurred towards the Commission by his companies?'

'Answer: My company did indeed buy all [Mr] Toma's shares in WTC and Latsec and 76 % of the shares of Systran Institut. I am therefore perfectly entitled to speak on behalf of the entire Group and to represent it with the Commission.'

'Question 2: What will become of those liabilities if Mr Gachot (or [Gachot SA]) ceases to be the owner (or the majority shareholder) of those companies? Does Mr Gachot undertake to ensure compliance with those liabilities by any purchasers?'

'Answer: No assignment is contemplated. On the contrary, our Group has a policy of permanent development in that area. Nor has the Commission any cause for concern in that area, as the contracts are between WTC and the Commission, that is to say, between legal persons, and any change that might come about in the ownership of the shares in those companies cannot affect the contracts entered into.'

'Question 3: Can Mr Gachot confirm that following the conclusion of the various contracts with WTC and Systran Institut the Commission has non-exclusive operating rights for the European public sector covering [new] language versions of Systran?'

'Answer: It is clear from the contracts between WTC and the Commission …, that the Commission has non-exclusive user rights for its own needs and also for the needs of Government agencies of the Member States of the Community, for the language versions of Systran II in the [pairs of] languages acquired by it …'

'Question 8: Does Mr. Gachot still agree to authorise inter-governmental agencies whose territory exceeds that of the Community to use the Systran [software], in return for royalties to be paid to him?'

'Answer: [Gachot SA] of course envisages that the Systran system will be made available to international bodies whose territory exceeds that of the Community, under various agreements to be concluded between [Gachot SA] and such bodies …'

'Question 14: Would WTC be prepared to assign to the Commission the operating rights, on the same terms as previously, for a Spanish-English Systran system? Would the price be of the same order as that offered for the German-English system?'

'Answer: WTC is perfectly prepared to assign to the Commission a non-exclusive user licence for Spanish-English, and possibly also for Italian-English and Portuguese-English. The price and terms will essentially depend on the state of advancement of the systems at the time when the Commission acquires them.'

'Question 15: Would WTC be prepared to develop new systems including Danish and Greek as target languages and assign them to the Commission with (non-exclusive) operating rights for the public and private sectors?'

'Answer: WTC is perfectly prepared to develop any system involving pairs of European languages and also other systems which the Commission might need.'

'Question 16: Would Mr Gachot be interested in converting the Systran system into C, operating in Unix, which would make it more portable? Would he be prepared to finance all or part of the required investment (which is probably in the region of [ECU 1 million)?'

'Answer: The conversion of the Systran system into C operating in Unix is a project which we have envisaged. Initially, however, it seemed much more important to focus our efforts on improving translation quality and unifying the different versions of the Systran [system]. While the conversion of the Systran [system] to Unix is very interesting, it depends on the financial means being available …'

13 By fax of 5 March 1987 from an official of DG 'Telecommunications, information industry and innovation' to Gachot SA, the Commission described the terms of the 'Systran agreement', currently under negotiation, as follows:

'Rights, objectives and obligations

Within the framework of the Agreement, the rights acquired by both parties are perfectly balanced.

The Systran Group is the owner of the basic software and the Commission's right to use its nine [pairs of] languages extends only to the Community institutions and the official agencies of the Member States.

On the other hand, the Commission is the owner of the dictionaries which it has updated since 1975.

Each of the parties has invested around ECU 8 million in order to acquire its rights and therefore seeks to ensure that its investment yields a profit.

The Commission is under a moral obligation to ensure that the Community economy benefits from the investment funded by its taxpayers, while the Systran Group wishes the system to be marketed in Europe without delay.

Those two objectives are perfectly compatible and can be reconciled within the framework of the proposed Agreement.

In addition, the Commission and the Systran Group have an interest in making [the] Systran [software] an effective instrument by means of the harmonisation of the software and dictionaries …'

14 On 4 August 1987 the Systran group and the Commission signed an agreement for the joint organisation of the development and improvement of the Systran translation system for the present and future official languages of the Community and also for its implementation ('the collaboration agreement').

15 The collaboration agreement stated, in a 'preamble':

'1. The Systran system, designed by WTC, is a machine translation system consisting of a basic software, linguistic and peripheral software and different bilingual dictionaries.

2. On 22 September 1975 the Commission entered into an agreement with WTC for the use of the Systran system by the Commission and the initial development of that system by WTC.

The Commission and WTC subsequently entered into other agreements with a view to the improvement of the existing system and the development of systems for [new pairs] of languages.

Those contracts, concluded between 1976 and 1985, had as their subject-matter the development and improvement of the translation software and the basic dictionaries for the languages concerned.

3. The maintenance and subsequent development of the systems was provided for in another series of agreements between the Commission and service companies. Those contracts were for the purposes of the Commission's own needs and purposes.

4. Since 1985 the Commission has entered into contracts with various companies under which those companies are authorised to use the Systran system for the benefit of State agencies and the European Community institutions, in return for information which would allow the Commission to improve the performance of the system.

5. The parties therefore declare that the Commission has a licence to use the basic systems and the improvements … made by WTC, limited to use on the territory of the European Communities in the sectors specified in [paragraph] 4 above.

6. The improvements and developments of the Systran system by the Commission and its contractors [referred to in paragraph 3 above], especially the dictionaries, are the exclusive property of the Commission.

7. The parties consider that their interest and the interest of users of Systran is that the system should be constantly improved. They have therefore decided to enter into the present collaboration agreement in order to combine their efforts and thus to continue to improve the system.

With that aim in mind, the parties mutually recognise a right to use the Systran system, capable of evolving by the implementation of the improvements which will be achieved owing to the use of the system in both the private and the public sector.'

16 Article 4 of the collaboration agreement, on '[p]roperty rights', states:

'The different language versions of Systran and their components continue to belong to the partners to which they belonged on the date of signature.

The companies of the Systran group undertake not to assign their property rights until they have informed the Commission and obtained its consent. The assignee will be required to assume the rights and obligations which those companies have under the present collaboration agreement.'

17 The introduction to Annex I to the collaboration agreement states:

'Whereas the Commission has always owned the dictionaries and other components which it has developed for various versions of Systran, the property rights in the basic software had been shared between a number of companies and the Commission had entered into agreements and contracts relating to the use of the system and its improvement and development, notably with [WTC] and Systran Institut.

As Gachot SA has been the main shareholder in those companies since the beginning of 1986, the present global agreement on the development and use of Systran has been concluded between all the interested parties …'

18 Article 4 *bis* of the collaboration agreement, on '[i]mprovements and royalties, states:

'Any development and any improvement of the system resulting from its exploitation by the Systran group shall be immediately communicated to and made available to the Commission.

Any development and any improvement of the system resulting from its exploitation by the Commission shall be immediately communicated to and made available to the Systran group.

Any modification to the system not arising from its exploitation in the strict sense shall be the subject of negotiation between the parties.

For an initial period of two years, each party shall be entitled to use the developments and improvements made by the other party without payment of royalties for doing so.

Following that period, and in the light of the experience acquired, the Commission and the Systran Group shall define the contractual arrangements for their future collaboration.'

19 Article 5 of the collaboration agreement, on '[r]ights of use', states:

'(a) The Commission shall have the right to use in the public sector on the territory of the Community the common system in its most developed version and to assign licences to use that system to the national and international public bodies established on the territory of the Community as defined in [paragraph] 4 of the preamble.

(b) …

(c) The companies of the Systran [g]roup undertake to allow any private body to use the system on terms consistent with commercial uses.'

20 According to Articles 11 and 12 of the collaboration agreement, the law applicable to the contract was Belgian law and any dispute between the parties concerning the interpretation, performance or non-performance of the contract was subject to arbitration.

21 Between 1988 and 1989 the Commission entered into four agreements with Gachot SA in order to obtain a licence to use the Systran software for the following pairs of languages: German-English, German-French, English-Greek, Spanish-English and Spanish-French.

22 By registered letter of 11 December 1991 the Commission terminated the collaboration agreement in accordance with Article 8 thereof, giving six months' notice. Under Article 8, it was provided that upon the expiry of a period of three years each party would have the Systran system available in the state which it had reached for each of them. According to the Commission, that termination was justified by the fact that Systran had not complied with its contractual obligations and intended to claim payment for the developments relating to two pairs of languages (French-Italian and French-Spanish) which had been carried out by the Commission and made available to Systran under the collaboration agreement. On the date on which the collaboration agreement ended, the EC-Systran Mainframe version consisted of 16 language versions.

23 The Systran group subsequently created and marketed a new version of the Systran software capable of operating in the Unix and Windows operation systems (Systran Unix), while the Commission developed the EC-Systran Mainframe version, covering the 16 pairs of languages referred to above, together with the Greek-French pair of languages developed with the assistance of an outside contractor, which operated in the Mainframe operating system, which is incompatible with the Unix and Windows operating systems.

B — *Second period: from Systran Unix to EC-Systran Unix*

24 In order to enable the EC-Systran Mainframe version to operated in the Unix and Windows environments, four contracts were concluded between Systran Luxembourg and the Commission ('the migration agreements').

25 On 19 December 1997, before the first migration agreement was signed, the Commission wrote to Systran seeking its agreement on a number of points, including the following two:

'1. Use of the name Systran

In presentations and also in documentation or correspondence, we frequently refer to the "Commission's machine translation system". Since that system is based on the Systran system, it would be more logical to use the name Systran or … EC Version of Systran on such occasions.

2. Principle of the reciprocal use of the systems of [the company] Systran … and … of the Commission

The Commission will be able to use the products of the company Systran … on its server. The company Systran will, for its part, be able to use the Commission's system.

The company Systran … and its subsidiaries hereby undertake not to make any pecuniary claim arising under the agreements concluded in the past between "the Systran group" and the Commission.'

26 On 22 December 1997, the date on which the first migration agreement was signed, Systran responded to the Commission's request in the following terms:

'1. Use of the name Systran

We confirm that we agree that the Commission may use the trade mark SYSTRAN. Its use must be systematic for any machine translation system deriving from the original Systran system. Consequently, we assign you the right to use the SYSTRAN trade mark for the sole purposes of the dissemination or supply of the Systran machine translation system.

2. Principle of the reciprocal use of the systems of [the company] Systran … and … of the Commission

We confirm that we agree that the Commission may use Systran products in the Unix and/or the Windows environment for its internal purposes.

The company Systran undertakes not to make any financial claim arising from the performance of the agreements concluded in the past between the Systran group and the Commission.'

27 Article 2 of the first migration agreement, between Systran Luxembourg and the Commission, gives the following definition of 'the Commission's machine translation system':

'The Commission's machine translation system, or "Systran EC version", designates a specific version of the Systran machine translation system originally developed by the World Translation Center, La Jolla, USA, which since 1976 has been further developed by the European Commission for internal purposes. The Commission's machine translation system is distinct from the "Systran Original Version", which refers to the machine translation system developed and commercialised by Systran S.A. of France and its subsidiaries.'

28 Article 13 of the first migration agreement, entitled 'Patents, utility certificates (utility models), trade marks, designs and industrial models, industrial and intellectual property rights, provides:

'1. Any results or patent obtained by the Contractor [namely Systran Luxembourg] in performance of this contract shall be immediately reported to the Commission and shall be the property of the European Communities, which may use them as they see fit, except where industrial or intellectual property rights already exist.

2. The Commission's machine translation system, together with all its components shall, whether modified or not in the course of the contract, remain the property of the Commission, except where industrial or intellectual property rights already exist.

...

5. At the first sign of proceedings by a third party, in particular of a claim, even after completion of the contract, the party involved shall notify the other party as soon as possible and the two parties shall then act in unison and provide each other with all the information and evidence that they possess or obtain.'

29 According to Articles 15 and 16 of the first migration agreement, the law applicable to the agreement was the law of Luxembourg and any dispute between the Community and Systran Luxembourg relating to the contract came within the jurisdiction of the Luxembourg courts.

30 Furthermore, the first recital to the fourth migration agreement fixed the end of the contract at 15 March 2002 and specified that, on that date, 'the Contractor undert[ook]

to carry out for 15 March 2002 all the tasks forming the subject-matter of the agreement, in particular: up-to-date proof of all rights (trade marks, patents, intellectual and industrial property rights, copyright, etc.) claimed by the Systran group and connected with the Systran machine translation system'. According to the Commission, Systran Luxembourg did not communicate that information to it.

C — *Third period: after the invitation to tender of 4 October 2003*

31 On 4 October 2003 the Commission launched an invitation to tender for the maintenance and linguistic enhancement of the Commission's machine translation service. Following that invitation to tender, two of the 10 lots making up the contract were awarded to Gosselies; these were the lots using English or French as the source language.

32 By letter of 31 October 2003 Systran informed the Commission:

'We have become aware of the invitation to tender issued on 4 October 2003 … Upon reading that document, it is apparent that the work which you propose to undertake is likely to infringe this company's intellectual property rights. Wishing to maintain the climate of constructive cooperation between this company and the Commission, we should welcome your observations on that point. For the reasons set out above, you will understand that we are unable to respond to that invitation to tender.'

33 In its response of 17 November 2003, the Commission stated:

'Your letter of 31 October last has come to my attention. It does not appear to us that the work which we propose to undertake is likely to infringe intellectual property

rights. I share your desire to main good working relations, in compliance with the Commission's procedures.'

34 Following that exchange of letters, further correspondence was exchanged between Systran and the Commission and meetings were held by the Commission in order to obtain further details of Systran's claims.

35 In the context of those contacts, the applicants relied on the following elements:

— the Systran group owns machine translating software called 'Systran' (of 'the Systran system') and develops the various versions of that software;

— at the end of a succession of agreements between the Systran group and the Commission, Systran adapted its software in order to create a version called 'EC-Systran';

— between 1999 and 2002 the Systran group ensured the migration of the EC-Systran version in order to enable it to run on Unix; in order to do so the Systran group used Systran's pre-existing rights on the original software and the kernel of the Systran system under Unix, which was completely rewritten by the Systran group in 1993 for its own needs.

36 In response, the Commission stated that those elements, like the technical documentation submitted by the applicants' IT expert on 6 January 2005, did not constitute 'proof of the intellectual property rights' which the Systran claimed in the Systran software. In the absence of 'probative documents' in that regard, the Commission contended that the Systran group was not entitled to oppose the work carried out by the company which won the tender in issue.

37 In short, the Systran group was unable to rely on the rights which it held in the Systran software, the Systran Unix of which it markets, in order to prohibit what it considers to be the infringement of that software by the Commission.

Procedure and forms of order sought by the parties

38 By application lodged at the Court Registry on 25 January 2007, the applicants brought the present action.

39 In the context of the measures of organisation of procedure, the parties were requested on 1 December 2008 to answer a series of questions relating to the contractual or non-contractual basis of the action ('the first series of questions').

40 The parties answered the first series of questions on 30 January and 2 February 2009.

41 Upon hearing the report of the Judge-Rapporteur, the Court (Third Chamber) decided to open the oral procedure and, in the context of the measures of organisation of procedure, requested the parties to answer a new series of questions relating to the Systran Unix version, user rights, the nature of the interventions requested in respect of the contract in issue and the activities of Gosselies in regard to the design and marketing of translation software ('the second series of questions').

42 The parties answered the second series of questions on 14 October 2009.

43 The parties presented oral argument and answered the questions put by the Court at the hearing on 27 October 2009.

44 At that hearing, the parties were invited by the Court to attend an informal conciliation meeting. Following that meeting, the parties stated that they would inform the Court of the terms of their compromise should it be reached before the date of delivery of this judgment. No communication to that effect has reached the Court.

45 In the minutes of the hearing, the principal elements to emerge from the hearing concerning the contractual or non-contractual nature of the action, the unlawful conduct in which the Commission was alleged to have engaged and the evaluation of the damage claimed by the applicants were recalled. Those minutes and the minutes of the informal meeting were notified to the parties.

46 By order of 26 March 2010 the Court (Third Chamber) ordered that the oral procedure be re-opened so that the parties could be requested to answer, in the context of the measures of organisation of procedure, a series of questions on the elements to be taken into consideration in the evaluation of the damage ('the third series of questions').

47 The parties answered the third series of questions on 4 and 5 May 2010.

48 In the light of those answers, and in the context of the measures of organisation of procedure, the applicants and the Commission were each requested to comment on the other party's answers to the third series of questions. The Court also wished to obtain further details of a number of matters raised by the parties in their answers ('the fourth series of questions').

49 The parties submitted their comments and answered the fourth series of questions on 11 June 2010. The oral procedure was then closed.

50 The applicants claim that the Court should:

— order the immediate cessation of the acts of infringement and disclosure committed by the Commission;

— order the confiscation of all the support material held by the Commission and by Gosselies on which the IT developments made by Gosselies on the basis of the EC-Systran Unix and Systran Unix versions are reproduced in breach of the applicants' rights and the delivery of such support material to Systran or, at least, its destruction under supervision;

— order the Commission to pay a minimum sum of EUR 1 170 328 to Systran Luxembourg and of EUR 48 804 000, to be re-evaluated, to Systran;

— order that the Court's decision be published, at the Commission's expense, in specialist journals, specialist reviews and on specialist Internet sites to be chosen by Systran;

— in any event, order the Commission to pay the costs.

51 The Commission contends that the Court should:

— declare the action inadmissible;

— failing that, declare the action unfounded;

— order the applicants to pay the costs.

Law

I — *Admissibility*

A — *The head of claim under which the applicants claim that the Court should order the Commission to pay compensation for the alleged damage*

52 The Commission puts forward three grounds of inadmissibility with respect to the third head of claim, whereby the applicants claim that the Commission should be ordered to pay compensation for the damage which they allege. First, it maintains that that claim for compensation is inadmissible owing to its contractual basis, in so far as the Court could evaluate the allegations of infringement of copyright and disclosure of know-how only on the basis of the various contracts between the Systran group and the Commission, which contain no arbitration clause designating the Court. Second, the claim for compensation is also inadmissible owing to the lack of clarity of the application, since it gives no details of the legal provisions alleged to have been breached by the Commission and provides few details about the acts of infringement and of disclosure of know-how alleged by the applicants. Third, the Court has no jurisdiction to adjudicate on infringement in the context of an action for compensation, as was decided in the order in Case T-295/05 *Document Security Systems* v *ECB* [2007] ECR II-2835; 'the order in *Document Security Systems*').

1. The substance of the action

(a) Arguments of the parties

53 The Commission contends that the Court cannot evaluate the existence of the infringement and the wrongful nature of the disclosure without taking as its basis the various contracts governing relations between the Systran group and the Commission between 1975 and 2002. Any liability that the Commission might incur on account of the exploitation of the EC-Systran Unix and Systran Unix versions of the Systran software is of a contractual nature. It is thus necessary to refer to the first paragraph of Article 288 EC, which provides that '[t]he contractual liability of the Community shall be governed by the law applicable to the contract in question'. In the absence of an arbitration clause within the meaning of Article 238 EC, the Court therefore manifestly lacks jurisdiction.

54 In answer to a question from the Court requesting the Commission to identify the contractual provisions on the basis of which it considers that it was entitled to proceed as it did in the context of the contract at issue without obtaining the applicants' permission, the Commission claimed, first, that it expresses doubts as to the fact that the applicants are the holders of intellectual property rights in the Systran Unix version of the Systran software and, second, that it 'categorically disputes that the applicants are the holders of rights in the EC-Systran Unix software'. In particular, the Commission maintains that it has 'exclusive property rights' with respect to the 'source codes of the linguistic parts of the software' under various contracts entered into between 1975 and 2002 and because of the work of its services in the development of those parts. Under those contracts, the Commission has the right, both before and after the migration, to have the EC-Systran Unix developed in cooperation with third-party contractors. On this point, the Commission refers to Article 4 of the technical cooperation agreement protocol, paragraph 6 of the preamble to the

collaboration contract and Article 13(1) and (2) of the migration agreements entered into with Systran Luxembourg, under which the Commission's machine translation system would remain its property.

55 The applicants observe, in substance, that the Court has jurisdiction under the second paragraph of Article 288 EC. In the present case, the present action is based on the fact that the Commission made or caused to be had made unauthorised, and therefore non-contractual, modifications to the Systran Unix software or its EC-Systran Unix version, when it had no rights permitting it to modify it, still less to cause it to be modified, without the applicants' authorisation.

56 In their answer to the questions put by the Court, the applicants emphasise that the Commission was never authorised to supply the material at issue to any third party. In the absence of a contractual provision authorising it to use and disclose the applicants' software in the way in which it did, the Commission, acting outside the framework determined by the agreements, incurred non-contractual liability, which comes within the exclusive jurisdiction of this Court.

(b) Findings of the Court

Observations on contractual and non-contractual jurisdiction

57 The Court's jurisdiction to hear and determine an action for damages differs according to the contractual or non-contractual nature of the liability involved. With respect to contractual liability, Article 238 EC states that the Court of Justice is to have

jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law. With respect to non-contractual liability, Article 235 EC provides that the Court of Justice is to have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288 EC, which refers to damage caused by the institutions or their servants in the performance of their duties.

58 Thus, as regards contractual liability, it is only in the presence of an arbitration clause within the meaning of Article 238 EC that this Court has jurisdiction. In the absence of such a clause, the Court cannot, on the basis of Article 235 EC, adjudicate on the basis of what is in reality an action for contractual damages. To do so would be to extend its jurisdiction beyond the limits placed by Article 240 EC on the disputes of which it may take cognisance, since that article specifically gives national courts general jurisdiction over disputes to which the Community is a party (see, to that effect, judgment of 20 May 2009 in Case C-214/08 P *Guigard* v *Commission*, not published in the ECR, paragraphs 35 to 41; order in Case T-44/96 *Oleifici Italiani* v *Commission* [1997] ECR II-1331, paragraphs 35 and 38; and judgment in Case T-154/01 *Distilleria Palma* v *Commission* [2004] ECR II-1493, paragraph 50).

59 On the other hand, as regards non-contractual liability, the Court of Justice has jurisdiction without there being any need for the parties to the dispute to express their consent. The Court's jurisdiction flows directly from Article 235 EC and the second paragraph of Article 288 EC for actions for compensation from the Community for the non-contractual damage caused by the Commission.

60 In order to determine its jurisdiction under Article 235 EC, the General Court must examine, by reference to the various relevant matters in the file, whether the applicants' claim for compensation is objectively and globally based on obligations of a contractual or non-contractual nature on the basis of which the contractual or

non-contractual nature of the dispute can be characterised. Those matters may be inferred, in particular, from an examination of the parties' claims, of the fact giving rise to the damage in respect of which compensation is claimed and of the content of the contractual or non-contractual provisions relied on in order to settle the point at issue (see, to that effect, *Guigard* v *Commission*, paragraph 58 above, paragraphs 35 to 38).

61 In that regard, it must be borne in mind that the Court's jurisdiction in contractual matters derogates from the ordinary rules of law and must therefore be construed narrowly, so that the Court may hear and determine only claims arising from the contract or that are directly connected with the obligations arising from that contract (see Case C-114/94 *IDE* v *Commission* [1997] ECR I-803, paragraph 82 and the case-law cited). That would be so, in particular, if it emerged from the factual background that the Commission was authorised by contract to entrust third parties to carry out the work provided for in the invitation to tender and if the subject-matter of the dispute constituted in reality, where the work in question was provided for in one or more contractual provisions, a claim for contractual damages (see, to that effect, *Guigard* v *Commission*, paragraph 58 above, paragraphs 35 and 36, as regards the relevance of the factual background, and paragraph 38, as regards the real subject-matter of the claim for compensation).

62 It should also be emphasised that, although, for the purpose of determining the merits of that line of argument, the Court must examine the content of the various contracts entered into between the WTC group/Systran and the Commission between 1975 and 2002, on which the Commission relies in support of its arguments, such an exercise forms part of the examination of jurisdiction and cannot have the consequence – as such – of altering the nature of the dispute by conferring a contractual basis on it. Were that not so, the nature of the dispute and, consequently, the court with jurisdiction to hear and determine it would be liable to change merely because the defendant asserts the existence of any contractual relationship whatsoever with

the applicant, even where examination of the contracts relied on led to the finding that they had no impact in that regard. Where it acts with respect to non-contractual liability, the Court is therefore perfectly entitled to examine the content of a contract, as it does with respect to any document on which a party relies in support of its arguments, in order to ascertain whether the document in question is of such a kind as to call in question the jurisdiction expressly conferred on the Court by Article 235 EC. That examination forms part of the assessment of the facts relied on in order to establish the Court's jurisdiction, the absence of which is an absolute bar to proceeding within the meaning of Article 113 of the Rules of Procedure.

63 By way of comparison, in a case relating to a claim for renewal of a contract where the applicant relied on the breach of obligations of contractual and non-contractual origin, the Court of Justice held that mere reliance on legal rules which did not follow from that contract, but which were binding on the parties, could not have the consequence of altering the contractual nature of the dispute and of removing it from the court with jurisdiction to hear and determine it (*Guigard* v *Commission*, paragraph 58 above, paragraph 43). Thus, in a case relating to the consequences of an invitation to tender where the applicants rely merely on the breach of obligations of a non-contractual origin, the mere reliance by their contracting partner on obligations of a contractual origin which do not envisage the conduct at issue cannot have the consequence of altering the non-contractual nature of the dispute and of removing it from the court with jurisdiction to hear and determine it.

64 Furthermore, as a general rule it is for the party alleging breach of an obligation to establish the content of that obligation and to show that it is applicable to the facts of the case. For that reason, the Court must examine the applicants' arguments relating to the claim for compensation before it examines those put forward by the Commission relating to the existence of contractual authorisation to disclose to a third party information capable of being protected by copyright and know-how.

Examination of the applicants' claim for compensation

65 In the present case, the applicants' claim for compensation is based solely on Article 235 EC and the second paragraph of Article 288 EC. The applicants neither invoke nor rely on any contractual provisions entered into with the Commission. Those contractual provisions are relied on only by the Commission in support of its argument that it was entitled to do what it is criticised for having done in the present case.

66 In order to support their claim for compensation, the applicants rely on two instances of non-contractual unlawful and harmful conduct. In the first place, the Commission unlawfully disclosed Systran's know-how to a third party, in so far as the provision of the services described in the invitation to tender necessarily entailed the unauthorised disclosure and modification of the source code of the Systran software, of which the applicants alone are the owners. In the second place, the Commission infringed the applicants' rights when Gosselies made unauthorised developments of the EC-Systran Unix version, a version of the Systran software which was virtually identical to and therefore dependent on the Systran Unix version, developed and marketed by the Systran group, the sole owner of the corresponding intellectual property rights.

67 In the present case, the event giving rise to the alleged loss in respect of which compensation is claimed, that is to say, the allegedly wrongful conduct with which the applicants take issue, therefore consists in the Commission's unauthorised disclosure to a third party, Gosselies, of the source codes which the Systran group claims to own and to be protected under the general principles common to the laws of the Member States on copyright and know-how.

68 More particularly, the applicants maintain that, as author of the Systran software and the Systran Unix version, they can oppose any use, modification, adaptation or improvement of the derivative work represented by EC-Systran Unix which is not authorised by the owner of the rights in the original software. The applicants thus have a legal 'right of objection' designed to ensure the protection of certain data which they own against use by the Commission or communication to a third party whom they have not authorised.

69 In support of that right, the applicants rely, by way of the general principles common to the laws of Member States, on the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, as amended ('the Berne Convention'), Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42) and Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (corrected version published in OJ 2004 L 195, p. 16). Those provisions, which are capable, where appropriate, of giving rise to non-contractual obligations, such as that recognised by the Commission in answer to a question from the Court on that point at the hearing, are reproduced in the laws of the Member States. In substance, those provisions enshrine the following general principles: by the sole fact of having created it, the author of a computer program has an exclusive intellectual property right in that program which is enforceable against all other persons; the capacity of author belongs, in the absence of proof to the contrary, to the person or persons under whose name the computer program is disclosed; and, subject to certain exceptions, the author of a computer program has the exclusive right to produce that program and to authorise its reproduction, adaption or dissemination.

70 It must be considered that, in doing so, the applicants have put forward sufficient elements to support the conclusion, at this stage of the analysis, that the Systran group can rely on copyright in the Systran Unix version of the Systran software which it developed and which it markets under its own name.

71 On the contrary, in the absence of proof that the applicants are now the owners of the rights in issue, the Commission has manifestly failed to call the Court's jurisdiction in question by challenging the copyright on which the Systran group relies with respect to that version of the Systran software.

72 In the first place, the doubts which the Commission expresses as to the applicants' capacity as owners of intellectual property rights in the Systran Unix version of the Systran software (paragraph 54) is are insufficient. Such an argument does not satisfy the standard of proof necessary to call in question the possibility that the Systran group can rely on copyright in the Systran Unix version of the Systran software in the light of the general principles common to the Member States referred to above, since they rely on general arguments which are insufficiently precise in the light of the characteristics of the software concerned and the legal and technical expert reports submitted by the applicants.

73 In the second place, without prejudging the outcome of the discussion which goes to the substance of the dispute, it should be pointed out that the Court requested the Commission to explain the substance of its doubts as to the property rights claimed by the applicants and requested the applicants to comment. The experts presented by the applicants thus set out a series of legal and technical arguments in support of the existence the Systran group's copyright in both rewritten software and the versions of that software which use its source code (opinion of Mr P. Sirinelli, a professor at the University of Panthéon-Sorbonne Paris-I, on the protection by copyright of re-written software, 'the second Sirinelli opinion'; and a technical note by Mr H. Bitan on the new and distinct nature, in terms of writing, composition and structure, of the Systran Unix software by comparison with the Systran Mainframe software and the EC-Systran Mainframe software, 'the second Bitan technical note'). In particular, it follows that the Systran Unix version is not merely a portage of the pre-existing Systran Mainframe version, as the Commission attempts to assert, as it involved re-writing in C language all the programs initially written in assembly language, and that those versions are fundamentally different. Nor is it disputed that the Systran Unix

version replaced the Systran Mainframe version, which had become obsolete with the passing of time.

74 In spite of being expressly requested to do so by the Court, the Commission was unable to adduce technical evidence capable of calling in question the existence of the Systran group's copyright in the Systran Unix version of the Systran software or in the IT elements making up the program or constituting the operational source code, notably as regards the parts relating to the basic kernel and the linguistic programs of the software, while the applicants do not dispute the Commission's property rights in the dictionaries compiled by its services to take account of the specific nature of the language used by that institution.

75 In the third place, as the contentious procedure continued, the Commission was induced to concede that the Systran group did in fact have intellectual property rights in that context. Thus, the Commission acknowledged at the rejoinder stage that it did not dispute that Systran was the owner of rights in the Systran Unix software marketed by Systran, stating at the same time that it is likely that the Systran group used the developments carried out for the Commission in the context of the EC-Systran Mainframe and EC-Systran Unix versions in order to integrate them in the Systran Unix version. More specifically, the Commission observed at the hearing that it did not actually dispute that Systran was the owner of rights in that software, whether the Mainframe version or clearly the Unix version, while none the less expressing some reservation as to the elements unlawfully incorporated in the initial version of Systran Unix following the agreements previously entered into with the Commission.

76 However, as indicated by the Court in the second series of questions and again at the hearing, it must be stated that the Systran Unix version precedes the EC-Systran Unix version by several years. It is therefore highly unlikely that the Systran group was able to incorporate in the Systran Unix which it developed and marketed the

developments subsequently made, in the context of the EC-Systran version, in order to satisfy the Commission's own linguistic and terminological needs. The Commission was unable to substantiate its assertion in that regard.

77 Likewise, there is no material evidence to support the Commission's argument that it is likely that elements of the EC-Systran Mainframe version, developed on the basis of the applicants' Systran Mainframe version, were unlawfully incorporated in the initial version of Systran Unix. That argument is contradicted, moreover, so far as the source code of the software is concerned, and particularly so far as the kernel and related linguistic programs are concerned, by the explanations of the applicant's technical expert that a program written in assembly language differs significantly from a program written in C (see the second Bitan technical note, notably the example of the treatment in assembly language and in C of the chain of characters 'Hello world!'). That technical explanation is not called in question by the Commission.

78 As regards the protection claimed for know-how, the applicants submit that know-how is generally defined as 'a body of technical information which is secret, substantial and identified in any appropriate manner'. They maintain on that point that the Commission's disclosure of such information to a third party, in the absence of any authorisation on the applicants' part, is unlawful conduct capable of giving rise to non-contractual liability on the part of the Community, pursuant to the second paragraph of Article 288 EC.

79 In support of that argument, the applicants properly refer to Case 145/83 *Adams* v *Commission* [1985] ECR 3539, paragraph 34, where the Court of Justice recognised that the duty of confidentiality placed on the Commission and its staff by Article 287 EC was a general principle of law. The general principle that undertakings are entitled to protection of their business secrets, a principle which finds expression

in Article 287 EC, was again reasserted in Case C-36/92 *SEP* v *Commission* [1994] ECR I-1911, paragraph 36. Article 41 of the Charter of Fundamental Rights, proclaimed on 7 December 2000 in Nice (OJ 2000 L 364, p. 1), also refers to the need for the administration to respect 'the legitimate interests of confidentiality and of professional and business secrecy'.

80 Business secrets are information of which not only disclosure to the public but also mere transmission to a person other than the one that provided the information may seriously harm the latter's interests (see, to that effect, Case T-353/94 *Postbank* v *Commission* [1996] ECR II-921, paragraph 87). In order that technical information be of the kind to fall within the ambit of the obligation of professional secrecy, it is necessary, first of all, that it be known only to a limited number of persons. It must then be information whose disclosure is liable to cause serious harm to the person who has provided it or to third parties. Last, the interests liable to be harmed by disclosure of the information must be objectively worthy of protection (Case T-198/03 *Bank Austria Creditanstalt* v *Commission* [2006] ECR II-1429, paragraph 71, and Case T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse* v *Commission* [2007] ECR II-4225, paragraph 65).

81 In the present case, it must therefore be considered that technical information which forms part of a undertaking's business secrets and which has been communicated to the Commission for specific purposes cannot be disclosed to a third party for other purposes without the authorisation of the undertaking concerned.

82 It must be concluded that the applicants assert, to the requisite legal standard to substantiate the jurisdiction conferred on the Court under Article 235 EC, the Commission's breach of obligations of a non-contractual origin relating to copyright and know-how concerning the Systran Unix version of the Systran software.

83 The Commission has been unable to call that conclusion in question and the Court must examine the second part of its argument, that it has authorisation of a contractual nature entitling it to do what it is criticised for having done in the present case.

Examination of the matters relied on by the Commission in support of the existence of contractual authorisation to disclose to a third party information capable of being protected by copyright and know-how

84 In the present case, the unlawful and harmful conduct supposedly committed by the Commission consists, in particular, in the alleged disclosure to a third party, Gosselies, without the applicants' consent, of information capable of being protected by the Systran group's copyright and know-how.

85 There is no evidence in the file on which it might be found that the Commission was authorised by contract to communicate the information relating to and the know-how applicable to the Systran Unix version to Gosselies.

86 In the first place, no contract signed by the parties expressly concerns the question of the allocation of any work relating to the EC-Systran Unix version to a third party. When Systran contacted the Commission concerning that question, the Commission merely denied that Systran held rights in the Systran Unix version of the Systran software and considered that the Systran group was not entitled to object to the work entrusted to Gosselies (see paragraphs 31 to 37 above).

87 In the second place, in answer to a question from the Court on this point, the Commission referred to three contractual provisions to support its contention that it could enlist Gosselies' services in order to have the EC-Systran Unix version of the Systran software developed without the Systran group being able to object by invoking copyright and know-how relating to the Systran Unix version of that software (see paragraph 53 above).

88 First, the Commission invokes Article 4, 'User rights', of the draft agreement on technical cooperation entered into on 18 January 1985 with Gachot SA before that company acquired the WTC group and became Systran, which states, in particular, that 'the Systran system, software and dictionaries, remains the Commission's property'.

89 It must be held that that provision does not establish that the present dispute is of a contractual nature. First of all, the provision cannot be raised against the applicants, whose property rights in the Systran software, and in particular the Systran Mainframe version, do not rely on the protocol signed on 18 January 1985 by the Commission with Gachot SA (see paragraph 10 above). The Systran group's property rights in the Systran software and its Systran Mainframe version came into being when the WTC group was acquired by Gachot SA at a later date (see paragraph 11 above and the documents submitted as Annexes 5 to 7 to the reply). Next, although no one disputes that on 18 January 1985 Gachot SA did not have the slightest property right in the Systran system, it is equally impossible to infer from the provision referred to above that the Commission may, as from that date and as a result of that protocol, claim whole and entire ownership of the Systran system and its software, including its basic kernel and its source codes. Such a conclusion would amount to a breach of the property rights in the Systran system, and in particular the Systran Mainframe version, then held by the WTC group, which are not disputed by the Commission (see paragraph 3 above), rights which were subsequently to be assigned to Gachot SA, which was to become Systran. Last, it must be observed that, in any event, the present

case does not concern rights held by the Systran group in the Systran Mainframe version, a version which has become obsolete, but rights held by the Systran group in the Systran Unix version, which succeeded that version and is written in a different langage in order to operate in a new computing environment.

90 Second, the Commission relies on paragraph 6 of the preamble to the collaboration agreement signed between the Commission and the Systran group (or at the time WTC Inc., Latasec SA, Systran Institut SA and Gachot SA), which states that '[t]he improvements and developments made to the Systran system by the Commission and its contractors [referred to at paragraph 3], especially the dictionaries, are the exclusive property of the Commission'. That provision must be read in conjunction with paragraph 3 of that preamble, according to which:

'The maintenance and subsequent development of the systems were carried out under another series of contracts between the Commission and service companies. Those contracts related to the Commission's own needs and purposes.'

91 Those provisions, too, are incapable of establishing that the present dispute is of a contractual nature. Under those two paragraphs of the preamble, the improvements and developments made to the Systran system by the Commission and its outside contractors before the collaboration agreement of 4 August 1987 was signed, notably as regards the dictionaries, are the exclusive property of the Commission. That exclusive ownership is not disputed by the applicants, whose pleadings do not claim any property rights in the dictionaries, the improvements and developments specifically carried out by or on behalf of the Commission in order to satisfy its terminological requirements. The rights which the applicants claim are based on the basic system,

namely the essential of the kernel and the linguistic routines of which the Systran group is the author and for which it has the know-how.

92 Furthermore, other paragraphs of the same preamble make it possible to define the relationship between the Commission and the companies of the Systran group and to evaluate the rights that could have been claimed by that group in the Systran system at a time when only versions compatible with the Mainframe environment existed. Thus, according to the words of the preamble:

'1. The Systran system, conceived by … WTC [Inc.], is a machine translation system which consists of basic software, linguistic software and various bilingual dictionaries.

2. On 22 September 1975 the Commission entered into a contract with … WTC [Inc.] relating to the use of the Systran system by the Commission and the initial development of that system by WTC.

The Commission and … WTC [Inc.] subsequently entered into other contracts aimed at, first, the improvement of the existing system and, second, the development of systems for [new pairs] of languages.

Those contracts, entered into between 1976 and 1985, had as their subject-matter the development and improvement of the translation software and the basic dictionaries for the languages concerned.

…

5. The parties therefore declare that the Commission has a licence to use the basic system and improvements … made by WTC, limited to the use on the territory of the European Communities in the sector specified in [paragraph] 4 above.

…

7. The parties consider that it is in their interest and the interest of users of Systran that the system be improved on an ongoing basis. They have decided to enter into the present collaboration agreement in order to combine their efforts and thus to seek improvements.

With that in mind, the parties mutually recognise a right to use the Systran system, capable of evolving by the introduction of improvements which will come about as a result of the system's being used in both the private sector and the public sector.'

93 It follows from those provisions, which envisage the contractual relationship existing at that time between the Commission and the Systran group, first, that the Systran group's role in creating the Systran system and in its initial and subsequent development for the Commission is expressly recognised and, second, that only user rights conferred by the Systran group on the Commission are referred to, not property rights, *a fortiori* exclusive property rights, in the entire system. In any event, those provisions make no reference to intervention by a third party for the purpose of modifying that system without such modifications being authorised in advance by the Systran group.

94 Last, just as for Article 4 of the draft technical cooperation agreement, it must be observed that the present case does not concern rights held by the Systran group in the Systran Mainframe group, a version which has become obsolete, but rights held

by that group in the Systran Unix version which succeeded it and which is written in a different language in order to operate in a new computing environment.

95 Third, the Commission relies on paragraphs 1 and 2 of Article 13 of the migration agreements, entitled 'Patents, utility certificates (utility models), trade marks, designs and industrial models, industrial and intellectual property rights', under which the Commission's machine translation system would remain its property. In the present case, it must be observed that those two paragraphs read as follows in the first migration agreement:

'1. The Commission shall be immediately informed of any result or of any patent obtained by the Contractor [namely Systran Luxembourg] in the performance of the present contract; this result or patent shall belong to the European Communities, which may dispose thereof freely, with the exception of cases in which industrial or intellectual property rights already exist.

2. The Commission's machine translation system, including its components, even where modified in the performance of the contract, remains the property of the Commission, with the exception of cases in which industrial or intellectual property rights already exist.'

96 Article 13(1) and (2) of the first migration agreement thus expressly reserves the question of pre-existing intellectual or industrial property rights. The Commission cannot therefore rely on that provision in order to claim that it is clear that the applicants waived their copyright and their know-how relating to the Systran system. Those rights, and most particularly the rights concerning the Systran Unix version of the Systran software, pre-exist the date of signature of the migration agreements,

which came into being at a time when the EC-Systran Mainframe version used by the Commission was becoming obsolete.

97 In addition, it is clear from Article 13 of the first migration agreement — as was indicated at the hearing by the parties — that paragraph 1 refers only to the 'EC' part of the updating of the EC-Systran Unix version of the Systran software, namely all the results and patents that might be obtained by Systran Luxembourg, the contractor in question, in the context of the performance of the migration agreements. The ownership of everything which pre-exists those possible results and patents, namely the Systran Unix version, from which the EC-Systran Unix version is derived, is excluded from the scope of the agreement. Thus, those agreements do not call in question the rights in the part of the basic kernel of the Systran Unix version that were not modified in the EC-Systran Unix version. As for paragraph 2 of that provision, it expressly refers to 'the Commission's machine translation system', namely the EC-Systran Mainframe version of the Systran software (see the definition provided in Article 2 of the first migration contract, set out at paragraph 27 above), therefore reserving the question of the rights held in the Systran Mainframe version, both of those versions being obsolete because of the Systran Unix version.

98 Furthermore, it should be pointed out that Systran is not a signatory to the migration agreements and that it cannot have assigned anything whatsoever to the Commission with respect to the rights relating to the Systran Unix version of the Systran software, which it developed and which it markets. In application of the principle of the relative effect of the agreements, which may be considered to be a general principle common to the laws of the Member States in contractual matters, the migration agreements are therefore not enforceable as such against Systran. In that regard, even on the assumption that Systran Luxembourg did not communicate to the Commission by 15 March 2002 'detailed evidence of all the rights … claimed by the Systran group and linked to the Systran machine translation system' (see point 30 above), that cannot have the consequence of depriving Systran of the possibility of relying as against the Commission on the rights which it holds through having acquired the companies of the WTC group or, above all, of having created and marketed the Systran Unix version, as the Commission was aware. It should also be observed that, as the applicants

claimed at the hearing without being contradicted on that point by the Commission, Systran Luxembourg was not at the time of the signature of the agreements a company fully integrated within the Systran group but was a joint undertaking combining the interests of the undertakings which previously worked with the Commission in order to provide maintenance for the EC-Systran Mainframe version and the interests of the Systran group in Luxembourg.

99 In the last place, and in any event, it is the rule in intellectual property matters that a clause assigning property rights cannot be presumed. As a matter of principle, such a clause cannot be implicit but must be express. In the present case, no contractual provision relating to the assignment of intellectual property rights from Systran, or indeed from an undertaking in the Systran group, capable of being relied on with respect to the Systran Unix version of the Systran software is apparent from the documents communicated to the Court by the parties.

100 It follows from the foregoing that none of the contractual provisions cited by the Commission supports the argument that the present dispute is necessarily of a contractual nature. Those contractual provisions, which relate to a period in the past, indeed the distant past so far as the contracts relating to the Systran Mainframe version, which became obsolete during the 1990s owing to the evolution of the computing environment, are concerned, do not substantiate the assertion that the Commission was or is authorised by the Systran group to disclose to a third party information capable of being protected by the copyright and know-how relied on with respect to the Systran Unix version of the Systran software developed and marketed by that group.

101 In the light of all the foregoing, it must be concluded that it follows from the content of the applicants' claim for compensation and from the general principles common to the laws of the Member States on which the applicants rely in order to establish their

rights in the Systran Unix version of the Systran software and the need to obtain the prior consent of its author before disclosing to a third party the content reproduced in the derivative EC-Systran Unix version that the applicants have established to the requisite legal and factual standard the elements necessary to enable the Court to exercise the non-contractual jurisdiction conferred on it by the Treaty.

102 Furthermore, examination of the various contractual provisions on which the Commission relies in order to establish that the claim for compensation has a contractual basis permits the finding that there was no assignment of copyright or authorisation to disclose to a third party information relating to the Systran Unix version by the Systran group.

103 It follows from that global assessment that the dispute in question is of a non-contractual nature. The Court must therefore assess the allegedly wrongful and harmful nature of the Commission's disclosure to a third party of information protected by copyright or know-how without the express authorisation of the owner in the light of the general principles common to the laws of the Member States applicable in such matters and not of contractual provisions set out in the agreements entered into in the past on questions which did not relate to Systran's copyright and know-how in the Systran Unix version.

104 The Commission's assertions that the action is inadmissible on account of its allegedly contractual basis must therefore be rejected.

2. The lack of clarity in the application

(a) Arguments of the parties

105 The Commission maintains that the action is inadmissible in that it does not satisfy the condition laid down in Article 44(1)(c) of the Rules of Procedure, which provides that the application is to state 'the subject-matter of the proceedings and a summary of the pleas on law on which [it] is based'. The Commission submits that the application does not provide any details of the legal provisions which the Commission is alleged to have breached and provides little detail of the acts of infringement and disclosure of know-how alleged by the applicants.

106 The applicants submit, in substance, that the application is sufficiently precise for the Commission to be able to prepare its offence and for the Court to be able to adjudicate on the case.

(b) Findings of the Court

107 Under the first paragraph of Article 21 of the Statute of the Court of Justice, which applies to the procedure before this Court by virtue of the first paragraph of Article 53 of that statute, and under Article 44(1)(c) of the Rules of Procedure of this Court, all applications must indicate the subject-matter of the dispute and contain a summary of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to exercise its power of review. In order to guarantee legal certainty and the sound

administration of justice, it is necessary that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (orders in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20, and judgment in Case T-294/04 *Internationaler Hilfsfonds* v *Commission* [2005] ECR II-2719, paragraph 23).

108 In order to satisfy those requirements, an application seeking compensation for damage caused by a Community institution must state the evidence from which the conduct alleged against it can be identified (order in *Internationaler Hilfsfonds* v *Commission*, paragraph 107 above, paragraph 24).

109 In the present case, the applicants state in their application that the Commission unlawfully disclosed Systran's know-how to a third party, following the award of a tender, and that on that occasion it infringed Systran's copyright. The Commission engaged in two instances of unlawful and harmful conduct (see paragraph 66 above). Having regard to the above, the Commission was able to prepare its defence.

110 The Commission's assertions relating to the inadmissibility of the action owing to the lack of clarity in the application must therefore be rejected.

3. The Court's lack of jurisdiction to make a finding of infringement in an action based on non-contractual liability

(a) Arguments of the parties

111 The Commission maintains that the action is inadmissible in that the Court has no jurisdiction to adjudicate on an alleged infringement in the context of an action based on non-contractual liability, as was recognised in the order in *Document Security Systems*, paragraph 52 above. In that regard, the Commission observes that, unlike the overall Community harmonisation brought about in relation to trade marks, copyright has been the subject of only partial harmonisation, which, however, concerns the protection of software (Directive 91/250). The fact none the less remains that, for copyright, just as for the law on patents, an action for infringement is not among the remedies in respect of which jurisdiction is conferred on the Community Courts. The same applies to know-how, which has not been the subject of the slightest Community harmonisation. The Commission rejects any comparison here with the solution arrived at in *Adams* v *Commission*, paragraph 79 above, on the ground that the applicants do not allege infringement of Article 287 EC but merely assert wrongful disclosure of know-how, without providing further details or evidence. Unlike in *Adams* v *Commission*, moreover, the information obtained in the present case was obtained in the context of contractual relations and not in the context of the transmission of documents protected by secrecy.

112 The applicants claim that, in view of the Community harmonisation which exists with respect to the protection of software by copyright (Directive 91/250), the Court has jurisdiction to determine whether there has been an infringement of software copyright by the Commission. The present action cannot therefore be made subject to the exercise of a national remedy which, unlike the case in which the order in *Document*

Security Systems, paragraph 52 above, was made, relating to patent protection, would be incapable of leading to reparation of the damage. It is a matter of ensuring effective judicial protection for the applicants. As regards the wrongful disclosure of know-how, the applicants emphasise the relevance of *Adams* v *Commission*, paragraph 79 above, which establishes the obligation of confidentiality placed on the Commission and its staff by Article 287 EC as a general principle of law.

(b) Findings of the Court

113 The Commission relies on the order in *Document Security Systems*, paragraph 52 above, to support its contention that the Court has no jurisdiction to adjudicate on infringement in the context of an action for damages.

114 It must be observed, however, that in *Document Security Systems* the Court distinguished the action for patent infringement brought by the applicant from the action for compensation in the strict sense. In the form of order sought, the applicant claimed that the Court should declare that the European Central Bank (ECB) had infringed the rights conferred by the patent and to order the ECB to pay damages and interest for its infringement of the rights conferred by the patent (order in *Document Security Systems*, paragraph 52 above, paragraph 25). In response, the Court first of all observed that it did not have jurisdiction to hear and determine an action for patent infringement (order in *Document Security Systems*, paragraph 52 above, paragraphs 50 to 75). As regards the action for damages in the strict sense, the Court expressly stated that it had jurisdiction to give judgment in that action under the combined provisions of Article 235 EC and the second paragraph of Article 288 EC (order in *Document Security Systems*, paragraph 52 above, paragraph 76). However,

that action for damages was declared manifestly lacking any foundation in law, in so far as the applicant had submitted no proof in that case capable of establishing the unlawfulness of the alleged conduct of the defendant (order in *Document Security Systems*, paragraph 52 above, paragraphs 80 to 82).

115 In the present case, it should be observed that the concept of infringement of copyright is relied on in conjunction with the concept of protection of the confidentiality of know-how for the sole purpose of characterising the Commission's conduct as unlawful in the context of an action alleging non-contractual liability. That assessment of the unlawful nature of the conduct in question is carried out by reference to the general principles common to the laws of the Member States and does not require a previous decision of a competent national authority, as was the case for the various patents at issue in *Document Security Systems*, paragraph 52 above. Thus, the ECB had brought revocation actions in a number of Member States and some of the courts with which those actions were lodged had delivered decisions at first instance and those decisions — which were inconsistent from one court to another — were the subject of appeals (order in *Document Security Systems*, paragraph 52 above, paragraphs 21 to 24), which is by no means the position in the present case.

116 Consequently, in view of the jurisdiction conferred on this Court by Article 235 EC and the second paragraph of Article 288 EC in matters of non-contractual liability, and in the absence of any national remedy that could lead to the Commission making reparation for the damage allegedly suffered by the applicants as a result of the alleged infringement, there is nothing to preclude the concept of infringement used by the applicants being taken into consideration for the purpose of characterising the Commission's conduct as unlawful in the context of a claim for damages.

117 The concept of infringement used by the applicants in the context of the present action for damages is to be interpreted solely in the light of the general principles common to the laws of the Member States, which, so far as computer programs are concerned, are reproduced or laid down in a number of harmonisation directives. The

Court must therefore reject the Commission's allegations relating to the inadmissibility of the action because the Court has no jurisdiction to make a finding of infringement in the sense that might be given to that word by a competent national authority of a Member States in application of the law of that State.

B — *The other heads of claim*

118 The Commission asserts that a number of heads of claim submitted by the applicants are inadmissible. These are the claims that the Court should order the immediate cessation by the Commission of the acts of infringement and disclosure, the confiscation from the Commission or Gosselies of certain IT data or their destruction and the publication of the decision of the Court, at the Commission's expense, in specialist journals and reviews and also on specialist Internet sites.

119 On that point, the Commission refers to settled case-law according to which even in proceedings for damages the Community judicature cannot make orders against a Community institution without encroaching on the rights and powers of the administrative authorities (see Case T-279/03 *Galileo International Technology and Others* v *Commission* [2006] ECR II-1291, '*Galileo*', paragraph 60 and the case-law cited).

120 It should be borne in mind that, pursuant to the second paragraph of Article 288 EC, '[i]n the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties'. That provision refers both to the conditions of non-contractual liability and to the

extent of the right to damages. Furthermore, Article 235 EC confers jurisdiction on the Community judicature in disputes relating to compensation for damage provided for in the second paragraph of Article 288 EC.

121 It follows from those two provisions – which, unlike to the first paragraph of Article 40 CS, which envisaged only monetary compensation, do not preclude the award of compensation in kind – that the Court of Justice has the power to impose on the Community any form of reparation that accords with the general principles of non-contractual liability common to the laws of the Member States, including, if it accords with those principles, compensation in kind, if necessary in the form of an injunction to do or not to do something (*Galileo*, paragraph 119 above, paragraph 63).

122 Consequently, the Community cannot, as a matter of principle, be excluded from a corresponding procedural measure on the part of the Court of Justice, as it has exclusive jurisdiction to hear actions seeking compensation for damage attributable to the Community (see, concerning an injunction relating to a trade mark, *Galileo*, paragraph 119 above, paragraph 67).

123 For the damage caused in the present case to be fully compensated, the right of the owner of the copyright must be re-established intact which, irrespective of any damages to be assessed, requires at the very least the immediate cessation of the infringement of his right. It is precisely by means of the injunction applied for in the present case that the applicants are seeking to ensure that the Commission's alleged infringement of their copyright should cease (see, to that effect, *Galileo*, paragraph 119 above, paragraph 71). The reparation in full of the damage may also take the form of the confiscation or destruction of the result of the infringement, or of publication of the Court's decision at the Commission's expense.

124 Consequently, the Commission's allegations concerning the inadmissibility of the heads of claim not relating to a claim for compensation for the alleged harm must be rejected.

125 It follows from the foregoing that all the objections of inadmissibility raised in the present action must be rejected.

II — *Substance*

126 For the Community to incur non-contractual liability within the meaning of the second paragraph of Article 288 EC, a series of conditions must be met, namely, the conduct of which the institutions are accused must have been unlawful, the damage must be real and a causal connection must exist between that conduct and the damage in question (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, and Case-243/05 P *Agraz and Others* v *Commission* [2006] ECR I-10833, paragraph 26).

A — *The rights invoked by the applicants and the unlawfulness of the Commission's conduct*

127 The unlawful conduct alleged against a Community institution must consist of a sufficiently serious breach of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42). Where the institution criticised has only considerably reduced, or even no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach of Community law (*Bergaderm and Goupil* v *Commission*, paragraph 44).

128 In substance, the applicants claim that there is substantial similarity between the Systran Unix version, developed by the Systran group since 1993, and the EC-Systran Unix version, developed by Systran Luxembourg to meet the Commission's requirements as from 22 December 1997. That great similarity entitles the applicants to object to the disclosure to a third party without their consent of the content of the EC-Systran Unix version on account of the copyright and know-how relating to the Systran Unix version. The opening of the invitation to tender thus entails an infringement of the copyright and a wrongful disclosure of the know-how of the Systran group capable of giving rise to non-contractual liability on the part of the Community.

129 The Commission disputes the existence of the rights which the Systran group claims in the Systran software. It maintains that it is the owner of the intellectual property rights necessary in order to carry out the acts which it did carry out and that it cannot be criticised for having carried out an act of infringement or of disclosure of know-how constituting a wrongful act within the meaning of the second paragraph of Article 288 EC.

1. Comparison of the different versions of the Systran software

(a) Arguments of the parties

130 The applicants distinguish three parts of the Systran software which interact with each other, namely the kernel, the linguistic programs — also called 'linguistic routines' — and the dictionaries. In that context, the applicants claim that the Systran Unix version is a primary work and that the EC-Systran Unix is a derivative work based on that primary work. A comparison of those two versions shows that they are virtually identical, or at the very least substantially similar. It could not be otherwise, moreover, since, in order to create the EC-Systran Unix version, from 22 December

1997, Systran Luxembourg took the Systran Unix version, developed by Systran since 1993, in order to incorporate the dictionaries of the EC-Systran Mainframe version in that version.

131 The Commission reiterates the applicants' presentation of the structure of the Systran software and adds the utilities, which bring together, in particular, the interfaces and dictionary management tools. It states that the kernel, the linguistic programs and the dictionaries have a source code that must be compiled in machine language. Thus, after an intervention on the linguistic programs, those linguistic programs and the kernel must be recompiled, but the kernel is not modified by that operation. In the Commission's submission, the enhancement of the linguistic programs does not require any modification of the kernel, the data structure or the preparatory design material. It entails exclusively a modification of the linguistic part of the source code. Likewise, the encoding of the dictionaries does not require any modification of the kernel or of the data structure of the system, so that the source code and the preparatory design material do not need to be modified. Furthermore, the utilities are generally scripts which can be used as such without modification.

132 In response to the argument that the Systran Unix and EC-Systran Unix versions are virtually identical, the Commission claims that the EC-Systran Unix version was not developed on the basis of the Systran Unix version, as the applicants allege, but on the basis of the earlier EC-Systran Mainframe version. The word 'migration' used in the migration agreements entered into with Systran Luxembourg thus means that only the computing environment of the software changes, while its logical structures are retained. The Systran group therefore did not provide a 'completely new version of the Systran system for Unix', as the applicants claim. In that context, the Commission emphasises that it still has the rights acquired under the contracts relating to EC-Systran Mainframe.

133 In that regard, the Commission claims that the modifications made to the Systran Mainframe version created by WTC in the EC-Systran Mainframe version which it uses did not relate solely to the dictionaries, which are regularly enhanced by the Commission's staff, but also to the kernel and especially the linguistic routines. In the Commission's submission, the linguistic routines of the Systran Mainframe version developed by WTC in the 1970s were embryonic and the Commission invested many hours and significant sums in improving those routines so that they would meet its specific requirements in the EC-Systran Mainframe version. The EC-Systran Mainframe version also includes langage routines developed specifically by and for the Commission (see technical note of 16 January 2008 from the Commission's Directorate-General for Translation ('DGT'), relating to '[l]inks of filiation between EC-Systran Unix and EC-Systran Mainframe' ('DGT's first note').

134 The Commission also observes that, if the migration had been carried out by the use of the linguistic programs of the Systran Unix version in the EC-Systran Unix version, no result could have been obtained for the Greek-French, English-Greek, Spanish-French, French-German and Spanish-Italian-Dutch pairs of languages, since those pairs of languages did not exist in the Systran Unix version (see Atos report of 4 May 1998, 'Feasibility of the migration from EC-Systran and the merger of EC-Systran with the Systran system', hereinafter 'the report of 4 May 1998', p. 32). Furthermore, as the dictionary codes of the EC-Systran Mainframe version were largely incompatible with the linguistic programs of the Systran Unix system, the linguistic programs of the other pairs of languages also had to be migrated in order to meet the Commission's specifications. Consequently, all the linguistic programs of the EC-Systran Mainframe version were converted by Systran Luxembourg by means of the Eurot conversion program and were not replaced by corresponding elements of the Systran Unix version. In all cases, the dictionaries used by the Commission required the associated linguistic programs and they could not therefore be reused merely by being integrated in the Systran Unix version.

135 In that context, the Commission contends that the EC-Systran Unix version was developed by Systran Luxembourg on the basis of the migration of the EC-Systran Mainframe version, the kernel of which was created by WTC, but numerous elements of which had been modified at the Commission's request in the context of various contracts specifying that the developments made for the Commission were its property. The migration of the EC-Systran Mainframe version to the EC-Systran Unix version means that the latter version is not merely a simple version of the Systran Unix software.

136 Furthermore, as regards the various similarities between the Systran Unix and EC-Systran Unix versions that emerge from the comparison made in the report of the applicants' computing expert, Mr Bitan ('the Bitan report'), the Commission claims that they do not prove the existence of wrongful conduct or infringement on its part. In the Commission's contention, all that can be inferred from that virtual identity between the two versions in question of the Systran software is, first, that the Systran group used elements of its pre-existing system and that the question therefore arises why it took four years' work and several hundreds of thousands of euros in order to arrive at such a similarity and, second, that it is likely that the Systran group used the developments carried out on the Commission's behalf by integrating them in its own marketed system, although according to the various migration agreements Systran had no rights in those elements. The comparison is thus vitiated from the outset, since the versions to be compared were not the ones owned by the Systran group but those that Systran developed on the Commission's behalf in the context of the migration agreements. The Commission reserves the possibility of defending its rights in that regard.

(b) Findings of the Court

137 In order to establish that the Commission's conduct was unlawful, the applicants claim that the Systran Unix version is a primary work and that the EC-Systran Unix version, in respect of which the acts of infringement of copyright and disclosure of know-how took place, is a work derived from that version of the Systran software.

That proof rests principally on the comparison of the content of the Systran Unix and EC-Systran Unix versions made by Mr Bitan, the applicants' computing expert, who is a doctor of laws, a telecommunications and computing engineer, a computing expert approved by the Court of Cassation (France), an expert before the Paris Administrative Court and the Paris Court of Appeal (France) and a teacher at the University Panthéon-Assas Paris-II.

138 On the basis of an examination of the data submitted by the applicants on that point, on which the Commission was given the opportunity to comment, three findings of fact can be made.

139 In the first place, it should be observed that the parties are agreed that the structure of the Systran software, whether the Systran Unix version or the EC-Systran Unix version, can be broken down into several parts (see the Bitan report, the technical note drawn up by Mr Bitan, 'the first Bitan technical note', and the second Bitan technical note):

— the kernel, the main part of the software, which steers the entire translation process with the help of the other components of the software, whose action it controls; the kernel includes the translation process management mechanism, data structures compatible with the linguistic routines and dictionaries, and also modules implemented during the translation process; it incorporates the dictionary management algorithms, the algorithms used to interpret the 'macros' used in the dictionaries, the filters for the various document formats and segmentation into phrases;

— the linguistic programs (also called 'linguistic routines'), which consist of an analysis, in several successive stages, the homographic and lexical routines, a transfer of the source language to the target language and a synthesis; those routines are made up of a set of linguistic rules used in a predefined order during the

translation process; their role is to modify the information in the analysis zone created by the kernel in the translation process;

— the dictionaries, which are databases used by the kernel and the linguistic programs, and the utilities, which bring together in particular the interfaces and dictionary management tools; the structures of the data used in the dictionaries have been defined in the translation rules and also in the coding manuals.

140 It should also be observed that the translation process steered by the kernel takes place in three broad stages, namely pre-treatment, which includes the filtering of the source document to be translated, the separation into phrases, consultation of the dictionaries, the various linguistic pre-treatments and the construction of the 'initial analysis zone', the application of the linguistic routines to the analysis zone organised in stages (analysis, transfer and synthesis), and post-treatment, which enables the phrases to be reconstructed and the translated document to be reinstated according to its original format.

141 Those explanations of the architecture and functioning of the Systran software concern both the Systran Unix version and the EC-Systran Unix version. It follows that the different parts of the software, even though they form part of a whole, none the less have a particular role within that whole. In particular, emphasis should be placed on the particularity and the role of the kernel, which prepares the source text by filtering it, breaking it down into phrases, and then for each phrase constructs the analysis zone on the basis of information from the dictionary. It is on that zone that the linguistic routines will operate

142 It is by reference to that structure of the Systran software, established in a probative manner by the applicants and not disputed as such by the Commission, that the rights invoked by the parties in the various versions of the Systran software at issue in the present case must be examined.

143 In the second place, the data produced by the applicants concerning the results of the comparison of the Systran Unix version with the EC-Systran Unix version, which are the only versions referred to for the purpose of alleging the unlawfulness of the Commission's alleged conduct, show that there is a substantial similarity between the two versions of the Systran software.

144 In effect, the main findings made in the Bitan report to substantiate the existence of a certain identity, or at the very least a substantial similarity, between the Systran Unix and EC-Systran Unix versions of the Systran software, are as follows:

— as regards the data structures, at least 72 % of the data structures of the Systran Unix version and the EC-Systran Unix version are identical or slightly different (see paragraph 5 'Synthesis' and paragraph 3.1 'Comparative analysis of the descriptions of the data structures');

— as regards the coding manuals, most of the codes set out in the coding manual of the Systran Unix version and reproduced in the EC-Systran Unix version (see paragraph 5 'Synthesis' and paragraph 3.2 'Comparative analysis of the coding manuals');

— as regards the source codes, the similarity between the kernels of the two versions of the Systran software, which constitute the main part of the software, reaches 80 to 95 %; other similarities exist at the level of the linguistic routines, while a large part of the routines of the Systran Unix version are to be found in the EC-Systran Unix version (see paragraph 5 'Synthesis' and paragraph 4 'Comparative analysis of the source codes').

145 Those findings of fact are not disputed as such by the Commission, which claims, first, that the EC-Systran Unix version is a work derived from the EC-Systran Mainframe

version and, second, that the Systran Unix version is a work which incorporates developments belonging to the Commission by virtue of the EC-Systran Mainframe version, which is itself derived from Systran Mainframe, or from the EC-Systran Unix version (see paragraphs 132 to 136 above and paragraphs 150 to 157 below).

146 Thus, at the hearing the Commission stated that it was not in a position to contradict Mr Bitan, who had reported similarities between the Systran Unix version and the EC-Systran Unix version in documents annexed to the application.

147 Consequently, in the light of the elements produced by the applicants and the observations submitted in that regard during the procedure (see paragraphs 137 to 146 above), it must be held that the applicants have established in a sufficiently probative manner that there is in the preset case a substantial similarity between the Systran Unix and EC-Systran Unix versions and that they can thus rely on the rights held by the Systran group in the Systran Unix version, developed by Systran since 1993, to object to the disclosure to a third party without their consent of the EC-Systran Unix derivative version, adapted by Systran Luxembourg from 22 December 1997 in order to meet the Commission's needs.

148 That conclusion does not affect the rights which the Commission may have in the EC-Systran Unix version under the migration agreements or because it created and developed dictionaries which meet its linguistic requirements. It serves only to recognise the fact that the applicants have adduced evidence that certain elements of the Systran software, in particular 80 to 95 % of the kernel and a large part of the linguistic routines, were created by Systran and are found in the Systran Unix version marketed by Systran, without the slightest assignment to the Commission of the ownership of those elements being apparent from the file.

149 It may thus be considered, as the Bitan report indicates, moreover, that in order to create the EC-Systran Unix version, Systran Luxembourg reproduced a very large part of the Systran Unix version marketed by Systran and incorporated the dictionaries of the EC-Systran Mainframe in that version.

150 In order to dispute that conclusion, the Commission claims that the EC-Systran Unix version is in reality only the result of the migration of the previous EC-Systran Mainframe version from one computing environment to another. That argument is developed by the Commission in DGT's first note, the conclusions of which are essentially as follows:

— '[t]he activity reports prove that EC-Systran Unix was developed on the basis of EC-Systran Mainframe [so that] that software was developed from its very beginning on the Commission's funds';

— '[t]he original system [the Systran Mainframe version] conceived by WTC was relatively rudimentary, given the extremely high number of modules [and] programs that the Commission had to have developed by its own efforts in order that that system would meet its quality expectations';

— '[i]t was easier for Systran … to offer the Commission its migrated basic system [namely the Systran Unix version] because that migrated system already contained certain specific elements of EC-Systran Mainframe resulting from the collaboration and development before 1993/1994, the date from which Systran SI initiated the migration [of] EC-Systran Mainframe on behalf of the Commission'.

151 In the Commission's contention, in view of the alleged relationship between the EC-Systran Mainframe and EC-Systran Unix versions, the rights acquired under the contracts relating to EC-Systran Mainframe therefore still belonged to it. Furthermore, as regards the similarities observed by Mr Bitan with respect to the Systran Unix and

EC-Systran Unix versions, the Commission maintains that they merely establish, in substance, that it is likely that the Systran group used the developments carried out for the Commission in the context of the EC-Systran Mainframe and EC-Systran Unix versions in order to incorporate them in the Systran Unix version.

152 The Commission's argument amounts to denying the Systran group the slightest right in the Systran software, whether the Systran Mainframe version acquired from the WTC group and its creator or the Systran Unix version, developed and marketed by the Systran group several years before the EC-Systran Unix version was established by the Systran group in order to meet the Commission's needs when it was faced with the obsolescence of the EC-Systran Mainframe version.

153 As already explained when the Court's jurisdiction to hear and determine the present action was being examined (see paragraphs 70 to 77 above), the Commission's argument is based on general and insufficiently precise allegations in light of the characteristics of the software and the legal and technical expert reports produced by the applicants.

154 In effect, in its argument, the Commission relies primarily on the role played by its services in updating the dictionaries used by the EC-Systran Mainframe version and the EC-Systran Unix version, which is not disputed by the applicants, and, to a lesser extent, the impact which its services may have had on the updating of certain linguistic routines of the EC-Systran Unix version. The importance of the work carried out by Systran with respect to the kernel and the main part of the linguistic routines is blurred by the Commission, which never refers to the rights which the Systran group may have derived from that work. As observed at paragraph 147 above, the applicants explain in a sufficiently probative manner the basis on which they can claim rights in the EC-Systran Unix version as a result of the development and marketing of the earlier Systran Unix version.

155 Furthermore, the Commission has never been in a position, in spite of being expressly requested by the Court to do so, to produce technical evidence capable of establishing how the Systran group could not rely on copyright in the Systran Unix version of the Systran software or in a particular computing element which makes up its program or constitutes its operational source code (most especially in the parts relating to the basic kernel and the linguistic programs of the software). At the hearing the Commission also acknowledged that it was not in a position to adduce evidence capable of identifying the elements of Systran Unix in which it could claim copyright as a result of the agreements entered into with the Systran group in relation to the Systran Mainframe version. The Commission's argument in that regard (see paragraph 136 above) cannot therefore be upheld by the Court.

156 Still at the hearing, moreover, and following the second Sirinelli opinion and the second Bitan technical note, Mr Bitan observed that in any event the Systran Unix and Systran Mainframe versions are completely different, simply because the language used is different. Apart from the fact that the relationship claimed by DGT's first note fails to establish how the applicants could not claim rights in the EC-Systran Mainframe version under the rights held in the Systran Mainframe version, a question which does not form the subject-matter of the present action, that alleged relationship is contradicted by the significant differences in computing terms between the versions of the Systran software which operate in the Mainframe environment, which has become obsolete with the passing of time, and the versions of that software adapted to the new computing environments Unix and Windows, for which it cannot be disputed that the Systran group is the creator of the original version, Systran Unix. That version, moreover, is much earlier than the EC-Systran Unix version updated by Systran Luxembourg for the Commission's needs as from 22 December 1997, contrary to what may be inferred from DGT's first note, which incorrectly refers to '1993/1994, the date from which Systran [Software, Inc.] initiated the migration [of] EC-Systran Mainframe on behalf of the Commission' (see paragraph 150 above).

157 Consequently, the conclusion set out at paragraph 147 above is not in any way called in question by the Commission's argument based on the relationship of the EC-Systran Unix version to the EC-Systran Mainframe version or the alleged contributions made to the Systran Unix version following the updating of the EC-Systran Mainframe version.

2. The unlawfulness of the Commission's conduct

158 The unlawful conduct in which the Commission is alleged to have engaged consists in the fact that it granted itself the right to have the work mentioned in the invitation to tender carried out, which was capable of modifying or entailing the disclosure of the elements of the Systran Unix version reproduced in the EC-Systran Unix version of the Systran software, which are protected by the Systran group's copyright or know-how, when that group had not assigned the ownership of those elements to the Commission by contract or authorised the Commission to have such work carried out.

(a) Arguments of the parties

The infringement of copyright

159 As regards the infringement of copyright, the applicants claim that the identical features or similarities set out in the Bitan report concern elements protected by copyright, namely the architecture and source codes of the Systran software. The EC-Systran Unix version is thus a work derived from the Systran Unix version, that is to say, a work dependent on the Systran system. That has the consequence that the author

of the first work, the Systran group, could oppose any modification of the derivative work which it has not authorised. By entrusting to a third party work intended to modify the EC-Systran Unix version created by Systran Luxembourg, the Commission therefore committed an infringement, since it was not entitled to modify that software without the prior authorisation of the Systran group. In order to establish the general principles common to the laws of the Member States applicable in this matter, the applicants emphasise that the infringement is subject to sanctions under the laws of all the Member States and recognised as a minor offence, an unintentional wrongful act or at least a wrongful act likely to entail compensation for the damage caused by the institutions.

160 According to Article 4 of Directive 91/250, which Member States were required to transpose before 1 January 1993, the author of software is recognised as having 'the right to do or to authorise: (a) the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole … (b) the translation, adaption, arrangement and any other alteration of a computer program and the reproduction of the results thereof'. Carrying out one of those acts without the author's authorisation constitutes an infringement of the software. That directive also emphasises that computer programs are protected by copyright as a work within the meaning of the Berne Convention. The reference to the Berne Convention, to which all 15 Member States at the time of the adoption of Directive 91/250 were parties, thus means that copyright can be defined by reference to the common principles already in existence.

161 In French law, the law applicable to Systran, which developed and marketed the Systran Unix version, Directive 91/250 was transposed by Law No 94-361 of 10 May 1994 implementing Directive 91/250 and amending the intellectual property code (*JORF*, 11 May 1994, p. 6863), codified in the French Intellectual Property Code. The author of software benefits from copyright attaching to that software on condition that it is original and can protect his software in an action for infringement. Article L 122-6 of that code thus provides that 'the right of exploitation belonging to the author of software includes the right to carry out and to authorise, [first,] the permanent or temporary reproduction of software by any means and in any form, in whole or in part[,

second,] the translation, adaption, arrangement and any other alteration of software and the reproduction of the software resulting therefrom'. Accordingly, acts which require the authorisation of the author of the software and are carried out without the author's authorisation constitute an infringement of the software. Directive 91/250 has also been transposed in the other Member States, such as Luxembourg (Law of 18 April 2001 on copyrights, neighbouring rights and databases, *Mémorial* A 2001, p. 1042, 'the Luxembourg law on copyright', in particular Article 3) and Belgium (Law of 30 June 1994 transposing into Belgian law the European Directive of 14 May 1991 on the legal protection of computer programs, *Moniteur belge*, 27 July 1994, p. 19315, 'the Belgian law on computer programs').

162 In response to the argument alleging that it is necessary to prove that the Systran group is the owner of the rights invoked, the applicants observe that the Commission requires such proof in spite of the numerous contracts into which it entered and in which it is stated that the companies of the Systran group are the sole owners of those rights, and in spite of the general principles common to the laws of the Member States applicable to such matters – which are set out in the opinion of Professor Sirinelli, entitled 'Analysis of the conditions of the admissibility of an action for infringement of the rights of a legal person' ('the first Sirinelli opinion') and 'Access to the copyright protection of rewritten software' ('the second Sirinelli opinion') –, in particular as to the theory of appearance, which allows the apparent owner to sue without the infringer being able to require production of the chain of contracts of assignment or plead inadmissibility on the basis of any doubt as to the owner of the rights. The Commission therefore acted in bad faith when it required proof of the ownership of the software in order to avoid being censured for copyright infringement.

163 That argument, moreover, is one commonly put forward by infringers, and used in this case by the Commission, which attempts to exempt itself from liability by claiming that the Systran group has not produced evidence of its capacity as owner of rights in the Systran Unix version of the Systran software and the EC-Systran Unix version derived from that version. In French law, however, which is applicable to Systran, and in Belgian law, on which the Commission relies, the defence of copyright is based on a presumption of the capacity of owner whereby it is assumed that the person exploiting a work is presumed to be the owner of the work. On that point, French

case-law infers from that presumption that the legal person which takes infringement proceedings is, in practice, not required to provide the full chain of contracts of assignment from the author, a natural person, the initial owner of the right, to the last owner, while the infringer cannot rely in its defence on any failure to produce the chain of contracts of transfer. A very similar solution is applied by Belgian law, which considers that the benefit of the presumption laid down by the second paragraph of Article 6 of the Law of 30 June 1994 on copyright and neighbouring rights (*Moniteur belge*, 27 July 1994, p. 19297, 'the Belgian law on copyright'), which provides that 'in the absence of proof to the contrary, whoever appears to be the author of a work, because of the mention of his name or a set of initials whereby he may be identified, is presumed to be the author', may be claimed by a legal person whose name is placed on the work. Community law applies the same presumption: Article 5 of Directive 2004/48, entitled 'Presumption of authorship or ownership', states:

'For the purposes of applying the measures, procedures and remedies provided for in this Directive,

(a) for the author of a literary or artistic work, in the absence of proof to the contrary, to be regarded as such, and consequently to be entitled to institute infringement proceedings, it shall be sufficient for his/her name to appear on the work in the usual manner;

(b) the provision under (a) shall apply *mutatis mutandis* to the holders of rights related to copyright with regard to their protected subject matter.'

164 Systran's action can therefore indeed be brought, unless the Commission adduces evidence that it lacks the capacity of owner. Thus far, however, the Commission has

merely attempted to rebut the burden of proof and place it on the applicants, and it is already possible to assert that the Commission will not adduce that evidence, since Systran is the undisputed exploiter of the work in question and since the Commission has always recognised it as such. The legal person which exploits a work is thus presumed to be the owner of the rights, which allows him to act against third-party infringers. That presumption applies whatever the nature of the work in question or the number of creators involved. All that matter are the acts of exploitation carried out by the claimant provided that they were not disputed by the author or authors. Professor Sirinelli states that there is a 'veritable substantive rule that he who exploits a work merits protection by the sole fact of that exploitation'. There is no doubt that Systran possessed the Systran Unix version of the Systran software: Systran granted licences of that version of the Systran Unix software to the main Internet portals and marketed it to numerous multinational undertakings, through large stores and in mail order catalogues. Systran also owns the SYSTRAN trade marks and the 'Systran' domain names, which it exploits throughout the world. Numerous articles or advertising material also show that the Systran group publicly asserted and demonstrated that possession. The applicants refer in particular to the fact that Systran was awarded the 'European First Prize' in The Hague (Netherlands) in 2005 by the Member of the Commission responsible for the information society. The Systran group, which acts as owner of both the work and its name, is therefore entitled to bring proceedings against the infringer before this Court. Furthermore, the software used by the Commission is identified under the name 'EC-Systran Unix', which enables the role played by Systran in that regard to be established.

165 Notwithstanding the foregoing arguments, and in order to dispel any possible doubt, the applicants intend to show, for the sake of completeness, that the Systran group is the indisputable owner of the intellectual property rights in the Systran Mainframe and Systran Unix versions of the Systran software and has historically been recognised as such by the Commission.

166 As regards the Systran Mainframe version, the applicants maintain that the Systran group is the owner of the rights in that version because it acquired them from Gachot

SA, which acquired to the rights of Mr Toma, the inventor and author of the initial software, and of the companies which exploited that software. In addition, Systran is indisputably the owner of the intellectual property rights in all the versions of the Systran Mainframe software, including EC-Systran Mainframe. In effect, the assignment and transmission of intellectual property rights can only be made in writing and, in the case of doubt, are always interpreted in favour of the author, in application of the principle of restrictive interpretation. However, while it was shown that Systran had acquired the rights from the actual author, Mr Toma, it never assigned them to the Commission, notwithstanding the agreements on which the Commission relies with the sole aim of attempting not to appear to be an infringer. The applicants are unable to understand for what purpose the Commission relies on contracts for the use of the software, entered into with third companies, which cannot be relied on as against Systran and, consequently, cannot entail any assignment of intellectual property rights to the Commission. As for the agreements entered into with Systran, or with the companies whose rights Systran acquired, these are solely agreements to license the use of the software or for the provision of services. None of them implies the assignment, transfer or transmission of the intellectual property rights to the Commission.

167 For example, the initial contact conferred on the Commission only a right of use (Article 4) for both the existing system and any new developments. Under Luxembourg law, applicable to that contract, and in that regard consistent with French law and Belgian law, the assignment and transmission of property rights are to be proved, with respect to the author, in writing and are interpreted strictly in the author's favour. Yet that contract contains no clause that might to a greater or lesser extent be interpreted as an assignment of rights. Consequently, it does not confer on the Commission any intellectual property right in the Systran software including in its EC-Systran Mainframe version, with the exception of the dictionaries developed by the Commission.

168 Likewise, the collaboration agreement provides for no assignment of intellectual property rights to the Commission. That agreement appears to assume particular significance for the Commission, although the Commission itself terminated the agreement in 1991. Contrary to the contention of the Commission, which sees in that

agreement the origin of its alleged intellectual property rights in the Systran Mainframe software, that agreement stipulates that the Commission has a licence to use the software and, far from transferring any right whatsoever, the agreement states that the rights of each party at the date of signature of the agreements are preserved and protected. The preamble to that agreement states:

'2. On 22 September 1975 the Commission entered into a contract with WTC [Inc.] for the use of the Systran system by the Commission and the initial development of that system by WTC.

…

5. The parties therefore declare that the Commission has a licence to use the basic system …'

169 Article 4 of the collaboration agreement also states that the rights of each party at the date of signature are to be protected: in fact the Commission had no rights in the Systran Mainframe software. The Commission is thus unable to rely on any assignment to it of intellectual property rights in the Systran Mainframe software, even though it is recognised as having rights in the dictionaries which it developed (paragraph 6 of the preamble to the collaboration agreement). Those rights do not in any way impinge on Systran's capacity as author or on its rights in the Systran Mainframe software (or the EC-Systran Mainframe version) and in particular in its kernel. Annex I to the collaboration agreement expressly recognises that WTC, Gachot and Systran have the capacity of author. At the end of that agreement, as also, moreover, of most of the agreements, the Commission was assigned the right to use and to sublicense, solely on Community territory, the software in its most developed version (see Article 5

of the collaboration agreement, which expressly states that the Commission has the 'right to use'). It does not avail the Commission to invoke the termination clause in the agreement. There, too, even by application of the general principles of the law of obligations applicable throughout the Community, contractual clauses cannot be interpreted more widely than their terms stipulate. The structure of the clause in question is clear: for three years, the right of use is granted as provided for in Article 5. During those three years, developments and/or improvements may thus be made by the Commission (Article 4 of the collaboration agreement). At the end of those three years, the Commission can use the EC-Systran Mainframe software in the state which it has reached on that date. At the end of that period the Commission can only have a right of use. In addition, the restrictive interpretation of transfers of property rights, in Belgian law too, permits the assertion that the Commission acquired no intellectual property right in the Systran Mainframe software at the end of the collaboration agreement.

170 Thus, no assignment of intellectual property rights, either in the Systran Mainframe software, or in the original idea and writing on which it is based, or in the preparatory design material, or in the structure of the data, still less in the kernel, was made in favour of the Commission. The applicants submit that the sole purpose of the arguments set out above, whereby they seek to establish that Systran is the owner of the intellectual property rights in the Systran Mainframe version of the Systran software, is to respond to the Commission's argument, which is wholly irrelevant to the outcome of the dispute, since the infringement concerns the Systran Unix version and not the Systran Mainframe version.

171 So far as the Systran Unix version is concerned, the applicants maintain that the Commission cannot claim the slightest intellectual property right in that version of the Systran software. In effect, the Systran Unix version was created, at Systran's request, by its wholly-owned subsidiary Systran Software (Systran's response to the invitation to tender). The Systran Unix version is a new version of the Systran software, different from the Systran Mainframe version, which had become obsolete. The Systran group

is the sole owner of the rights in the Systran Mainframe version and in its kernel and, in its capacity as promoter of the Systran Unix version, has full and entire possession of that new software and its kernel, as demonstrated by Professor Sirinelli.

172 It was only after the new Systran Unix software had been created and placed on the market that the migration agreements were entered into by Systran Luxembourg and the Commission. Those agreements provide that the EC-Systran Mainframe version is to be replaced by the Systran Unix version, the originality and novelty of which have been demonstrated, and that the Commission's dictionaries are to be migrated to enable them to function with that new version. That results, moreover, from the Bitan report, since the EC-Systran Unix version has the same kernel as the Systran Unix software, as the two kernels are 85 % similar. Contrary to the Commission's assertion, the EC-Systran Unix version is therefore not just a simple version of the Systran Unix software including the dictionaries developed by the Commission, which were migrated in the context of the migration agreements, and not the result of the migration of the of the EC-Systran Mainframe software, which had become obsolete. Thus, and even though the Commission has rights in the dictionaries which it has developed, it has no right in the Systran Unix software, which pre-existed the migration agreements.

173 In addition, those agreements, in the same way as the previous ones, do not involve any transmission of intellectual property rights in the Systran Unix software to the Commission. They were entered into with Systran Luxembourg, moreover, which has no right in the Systran Unix software, and not with Systran, the sole owner of those rights. Furthermore, they expressly provide for the protection of pre-existing intellectual property rights, clearly including Systran's copyright in the Systran Unix software. Even if the Commission's argument relating to the migration of the EC-Systran Mainframe version were to be followed, the Commission would have the advantage of a derivative right which would not in any event allow it to modify the EC-Systran

Unix software without being authorised to do by Systran. Thus, even in that situation, the Commission would have committed an infringement in carrying out or causing to be carried out the work envisaged in the invitation to tender.

174 The applicants express their surprise and shock at the Commission's position, first of all because the institutions have made the fight against infringement their warhorse and a priority, implementing all sorts of initiatives, measures and regulations enabling that flood to be fought effectively, and, next, in the present case, because the Commission has always been fully aware that the Systran group was indisputably the owner of the rights in the Systran software, and in particular in the Systran Unix software. The Commission has thus entered into numerous licensing agreements which show that it was convinced of Systran's capacity as owner of the rights in Systran. In addition, the Commission has always been informed of Systran's capacity as owner of the intellectual property rights in both the Systran Mainframe software and the Systran Unix software, and of the pre-existence of the latter software, witness:

— the exchange of letters of 27 January and 5 February 1987 between the Director of DG 'Telecommunications, IT industry and information' and Mr Gachot;

— the report of 4 May 1998, which emphasises the innovative nature of the Systran Unix software developed Systran; with more particular regard to the kernel, the report of 4 May 1998 states that '[t]he system programs have all been recreated or rewritten in C';

— the response to the invitation to tender launched by the Commission in 1997 with a view to entering into migration agreements, which shows that the Commission was perfectly aware of the origin of Systran's rights, which it did not dispute at the time, and that Systran Unix already existed.

175 Furthermore, the Commission has on several occasions recognised that Systran is the owner of both the Systran Mainframe version and the Systran Unix version, and also that the Systran Unix version pre-dated the EC-Systran Unix version, witness:

— the fax sent to Gachot SA on 5 March 1987, in which the Commission wrote:

'The Systran [g]roup is the owner of the basic software and the Commission's rights of use relating to its nine [pairs] of languages extend only to the Community institutions and to the official agencies of the Member States. Conversely, the Commission is the owner of the dictionaries which it has updated since 1975';

— Mr Carpentier's report to the Advisory Committee on Procurement and Contracts;

— Mr J. Beaven's report, which provides that the Systran Unix software pre-existed the EC-Systran Unix version and that it was in order to benefit from the innovations brought about by the Systran Unix software, and in order to emerge from the situation of obsolescence in which it found itself, that the Commission wished to renew commercial relations with Systran;

— the technical annex to Annex II to the second, third and fourth migration agreements, which establishes the general approach to migration and which shows that the Commission was aware that the Systran Unix software was already in existence and that it was that software that had enabled the EC-Systran Unix version to be developed;

— the settlement with Systran concluded by the Commission, which must be emphasised: first, the Commission, in breach of the initial contract, since it had paid no royalties to Systran, although it was obliged to do so, had considered it necessary to seek a reconciliation with Systran and had concluded with it a settlement taking the form of an exchange of letters of 19 and 22 December 1997, in which the Director-General of DGT stated that it was desired to 'capitalise as much as possible on the work invested for 20 years by the Commission in the preparation of dictionaries specially adapted to the administrative and technical language of the Commission's documents'; that work, carried out by the Commission over 20 years, is the only work that can be claimed, as its rights in the Systran Mainframe software are non-extent; second, the Director-General of DGT requested Systran to undertake 'not to make any monetary claim arising from the performance of the contracts entered into by the Systran group and the Commission'; yet, specifically, Systran's monetary claims consisted at the time in royalties payable in respect of its copyright in Systran Mainframe versions; third, the Director-General of DGT even sought authorisation to use the name Systran, thus recognising that Systran had the capacity of author; Systran gave its consent to the Commission for the use of the name Systran for the 'machine translation system deriving from the original Systran system', confirmed its consent for the Commission to use its software, waived the monetary claims relating to the breaches of the old contracts and stated:

'[W]e have no objection to the principle of the publication of certain parts of the dictionaries of the Systran version used by the Commission. None the less, care must be taken to ensure that the proprietary elements of the Systran system are not disseminated in public.'

176 The applicants therefore claim that the Commission cannot pretend today not to be aware of the extent of their rights and that it knows full well that it was never authorised to modify the Systran Unix software, and in particular its kernel. Any modification made without authorisation is an infringement, since the rule is that such modification is prohibited, and not vice versa.

177 The Commission emphasises that software is protected in all Member States by copyright law. It refers to the position in Belgium, where the relevant law is the Belgian Law on computer programs and the Belgian Law on copyright, and in Luxembourg, where the relevant law is the Law of 24 April 1995 amending the Law of 29 March 1972 on copyright with respect to the legal protection of computer programs (*Mémorial* A 1995, p. 944; 'the Luxembourg law on computer programs'), the Law of 8 September 1997 amending the amended Law of 29 March 1972 on copyright (*Mémorial* A 1997, p. 2662) and the Luxembourg Law on copyright.

178 In the first place, the Commission claims that there is no proof of the rights which Systran claims in the Systran software. In the present case, the applicants have failed to explain in what way they acquired the rights of which they claim to be the owners.

179 As regards the Systran Mainframe and EC-Systran Mainframe versions, the Commission observes that the applicants maintain that the author of the Systran software is clearly identified in the initial agreement as WTC; that they claim that, at the end of the 1980s, in the context of an active partial support, Systran acquired the shares relating to the full 'Machine translation' branch of activity from Gachot SA, which had itself acquired the rights of the companies WTC, Latsec, Systran USA and Systran Institut (Germany), which conceived the Systran machine translation system still designated 'Systran software' or 'Systran system', and that they maintain that all the agreements entered into with the Commission between 1975 and 1987 were taken over and continued by Systran by operation of law. Yet, in spite of those assertions and the Commission's specific requests (see letters to Systran of 15 February and 28 April 2005 requesting it to identify the legal and contractual bases of its claims), the applicants, and especially Systran Luxembourg, failed to produce the slightest evidence (agreement assigning rights, etc.) that they had indeed become the owners of the rights which they claimed to have been infringed or stated for what territories and what period those rights were held. Article 5(c) of the initial agreement with

WTC provides that no transfer of rights or obligations arising under the contract could take place without the Commission's prior consent. The Commission relies on that provision to claim that it was never notified in advance of the contribution or assignment on which the applicants rely and that it never consented to the assignment from WTC to the applicants.

180 As regards the presumption that, in the absence of proof to the contrary, the capacity of author belongs to the person or persons under whose name or names the work is disclosed, the Commission disputes the application of French law in that regard. That presumption, enshrined in Law No 94-361 in France, is not applicable in the present case and is criticised in Belgian and French legal writing. The Commission also emphasises that that presumption applies only until there is proof to the contrary and that it is clear that the Commission has rebutted that presumption with respect to the EC-Systran Unix version because that version is not marketed in packaging bearing the author's name and because that version is sometimes called 'the Commission's MT system' or 'ECMT'.

181 In the second place, the Commission contends that the contractual relations between the parties should be analysed as a succession of 'order contracts' designed to confer the ownership of the EC-Systran Mainframe and EC-Systran Unix versions on the Commission without the Systran group being able to claim any rights in that regard. In the various agreements which the parties entered into after 1975, the companies of the Systran group generally undertook to create on the Commission's behalf all or part of the elements of the EC-Systran program that would meet the specific needs generated by the Commission's activities, whether in the EC-Systran Mainframe version or the EC-Systran Unix version. In that regard, Systran has failed to show that it acquired the rights in the programs thus developed for the Commission. Those programs were by the nature of things created and developed by natural persons. In order for Systran to be able to claim to have the rights in those programs, it must establish that it acquired them from those creators. The Commission observes on that point that it follows from the Belgian legislation, on which Systran relies, that a computer program is not acquired from its author, even if he is the principal, unless that assignment was in writing. The same provision is made, moreover, in the Luxembourg law on copyright. The Belgian law on computer programs contains only a singe provision, under which it is possible to derogate from the general scheme established in Article 3 of the Belgian Law on copyright (which, like the Luxembourg law, requires a written document from the author). That exception relates to the case

where the program was created by an employee or a public official, in which case there is a presumption that the monetary rights will be assigned to the employer unless the contract of employment or staff regulations provide otherwise. Apart from that case, which the applicants have not established, the 'order contract' whereby a person commissions another person not subordinate to him to create all or part of a computer program therefore continues to be subject to the abovementioned rules of the Belgian Law on copyright. In addition, the Commission observes that in Belgian law the applicants, who are legal persons, cannot be regarded as authors. The initial owner of the copyright is the natural person who created the work and copyright can come into being in Belgium only in favour of a natural person. Relying on the Belgian case-law, the Commission emphasises that legal persons must establish from what persons and in what way they obtained the rights (judgment of the Gent Court of Appeal of 27 October 1993, *Ing. Cons.*, 1993, p. 366). The Commission claims that the applicants do not explain how they, as legal persons, can claim rights in the Systran Unix version or in the EC-Systran Unix version derived from that version.

182 In the alternative, even if it should be accepted that the applicants are the owners of certain rights in the Systran software, the Commission asserts in any event that it is also the owner of the intellectual property rights necessary for the acts which it carried out by entrusting certain work relating to the EC-Systran Mainframe to a third party. The Commission refers on that point to the content of the initial contract, the technical cooperation agreement and the collaboration agreement, which concern the EC-Systran Mainframe version, and to the migration agreements entered into with Systran Luxembourg between 1998 and 2002 with respect to the EC-Systran Unix version. Those agreements allow the Commission to challenge the applicants' assertion that no intellectual property right relating to the Systran Unix version was assigned to it.

183 In order to challenge the applicants' assertion that the alleged virtual identity between the Systran Unix version and the EC-Systran Unix version of the Systran software

permits the conclusion that the Commission's unauthorised use of the Systran software constitutes infringement and thus unlawful conduct, the Commission claims the existence of several rights.

184 First, the Commission claims that it is the owner of property rights in the development and improvements of the Systran software financed by its services, whatever the part of the system in question (kernel, linguistic programs and dictionaries). In addition, it has an exclusive property right in the glossaries and dictionaries which it developed and improved for its own needs (see Article 4(a) of the initial contract, Article 4 of the technical cooperation agreement protocol, paragraph 6 of the preamble to the collaboration agreement and Article 4 of that agreement and Annex I thereto, which states that '[a]lthough the Commission has always been the owner of the glossaries and other components which it has developed for various versions of Systran, the property rights in the basic software had been shared between various parties'.) The Commission emphasises that the numerous specific developments carried out in order to migrate from the Mainframe system to the Unix systems are the Commission's property (see Article 13(2) of the migration agreements and appendix 2 to the annex to supplementary agreement no 4 to the first migration agreement).

185 Second, the Commission claims that it is the owner of rights of utilisation. In that regard, the applicants' assertion that the Commission, which did not create the initial Systran software, cannot be the owner of any right related to that software or to any development, which, moreover, is unauthorised, based on the Systran software is contrary to Article 13 of the migration agreements. In that regard, the applicants' interpretation of the restriction contained in that provision, namely 'apart from the cases in which industrial or intellectual property rights already exist', is contrary to the principles that agreements are to be interpreted in good faith. In the Commission's contention, the migration agreements emphasise the difference between the Systran system marketed by the Systran group and the EC-Systran versions used by the Commission and, in addition, expressly provide that the system called 'the Commission's

machine translation system' will indeed remain the Commission's property, with all its components, whether or not they have been modified during the performance of the agreement. The restriction which states that those rights are 'without prejudice to the industrial or intellectual property rights already existing' could therefore be understood solely as a protection of the status quo existing before the end of the migration of the system and excludes any acquisition by the applicants of rights with respect to the EC-Systran Unix version through the migration. That commitment entered into with Systran Luxembourg, the signatory of the migration agreements, could be extended to Systran, since in a letter of commitment of 12 March 2001 (Annex V to the fourth migration agreement), it guaranteed the proper performance of the entire fourth migration agreement by its subsidiary Systran Luxembourg.

186 Consequently, the Commission maintains that it follows from the agreements referred to above, and already from the initial contract of 22 September 1975, that it was indeed the parties' intention to make the Systran translation system available to the Community and that the Commission had property rights or in any events utilisation rights in the EC-Systran versions. Those versions of the Systran software were developed at the Commission's expense (with a budget of around EUR 45 million, around EUR 14 million of which was allocated to the companies of the Systran group) and, moreover, could have been developed autonomously by the Commission. There is no doubt as to the possibilities of using the Systran software by the Community for the public sector in the broad meaning of the term, on the territory of the Community. In addition, the initial contract already provided that the Community would be free to use the system for any purpose, and therefore also outside the territory of the Community, including in the private sector, against payment of an additional royalty to WTC. In the Commission's contention, the 'philosophy' of that solution consists in considering that the partner WTC, having developed the system, and being authorised also to use it itself, obtained, at the end of several contracts, sufficient remuneration for the Community to be considered to have acquired the entire right and the freedom to dispose of it, and therefore the property right.

187 Admittedly, the Commission observes that that solution is not expressly envisaged as such in the 1987 collaboration agreement, but that agreement could only be interpreted in that manner. Any other interpretation than that aimed at conferring property rights in the EC-Systran Mainframe version of the Systran software on the Commission, without the applicants being able to rely on the right of objection, would not serve to explain the coherence between Articles 4, 4 *bis*, 5 and 8 of that agreement. In the Commission's contention, that agreement thus appears as a 'compromise solution' enabling any discussion between the parties on the questions of ownership relating to the different components of the Systran system, including the dictionaries, to be eliminated.

188 In the third place, even on the assumption that the Commission uses the EC-Systran Unix version of the Systran software in a modified form by comparison with the Systran Unix version, as indicated in the Bitan report, the applicants produce no evidence that the Commission infringed Belgian law or Luxembourg law. The Commission relies on various provisions of Belgian and Luxembourg law under which a computer program could be reproduced or adapted without its author's consent when that is necessary in order to enable the user to use the program in a manner consistent with its intention, including to correct errors (see Article 6 of the Belgian Law on computer programs, Article 28(4) of the Luxembourg Law on computer programs and Article 34 of the Luxembourg Law on copyright).

189 In the last place, the Commission categorically denies having communicated the source codes of the EC-Systran Unix version to Gosselies in the context of the work to be carried out under the contract at issue. Contrary to the assertions in the Bitan report, the work entrusted to that company did not require any intervention at the level of the kernel of the software. Following the award of the contract in issue, Gosselies had access solely to the source codes of the linguistic parts of the EC-Systran Unix version, in which the Commission had exclusive property rights owing to the

agreements entered into between the parties and the contribution of the Commission's services to the development of those parts.

190 Consequently, while there are similarities between the Systran Unix version and the EC-Systran Unix version of the Systran software, that does not prove that the Commission committed an infringement. The legal conclusions which the applicants draw from the similarity are incorrect. The Commission was perfectly entitled to modify or adapt the software and to entrust a third company with the modification or adaption of the software without the applicants' prior authorisation.

The rights invoked with respect to know-how

191 The applicants claim that know-how is defined as 'a body of technical information that is secret, substantial and identified in any appropriate form'. They rely, on that point, on the definition in Article 10 of Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article [81](3) [EC] to certain categories of technology transfer agreements (OJ 1996 L 31, p. 2). They also submit that it follows from that provision and from the general principles common to the laws of the Member States that know-how is an asset protected either in agreements on the transfer of know-how or confidentiality agreements, or in liability actions where that know-how is disclosed without the authorisation of its owner. In the present case, the applicants rely on their know-how in the Systran software, whether the Systran Unix version, developed and marketed by the Systran group, or the derivative and virtually identical EC-Systran Unix, developed by Systran Luxembourg for use by the Commission. That know-how, which the applicants protect and keep secret, results from a body of technical, computing and linguistic knowledge which takes concrete form in the kernel, the linguistic routines and the dictionaries and also be the accompanying documentation (see the Bitan report and the first Bitan technical note). In fact, the performance

of the tasks described in the invitation to tender published by the Commission requires the modification of the source code of the Systran software and therefore disclosure of that source code to the person awarded the contract. By entrusting the performance of such a contract to a third party, the Commission disclosed Systran's know-how without being authorised to do so. That disclosure constitutes a wrongful act capable of rendering the Community liable.

192 In response to the argument that the concept of know-how cannot be defined and that know-how cannot be protected as such, the applicants itself observe that it was the Commission itself that defined the concept of know-how in its regulations and that it follows from those provisions that the value of know-how lies in the considerable advance that its communication can secure, which means that it should remain secret, that it should not be known and be impossible to obtain. It cannot be denied that the Systran Unix version of the Systran software is a major innovation achieved by the Systran group, which demonstrates a real technical mastery and the existence of know-how achieved by research and experience, as is illustrated by the rewriting in C++ of the Systran system previously written in assembly language. Access to those elements would permit the revelation, in particular, of the manufacturing secrets of the software and would enable any company having access to it to manufacture competing software.

193 In response to the arguments that, first, the Commission cannot be required to make good the damage claimed on the basis of the wrongful disclosure of know-how, since only an action for unfair competition would permit reparation of an infringement of know-how, and, second, the Commission is not a trader and a competitor of the applicants, but a Community institution, the applicants contend that an action based on unfair competition is above all an action for non-contractual liability based on the triptych fault, damage and causation, which is indeed the case here. In any event, the applicants observe that French case-law, in common with that of a large number of European countries, has stated that 'mere disclosure of the know-how outside the undertaking was actionable independently of the use to which it may have been put'

and that 'a principal who transmits to a subcontractor the plans drawn up by another subcontractor committed a wrongful act engaging his civil liability' (judgment of the Paris Court of Appeal of 31 May 1995; judgments of the Court of Cassation, Commercial Chamber, of 28 January 1982 and 8 November 1994).

194 In response to the argument that it was the Commission that held know-how and it was Systran that gained from that know-how, the applicants observe that it reveals the Commission's approach of unlawfully appropriating the versions of the Systran software designed to operate in the Unix environment. The Commission has expressly recognised Systran's know-how on a number of occasions.

195 As regards the argument based on the confidentiality clause envisaged for the award of the contract to Gosselies, the applicants claim that the Commission cannot maintain that it would be able to conceal the Systran group's know-how if that infringement were to remain confidential. The Commission's reasoning, which amounts to saying that an employee who has been dismissed and who has not been expressly forbidden to commit infringements could freely commit such infringements without being concerned and could freely transmit to third parties, without the authorisation of the right-holder, works that would be protected if there were a confidentiality clause, is absurd.

196 The Commission observes that, although the applicants refer to the definition of know-how in Regulation No 240/96, they do not state the legal basis of the unlawful act which they impute to the Commission. It maintains, in that regard, that know-how is not protected, at least as such. There is no legislative provision containing a definition or protection of that know-how. In the Commission's contention, the

protection of know-how is traditionally granted solely on the basis of the legislation on unfair competition. It refers on that point, so far as Belgium is concerned, to the Law of 14 July 1991 on commercial practices and the information and protection of consumers (*Moniteur belge*, 29 August 1991, p. 18712) and, so far as Luxembourg is concerned, to the Law of 27 November 1986 regulating certain commercial practices and penalising unfair competition (*Mémorial* A 1986, p. 2214) and the Law of 30 July 2002 regulating certain commercial practices, penalising unfair competition and transposing Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (*Mémorial* A 2002, p. 1630). Under those legislative provisions, the conditions necessary for the protection of the applicants' alleged know-how under unfair competition cannot be satisfied in so far as the Commission and the applicants are not competitors, the Commission is neither a trader nor an industrialist nor an artisan, and the Commission's seat is in Belgium and not in France, which renders the French law inapplicable.

197 The Commission maintains that it has never been in possession of the source codes of the Systran Unix version, but only of those relating to the EC-Systran Unix version, in which it claims certain property rights and usage rights, relying on the various agreements entered into with the Systran group concerning the EC-Systran Mainframe version and the migration of that version to the Unix environment. The Commission also maintains that the agreements which it had entered into with the Systran group contained no confidentiality clause with respect to the Commission. Nor does any of those agreements refer to the provision of know-how by the Systran group or to the protection of such know-how. In addition, the Commission emphasises that both its services and companies not forming part of the Systran group but working alongside it significantly developed the Systran software and its applications. The applicants thus gained from the Commission's or third parties' know-how and were able to market the products of the Commission and of those third parties to their advantage. The Commission states that some of the individuals who worked on the EC-Systran Unix version for Gosselies previously worked for the company Telindus and then for Systran Luxembourg. Telindus, with which Systran became associated in order to create Systran Luxembourg, had entered into translation contracts with the Commission in 1990, which shows that Systran cannot claim rights and know-how in the EC-Systran Unix version.

198 Furthermore, in the light of Article 4(a) of the initial contract, paragraph 6 of the preamble to the collaboration agreement and Article 4 of that agreement, and also Article 1 of appendix 1 to annex II to the second migration contract, the award of the contract to Gosselies cannot have given rise to any unlawful act on the Commission's part.

199 The Commission also makes clear that the invitation to tender contains a confidentiality clause, under which the successful tenderer cannot use or disclose to a third party the information transmitted by the Commission (see Article II.9 of annex 1 to the invitation for tenders of 4 October 2003). Under that confidentiality clause, and in any event, Gosselies could not disclose any confidential information that the Commission might have communicated to it. The disclosure of such information to that undertaking could not therefore cause damage for the applicants. The Commission observes, last, that the programs and dictionaries of the EC-Systran Unix version are exclusively stored on its computers.

(b) Findings of the Court

200 The unlawful conduct alleged in the present case consists in the Commission's having granted to itself, without the applicants' consent, the right to have carried out the work mentioned in the invitation to tender, which was likely to modify or entail the disclosure to a third party of elements of the Systran Unix version used in the EC-Systran Unix version of the Systran software, which are protected by copyright or form part of the Systran group's know-how.

201 In order to establish whether such conduct is unlawful, it is necessary first of all to determine whether the applicants can rely, under the general principles common to the Member States, on the right to object to the Commission's entrusting to a third party, without their consent, work relating to certain aspects of the EC-Systran

Unix version. That right, which the applicants based on copyright and know-how in the original and earlier Systran Unix version, is disputed by the Commission, which claims that the applicants have not adduced evidence of the rights which they claim in that version of the software (see paragraphs 178 to 179 above).

202 If it should prove to be the case that such rights can be invoked by the applicants, it will then be necessary to examine the Commission's assertion that the Systran group authorised it to entrust to a third party the work defined in the contract in issue. In substance, the Commission contends that the various agreements concluded with the Systran group since 1975 and the financing allocated for that purpose confer on it sufficient usage rights and property rights concerning the various elements of the EC-Systran Unix version for it not to be required to take account of the right of objection raised by the applicants in respect of the rights held in the Systran Unix version (see paragraphs 181 to 187 above).

203 If it should prove to be the case that the Commission was not entitled to ignore the right of objection claimed by the applicants, it will next be necessary to analyse the content of the work to be carried out on the EC-Systran Unix version mentioned in the invitation to tender in order to ascertain whether it is likely to entail the modification or disclosure of elements or information protected by the copyright and know-how claimed by the applicants, which the Commission ultimately disputes (see paragraph 189 above).

The rights which the applicants invoke with respect to the Systran Unix version of the Systran software

204 In order to define the general principles common to the laws of the Member States on copyright, the applicants rely on the Berne Convention, Directive 91/250 and Directive 2004/48. They also mention the laws of the Member States and produce two

opinions of Professor Sirinelli, which deal with the question of the admissibility of an action for infringement brought by a legal person and access to the copyright protection of rewritten software, and also the second Bitan technical note.

205 As was explained at the stage of the examination of the Court's jurisdiction (see paragraphs 68 to 73 above), the Systran group is entitled to rely on copyright in the Systran Unix version of the Systran software which it developed and which it markets under its own name without having to produce other evidence.

206 Indeed, as a general rule, as the Commission claims, where there is a dispute over the existence of a right, it is for the person claiming that the right does or does not exist to substantiate that claim (*actori incumbit probatio*). In copyright matters, however, there is a legal presumption which enables the burden of proof to be reversed. Community law enshrines such a presumption in Article 5 of Directive 2004/48, entitled 'Presumption of authorship or ownership', which provides that '[f]or the purposes of applying the measures, procedures and remedies provided for in this Directive … for the author of a literary or artistic work, in the absence of proof to the contrary, to be regarded as such, and consequently to be entitled to institute infringement proceedings, it shall be sufficient for his/her name to appear on the work in the usual manner'. The applicants also relied on two illustrations of such a presumption in the laws of the Member States, while the Commission did not present any examples to the contrary from the laws of other Member States. In French law, the law of the place of establishment of Systran, which relies in the present case on copyright in the Systran Unix version of the Systran software which it markets, Article L 113-1 of the French Intellectual Property Code of intellectual property provides that '[a]uthorship shall belong, unless proved otherwise, to the person or persons under whose name the work has been disclosed'. In Belgian law, the law of the country in which the Commission has its seat, such a presumption is enshrined in the second paragraph of Article 6 of the Belgian Law on copyright, which provides that 'the author is presumed, unless proven otherwise, to be whoever appears as such on the work, by the mention of his name or

of initials enabling him to be identified'. Those different provisions were relied on as illustrations of a general principle common to the laws of the Member States.

207 As an example of provisions essentially found in all Member States, the applicants claim that the work is protected in France by the mere fact of its creation. Article L 111-1 of the French Intellectual Property Code provides that '[t]he author of an intellectual work shall enjoy in that work, by the mere fact of its creation, an exclusive intangible property right which shall be enforceable against all persons'. As for the definition of 'intellectual work', it follows from Article L 112-2 of the French Intellectual Property Code that '[t]he following … shall be considered works of the mind within the meaning of this Code: software, including the preparatory design material'. No element submitted by the Commission contradicts that example submitted by the applicants.

208 As soon as the work is created its originality is presumed. The problem which arises in that regard concerns whether one work takes precedence over another. In the present case, proof that the Systran Unix version takes precedence over the EC-Systran Unix version comes from the simple fact that the second version was developed following the first version and that, in order to develop it, the Commission called on the Systran group and its Systran Unix version. It should be observed on this point that, as it confirms in the rejoinder, the Commission does not deny that Systran has rights in the Systran Unix software which it markets.

209 Furthermore, it should be observed that, according to the data submitted by the applicants with respect to French law and Belgian law, an undertaking's capacity as author is enshrined in the case-law of those Member States: for France, the judgment of the First Civil Chamber of the Court of Cassation of 24 March 1993, according to which a legal person need merely establish that it exploits the work, without having to establish the origin of its rights, in order for its action to be admissible; and, for Belgium, the judgment of the Court of Cassation of 12 June 1998 (see the first Sirinelli report, pp. 18 and 26). In order to rebut that detailed legal opinion, the Commission

merely makes vague and brief allegations based on a criticism of the solution set out above in a part of legal writing and a judgment of 1993 of the Ghent Court of Appeal which predates the judgment of the Belgian Court of Cassation cited above. The question of the content of the laws of the Member States other than those cited by way of illustration by Professor Sirinelli is not mentioned or discussed by the parties.

210 The solution thus developed by the courts has the interest of limiting the possibilities for the infringer to plead that the action is inadmissible and of avoiding a situation in which the legal person is required to supply the complete chain of contracts of assignment since the author, the natural person, who was the initial holder of the right. Thus, in evidentiary terms, the reality of possession on the day on which the action is brought prevails over the history of the acquisition.

211 In response to the Commission's argument that the presumption relating to copyright is reversed in the case of the EC-Systran Unix version because that version is not marketed in packaging bearing the author's name and because it is sometimes called 'the Commission's MT system' or 'ECMT', it should be observed that, in order to provide a basis for their action in non-contractual liability, the applicants rely on the Systran Unix version and that they then proceed to compare that version with the EC-Systran Unix version in order to establish that a part of that derivative version comes from the earlier and original version. It follows from the foregoing that there is in fact a part called 'Systran' in the EC-Systran Unix version (namely, in particular, the essential part of the kernel), just as it is not disputed that there is a part called 'EC' in that version (namely, in particular, the dictionaries, which were created by the Commission). The discussion is therefore not about the EC-Systran Unix version, but about the rights on which the applicants can rely where works affecting the EC-Systran Unix version are carried out, on the basis of the rights held in the original and earlier Systran Unix version. Furthermore, and incidentally, it should be observed that it follows from the definitions provided in the model contract attached to the invitation to tender that the title 'Commission's Machine Translation Service (or System)' to which the Commission refers is defined as follows: 'The Commission's machine translation

service is built around EC Systran, a specific version of the Systran machine translation system originally developed by the World Translation Center, La Jolla, USA, which since 1976 has been further developed by the European Commission'. Thus, according to the actual words used by the Commission to third parties, the Commission's machine translation service or system has its origin in the machine translation system created and developed by the WTC group/Systran.

212 In conclusion, the applicants can rely, as the Systran group, on copyright in the Systran Unix version of the Systran software, marketed by Systran for several years and even before the updating of the EC-Systran Unix version by Systran Luxembourg in order to meet the Commission's specific needs.

213 In any event, the contractual provisions invoked by the Commission do not serve as the basis for an alleged right to approve the acquisition of the WTC group by the Systran group (see paragraph 179 above). The Commission relies in that regard on Article 5(c) of the initial contract entered into with WTC on 22 December 1975 to support its claim that no transfer of rights or obligations arising under the contract can take place without its prior consent. However, that provision states only: 'The Contractor shall not transfer or assign all or any part of the rights and obligations deriving from the contract, enter into subcontracts or allow third parties to replace him *de facto*, in the execution of the programme of work, without the prior and express authorisation of the Commission.' That provision is valid only for the duration of the contract, that is to say, for a few months, and the obligations the transfer and assignment of which are mentioned concerned only the use of the Systran system and not the associated property rights. That provision cannot therefore deprive WTC of the right to dispose of its property by being taken over at the end of 1985 by Gachot, which was to become Systran, as may be seen from the contracts submitted by the applicants in the annex to the reply. The Commission's argument that the legal and contractual basis of the applicants' copyright ought to have been identified must likewise

be rejected. Under the legal provisions set out above authors are under no obligation to register or file their works, as may be the case for patents.

214 Furthermore, it must be noted that the Commission was perfectly aware of the fact that the Systran group and the companies acquired by that group, in particular WTC, were the owners of intellectual property rights in the various versions of the Systran software commercially exploited since the 1970s, in particular with the Commission. The applicants provide numerous elements on which the existence of an intellectual work may be established in the matter and the fact that that intellectual work was created by Mr Toma, then acquired by the companies of the WTC group and the companies of the Systran group (see paragraphs 174 and 175 above).

215 As regards the protection invoked for know-how, the applicants claim that the disclosure by the Commission to a third party of the technical and secret information relating to the elements of the Systran Unix version found in the EC-Systran Unix version constitutes unlawful conduct capable of giving rise to non-contractual liability on the part of the Community, pursuant to the second paragraph of Article 288 EC. As explained at the stage of the examination of the jurisdiction of the Court (see paragraphs 78 to 81 above), it is also permissible to consider that the Systran group is entitled to rely on that protection of the technical and secret information relating to the Systran Unix version of the Systran software.

The assertion that the rights held by the Commission enable it to ignore the applicants' right of objection

216 In support of its allegation that it was not required to take account of the applicants' right to object to certain work relating to the EC-Systran Unix version being entrusted to a third party on account of the rights held in the Systran Unix version, the Commission claims that it has the necessary authorisations by reason of the rights assigned under the contracts concluded with the Systran group since 1975 and the financing allocated in that context.

217 That argument must be rejected. As the applicants correctly claim, an assignment of a right cannot be presumed. The fact of having financed an IT development does not mean that the person concerned acquires ownership. Such a legal consequence must be expressly mentioned in the contract in question. Assignments of rights are interpreted strictly and in favour of the author.

218 On that point, the applicants categorically deny having assigned any intellectual property rights whatsoever to the Commission, either in the Systran Mainframe version, or in the Systran Unix version, or in the original idea and writing on which they are based, or in the preparatory design material, in the data structures and still less in the kernel. The only rights which the applicants recognise to the Commission relate to the dictionaries, which were developed by the Commission's services without the intervention of Systran.

219 Furthermore, the contractual provisions on which the Commission relies, whether they relate to the EC-Systran Mainframe version or the EC-Systran Unix version, expressly reserve the hypothesis of the pre-existing intellectual property rights, whether rights relating to the Systran Mainframe version or to the Systran Unix version. It should be observed, moreover, that the provisions on which the Commission relies do not serve as the basis for a transfer of the copyright held by the signatory (WTC or the companies of the Systran group) in the different versions of the Systran software covered by those contracts. In particular, it should be observed that the only contractual provision relating to the EC-Systran Unix version, on which the Commission relies to justify its acts, is Article 13(1) and (2) of the migration agreements, which makes the property claimed by the Commission conditional on the absence of earlier intellectual property rights (see paragraphs 95 to 97 above). As regards the extract from Article 1 of appendix 1 to annex II to the second migration contract cited by the Commission, it stipulates: 'The migration works described in the present technical [a] nnex and also the making available to the parties of the system, the human resources

and the know-how of [Systran Software] and of [Systran] shall give rise to no additional payment, or to any monetary claim under any property right'. Apart from the fact that that provision expressly recognises Systran's know-how, it is also possible to state that it applies only for the monetary claims made in respect of the migration work carried by Systran Luxembourg for the Commission. However, the present action relates to the work entrusted by the Commission to a third party following an invitation to tender.

220 It should be observed, moreover, that the Commission itself observes that the 'order contract' argument, which enables it to interpret the contracts entered into between the companies of the WTC group and then the companies of the Systran group as contracts whereby those companies intended to transfer their copyright to the Commission, does not expressly follow from the contracts on which it relies. In fact, no contractual provision cited by the Commission can be interpreted in that sense, in so far as those different provisions refer to a usage right and not to a property right, or expressly reserve pre-existing intellectual property rights.

221 Last, the Commission's argument based on the 'philosophy' of those contracts must be rejected, since the philosophy of the contracts in regard to the making available of computing software consists precisely in limiting the user's rights to a licence to exploit the software, without allowing it to appropriate the software.

222 In conclusion, the Commission is unable to establish that it was contractually authorised by the applicants to proceed to the uses and disclosures made following the award of the public contract in issue, on the basis of the property which it could claim in the EC-Systran Unix version of the Systran software.

223 In the alternative, the Commission maintain that it can modify the EC-Systran Unix version without affecting any copyright which the Systran group may have in the Systran Unix version, since those modifications are authorised by law to any person benefiting from a usage licence.

224 The Commission relies on that point on Article 6 of the Belgian Law on computer programs, which states that the acts of reproduction and adaptation of a computer program referred to in Article 5(a) and (b) of that law are not subject to the authorisation of the owner when they are necessary in order to allow the person entitled to use the program to do so in a manner consistent with its purpose, including the correction of errors. The Commission also relies on Article 28(4) of the Luxembourg Law on computer programs, entitled 'Exceptions to the acts subject to restrictions', which provides that '[i]n the absence of specific contractual provisions, the acts envisaged in Article 28[(3)](a) and (b) are not subject to the authorisation of the owner where those acts are necessary in order to enable a user who has legitimately acquired the computer program to use it in a manner consistent with its purpose, including to correct errors'. Likewise, according to Article 34 of the Luxembourg Law on copyright, entitled 'Exceptions to acts subject to restrictions': '[i]n the absence of specific contractual provisions, the acts envisaged in Article 33 are not subject to the authorisation of the owner where those acts are necessary in order to enable a user who has legitimately acquired the computer program to use it in a manner consistent with its purpose, including to correct errors and integrate it in a database the operation of which the user must ensure'.

225 However, it must be observed that that legal exception to the acts subject to restrictions, that is to say, to acts requiring the author's consent, must be interpreted strictly. That legal exception provided for in Article 5 of Directive 91/250 to acts coming with

the exclusive right of the author of the program defined in Article 4 of that directive is intended to apply only to works carried out by the legitimate acquirer of a computer program and not to works entrusted to a third party by that acquirer (see opinion of Professor Sirinelli on the scope of the right for the legitimate user of a computer program to modify that program, and Mr Bitan's third technical note on the nature of the work entrusted to Gosselies; see also the parties' answer to the questions put by the Court concerning user rights). That exception is also limited to the acts necessary to enable the legitimate acquirer to use the computer program in a manner consistent with its purpose, including to correct errors. In the present case, the Commission has failed to indicate in what way the modifications requested could be entrusted to a third party and in what way they were necessary to correct errors or to permit the program to be used in a manner consistent with its purpose. There is nothing in the file that would enable it to be understood on what basis that exception would allow the improvements, adaptations and add-ons to be made to the computer program used by the Commission (on the nature of the works entrusted by the Commission to a third party, see paragraphs 227 to 250 below). Those works come within the restricted acts in that they concern the adaption, arrangement or any other alteration of the computer program within the meaning of Article 4 of Directive 91/250. At the hearing, the applicants thus submitted that, contrary to the Commission's contention, its other customers seek its authorisation in order to carry out modifications of the kind that Gosselies was requested to carry out.

226 In conclusion, the Commission has been unable to establish in the present case why it could rely on the legal exception to the acts subject to restriction in order to entrust to a third party the works to be carried out in the context of the contract at issue. It should be observed, moreover, that, in any event, the Commission claims that the impugned acts, namely, in its submission, the correction and improvement of the dictionaries, are at least in part covered by the exception provided for in Article 5 of Directive 91/250 (see the Commission's answer to the third series of questions,

observations on the price of a licence to use the Systran software, point 23), which means implicitly that it recognises that certain works requested in the context of the invitation for tenders at issue may not come within that exception and may constitute a restricted act in the sense defined by Article 4 of Directive 91/250.

227 It must therefore be considered, first, that the applicants can rely on copyright and the protection of know-how in the information and elements relating to the original and earlier Systran Unix version which are to be found in the derivative EC-Systran Unix version; second, that the Commission has been unable to establish that the applicants did not have the rights claimed with respect to the Systran Unix version, that those rights were expressly or implicitly assigned to the Commission by virtue of the contracts concluded with Systran group or the financing allocated with respect to the EC-Systran Mainframe and EC-Systran Unix versions; and, third, that the Commission has also been unable to establish that it was entitled to have the requested works carried out by a third party without obtaining the Systran group's prior consent.

The nature of the works entrusted to a third party by the Commission

228 In order to establish the breach of the right of objection claimed by the applicants, the applicants must demonstrate that the works referred to in the invitation to tender, and to which the Systran group did not give its consent, were capable of entailing the modification or the transmission of information or elements relating to the Systran Unix version which are found in the EC-Systran Unix version.

229 In the present case, in order to establish such a wrongful modification or disclosure, it is appropriate first of all to observe that the Commission's invitation to tender related to the maintenance and linguistic enhancement of the Commission's machine translation service. That invitation to tender contained the following services:

'3.1 Dictionary coding: Dictionary coding based on feedback, glossaries and texts submitted to [machine translation] by users, including the "levelling-up" of dictionaries between pairs of languages. A utility will be provided to help with coding. … This task also includes:

The revision and encoding of [machine translation] dictionary files which have been prepared for the Commission's [machine translation] service by other sources.

The harvesting of users' custom dictionary files — if requested, the contractor will review user entries, and where terms are of general use, include them in the main dictionaries, ensuring that there is no conflict with existing terms.

3.2 Enhancements, Adaptations and Additions to Linguistic Routines: Specific improvements to Analysis, Transfer and Synthesis programs based on feedback, glossaries and texts submitted to [machine translation] by users. For example: the treatment of hyphenated words in source and target output, capitalisation, the English genitive *s*, homographs, and respect of Commission conventions (amongst others, for the writing of numbers).

3.3 System updates: Updates to dictionaries and programs will take place as required by the Commission. The contractor will work closely with the Commission to ensure the smooth integration of updates.

3.4 Documentation updates: The contractor shall update as required any documentation (e.g. coding manuals) on parts of the system for which he is responsible and shall store revised documents at the Data Centre. The updated versions shall include a description of, and explanation for, improvements and changes made under contract …)'

230 In the applicants' submission, in order to carry out those tasks it was necessary to modify and adapt the kernel of the system, the linguistic programs and the data

structure of the Systran software (EC-Systran Unix version), which entails modifying the source code of the software and the preparatory design material. The need to have the source codes and to modify them in order to carry out the tasks described in the invitation to tender is corroborated by paragraph 3.7.5 of the invitation to tender, which states that one of obligations for the contractor is to ensure that the latest versions of the source code, the dictionaries and programs are correctly installed and compiled on the Commission's servers.

231 Furthermore, the first Bitan technical note states, without being challenged by the Commission, how the performance of the works entrusted to Gosselies under the contract awarded to it would inevitably affect aspects of the EC-Systran Unix version used in the Systran Unix version.

232 In the functional description of the elements of the Systran software, the first Bitan technical note states the following:

— the functionality 'breakdown of hyphenated words' mentioned in the invitation to tender (paragraph 3.2 of the invitation to tender, see paragraph 229 above) is carried out in the kernel in the context of the document pre-treatment modules;

— the functionality 'capitalisation', namely the treatment of capital letters from one language to another, mentioned in the invitation to tender (paragraph 3.2 of the invitation to tender, see paragraph 229 above) is carried out in the kernel in the context of the text post-treatment modules;

— the rules on typographical formatting (for example, the management of numbers or spaces) mentioned in the invitation to tender (paragraph 3.2 of the invitation to tender, see paragraph 229 above) are implemented in the kernel in the context of the text post-treatment modules;

— the rules on the consultation of dictionaries (for example for the reinstatement of the English genitive) mentioned in the invitation to tender (paragraph 3.2 of the invitation to tender, see paragraph 229 above) are implemented in the kernel, which contains specificities for each language.

233 As explained above, the parties are agreed that the kernel is at the core of the 'linguistic development' It is not made up of static libraries that are independent of the 'linguistic development', but, on the contrary, is an integral and essential part of it. On that point, the first Bitan technical note states that in a 'normal framework of linguistic development' the kernel must be modified in numerous cases, notably when the following works envisaged in the invitation to tender are carried out: 'Enhancements, adaptations and additions to linguistic routines' (paragraph 3.2 of the invitation to tender, see paragraph 229 above and the first Bitan technical note).

234 It follows from the foregoing that, in order to be able to carry out the tasks entrusted to it, the successful tenderer must have available the source codes of the EC-Systran Unix version so that he will be able to adapt and modify them in order to carry out the specific enhancements of the programs for analysis, transfer and synthesis defined in paragraph 3.2 of the invitation to tender and to effect the updates requested in paragraphs 3.3, 3.4 and 3.7.5 of the invitation to tender.

235 The arguments put forward by the Commission cannot affect that assessment. In that regard, it must be borne in mind that the Commission categorically denies having communicated the source codes of the EC-Systran Unix version in the context of the works to be carried out in order to perform the contract awarded to Gosselies. It states that the works entrusted to that company did not require any intervention on the kernel of the software.

236 That assertion is based on a technical note of 16 January 2008 of DGT intended to respond to the first Bitan technical note and referred to hereinafter as 'the second note' or 'the second DGT note'. In the introduction to the second note, DGT observes that the first Bitan technical note seeks primarily to demonstrate that all modifications of a linguistic type take place in the 'analysis zone' and that they inevitably result in treatment by the kernel and therefore in a modification of the actual kernel. However,

it is emphasised in the second DGT note that the works envisaged in the invitation to tender which concern the linguistic routines do not require a modification of the kernel.

237 In support of that argument, DGT stresses the importance of not confusing the container (the structure defined at the level of the kernel) with the thing contained (the codes assigned by the linguistic programs and having a linguistic connotation) in the 'analysis zone'. The principle of the modularity of the components of the translation system requires a clear separation, not only between the different linguistic modules but also between the linguistic modules and the kernel. In DGT's submission, the kernel has a marginal linguistic scope. In that regard, DGT observes that, even though it is true that the kernel controls the execution of the translation process, that it interacts with all the components and that it contains certain functionalities that might vaguely be defined as being of a linguistic nature (segmentation into phrases, treatment of hyphenated words or words that are not found), it is also true that the modules of the kernel have a general scope, whereas the linguistic routines are specific to a source language, a pair of languages or a target language.

238 In examining the examples provided in the invitation to tender of 4 October 2003 and highlighted as elements necessarily requiring an intervention on the kernel, DGT puts forward the following two considerations:

— '[c]ontrary to Systran's' allegations, the reference to the [linguistic routines] in the invitation to tender … correctly expresses the nature of the services to be provided, namely specific enhancements to the programs for the analysis, transfer and synthesis, based on feed-back from users. The examples of problems set out in the invitation to tender are given on a purely indicative basis and are clearly of a linguistic nature';

— '[i]t seems clear that linguistic problems will primarily be resolved in [linguistic routines], which, as their name implies, is what they are intended to do. And even if certain problems stated were treated at the kernel level, they may also and are in fact treated at the level of the [linguistic routines] and dictionaries. As in any complex system, the procedures for treating linguistic phenomena are many and complex'.

239 It follows from the foregoing that DGT does not really dispute Mr Bitan's assertions that certain tasks entrusted in the context of the contract awarded require an intervention on the kernel. Thus, DGT expressly recognises that the kernel of the Systran software, the structure of which is the same in the Systran Unix and EC-Systran Unix versions, contains certain functionalities, like the functionality of treating the hyphenated words mentioned in the invitation to tender. Likewise, DGT implicitly recognises the asserions made by Mr Bitan by merely stating that 'even if certain problems stated were treated at the kernel level, they may also and are in fact treated at the level of the [linguistic routines] and dictionaries'. It is possible either to encode directly in the dictionaries all the words containing a hyphen or to request that a program be written or enhanced that would enable hyphenated words to be treated systematically without having to be encoded, one by one, in the dictionaries. Mr Bitan observes, on that point, without being contradicted by DGT, that the functionality 'breakdown of hyphenated words', that is to say the computer program that deals systematically with that issue, is carried out in the kernel in the context of the document pre-treatment modules. In addition, DGT cannot convincingly assert that the examples set out in the invitation to tender and highlighted by Mr Bitan as requiring an intervention on the kernel are purely indicative. According to the actual terms of the invitation to tender, they are examples provided by users of the EC-Systran Unix version of the specific enhancements to be made in the context of the contract.

240 As concerns, more particularly, the treatment of hyphenated words (for example the word 'hospital-based'), DGT observes that it is difficult to describe the role played by the kernel as linguistic, since it merely looks first of all in the dictionary for the word as written and then, if the result is negative, repeats the search, deleting the hyphen (it looks for the word 'hospitalbased'). If the search is still unsuccessful, the two words ('hospital' and 'based') are then sought separately. Words of this type can easily be treated if they are encoded directly in the dictionary, as has been done for the word 'medium-sized', which appears frequently in Community documents. Once encoded, the word requires no further treatment and causes no problem. The essential part of the treatment is then carried out in the linguistic programs and first of all at the analysis level in the program Ehmrt000.c. Next, the treatment continues at the transfer level. Lexical routines which treat hyphenated words are created for most pairs of languages on the basis of the English

241 However, those factors do not alter the need for an intervention on the kernel in order to implement the contract awarded. It matters little that a different approach is possible, just as it is irrelevant whether the content of the functionality requested is linguistic in nature. What matters is the approach adopted in the EC-Systran Unix version, which is here the same as that adopted in the Systran Unix version. There is thus nothing to contradict the applicants' IT expert's assertion that the treatment of hyphenated words by a computer program relating to that functionality is indeed carried out at the level of the kernel. On the contrary, that assertion is confirmed by DGT's second note (see paragraph 239 above). On that point, moreover, the invitation to tender does not request the successful tenderer to encode all existing hyphenated words, but to improve the computer program relating to that functionality.

242 As regards the treatment of capital letters, DGT observes that the role played by the kernel is not at all linguistic, but rather mechanical. For example, the role of the program Rtrprint.c, which is a program in the kernel, mentioned in the first Bitan technical report, is merely to apply in the target language the decisions taken by the linguistic programs, and in particular the lexical routine Lefweekd.c, which is a program in the linguistic routines, a routine which treats the days of the week. Likewise, the decision to apply the functionality 'capital' according to the rules of grammar and the linguistic context is taken in the linguistic programs and results primarily from the analysis carried out by the program Epropnou.c, which treats proper names, initials, acronyms, etc. The treatment may continue at the level of the transfer in the lexical routines, as in the English-Italian language pair. DGT also observes that the decision on capitals may even be taken at the level of the dictionaries. For example, all proper nouns (Panama, Palestine, Parkinson) or all German nouns are coded with a capital at the beginning of the word.

243 However, those elements do not call in question the need for an intervention on the kernel in order to implement the contract awarded. It matters little in that regard what is the linguistic or mechanical nature of the intervention carried out, since the only issue is the fact that unauthorised modifications are made to elements protected by copyright and know-how. Likewise, it is irrelevant whether such an approach is possible: what matters is the approach taken in the EC-Systran Unix version, which here is the same as that adopted in the Systran Unix version. In the present case, the invitation to tender requested the successful tenderer to enhance the computer program relating to that functionality and there is nothing to contradict the applicants'

IT expert's assertion that the computer treatment of capitals from one language to another is carried out in the kernel in the context of the text post-treatment modules. On the contrary, DGT expressly recognises that the kernel at least contributes to that process, since the decisions taken by certain routines are implemented in the kernel. Incidentally, as regards the source codes of the Systran Unix and EC-Systran Unix versions, it should be observed that Mr Bitan not only demonstrated that 80 to 95 % of the source codes were similar in the kernels of both versions, but also that other similarities existed at the level of the linguistic routines, since a large part of the routines of the Systran Unix version are found in the EC-Systran Unix version. Just like the EC-Systran Unix version, the Systran Unix version has a program enabling it to treat capitals. Here again, the invitation to tender does not request the successful tenderer to encode all existing words with an initial capital, but to enhance the computer program relating to that functionality.

244 DGT does not envisage the question of compliance with the Commission's conventions, which according to Mr Bitan requires an intervention on the kernel.

245 As regards the treatment of the English genitive 's' (for example the word 'operator's'), DGT emphasises that the role of the kernel in the treatment of words of that type is very limited and consists in deleting the 's' to enable a search for the simple word (that is to say, the word 'operator') in the dictionary. Furthermore, as the treatment works perfectly, there is no reason to alter it.

246 Those elements do not affect the need for access to the kernel and for its modification in order to implement the contract awarded. On the contrary, DGT expressly confirms the role of the kernel in the treatment of the English genitive and merely indicates that the role of the computer program developed in order to ensure that functionality worked perfectly, whereas it follows from the actual wording of the

invitation to tender that this was one of the specific enhancements to be carried out by the successful tenderer.

247 The nature of the interventions requested of Gosselies was the subject-matter of several questions in the context of the second series of questions put by the Court and at the hearing. In particular, the Court requested the Commission to state whether it had actually given access to the source codes of the kernel of the Systran software to enable the works entrusted Gosselies to be carried out, whether or not those works concerned, incidentally or principally, other parts of the Systran software. In the event that the Commission should maintain the assertions that, first, the works in question did not require any intervention at the level of the basic kernel and, second, the Commission did not disclose the source codes of the EC-Systran Unix to Gosselies, the parties were requested to state whether and how those assertions might be verified technically.

248 In answer to those questions, the Commission maintained its assertions that 'the works entrusted to Gosselies did not require any intervention at the level of the basic kernel' and stated that 'it ha[d] not given access to the source codes of the kernel of the Systran software or disclosed the source codes of the EC-Systran Unix system to Gosselies'. The Commission also referred to the confidentiality agreement relating to the invitation to tender of 4 October 2003, which has little relevance to the issue of the Commission's liability in the present case. As regards the technical verification of those assertions, which are contradicted by the wording of the invitation to tender and the first Bitan technical note, the Commission maintains in its answer to the second series of questions that:

'In view of the competences required to carry out the acts referred to above and the qualifications as linguists (and not as IT technicians) of the members of Gosselies' staff who were to perform the contract with the Commission, it may be confirmed that those persons were wholly incapable of intervening on the basic kernel. In that regard, it may be made clear that the works carried out at that time by Gosselies are not carried out by the Commission's linguists.'

249 That answer must be compared with the answer provided by the applicants, whose expert, Mr Bitan, describes in his third technical note, concerning the method of verifying the Commission's technical assertions, the approach to be followed in order to compare the two versions of the EC-Systran Unix software, namely the version which precedes the invitation to tender and the version which follows that invitation tender and enables the Commission's expectations to be satisfied. That point was discussed at the hearing, during which the Commission observed that such an approach was not as difficult to implement as it thought.

250 Consequently, in the light of the arguments put forward by the applicants and the answers to the questions put by the Court, it must be considered that the Commission has not succeeded in calling in question the data presented by the applicants in support of their argument that the works which Gosselies was requested to carry out required access to the source code of the EC-Systran Unix version and the modification of that source code. The Commission's position is contradicted both by the technical data produced on that point by the applicants and by its own invitation to tender. Furthermore, the applicants maintain that 'Gosselies, which up to the time of the invitation existed only in embryonic form and had virtually no employees, succeeded, by hiring former employees of Systran Luxembourg in acquiring the human resources to satisfy the invitation to tender and secure the contract'. However, it is apparent from the activity reports of Systran Luxembourg produced in Annexes 4 and 5 to the Commission's answer to the first series of questions that that company carried out tasks of an technological rather than a linguistic nature. At the hearing the Commission produced the curricula vitae of Gosselies' employees, which shows that they were not only linguists but also technologists perfectly capable of accessing the source codes of the Systran software and working on those codes, including the codes corresponding to the kernel or the related linguistic routines.

251 Last, it should be observed that, in answer to the third series of questions on the factors to be taken into consideration in assessing the damage, the Commission submitted in an annex an expert report dated 3 May 2010 and prepared by Mr L. Golvers, a Civil Engineer, an IT expert approved by the Belgian courts, on the alleged wrongful acts committed by the Commission in relation to the modification of the kernel of the EC-Systran Unix version and the disclosure of Systran's know-how, 'the Golvers

report'; see also the note of observations on the Golvers report prepared by Mr Bitan, without prejudice to the Court's decision on the admissibility of the Golvers report, produced as an annex to the applicants' answers to the fourth series of answers and also a witness statement dated 23 April 2010 submitted by Mr A. Seck, an administrator at Gosselies, who explains the content of the work carried out by that company for the Commission ('the Gosselies statement').

252 It must be held, however, that both the Golvers report and the Gosselies statement were submitted at an extremely late stage, without the slightest explanation for the delay in submitting them being given at the time when they were produced. That lack of explanation is all the more incomprehensible because the different aspects of the unlawfulness of the Commission's conduct, and especially the aspects relating to the IT expert report expected from the Commission to refute the arguments presented the applicants' IT expert and the information that might be submitted to assist a better understanding of the works carried out by the successful tenderer, had formed the subject-matter of the two previous series of questions and were thoroughly discussed at the hearing.

253 Consequently, in accordance with Article 48(1) of the Rules of Procedure, it must be held that the Golvers report and the Gosselies statement are not admissible and that they should not be taken into account in the assessment of the parties' arguments.

254 In any event, as regards the Golvers report, it must be emphasised that that report, although prepared by a civil engineer, and IT expert approved by the Belgian courts, does not contradict the results of the IT expert report submitted by the applicants' expert on that point. Mr Golvers does not base his report on the different versions of the Systran software, whether Systran Unix or the different versions of EC-Systran Unix, before and after the completion of the works envisaged by the invitation to tender in issue, and he did not examine the result of the works carried out by Gosselies

on behalf of the Commission. In that regard, it must be borne in mind that, in answer to a written question put by the Court, and at the hearing, the applicants' IT expert clearly stated how it was possible for the Commission to compare the different versions of the EC-Systran Unix software in order to confirm or reject the indications that the different works envisaged in the invitation to tender required access to the kernel and to the related linguistic routines and had the consequence of modifying them. The Commission was on several occasions given the opportunity to exonerate itself from any liability by producing material proof that no modification of the data protected by Systran's copyright and know-how had been made following the completion of the works envisaged by the invitation to tender. The Golvers report does not provide such material proof.

255 The Golvers report is based exclusively on the pleadings, annexes and procedural acts of the present case, including the different technical reports of the applicants' IT expert, and interviews with officials of DGT and also with Mr D. Buisoni, an administrator at Gosselies and a former programmer at Systran Luxembourg. At the technical level, Mr Golvers refers in substance to the importance which the Commission attaches to the dictionaries which it has compiled, which is not in issue and in no way prevents the Systran group from relying on intellectual property rights in the kernel of the Systran software, whether the initial Systran Mainframe version, or also, and above all, the Systran Unix version, the only version relevant to the present case.

256 Mr Golvers also emphasises that, by definition, Gosselies' staff did not have the technical competences necessary to carry out interventions on complex programs written in C, although he also states that Gosselies was composed of staff from Systran Luxembourg, which was perfectly capable of working on the different versions of the Systran software.

257 In addition, in his description of the works carried out by Gosselies in order to satisfy the invitation to tender, Mr Golvers places particular emphasis on the works intended to respond to paragraph 3.1 of the invitation to tender, namely dictionary coding, and scarcely refers to the works associated with the implementation of paragraph 3.2, that is to say the enhancements, adaptations and additions to the linguistic routines.

258 As regards the coding, this was achieved through the intermediary of an external software, called 'DMP', which is not mentioned in the invitation to tender and the existence of which was raised for the first time at this stage of the proceedings, namely on 5 May 2010. According to the Golvers report, dictionary coding consisted in the addition and correction of 10 577 entries. The Gosselies statement states in that regard that Gosselies' 'task was to audit the electronic dictionaries which over the years contained thousands of adaptations to be carried out' and that, in order to do so, it 'used the DMP software which enabled it to visualise the inconsistencies more readily, to correct them and … to protect the dictionaries on an open format of databases'. In that regard, in the light of the observations submitted by the applicants' expert on that point, it must be held that it seems unlikely that the Commission paid approximately EUR 2 million to request an external service-provider to correct 10 577 entries in a program, or, according to the calculations carried out by Mr Bitan taking the duration of the contract into account, the equivalent of 2.5 entries per day per employee of Gosselies, whereas a Systran lexicograph does an average of 400 entries per day.

259 As regards the other works, the Golvers report states briefly that Gosselies 'carried out most of the work of updating the dictionaries and a few adaptations of the linguistic routines, not in the "kernel" but on the files automatically extracted from Mainframe Amdhal'. The Gosselies statement does not even refer to that aspect of the works carried out except, perhaps, ambiguously, when it states that 'the ultimate aim of the adaptations at the level of the dictionaries was to enhance the translation'. To follow Mr Golvers' argument, even if it should prove that the 'few' adaptations of the linguistic routines carried out by Gosselies made it essential to work on the source

code of the EC-Systran Unix version, the Systran group would have no copyright or know-how in that regard, since it would involve only the Unix version of a source code which previously existed solely in the EC-Systran Mainframe version in which the Systran group could not claim the slightest rights and which could not be connected to the Systran Unix version. In that regard, it should be borne in mind that it follows from the investigation that the Systran Unix version is a version that can be described as a primary, original and protectable work, that the EC-Systran Unix version is a derivative version of Systran Unix which has several substantial similarities at the level of the kernel and the linguistic routines and that the Commission has never been in a position to establish the elements of the kernel and the linguistic routines of Systran Unix which it claimed to own by virtue the rights which it held in the dictionaries and the related linguistic routines of EC-Systran Mainframe, without the applicants being able to rely in that regard on the rights held in the original Systran Mainframe version.

260 On the other hand, the applicants claim and have shown to the requisite standard that the modifications required by paragraph 3.2 of the invitation to tender require access to the elements of the EC-Systran Unix version used in the Systran Unix version and the modification of those elements. The Commission has failed to adduce evidence to the contrary, by making a comparison between the different versions of the Systran software in order to demonstrate that none of the data contained in the kernel of the Systran Unix version was modified by the works carried out following the invitation to tender.

261 It follows from the foregoing that, by granting itself the right to carry out works that necessarily entailed the modification of the elements relating to the Systran Unix version of the Systran software found in the EC-Systran Unix version, without having obtained the prior consent of the Systran group, the Commission committed an unlawful act by reference to the general principles common to the laws of the Member State applicable in such matters. That unlawful act, which constitutes a sufficiently manifest infringement of the Systran group's copyright and know-how in the Systran Unix version of the Systran software, is of such a kind as to give rise to non-contractual liability on the part of the Community.

B — *The damage sustained and the causal link*

1. The damage sustained by Systran Luxembourg and the causal link

(a) Arguments of the parties

262 The applicants claim that the damage sustained by Systran Luxembourg comes to at least EUR 1 170 328. That damage consists, first of all, in the loss of EUR 571 000 which that company made in 2003. In effect, the invitation to tender launched by the Commission in 2003 was preceded by the cessation of the business relationship with Systran Luxembourg, which entailed the dismissal of that company's staff. That loss must therefore be taken into consideration, since the decision to dismiss the staff was taken only after the cessation of the business relationship with the Commission. The damage caused to Systran Luxembourg also consists in the loss of profit on the contract awarded to Gosselies following the invitation to tender which infringed the Systran group's rights. The applicants put that loss of profit at 30 % of the net profit. As the contract awarded to Gosselies envisaged a turnover of EUR 890 000 per annum over four years, that damage is equal to 30 % of EUR 3 200 000, or EUR 960 000. At the stage of the reply, the applicants stated that that amount is EUR 599 328, in the light of the calculation submitted by the Commission, according to which the 30 % should be calculated on the sum of EUR 1 997 760. The damage sustained Systran Luxembourg follows directly from the Commission's acts, which are the sole origin of the dismissal of that company's staff. Likewise, the loss of profits sustained by Systran Luxembourg is directly linked to the Commission's decision to award the contract to Gosselies, in breach of the Systran group's rights.

263 The Commission contends that the applicants have not established the reality of the damage claimed so far as Systran Luxembourg is concerned. In addition, the conduct attributed to the Commission is not at the origin of the loss made by that company in 2003 or of the loss of profits claimed for the years 2003 to 2007. Systran Luxembourg and Systran did not respond to the invitation to tender of 4 October 2003. Furthermore, even on the assumption that that loss does exist, the basis for calculation used should take into account the total turnover resulting from the contracts entered into with Gosselies following the invitation to tender of 4 October 2003, that is to say, EUR 1 997 760 over four years and not EUR 3 200 000 as the applicants state. In addition, Systran Luxembourg's objects are diversified and include 'IT developments, notably in the sphere of natural languages, the sale and provision of IT services and software, the treatment, acquisition and translation of text in any form whatsoever'. The fact that Systran Luxembourg ceased trading cannot therefore be attributed to the Commission.

(b) Findings of the Court

264 The applicants claim compensation in the sum of EUR 1 170 328 for the damage allegedly sustained by Systran Luxembourg, that is to say, EUR 571 000 for the loss associated with the cessation of its activities and EUR 599 328 for the loss of profits associated with the award of the contract to Gosselies.

265 However, it should be observed that the event giving rise to the loss associated with the cessation of activities consists, as the applicants made clear at the hearing, in a manoeuvre by the Commission designed to force Systran Luxembourg to dismiss its staff. Even on the assumption that such a manoeuvre, which resulted in Systran Luxembourg ceasing trading, were demonstrated, it has no connection with Systran's copyright and know-how in Systran Unix, the infringement of which constitutes the illegality invoked by the applicants and upheld in the present case. In addition, the damage consisting in the loss of profits cannot be directly attributed to the Commission, as Systran Luxembourg did not present its candidature in the invitation to tender in issue, which led to the contract being awarded to Gosselies.

266 In the absence of a causal link between the Commission's impugned conduct and the damage alleged by Systran Luxembourg, that company cannot be compensated for the loss which it invokes.

267 In consequence, Systran Luxembourg's claim for compensation for the losses associated with the cessation of its activities in 2003 and for the loss of profits associated with the award of the contract to Gosselies must be rejected.

2. The damage sustained by Systran and the causal link

268 At this stage, it is important to bear in mind that the Community's non-contractual liability under the second paragraph of Article 288 EC requires that the damage for which compensation is sought be actual and certain (see *Agraz and Others* v *Commission*, paragraph 126 above, paragraph 27 and the case-law cited) and that there be a sufficiently direct causal link between the conduct of the institution and the damage (see, to that effect, Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier and Others* v *Council* [1979] ECR 3091, paragraph 21).

(a) Arguments of the parties

The different forms of damage, its reality and the causal link

269 In the first place, the applicants claim that the material damage suffered by Systran comes to a total of EUR 46 804 000. That damage follows directly from the Commission's acts. It is the result, first of all, of the depreciation of Systran's shares in Systran

Luxembourg. The value of those shares, recorded at 100 % in Systran's accounts, is EUR 1 950 000, to which another provision of EUR 64 000 should be added, making a total of EUR 2 014 000. Systran's material damage also consists in the loss of the economic value of its intangible assets. In awarding the contract to Gosselies and thus disclosing Systran's know-how without having obtained its consent, the Commission deprived those assets of their economic value, which lies in their secret nature. The damage which the Commission must make good in its entirety thus corresponds to the value of the know-how disclosed. The applicants also emphasise that the alleged infringement and disclosure of know-how cause them real damage. They produce a number of statements from distributors, financiers and auditors showing the extent to which the Commission's approach with respect to their copyright causes them serious damage.

270 The Commission takes issue with that evaluation of the material damage, on the grounds that the reality of the damage relied on is not established and that, even if it is the author of the alleged harm for which it is claimed to be responsible, those wrongful acts did not entail the total depreciation of Systran Luxembourg's shares and damage corresponding to the total loss of the pecuniary value of Systran's intangible assets. Nor have the applicants proved the slightest causal link between the alleged unlawful acts and the material damage alleged to have been suffered. In addition, it follows from Systran's annual report for 2005, which sets out the accounts for 2001 to 2005, that 2003 was particularly prosperous by comparison with the preceding years (2001 and 2002) and the following years (2004 and 2005). That annual report does not explain the fall in turnover by the loss of the Commission as a customer or by the existence of an alleged infringement by the Commission. In that regard, the annual report states:

'Generally, computer programs are not patentable inventions. The Group retains full copyright in relation to its technology and its products. Thus far the Group has not been involved in any intellectual property disputes … There is no dispute or

arbitration that might have or have had in the recent past a significant impact on the Group's financial situation, activities or results.'

271 As regards the various statements produced in order to illustrate the reality of the damage, the Commission disputes, first of all, the auditors' statement, on the ground that, according to that statement, the Commission's alleged disclosure justifies in part the provision made by Systran. The Commission asserts, in substance, that this is an 'opportunity entry' made with respect to a year, 2008, when all undertakings were prudent. The Commission also maintains that it would be manifestly incorrect that its conduct disrupted the business relations of the Systran group, since it was the Systran group that ensured that the dispute was reported in the media and since neither the Commission nor Gosselies is a competitor of the Systran group. The documents provided by Systran's distributors were manifestly drawn up after the event and it would be absurd to maintain that the alleged infringement can have had an impact on those distributors. The business difficulties are attributable, rather, to the appearance of competing solutions, to the obsolescence of various versions of the software or to the economic crisis in 2008/2009. The Commission maintains, moreover, that the assertion that its conduct could represent a significant barrier for investors interested in the Systran group is not true. Their conduct might in effect be explained by the fact that the Systran group lost the Commission as customer. No causal link is demonstrated in that regard.

272 In the second place, the applicants evaluate the non-pecuniary damage suffered by Systran at, at least, EUR 2 million. That non-pecuniary damage can only be estimated, even though it is certain, since the Systran group has made considerable losses owing to the Commission's disclosure. The Systran group's reputation is also undermined by the fact that the applicants were forced to bring proceedings against an institutional customer, which significantly harms their image and their business relationships. In addition, the Commission's conduct can only encourage the Systran group's other customers and potential groups to attempt to appropriate its system by other than commercial means.

273 In that regard, the Commission observes that Systran alone is responsible for ensuring that the dispute was covered in the media and that it should not be compensated for any non-pecuniary damage. The Commission also emphasises the if the victim of an infringement is unable to adduce evidence of his loss or of the extent of it, compensation may be refused or limited to a 'symbolic franc'. No proof has been adduced of the existence of non-pecuniary damage of EUR 2 million or of the causal link between the Commission's alleged conduct and that alleged damage.

The initial evaluation of the loss in value of the intangible assets

274 In response to the Commission's observations on the loss in value of the intangible assets, the applicants produced a note drawn up by their financial expert (note of Mr A. Martin, chartered accountant and auditor in France approved by various French courts including the Court of Cassation, on the evaluation of Systran's intangible assets; 'the applicants' first financial note'). As regards Systran, a 'single-product' company, the only assets that can be valued are the software and the know-how shown in part as fixed assets in its accounts. However, that book value does not constitute the real value of those assets, which can be estimated on the basis of the company's stock market value. In the present case, the evolution of Systran's share price makes it possible to establish a clear correlation between the Commission's wrongful acts and the loss of Systran's stock market value and therefore the loss in value of its intangible assets. In the applicants' first financial note, Mr Martin reaches the following conclusion: 'Systran's intangible assets [could] be evaluated on the basis of the stock market capitalisation at the beginning of 2004 in the region of EUR 43 [to] 45 million. Those intangible assets essential represent the machine translation software, Systran's sole product, and the related know-how. At the end of 2004 those intangible assets represented a value of only EUR 23 [to] 24 million, there being no explanation for the depreciation of EUR 20 [to] 21 million other than the Commission's acts … which led to the disclosure of those elements and their impugned use.'

Consequently, the applicants claim at this stage that the Commission should be ordered, with respect to the loss in value of the intangible assets, to pay the sum of EUR 44 790 000 in so far as the disclosure causes those assets to lose their entire economic value. At the very least, the Commission should be ordered to make compensation for the certain and already-established damage consisting in the loss in value attributed by the market, namely the sum of EUR 21 million resulting from the disclosure.

275 In response to the applicants' first financial note, the Commission submits a note drawn up by its financial expert (note of Ms P. Tytgat, a corporate auditor in Belgium). Thus, in response to the assertion that 'after a fall in 2004 largely attributable to the loss of the Commission [as a customer], [Systran's] turnover remained steady in 2005 before again falling in 2006', the Commission's expert observes that it was Systran Luxembourg and not Systran that had the Commission as a customer and that such an assertion seems to demonstrate that the fall in Systran's turnover was not the result of the alleged infringement. In order to refute the assertions that 'the reduction in the stock market capitalisation in 2004 … can only be explained by the Commission's acts' and 'the regular fall in Systran's [share] price in 2004 as news of the Commission's disclosure of the software and the related know-how spread, when stock market values were increasing, the CAC thus increasing in annual monthly value from 3 636 [points] in January to 3 796 [points] in December 2004', the Commission's expert observes that the evolution of Systran's shares should be compared not with that of the 'CAC 40' index but with the 'Software and IT services' sectoral index of the Paris Stock Exchange. That evolution shows that Systran's share price followed the sectoral index, which proves that the alleged infringement is not at the origin of the damage claimed. In addition, the value of an intangible asset depends on a financial evaluation at a given time and not on the share price, which depends on a whole series of other factors. The applicants are therefore wrong to claim that the value of a company's intangible assets is automatically and without distinction a function of its stock market capitalisation. The Commission's expert also emphasises that Systran's assets do not consist solely of the Systran software. It markets other software and has a trade mark which, given its position on the translation software market, constitutes another important element of its intangible assets. Systran is therefore not a 'single

product' company and there can be no question of maintaining that the value of its business can have been effected.

The other evaluations of the damage

276 Following the hearing, and in answer to the third and fourth series of questions on the evaluation of the damage, the applicants mention the two methods of evaluation envisaged by Article 13 of Directive 2004/48, namely the 'negative economic consequences' method, which takes into consideration 'all appropriate aspects', including lost profits and loss in value of the intangible assets, and the 'lump sum compensation' method, which sets the amount of damages as a lump sum on the basis of elements such as the amount of royalties which would have been due if the infringer had requested authorisation to use the intellectual property right in question. The applicants' answers are accompanied by two notes drawn up by their financial expert (Mr Martin's note of 23 April 2010 and Mr Martin's note of 2 June 2010, 'the applicants' second financial note' and 'the applicants' third financial note' respectively).

277 As a preliminary point, the applicants refer, first of all, to the reality of the damage suffered owing to the loss of value of the intangible assets. They emphasise that, during 2004, within scarcely 12 months of the award of the contract, those intangible assets depreciated by 46 %, or an amount of between EUR 20 and 21 million, while over the same period the stock market capitalisation of shares in the sector increased by 1.5 %, according to the data of the Software and IT services index of the Paris Stock Exchange. Only the Commission's disclosure of Systran's know-how can explain such

a fall in its share price. That loss of value subsequently increased and reached between EUR 43 and 45 million in March 2010.

278 The applicants maintain, next, that the loss in value of the intangible assets must be taken into consideration under the 'negative economic consequences' method and under the 'lump sum compensation' method. Two approaches enable that loss of value to be assessed: the evaluation by determination of loss of future cash flow proposed at the hearing by Ms Tytgat, the Commission's financial expert, or evaluation by comparison with stock exchange capitalisation initially proposed by Mr Martin. The applicants claim that the former approach is less relevant than the latter, since it is based on projected and hypothetical elements. However, that approach was followed by Mr Martin in the applicants' second financial note, which concludes that Systran's damage would then be EUR 33.5 million (EUR 18.5 million for the period 2004 to 2010 and EUR 15 million for the future, according to the data converted for current value to take account of the first half of 2010). As regards the second approach, the applicants observe that the indication that factors other than the Commission's illegal conduct could explain the loss of stock market capitalisation is relevant in theory, but has no consequence in the present case, since no other factor would explain the 46 % fall in stock market valuation in 2004 compared with a 1.5 % increase in the reference index. In any event, whatever approach is taken, the damage resulting from the loss of value of the intangible assets comes at the minimum to the sum of EUR 20 million.

279 In answer to the Court's question on the evaluation of the loss of value of the intangible assets by the application of a rate of 5 % to the turnover achieved since 2004, the applicants claim that such an approach can be followed only under the 'lump sum compensation' method and not under the 'negative economic consequences' method. In application of the 'lump sum compensation' method, the following elements would then have to be taken into consideration: the amount of the royalties which the Commission ought to have paid in order to be able to modify Systran's source

code (EUR 10.9 million for the period from 2004 to the first half of 2010), plus, first, a 'supplementary amount' taking account of other elements such as the weakening of Systran's competitive position, loss of customers and damage to its capacity to develop, which only the award of the royalties referred to above could make good — in that regard, Mr Martin observes that this supplementary amount may be determined by the application of a percentage to turnover, on condition that worldwide turnover and not European turnover is taken into account, that turnover for 2003 is taken into consideration as the basis for calculation, and that a rate not of 5 % but of 10 % is applied —, and, second, future damage, evaluated by Mr Martin at EUR 15 million.

280 The Commission disputes at the outset the reality of the material damage suffered by the Systran group, since it does not follow sufficiently directly from the Commission's alleged conduct. Relying on its rights in the dictionaries, the Commission maintains that it was entitled to have the works which it requested Gosselies to undertake carried out without the Systran group's consent. The Commission also notes that Gosselies' employees were employees of Systran Luxembourg and that they were familiar with the know-how which the Commission is alleged to have disclosed. The Commission's answers were accompanied by a note drawn up by their financial expert (Ms Tytgat's note of 3 May 2010 and Ms Tytgat's note of 10 June 2010; 'the Commission's second financial note' and 'the Commission's third financial note', respectively).

281 In answer to the Court's question about the evaluation of a part of the damage suffered by the application of a rate of 5 % to the turnover achieved since 2004, the Commission applies the analysis of Ms Tytgat, according to which 'to refer to 5 % of the turnover achieved by Systran since 2004 is irrelevant'. Ms Tytgat emphasises that no element of fact supports the conclusion that the value of Systran's business can have been changed since 2004. As it did not respond to the Commission's invitation to tender in 2004, Systran 'positioned itself badly in one of its activities at a given moment'.

In the complex matrix of Systran's activities, costs, margins and turnover, it is not possible to determine in a precise, certain and proven way the financial effects of a given action, just as it is not possible to evaluate damage on the basis of the loss of stock market capitalisation. In addition, since 2005 various elements could affect the value of the Systran group. The only way in which to evaluate future damage consists in referring to the 'loss of future cash flow generated strictly by the lost asset', using a bottom-up approach, on the basis of '[the] contracts, [the] cost centres, of a revenue-generating unit' and not top-down approach, on the basis of 'total turnover for all products, all contracts, all countries, with unproven standard coefficients' Furthermore, Systran's activity is 'multiproduct, multisegment, multiterritory, multiportal and, accordingly, multicustomer'. According to Systran's annual report for 2008, the activities of software publishing, which are cyclical, are falling, since version 6 of the Systran software is almost out of date and everyone is waiting for version 7. The multidimensional matrix to which Ms Tytgat refers and the short life of certain products marketed by Systran mean that certain components of its turnover are volatile and that any reference to turnover is perilous. Last, the essential part of Systran's turnover comes from large Internet operators, which provides that the damage is non-existent, since those customers are still present.

(b) Findings of the Court

282 In the present case, the applicants claim compensation of EUR 46 804 000 for the material damage suffered by Systran as a result of the Commission's conduct, namely EUR 2 014 000 for the depreciation of Systran Luxembourg's shares and EUR 44 790 000 for the loss in value of the intangible assets including losses already established of EUR 21 million.

The depreciation of Systran Luxembourg's shares

283 As regards the damage linked with the depreciation of Systran Luxembourg's shares after it ceased trading, it should be observed that Systran cannot claim compensation under this head since the reason why Systran Luxembourg ceased trading lies, according to the applicants, in a manoeuvre on the part of the Commission designed to force it to dismiss its staff (see paragraph 265 above). Even on the assumption that such a manoeuvre were proven, it is not linked with Systran's copyright and know-how in Systran Unix, the infringement of which constitutes the unlawful act found in the present case. In addition, if the manoeuvre in question should consist in the award of the contract in issue to another company, the damage relied on under that head could not be directly attributed to the Commission, since Systran Luxembourg did not submit its candidature in the invitation to tender in issue, which led to the contract being awarded to Gosselies.

284 In the absence of a causal link between the Commission's conduct and the alleged damage, Systran's claim for compensation for the losses associated with the depreciation of Systran Luxembourg's shares must be rejected.

The loss in value of the tangible assets

285 As regards the damage associated with the loss in value of Systran's intangible assets, the applicants must be compensated should it prove that the damage in respect of which compensation is claimed is real and certain and that there is a sufficiently direct causal link between the Commission's conduct and the damage.

— The initial evaluation proposed by the applicants

286 It should be noted at the outset that the evaluation initially proposed by the applicants for the purpose of assessing the loss of value of Systran's intangible assets cannot be accepted. That evaluation is based, in effect, on the comparison of Systran's stock market value with an index representing the 40 main companies quoted on the Paris Stock Exchange (the CAC 40 index) (see paragraph 274 above and the applicants' first financial note). In the present case, such a comparison is not probative, since it is too general to enable the damage cause by the Commission's conduct to be identified in a satisfactory manner.

287 As the Commission's financial expert correctly stated, the loss of stock market capitalisation can be explained by a large number of factors and not just by the Commission's conduct.

288 Admittedly, the applicants' financial expert observed in that regard that in his opinion no element other than the wrongful disclosure of Systran's know-how could explain the fall in the share price in 2004, which would also be significant if it were compared with a relevant sectoral index, the 'Software and IT services' index of the Paris Stock Exchange instead of with the CAC 40 index.

289 However, and contrary to the applicants' contention, it has not been sufficiently established that the regular fall in Systran's share price in 2004 occurred as news of the Commission's disclosure of the software and the related know-how spread. In effect, it is apparent on reading the various documents in the file that that news spread rather in 2005 or, in any event, became public in 2006. Thus, the complaint against the Commission was submitted to the European Ombudsman on 28 July 2005, who presented the results of his investigation on 28 September 2006. Likewise, in the Commission's

second financial note, Ms Tytgat observes, after stating that 'no element of fact permits the conclusion that the value of Systran's business … appeared to be altered after 2004 (see site and other communiqués)', that 'it is known, moreover, and for example, that the actual disclosure of the existence of the dispute by Systran, from the time of its press release of 18 October 2006 at 6.48 a.m. and its annual report for 2006, had a negative impact on the value of the group'. There was no reference to that dispute in Systran's annual report for 2005 (see paragraph 270 above). Furthermore, the various press articles annexed to the application in order to illustrate the media coverage of the present case all date from the end of 2005 or 2006.

290 Consequently, in the light of the data produced by the parties, the argument that Systran's share price over the period under consideration depended on a large number of factors likely to influence it cannot be discounted, which means that the applicants cannot rely on the entire loss in value of Systran's intangible assets, which they evaluate at a sum of between EUR 43 and 45 million since 2004.

— The reality of the damage suffered by Systran and the causal link between that damage and the Commission's conduct

291 None the less, that insufficiently precise initial evaluation cannot lead the Court to disregard the fact that in the present case the Systran group suffered real and certain damage attributable in a sufficiently direct manner to the Commission's conduct.

292 In answer to the second series of question, seeking in particular to measure the effects of the Commission's conduct on the activities of the Systran group other than by comparison with Systran's stock market value, the applicants communicated a whole series of elements in order to illustrate the loss in value of Systran's know-how following its disclosure by the Commission.

293 First, the applicants submitted two statements by their distributors, which explain the extent to which the Commission's attitude at the time of and after the award of the contract in issue causes actual damage to the Systran group in its business activities. That damage takes the form of the loss of potential customers and the complication of discussions with current customers, who do not understand why they have to pay for something which has no value for the Commission (see the statements submitted on behalf of two distributors annexed to the applicants' answer to the second series of questions).

294 Contrary to the Commission's contention (see paragraph 271 above), those statements illustrate the perfectly plausible fact that a dispute between an undertaking which markets computer software of which it is the author and one of its institutional customers, which claims to be entitled to engage a third party to carry out works on software derived from earlier software without having obtained the authorisation of the author of the original work, makes that undertaking's business relations with its current and potential customers more difficult. In that regard, the Commission cannot take issue with Systran, a company quoted on the Stock Exchange, for having informed the public, in accordance with its obligations, that there was a dispute between Systran and the Commission about the intellectual property in the computer software which it markets. Likewise, the fact that the Commission does not market computer software has no impact on the fact that, as a result of its conduct, the Systran group's customers may be uncertain as to the precise extent of the rights held by Systran in the computer software which it markets. There is thus nothing to indicate that the statements produced by the applicants must be discounted because of their

alleged opportuneness. On the contrary, those statements highlight the specific impact of the Commission's conduct on Systran's business activities.

295 Second, the applicants provided several statements or witness statements drawn up by financial companies, which demonstrate that the Commission's conduct made Systran less attractive to its shareholders, current or potential investors or again acquirers (see the documents submitted on behalf of several investment companies and one bank annexed to the applicants' reply to the second series of questions).

296 Contrary to the Commission's contention (see paragraph 271 above), those different witness statements and statements explain in a sufficiently probative manner the reactions of several investors when they are considering whether to maintain, invest in or acquire a company marketing computer software the rights in which are disputed by the Commission. Some investors thus refused to invest in Systran. Another decided to sell a significant shareholding at a loss, stating expressly that 'Systran's dispute with the Commission and in particular the Commission's contestation of Systran's rights and know-how prevents the company from developing commercially and thus deprives investors of all share price visibility'. In that regard, it should be observed that the Commission is not just any customer, but an institutional customer with a particularly substantial legal service and significant intellectual property expertise. The nature of the dispute must also be taken into consideration, since the dispute in question it is not merely a commercial dispute but concerns Systran's copyright and know-how relating to the computer software which bears its name and constitutes the most important asset for that company, whose entire activity turns around the development and marketing of its Systran machine translation software.

297 In that regard, the Commission's argument that the obsolescence of the different versions of the Systran software is at the origin of Systran's difficulties cannot be upheld. As the applicants state in answer to the fourth series of questions, the marketing of

a new version of a piece of software does not affect its author's intellectual property rights in the preceding version, which retains an economic value. The Systran group continues to derive the benefits from the preceding versions from its customers by providing maintenance, selling additional licences to cover new pairs of languages or other servers, selling related services or integration agreements with other software publishers. In addition, the applicants emphasise convincingly that the EC-Systran Unix version, which corresponds to the Systran Unix 4 version, has the same architecture as the subsequent versions (that is to say, versions 5 to 7). Those versions all have a common source code and are based on the same software, namely the Systran software in its Unix version. Those different versions are distinguished not by their architecture but by the addition of new functionalities, the improvement of the translation algorithms and the enhancement of the linguistic resources.

298 Third, the applicants emphasised that the loss of value of Systran's intellectual property rights associated with the Commission's conduct increases with time. They observe that on 31 December 2008 Systran was led to make a provision of a significant sum for the depreciation of its intangible assets 'owing to the significant damage resulting from the infringement of its intellectual property rights and the disclosure of its know-how by the Commission, the difficulties encountered in 2008 and the exceptional instability of the current economic environment' (see Systran's auditors' statement of 13 October 2009). The Commission's conduct therefore justifies, at least in part, that provision in Systran's accounts.

299 It must be held that that statement permits it to be established that the provision of EUR 11.6 million for depreciation of the intangible assets entered in the 2008 accounts is linked with the three reasons set out in those accounts, the first being the dispute with the Commission. In spite of the observations submitted by the Commission (see paragraph 271 above), which endeavour to stress another reason set out in

that statement, namely the exceptional financial crisis which began in 2008, it cannot be precluded that a dispute over the infringement of intellectual property rights and the wrongful disclosure of Systran's know-how is capable of having an impact on the assessment of that company's intangible assets.

300 Consequently, the Commission's conduct in the present case has a sufficiently direct causal link with the damage suffered by Systran, first of all at the commercial level, owing to the loss of potential customers and the complication of discussions with current customers; next, at the financial level, owing to the reduction of its attractiveness to shareholders, investors or possible acquirers; and, last, with Systran's need to record at the end of 2008 a part of the provision of EUR 11.6 million for depreciation of its intangible assets owing to the Commission's conduct. That damage occasioned by the Commission's conduct is real and certain, as shown in the documents presented in that regard by the applicant, even though it could not be quantified precisely. The question of the non-monetary damage is examined at paragraphs 324 and 325 below.

— The lump-sum evaluation of the loss

301 In that context, the parties were questioned about the method that might be used to evaluate the amount of the real and certain damage, attributable in a sufficiently direct manner to the Commission's conduct in the present case.

302 In answer to the third series of questions, the applicants relied on the content of Article 13 of Directive 2004/48, which provides that:

'1. Member States shall ensure that the competent judicial authorities, on application of the injured party, order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder damages appropriate to the actual prejudice suffered by him/her as a result of the infringement.

When the judicial authorities set the damages:

(a) they shall take into account all appropriate aspects, such as the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the right holder by the infringement;

or

(b) as an alternative to (a), they may, in appropriate cases, set the damages as a lump sum on the basis of elements such as at least the amount of royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.

...'

303 The application of the 'negative economic consequences' method gives rise to significant difficulties in the present case, since the Commission's financial expert systematically objects to all attempts at evaluation made by the applicants' financial expert. In substance, Ms Tytgat merely criticises the evaluations and criteria used by Mr Martin to evaluate the difference negative economic consequences suffered by Systran, and in particular the loss of profits, but without making a parallel evaluation.

304 By way of illustration, when Mr Martin attempts to evaluate the damage linked with the loss in value of the intangible assets by referring to the method suggested by Ms Tytgat at the hearing, namely taking into account the loss of cash flow strictly generated by the assets concerned, he is criticised for using data, resulting from the financial analysis carried out by a consultancy, the 'accuracy of the correlation' of which is not demonstrated (the Commission's third financial note, p. 4). However, no replacement criterion is actually proposed, even though Mr Martin had stated that that financial analysis, by an independent consultancy, had been carried out on the occasion of the proposed issue of EUR 7 million of underwritten bonds which Systran had unsuccessfully attempted to implement at the beginning of 2004, which corresponds to the period to be taken into consideration (the applicants' second financial note, footnote 2, and the annex to that note).

305 Likewise, when the applicants state, without being seriously contradicted by the Commission, first, that Systran's copyright in the Systran Unix version of the Systran software constitutes that company's core activity and, second, that the Commission's refusal to give effect to those rights is capable of having an impact on that company's turnover and its development, Ms Tytgat continues to require a detailed and documented evaluation based on 'that is to say, a contract, a cost centre, a revenue-generating unit', to take account of what is alleged to be a multitude of products sold by Systran or activities carried out by it, which none the less prove to be all linked with the development and marketing of the Systran software (the Commission's second financial note, p. 8). However, when Mr Martin attempts to evaluate the damage

in consideration of the economic value of the contract specifically awarded to Gosselies by the Commission, which corresponds to a net margin estimated at 30 % of the turnover actually achieved, which is below the real margin achieved by the Systran group on that type of contract according to the data supplied by the applicants (the applicants' answer to the fourth series of questions, paragraph 12), that assessment is criticised by Ms Tytgat on the ground that 'to propose to quantify the net margin on the basis of a standard proportion of the turnover of a single operation is not rigorous … [as a] standard rate can be validated only on a sample of data which are probative and over time' (the Commission's second financial note, p. 3, and the Commission's third financial note, p. 5). To follow the observations of the Commission's financial expert, it would be almost impossible to evaluate concretely the damage suffered by Systran as a result of the Commission's conduct in the absence of exhaustive or sufficiently precise data in that regard, irrespective of the criterion adopted for the purpose of making that evaluation.

306 Consequently, in view of the difficulty in determining the criteria to be applied for the purpose of assessing the negative economic consequences suffered by Systran, it is appropriate in the present case to set a lump sum of damages, under the lump sum compensation method, on the basis of elements such as at least the amount of royalties or duties which would have been due if the infringer had requested authorisation to use the intellectual property right in question. In application of that method, the elements set out below should be taken into consideration.

307 The first element to be taken into consideration is the amount of royalties which would have been due if the infringer had requested authorisation from Systran to use the intellectual property rights in question to carry out the works relating to the enhancement, the adaptations and the additions to the linguistic routines listed in the invitation to tender which require access to the elements of the Systran Unix version which are reproduced in the EC-Systran Unix version and the modification of those elements.

308 In view of the nature of those works, and for the reasons convincingly explained by the applicants in their answers to the third and fourth series of questions, the determination of such a lump sum amount must be made by reference to the price of a licence authorising the licensee to modify the source code of the software and not a simple licence to use the software. Such a licence to modify the source code is unusual, as it is not part of the traditional economic model of software publishers. In effect, such a licence deprives the publisher of any possibility of selling its holder licences for new versions of the software, and also of providing the services which the publisher alone is normally authorised to provide for that software. In addition, such a licence can jeopardise the publisher's know-how, as it may lead to the source code being communicated to third parties. The sale of a licence to modify the source code authorising the licensee himself to develop the software therefore amounts to waiving future revenue resulting from the usage licences that might be derived from that software.

309 In that context, it is necessary to evaluate the theoretical amount of such a licence to modify the source code by following the financial approach suggested by the applicants' financial expert in the answer to the third series of questions. That approach takes as the starting point for the determination of the theoretical price of a licence to modify the source code the price of an annual licence for the Commission to use the Systran software.

310 In that regard, the applicants' financial expert, Mr Martin, evaluates the price of an annual licence for the Commission to use the Systran software at EUR 760 000. That price was evaluated on the basis of the price paid each year by an Internet service company operating on a worldwide basis for the right to use the Systran software, the annual price paid in the past by two other United States companies of worldwide importance, one of which operates an Internet search engine, while the other is a specialist in the publication of computer software, and the price of around EUR 1.3 million paid by a national administration of a size more or less comparable to that of the Commission for a simple update enabling it to use version 7 of that software

and which, like the Commission, already has a permanent licence to use the software without being entitled to modify it.

311 Mr Martin's references to private companies are criticised by the Commission's financial expert, Ms Tytgat, on the ground that they are inappropriate examples with nothing in common with the rates applicable to the Commission. The licences referred to are licences with commercial and not private repercussions. The Commission does not use the Systran software to improve its commercial offer to the public at large, but to provide it to a few hundred officials. For that reason the value taken as the starting point for the definition of the price of a licence to modify the source code is incorrect and the remainder of the reasoning should be disregarded.

312 The Commission maintains that the applicants' financial expert ought to have taken as the starting point a price of around EUR 15 000, which corresponds to the price of a licence for non-business use, intended for the administration, as illustrated by the price offered to the European Anti-Fraud Office (OLAF) by a software distributor for an annual licence for the Systran Enterprise Server 7 software, Standard Edition (or around EUR 15 000 for the use of that software by 2 500 users and around EUR 15 000 for the 'English World Pack', which includes several languages, namely English, Arabic, Chinese, Dutch, French, German, Greek, Italian, Japanese, Korean, Polish, Portuguese, Russian, Spanish and Swedish). The Commission also refers, in its answers to the third and fourth series of questions, to the price range between EUR 15 000 (up to 100 users) and EUR 150 000 or more (for an indeterminate number of users and for the complex needs of large undertakings requiring integration) envisaged in a Systran press release for the various types of licence to use the Systran Enterprise Server 6 software (Workgroup Edition, Standard Edition and Global Edition).

313 It should be observed at the outset that the parties' financial experts do not disagree as to the possibility of taking the price of an annual licence for use of the Systran

software by the Commission into consideration as a starting point for the determination of the price of a theoretical licence to modify the source code of that software, but that they disagree on the value to be given to such a licence. On that point, by way of comparison, it should be observed that the Commission states in its answers to the third and fourth series of questions that Gosselies was paid EUR 1 925 280 to carry out the works assigned to it, which extended over three years, from 2004 to 2006. Consequently, Gosselies received on average EUR 641 760 each of those years for carrying out the works requested by the Commission.

314 As regards the Commission's criticisms concerning the price of the various usage licences paid annually by the three undertakings of worldwide importance cited by the applicants' expert (see paragraph 310 above), examination of the financial documents relating to the Systran group shows that the essential part of that undertaking's revenues comes from three large customers. The reference document of 2008, lodged on 29 April 2009 with the Autorité des marchés financiers française, thus states that in 2004 the Systran group's five leading customers accounted for 60.9 % of its turnover, the first and second customers producing exactly the same sum (a share of 14.8 %) and that in 2008 its five leading customers represented 42.3 % of its turnover, the first customer representing 10.9 % of the EUR 7.6 million turnover, or a little over EUR 760 000. That element can therefore be invoked as an element to be taken into consideration for the purpose of evaluating the price of an annual licence. That represents, in a way, a maximum amount.

315 It should also be observed that, contrary to the impression given by the Commission, which bases itself in that regard on documents of the Systran group which refer to licences to use the Systran Enterprise Server software, version 6 or 7, that undertaking does not appear to charge a special price for the administrations when it distributes software or has it distributed. As the Commission acknowledges, moreover, the Systran group's pricing policy for licences to use its software depends essentially on

the edition sold. By way of example, by comparing the data supplied by the Commission with respect to versions 6 and 7 of the Systran Enterprise Server software, the least expensive edition of that software, the 'Workgroup Edition', which may be used by a single production server, with the Windows operating system, by up to 100 persons, is available from EUR 15 000; the intermediate edition, the 'Standard Edition', which may be used on two production servicers, with the Windows and Linux operating systems, by up to 2 500 persons, is available from EUR 30 000; and the most developed edition, the 'Global Edition', which may be used by an unlimited number of production servers, with the Windows, Linux and Solaris operating systems, with no limit on the number of users, is available from EUR 150 000. In their observations on the Commission's assertion that the price of a usage licence could not exceed EUR 150 000, the applicants emphasise that the price referred to on the basis of a Systran group press release relating to version 6 of the Systran Enterprise Server software clearly states that that is a minimum price, as the word 'from' indicates. According to what the applicants state, that price is a starting price for a single pair of languages and a single server.

316 In the light of the different arguments and the documents cited in support of those arguments, the amount of a hypothetical annual licence for use of the Systran software by the Commission, used as the starting point for the calculation of the price of an annual licence to modify the source code, should be fixed at EUR 450 000. The amount suggested by the applicants' expert is too high, since even though the version used by the Commission is provided to more than 2 500 users, that number is much lower than the number of users in the three undertakings of global importance which the applicants' expert cites, which in all likelihood correspond to the three largest contracts signed by the Systran group. Furthermore, the amount suggested by the Commission is too low, on the ground that the sum of EUR 150 000 corresponds to a starting price for the solution desired by the Commission and that, as the applicants claimed without being challenged by the Commission, a national administration at least as large as the Commission paid a sum equivalent to EUR 1.3 million to update the version of the Systran software which it uses.

317 On the basis of that starting amount of EUR 450 000, it is appropriate to determine the amount of the royalties which would have been due if the infringer had requested authorisation from Systran to use the corresponding intellectual property rights to carry out the works envisaged in the invitation to tender. Applying the calculation method suggested by the applicants' financial expert, which is not seriously challenged by the Commission (see paragraph 319 below), the amount of the annual royalty for modification of the source code can validly be fixed at twice the amount of an annual usage licence, or EUR 900 000, taking account, as the applicants' financial expert did, of the fact that the Commission already had the right to use that software and of the fact that that software is not used by the general public.

318 For the years 2004 to 2010, the amount of the annual royalties for modification of the source code can thus be fixed at EUR 7 million (that is to say, EUR 0.9 million, corresponding to the amount of the annual royalty for modification of the source code multiplied by 7.76, which corresponds to the current value coefficient calculated by the applicants' financial expert in consideration of the no-risk rate of 4 % for the period 2004 to 2010, or in total EUR 6 984 000, rounded up to EUR 7 million).

319 In that regard, it should be observed that the Commission does not really dispute the method suggested by the applicants' financial expert and applied by the Court. The Commission merely reiterates on this point the assertion of its financial expert, who, in answer to the fourth series of questions, states solely that the applicants' expert 'undertakes calculations of capitalisation rather than present value for periods which have ended' and that 'the better financial doctrine recommends splitting the observations periods up into various horizons with particular parameters, rather than capitalising indiscriminately'. However, it should be noted that the method adopted by the applicants' financial expert is not based on the 'capitalisation' referred to by the Commission's financial expert, but rests on the present value of the data at the no-risk rate of 4 % for the period 2004 to 2010, which corresponds to a reasonable rate that can be applied to the period under consideration. The Commission puts forward no

relevant reasons capable of explaining why the Court could not use that method to fix the amount of the royalties that would have been due if it had requested the necessary authorisation from Systran to carry out the work in issue.

320 The second element to be taken into consideration is what is called a 'supplementary' amount, which is necessary to take account of the other material elements which the award of the abovementioned royalties alone cannot make good. In effect, the payment in arrears of the amount of the royalties which would have been due if the Commission had requested authorisation from Systran to use the intellectual property rights in question to carry out the works in issue cannot in itself make good the damage suffered by that undertaking since 2004.

321 In that regard, in the light of the documents in the file and in particular of the different witness statements produced by the applicants to establish the impact of the Commission's unlawful conduct on Systran's activity and development, it must be considered that the activity and development of that undertaking have been affected each year since 2004 to the extent of a lump sum amount of EUR 650 000 (or approximately 6 % of the turnover achieved in 2003).

322 That supplementary amount, converted to current value for the years 2004 to 2010, can thus be fixed at EUR 5 million (that is to say, EUR 0.65 million, corresponding to the annual lump sum referred to above multiplied by 7.76, which corresponds to the present value coefficient calculated by the applicants' financial expert in consideration of the no-risk rate of 4 % for the period 2004 to 2010, or EUR 5 044 000, rounded down to EUR 5 million).

323 Conversely, in the light of the documents in the file, the Court does not accept that account should be taken in the present case, in the context of a lump-sum assessment

of the damage suffered, of the 'future' damage evaluated by the applicants' financial expert at EUR 15 million. The estimation supplied in that regard is not based on sufficiently probative material data to justify such an award.

324 The final element to be taken into consideration in the lump-sum assessment of the amount of the damages is the non-monetary damage suffered. It should be observed in that regard that, by its conduct, the Commission denied Systran the rights which it could derive from its creation. That conduct is all the more serious because, as an institution, the Commission is at the origin of the various provisions harmonising Community law on copyright which have not been complied with in the present case. Systran should therefore be compensated for the non-monetary damage suffered as a result of the Commission's conduct.

325 As the applicants have failed to explain the reasons why that compensation should be set at at least EUR 2 million, it seems appropriate in the context of determining the lump sum amount of the damages to order the Commission to pay compensation for the non-monetary damage caused by its conduct, evaluated at the symbolic sum of EUR 1 000.

326 It follows from the foregoing that a lump sum of damages of EUR 12 001 000 should be awarded to Systran to compensate for the damage suffered as a consequence of the Commission's conduct, namely:

— EUR 7 million corresponding to the amount of the royalties that would have been due between 2004 and 2010 if the Commission had requested authorisation to use Systran's intellectual property rights to carry out the works relating to

enhancements, adaptations and additions to the linguistic routines listed in the invitation to tender, which make it necessary to have access to the elements of the Systran Unix version used in the EC-Systran Unix version of the Systran software and to modify them;

— EUR 5 million corresponding to the supplementary amount, namely the impact which the Commission's conduct had on Systran's' turnover between 2004 and 2010, and more widely on the development of that company;

— EUR 1 000 for non-monetary damage.

C — *The measures other than the award of damages*

1. Arguments of the parties

327 The applicants maintain that the general principles referred to in the second paragraph of Article 288 EC must permit reparation of the damage already caused, but must also make it possible to put an end to the unlawful conduct, contrary to the Commission's assertions. By their claim that the infringement should cease immediately, the applicants seek to ensure the practical effect of the judgment to be delivered.

328 The Commission contends that the measures sought by the applicant over and above the award of monetary compensation cannot be adopted by the Court. It claims that the Court, in the exercise of its powers, cannot address instructions to the institutions or substitute itself for them.

2. Findings of the Court

329 The applicants request the Court to order, first, the immediate cessation of the acts of infringement and disclosure committed by the Commission; second, the confiscation of all the material held by the Commission and by Gosselies on which the computer developments carried out by Gosselies on the basis of the EC-Systran Unix et Systran Unix version are reproduced in breach of Systran's rights, and their reinstatement to Systran, or at least their destruction under supervision; and, third, publication of the judgment, at the Commission's expense, in specialist journals and reviews and also on specialist internet sites to be chosen by Systran.

330 In that regard, it must be borne in mind that an institution whose conduct has been declared illegal is required to take the measures necessary to comply with the judgment of the Court (see, by analogy, Article 266 TFEU). It is therefore for the Commission to draw all the necessary conclusions in order ensure that all Systran's rights in the Systran Unix version of the Systran software are taken into account so far as the works relating to the EC-Systran Unix version of that software which infringe Systran's copyright and know-how are concerned. Otherwise, and since the damage made good in the present case applies only for the period between 2004 and the date of delivery of the judgment, Systran would be entitled to lodge a fresh claim with the Court for compensation for the damage which it might still sustain.

331 Last, so far as the request for publication in various journals and reviews and on internet sites, the Court will today issue a press release concerning the present judgment. That press release can then be reproduced and disseminated in the specialist press. The applicants will thus have a court decision ruling on the Commission's conduct towards them and a press release that can be widely disseminated, which is capable of providing them with satisfaction on that point. That press release also allows the Court to repair in kind the non-pecuniary damage consisting in the harm to Systran's reputation resulting from the Commission's unlawful conduct.

332 Consequently, the Court considers that Systran's interests are sufficiently protected by the monetary compensation and that its claims for compensation in kind should not be granted.

Costs

333 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicants.

334 Furthermore, it should be observed that the preparation of the various documents produced by the applicants in order to support the content of their pleadings or to answer the questions put by the Court concerning the technical aspects of the software (report, technical notes and Mr Bitan's observations), its legal aspects (opinion of Professor Sirinelli) and the assessment of the damage sustained (financial notes of Mr Martin) are expenses necessarily incurred for the purpose of the present

proceedings and must therefore be regarded as recoverable costs within the meaning of Article 91(b) of the Rules of Procedure.

On those grounds,

THE GENERAL COURT (Third Chamber)

hereby:

1. **Orders the European Commission to pay Systran SA lump-sum damages of EUR 12 001 000;**

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

3. **Orders the Commission to pay the costs.**

Azizi Cremona Frimodt Nielsen

Delivered in open court in Luxembourg on 16 December 2010.

[Signatures]

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